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SERVICE DATE –JULY 5, 2016

SURFACE TRANSPORTATION BOARD

DECISION

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

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

Decision No. 3

Digest:¹ This decision grants BNSF Railway Company’s application for terminal trackage rights over a single track jointly owned by Kansas City Southern Railway Company and Union Pacific Railroad Company.

Decided: June 29, 2016

This sub-docketed proceeding arises out of the 1996 merger between the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) (collectively UP) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) (collectively SP). Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 44), 1 S.T.B. 233, 241 (1996). BNSF Railway Company (BNSF) argues that the Board’s merger conditions granted BNSF the option to handle the traffic of shippers in the Lake Charles area of Louisiana directly via trackage rights, and not just through reciprocal switching, and BNSF has filed an application to enforce those rights. Specifically, BNSF seeks terminal trackage rights over the Rosebluff Lead, a nine-mile track jointly owned by Kansas City Southern Railway Company (KCS) and UP. The Board will grant BNSF’s application.

BACKGROUND

Current Operations On The Rosebluff Lead

The Rosebluff Lead is a single track line that begins at the former SP Lafayette Subdivision between Dawes, Tex., and Avondale, La., at MP 222.3. The Lead extends nine miles to the south. The Lafayette Subdivision, now jointly owned by UP and BNSF, is also referred to as “the 50/50 Line.” (UP Reply 8.) The Rosebluff Lead runs through Rosebluff

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

Yard, which is located at the northern end of the Lead. Rosebluff Yard consists of five yard tracks and one running track. (BNSF App. 2.)

Although BNSF and UP jointly own the Lafayette Subdivision, UP and KCS jointly own the Lead and the Yard under the terms of several joint facility agreements between KCS and UP/SP predecessor Texas & New Orleans Railroad Company (T&NO).² (BNSF App. Ex. 6.) Pursuant to those agreements, UP and KCS own the Lead and the Yard equally, with equal rights to use the tracks. (See, e.g., KCS Reply 17; UP Reply, Counsel's Ex. 9, at 1.) Since 1981, however, KCS and UP (or UP's predecessor SP) have, as a matter of convenience, divided their operations on the Lead into two customer zones, Zone 1 and Zone 2. (UP Reply 11 & Counsel's Ex. 10.) Zone 1 customers are generally located north and east of the Yard while Zone 2 customers, including CITGO Petroleum Corporation (CITGO), are located south of the Yard. (*Id.*) Today, KCS switches customers in Zone 1, and UP switches customers in Zone 2. (UP Reply 11-12.) Each carrier moves cars for the other in its assigned zone. (*Id.* at 12.) UP and KCS, each of which operates its own yard off nearby mainline track, both use Rosebluff Yard to exchange cars destined to or originating from the other carrier's zone. (*Id.*)

BNSF currently serves shippers on the Rosebluff Lead via reciprocal switching by UP. BNSF delivers cars to UP at UP's Lake Charles Yard, which is located on the 50/50 Line. UP then moves BNSF traffic to Rosebluff Yard, where it is sorted and delivered to various industries on the Lead by either UP or KCS, depending on the location of the industry. By its application here, BNSF seeks to exercise the option of delivering its cars directly from its recently completed Lacassine Yard (located on the 50/50 Line, 20 miles east of the Lead) to shippers on the Lead, avoiding the extra stop in UP's Lake Charles Yard and the associated additional time and cost.

The Board's Decisions in the Original UP/SP Merger Proceeding

UP/SP Decision No. 44 and the Lake Charles Merger Conditions. In connection with their 1996 merger, applicants UP and SP entered into a series of settlement agreements with BNSF dated September 24, 1995, November 18, 1995, and June 27, 1996 (referred to collectively as the BNSF Agreement). Most significantly, the BNSF Agreement granted BNSF trackage rights over approximately 4,000 miles of UP/SP's lines to serve all "2-to-1" shippers, i.e., those who would otherwise have their competitive options reduced from two carriers (UP and SP) to only one carrier (the merged UP/SP entity) after the merger. *UP/SP Decision No. 44*, 1 S.T.B. at 368. Acknowledging that the BNSF Agreement was "intended . . . to address competitive issues raised by the merger," UP/SP specifically "requested that the terms of this agreement be imposed as a condition to approval of the merger." *Id.* at 243.

On April 18, 1996, UP/SP entered into an additional settlement agreement with BNSF and the Chemical Manufacturers Association (CMA), referred to as the CMA Agreement, which,

² In 1961, the T&NO merged into SP, and the T&NO ceased to exist as a separate entity. See *S. Pac. Co.—Merger—Tex. & New Orleans R.R.*, 312 I.C.C. 598, 600-01 (1961). Thus, SP was T&NO's successor to the joint facility agreements and co-owner of the Rosebluff Lead with KCS from 1961 until the UP/SP merger.

among other things, required certain amendments to the BNSF Agreement. As relevant here, Paragraph 8 of the CMA Agreement amended the original BNSF Agreement to give BNSF the right to handle traffic of Lake Charles and West Lake shippers that were “open” to all of UP, SP, and KCS³ for traffic moving (a) from, to, and via New Orleans and (b) to or from points in Mexico via certain border crossings. *Id.* at 427-28. UP/SP extended this relief to incorporate West Lake Charles traffic open to SP and KCS, including the traffic on the Rosebluff Lead. *Id.* at 428 (citing the extension to West Lake Charles shippers described in the UP/SP brief).

In UP/SP Decision No. 44 approving the UP/SP merger, the Board stated that it was imposing the terms of both the BNSF and CMA Agreements as conditions with modifications. *Id.* at 246-47. With respect to Lake Charles area shippers, the Board found the Agreements to be “an inadequate solution” because (1) many shippers’ critical routings still required a connection with either UP or SP, giving the merged entity control of a “bottleneck” for such movements; (2) the geographic restrictions of the CMA Agreement Paragraph 8 greatly limited BNSF’s ability to handle shipments routed to certain destinations; and (3) the BNSF Agreement imposed an additional haulage fee on all BNSF access to shippers in Westlake and West Lake Charles. *Id.* at 426-28. The Board therefore ordered applicants to modify the BNSF Agreement in several respects, including removing the (New Orleans and Mexico) geographic restrictions on BNSF’s service and removing the additional haulage fee. *Id.* at 428. The Board explained that expansion of the original terms of the BNSF and CMA Agreements was necessary to preserve competition for shippers in the Lake Charles area. *Id.* The merger was subsequently consummated subject to these and other conditions.

UP/SP Decision No. 63. In September 1996, KCS petitioned the Board to reopen or reconsider UP/SP Decision No. 44, arguing that the solutions the Board provided were excessive, because the “principal effect of these changes will be to provide BNSF direct access to all Lake Charles area shippers, even those that will suffer no competitive harm from the merger.” (UP/SP, KCS Pet. for Recon./Reopening 9, Sept. 3, 1996.) KCS asked the Board to reject Paragraph 8 of the CMA Agreement as it applied to Lake Charles area traffic, to reject the corresponding provision in Section 5(b) of the BNSF Agreement, and to vacate the UP/SP Decision No. 44 conditions requiring the elimination of the geographical restrictions and haulage fee. See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 63), FD 32760, slip op. at 4 (STB served Dec. 4, 1996). In addition, KCS separately argued that various joint facility agreements prohibited UP from providing BNSF access to shippers at West Lake and West Lake Charles without KCS’s consent, and that the Board could only require KCS to provide such access if BNSF filed a terminal trackage rights application under 49 U.S.C. § 11103 (now 49 U.S.C. § 11102). UP/SP Decision No. 63, slip op. at 5-6.

The Board denied KCS’s petition, refusing to eliminate “important aspects” of the Lake Charles conditions. *Id.* at 7-9. In particular, 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

³ Traffic that is open to a named railroad or railroads may be carried by, or on behalf of, those railroads.

area shippers.” Id. at 8. The Board also determined that it need not resolve the issue of whether KCS’s consent was required for UP to grant trackage rights to BNSF. Id. at 9. The Board stated that if the parties (KCS, BNSF, and UP) were unable to come to an agreement regarding the terms of the joint facility agreements, any differences in interpretation of the joint facility agreements could be submitted to arbitration under the terms of those agreements. Id. at 9-10. The Board further stated that, in the event of an impasse, BNSF could return to the Board to seek approval of a terminal trackage rights application. Id. at 10.

BNSF’s Request for Direct Access

Since the UP/SP merger, BNSF has served CITGO and other shippers on the Rosebluff Lead via reciprocal switching by UP. (BNSF Opening 9.) BNSF maintains that, over time, this arrangement became increasingly unsatisfactory for its customers. In 2012, CITGO sought direct single-line service from BNSF to accommodate the increasing amounts of crude oil received at its refinery for processing. (BNSF Opening 9; CITGO Pet. to Intervene 2). In May 2012, BNSF notified UP via letter that it intended to change its method of service by instituting direct service to the CITGO Lake Charles facility on November 20, 2012. (BNSF App. Ex. 1.) In reply, UP raised concerns about congestion on the Lead and the need for track infrastructure improvements and “operational concurrence” from KCS. (See BNSF App. Ex. 2, Ex. 4.)

On December 18, 2012, UP’s Roger Lambeth, then Superintendent of Transportation Services for the region encompassing Lake Charles, sent an email with the subject “BNSF Citgo Crude Operating Plan” to BNSF personnel. (BNSF Opening Ex. F.) The email stated that BNSF “will begin delivering” a 30-car unit train to CITGO “on Friday (12/21) morning . . . between 5am and 7am” and that BNSF “will then be able to come every other day to spot and pull,” depending on CITGO’s capacity. (Id.) Shortly after Mr. Lambeth’s email was sent, KCS’s Chief Legal Officer wrote to BNSF’s General Counsel to state that BNSF did not have the right to serve shippers on the Rosebluff Lead directly and that UP could not grant rights over the joint facility tracks without KCS’s consent. (BNSF App. Ex. 6.) In later correspondence, UP suggested that UP, BNSF, and KCS meet to discuss how all three carriers could safely and efficiently serve the Lake Charles area shippers. (Id. at Ex. 9.)

BNSF’s Application for Terminal Trackage Rights

BNSF filed its terminal trackage rights application, thereby initiating this proceeding, on February 27, 2013. In its application, BNSF argued that KCS and UP continued to block BNSF direct access to shippers at West Lake Charles despite months of negotiation. (BNSF App. 1.) CITGO filed a petition to intervene in support of BNSF’s application on April 24, 2013. After receiving separate letters from BNSF, UP, and KCS in September 2013, indicating their willingness to engage in negotiations to resolve access issues, the Board issued a decision on April 14, 2014 that directed the parties to engage in mediation and that also granted CITGO’s petition to intervene. On July 17, 2014, the Board’s Office of Public Assistance, Governmental Affairs, and Compliance notified the Board via public letter that the mediation was not successful.

By decision served December 1, 2014, the Board issued a procedural schedule for the submission of evidence. In accordance with the procedural schedule, BNSF filed its opening statement on December 31, 2014. On August 24, 2015, KCS, UP, and CITGO filed replies to BNSF's opening statement. BNSF, KCS, and UP filed rebuttals on October 23, 2015. In response to a request by UP, the Board served a decision on November 30, 2015, directing the parties to file final briefs that summarize the evidence and arguments previously presented and direct the Board's attention to the critical issues. The parties filed final briefs on December 30, 2015.

PRELIMINARY MATTERS

Motions to Strike

Two motions to strike have been filed in this proceeding. On November 12, 2015, KCS filed a motion to strike the evidentiary statements of Richard Weicher, Vice President and General Counsel-Regulatory for BNSF, which accompanied BNSF's opening and rebuttal filings, along with footnotes 7 and 15 of the argument portion of BNSF's rebuttal. KCS argues that Weicher purports to serve an impermissible dual role as both counsel and fact witness. (KCS Mot. to Strike 2.) KCS also argues that footnotes 7 and 15 of BNSF's rebuttal should be stricken as being inconsistent with prior statements made by BNSF. (Id. at 7-8.)

BNSF replied to KCS's motion to strike on December 2, 2015. BNSF argues first that KCS's motion was untimely with respect to Weicher's first verified statement. (BNSF Reply to KCS Mot. to Strike 2.) BNSF also states that Weicher was a direct participant in the negotiation of the two key merger settlement agreements, the BNSF Agreement and the CMA Agreement. (Id. at 1.) BNSF argues that the Board has no rule prohibiting practitioners from participating in proceedings as both advocates and witnesses and that Weicher had previously acted as both witness and advocate in connection with a 2002 UP/SP merger pleading. (Id. at 4-5.) Furthermore, BNSF asserts that 49 C.F.R. § 1112.6 allows verified statements to contain both facts and arguments. (Id. at 5.) With respect to footnotes 7 and 15 of its rebuttal, BNSF argues that the challenged statements were factually correct but that BNSF is not relying on them as the basis for its terminal trackage rights application. (Id. at 9-10.)

KCS's motion to strike will be denied. Under the Board's regulations, "redundant, irrelevant, immaterial, impertinent, or scandalous matter" may be stricken from any document. 49 C.F.R. § 1104.8. KCS has not shown that any of the statements it seeks to strike meet that standard. Weicher is a long-time BNSF employee who directly participated in the negotiations of key settlement agreements. Because the Board is capable of distinguishing between his evidence and argument, Weicher may testify as to facts pertaining to his work on behalf of BNSF and provide arguments based upon those facts. See 49 C.F.R. § 1112.6. With respect to the statements in footnotes 7 and 15, BNSF does not rely upon them as a component of its argument, which the Board weighs accordingly.

On January 19, 2016, BNSF filed a motion to strike what it characterized as new arguments and new evidence in the final briefs of UP and KCS. According to BNSF, both UP and KCS present arguments for the first time regarding the division of traffic and the competitive

situation in Lake Charles pre- and post-merger. (BNSF Mot. to Strike 3.) BNSF also claims that KCS makes arguments for the first time regarding the availability of an override of the joint facility agreements under 49 U.S.C. § 11321(a). (Id. at 3.) BNSF further argues that UP impermissibly attached as Exhibit A to its final brief a workpaper produced by BNSF that was not already in the record. (Id.) BNSF states that UP similarly cites BNSF workpapers not already in the evidentiary record in support of its position on the practicability of BNSF direct train service. (Id. at 4.)

KCS replied to BNSF's motion to strike on February 8, 2016. KCS argues that BNSF's motion should be denied, because the language BNSF seeks to strike is neither new evidence nor new material. (KCS Reply to BNSF Mot. to Strike 2.) KCS argues that there was nothing improper about KCS's attempt to summarize, compare, and contrast BNSF's arguments with those of KCS, the prior decisions, and the statute. (Id. at 3.) KCS states that it has made arguments throughout the proceeding regarding the competitive position of the parties in the Lake Charles area, which is not a new issue. (Id. at 4.) KCS also asserts that its views on the scope of Section 11321(a) were legal argument and were neither new material nor new evidence.

UP also replied to BNSF's motion to strike on February 8, 2016. UP claims that it previously expressed the same position regarding the division of traffic and pre- and post-merger competition in the Lake Charles area on both reply and rebuttal. (UP Reply to BNSF Mot. to Strike 2.) UP also argues that it attached Exhibit A to its final brief because BNSF discussed the content of that exhibit in BNSF's rebuttal but did not produce the workpaper to UP until after filing rebuttal. (Id. at 3.) Similarly, UP argues that it cited a second workpaper in its final brief after a BNSF witness had introduced that evidence in a verified statement attached to BNSF's rebuttal. (Id.)

The Board will deny BNSF's motion to strike. Because Exhibit A and the additional workpaper citations in UP's brief were themselves a response to new material in BNSF's rebuttal, the Board will accept that evidence in the interest of a complete record. The Board is otherwise satisfied that the disputed evidence and arguments are already on the record, and thus do not constitute new material.

Request for Oral Argument

On April 7, 2016, BNSF submitted a request for oral argument. UP and KCS filed replies in opposition to that request on April 27, 2016. We will deny BNSF's request for oral argument. BNSF has not explained why an oral argument is necessary at this time and has consistently asked the Board to rule on this matter expeditiously. Given the extensive record already developed, we do not believe an oral argument is necessary to resolve the issues in this proceeding.

DISCUSSION AND CONCLUSIONS

The Legal Standard

49 U.S.C. § 11102(a) provides that the Board may require terminal facilities owned by a rail carrier to be used by another rail carrier “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 . . . to handle its own business.” Additionally, “[t]he rail carriers are responsible for establishing the conditions and compensation for use of the facilities.” 49 U.S.C. § 11102(a). If the rail carriers cannot agree, the Board may establish conditions and compensation for use of the facilities and will, with respect to compensation, employ the principle controlling compensation in condemnation proceedings. *Id.* The parties do not dispute that the Rosebluff Lead constitutes a “terminal facility” under § 11102(a). The Board therefore directs its discussion to the remaining considerations under the statute, which are contested: the public interest, practicability and substantial impairment, and the conditions and compensation for use.

The Public Interest

The Parties’ Arguments. BNSF argues that the Board need not make a new public interest determination, because the Board conclusively determined in UP/SP Decision No. 44, and reconfirmed in UP/SP Decision No. 63, that BNSF’s requested terminal trackage rights are in the public interest. The Board believed that direct BNSF service was a vital and necessary component in resolving the loss of competitive options to Lake Charles area shippers as a result of the UP/SP merger. (BNSF Opening 15.) According to BNSF, the Board imposed specific conditions to that effect, namely Paragraph 8 of the CMA Agreement and Sections 5(b), 5(c), and 5(d) of the BNSF Agreement, as expanded by applicants and UP/SP Decision No. 44, and the current public interest analysis is therefore satisfied. (BNSF Rebuttal 6-10.) BNSF further argues that the Board applies a “broad” and “flexible” public interest standard when assessing terminal trackage rights in the context of a merger, granting such rights where they are essential to implementing a merger condition imposed to preserve shippers’ competitive options. (BNSF Rebuttal 15-17; BNSF Final Brief 5.)

CITGO likewise argues that the Board already made its public interest determination in UP/SP Decision No. 44. The preservation of effective rail competition required that Lake Charles area shippers have direct access to BNSF, and the Board imposed conditions accordingly. (CITGO Reply 11-14.) CITGO agrees with BNSF that a “broader” public interest standard applies in merger cases, where the objective is the preservation of existing rail competition that would otherwise be lost as a result of the transaction. (*Id.* at 12-13.)

KCS maintains that BNSF has not shown that the requested terminal trackage rights would be in the public interest, because it has not met the standard articulated in Midtec Paper Corp. v. Chicago & North Western Transportation Co. (Midtec), 3 I.C.C.2d 171 (1986), which requires a showing of anticompetitive conduct by the owning carrier. (KCS Reply 29-30.) KCS maintains that Midtec is the appropriate standard here, because BNSF did not file its terminal trackage rights application during the original UP/SP merger proceeding. (*Id.* at 30-31.) Alternatively, KCS argues that BNSF cannot meet the only other potentially applicable public

interest standard, the “bridge the gap” standard discussed in Canadian National Railway—Control—Illinois Central Corp. (CN/IC), 4 S.T.B. 122, 173 (1999), which, according to KCS, requires BNSF to show that its terminal trackage rights are designed to “bridge a gap” within broader (generally overhead) trackage rights granted in a merger and are necessary to remedy or mitigate a merger’s anticompetitive effects. (KCS Reply 32-34.) Further, KCS argues that terminal trackage rights are not needed to ensure that BNSF can compete with UP and KCS in the Lake Charles area, and submits both expert testimony and a newly conducted competitive analysis purporting to show that BNSF is already an effective competitor without terminal trackage rights. (KCS Reply 36; KCS Final Brief 11.)

Similarly, UP maintains that BNSF may establish that its requested terminal trackage rights are in the public interest only by making either a Midtec or CN/IC “bridge a gap” showing. (UP Reply 26.) UP argues that BNSF has failed to meet either standard and there are no cases expanding the “public interest” criterion beyond these two limited situations. (Id. at 26-32.)

Applicable Public Interest Standard. The applicable public interest standard here is the merger standard articulated in UP/SP Decision No. 44. See UP/SP Decision No. 44, 1 S.T.B. at 448-49. There, the Board granted a terminal trackage rights application arising from the UP/SP merger (in the Sub-No. 9 docket), permitting BNSF to use two small segments of KCS track in Shreveport and one small segment of KCS track in Beaumont. Id. at 446. In particular, the Board held that it was “inappropriate” to apply the Midtec standard in the merger context and specifically overruled any prior cases that suggested otherwise. Id. at 448. Rather, the Board stressed that:

Congress gave us broad authority in both the public interest standard in section 11103 [now 11102(a)] and in the public interest standard of section 11343 [now 11323]. Thus, we believe that it is appropriate for us to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking our ability to craft merger conditions that are clearly in the public interest.

Id. at 449. Pursuant to that broad and flexible authority in the merger context, the Board concluded that terminal trackage rights are in the public interest where they are essential to effectuating merger conditions designed to ameliorate potential anticompetitive effects. Id. at 448-49 (citing Union Pac. Corp.—Control—Mo. Pac. R.R. (UP/MP/WP), 366 I.C.C. 459, 574-76 (1982)).

KCS and UP read CN/IC as narrowing our public interest merger standard to apply only where the requested terminal trackage rights “bridge a gap within broader trackage rights imposed on applicants.” We disagree. Although the CN/IC decision noted that the Board has granted terminal trackage rights to bridge such a gap “[i]n previous railroad mergers” (CN/IC, 4 S.T.B. at 173 (citing UP/SP Decision No. 44, 1 S.T.B. at 448-49)), nothing in that or any prior decision limits our broad authority to assess the public interest in the context of a merger and to grant terminal trackage rights necessary “to make the agency’s overall merger conditions

effective” (UP/SP Decision No. 44, 1 S.T.B. at 448 (citing UP/MP/WP, 366 I.C.C. at 574-76)).⁴ BNSF’s current application for terminal trackage rights flows directly from the UP/SP merger,⁵ and we will therefore apply the broad and flexible public interest standard outlined in UP/SP Decision No. 44.

Public Interest Determination. We find BNSF’s requested terminal trackage rights to be in the public interest, because they are necessary to effectuate the merger conditions imposed in UP/SP Decision No. 44 and reaffirmed in UP/SP Decision No. 63. In considering the UP/SP merger, the Board was concerned about potential adverse competitive effects on shippers in the Lake Charles area, including limitations on shippers’ access to non-applicant carriers as a result of routing and storage-in-transit restrictions. As a result of its competitive analysis, the Board imposed conditions specifically to “preserve competition for Lake Charles area shippers.” UP/SP Decision No. 44, 1 S.T.B. at 428. In particular, the Board expanded and imposed the conditions embodied in Paragraph 8 of the CMA Agreement and in Section 5 of the BNSF Agreement.

Initially, Section 5(b) of the BNSF Agreement gave BNSF trackage rights to access only listed 2-to-1 shipper facilities, which did not include the Lake Charles area. (UP Reply Ex. 1 (BNSF Agreement) at 8.) Section 5(c) of the BNSF Agreement stated that access to shippers at the listed 2-to-1 points open to BNSF “shall be direct or through reciprocal switch.” (*Id.*) Paragraph 8 of the CMA Agreement—as expanded voluntarily by UP and subsequently by the Board—gave BNSF “the right to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and West Lake, Louisiana” and “traffic of shippers open to SP and KCS at West Lake Charles.” (UP Reply Ex. 2 (Restated & Amended BNSF Agreement) at 20-21); UP Reply Ex. 3 (CMA Agreement) at 3; see also UP/SP Decision No. 44, 1 S.T.B. at 428 (removing geographic restrictions).) With respect to how BNSF would handle the Lake Charles traffic, CMA Agreement paragraph 8 states that BNSF’s access to those shippers “shall be on the same basis as is provided for in the [BNSF Agreement] for ‘2-to-1’ points[,]” which, as noted above, “shall be direct or through reciprocal switch.”⁶ (UP Reply Ex. 1 at 8; UP Reply Ex. 3 at 3.)

⁴ See also S. Pac. Transp. Co. v. ICC, 736 F.2d 708, 723 (D.C. Cir. 1984) (upholding ICC’s grant of terminal trackage rights in UP/MP/WP, where “necessary to allow [the grantees] to enter [particular] terminals” and create a competitive alternative); Rio Grande Indus., Inc.—Purchase & Related Trackage Rights—Chi., Mo. & W. Ry. Line Between St. Louis, Mo. & Chi., Ill. (Rio Grande/CMW), 5 I.C.C.2d 952, 979-84 (1989) (granting terminal trackage rights in acquisition transaction where access was necessary to allow applicants to assume acquired carrier’s operations, including, e.g., accessing Chicago to allow interchange of existing north-south traffic).

⁵ In 1996, the Board stated that BNSF could seek approval of a terminal trackage rights application to resolve the question of its access to Lake Charles area shippers pursuant to the UP/SP merger. See UP/SP Decision No. 63, slip op. at 10.

⁶ This option was memorialized in the final Restated & Amended BNSF Agreement, which provides that BNSF’s access to 2-to-1 points “shall be direct or through reciprocal switch, or, with UP/SP’s prior agreement, through a third party contractor[,]” and sets forth a process by
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Thus, with the Board's imposition of the CMA and BNSF Agreements as conditions to the merger, the Board gave BNSF the option of directly accessing Lake Charles area shippers, including those on the Rosebluff Lead, via trackage rights.

The Board's determination in UP/SP Decision No. 44 (and reaffirmed in UP/SP Decision No. 63) that the public interest would be served by giving BNSF the option of direct or reciprocal-switching access to all Lake Charles area shippers is controlling in this trackage rights proceeding. Indeed, the preservation of BNSF's option of direct access is necessary to preserve these shippers' access to multiple competitive carriers and routing options and, thus, necessary to effectuate the merger conditions imposed in UP/SP Decision No. 44. BNSF's requested terminal trackage rights are therefore in the public interest under § 11102(a). As discussed below, we find KCS's and UP's arguments to the contrary unpersuasive.

KCS argues that the merger conditions did not afford BNSF the option to elect direct access to shippers in West Lake Charles. But KCS has previously recognized that the Board's UP/SP merger conditions provided BNSF with the option of accessing Lake Charles area shippers either directly or indirectly. (See, e.g., UP/SP, KCS Pet. for Recon./Reopening 4-5, 9, 13-16, 19 (filed Sept. 4, 1996); UP Reply 22; UP Final Brief 2.) In seeking reconsideration or reopening of UP/SP Decision No. 44 in 1996, KCS argued that the effect of the Lake Charles conditions was to give "BNSF direct access to all Lake Charles area shippers, even those [in West Lake Charles] that would have suffered no competitive harm from the merger," and that the Board could not grant this "direct access" "over KCS trackage" absent a terminal trackage rights application. (UP/SP Decision No. 63, slip op. at 4, 6; UP/SP, KCS Pet. for Recon./Reopening 13; see also UP/SP, KCS Pet. for Recon./Reopening at 4-5, 9, 14-16, 19.) Nevertheless, in UP/SP Decision No. 63, the Board, in declining to alter its conditions, rejected KCS' request to rescind direct access and reiterated the need for BNSF to be a strong competitor in Lake Charles. UP/SP Decision No. 63, slip op. at 7-9. As the decision explained, "it was necessary to expand the voluntary settlement agreements . . . [and] giving BNSF additional rights was the most effective way to assure continued competition for Lake Charles area shippers." Id. at 8. The Board also specifically contemplated that BNSF could file an application for terminal trackage rights, if necessary, to exercise those rights. Id. at 10. Thus, we reject KCS's contentions regarding the effect of the Board's conditions.

UP effectively concedes here that the combined effect of Paragraph 8 of the CMA Agreement and Sections 5(b) and 5(c) of the BNSF Agreement, as expanded and imposed as merger conditions, was to give BNSF the option of accessing all Lake Charles area shippers directly (via trackage rights) or indirectly (through reciprocal switching or otherwise).⁷ UP

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which BNSF "shall notify UP of its election" under Section 5(c) and develop an operating plan with UP. (UP Reply Ex. 2 (Restated & Am. BNSF Agreement) at 21-22.)

⁷ See, e.g., UP Reply 22 ("The issue of *how* BNSF would 'handle' the traffic [in Lake Charles] is governed by separate provisions of the BNSF Settlement Agreement. The parties recognized that different methods of access might be appropriate in different commercial and operating environments. They agreed that BNSF's access to shippers could be 'direct or through
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contends, however, that BNSF's right to access the Lake Charles area shippers is qualified by a separate provision of the BNSF Agreement, Section 8(n). (UP Final Brief 2-3; see also UP Reply 19-20.) Section 8(n) provides:

In the event, for any reason, any of the trackage rights granted under this Agreement cannot be implemented because of the lack of sufficient legal authority to carry out such grant, then UP/SP shall be obligated to provide an alternative route or routes, or means of access of commercially equivalent utility at the same level of cost to BNSF as would have been provided by the originally contemplated rights.

(UP Reply Ex. 2 (Restated & Am. BNSF Agreement) § 8(n).) Relying on the testimony of its former Vice President for Network Planning and Operations John H. Rebensdorf, UP asserts that "Section 8(n) was intended to address the parties' mutual concern that some of the thousands of miles of lines over which Union Pacific was otherwise granting trackage rights to BNSF under other provisions of the [BNSF] Agreement might be covered by pre-existing agreements that would restrict Union Pacific's ability to grant access to BNSF." (UP Final Brief 3 (citing Rebensdorf Reply V.S. 3).) Based on this interpretation, UP argues that it lacks "sufficient legal authority" to carry out a grant of trackage rights to BNSF over the Rosebluff Lead because KCS has not consented to the grant, as allegedly required under UP and KCS's joint facility agreement of 1948 (the 1948 Joint Facility Agreement). (UP Final Brief 2-3.) Thus, UP contends, it may properly deny BNSF direct access to shippers on the Rosebluff Lead and instead provide access via reciprocal switching, which UP asserts is "an alternative means of access of commercially equivalent utility" under Section 8(n). (UP Reply 19; UP Final Brief 3.)

BNSF, on the other hand, argues that Section 8(n) does not apply here. Citing the testimony of its Vice President and General Counsel-Regulatory Richard E. Weicher, BNSF asserts that it "did not intend, and would not have agreed, that UP could avoid its obligation to provide trackage rights by simply failing to secure contractual authority to enable it to do so." (BNSF Rebuttal 10-11 (citing Weicher Rebuttal V.S. 5).) Rather, BNSF argues, Section 8(n) was intended to address situations where, after exhausting all possibilities, legal authority to implement the granted trackage rights could not be obtained, such as when a required environmental or regulatory approval could not be obtained. (BNSF Rebuttal 10; Weicher Rebuttal V.S. 5 & n.2.) BNSF notes that UP consummated the 1996 merger with knowledge of KCS's claim that its consent was required to grant BNSF trackage rights over the Rosebluff Lead; and nonetheless, UP has never raised Section 8(n) until its Reply here, nor sought KCS's consent, nor initiated legal action or otherwise asserted a claim against KCS with respect to the consent provision of the 1948 Joint Facility Agreement. (BNSF Rebuttal 10-11 & n.6; BNSF

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reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor." (emphasis in original)(citing Restated & Am. BNSF Agreement § 5(c)); UP Final Brief 2 ("Union Pacific agreed that BNSF would have the right to elect to serve Lake Charles area shippers using trackage rights . . . to the same extent that BNSF can elect to serve shippers at 2-to-1 points using trackage rights.").

Final Brief 9; see also KCS Reply 18 (“[A]t no point did UP request KCS’s consent to BNSF having trackage rights on the Rosebluff Lead.”).)

The Board concludes that Section 8(n) does not apply here and thus does not bar BNSF from electing direct access to shippers on the Rosebluff Lead. While informative, arguments concerning whether the parties intended to apply Section 8(n) in such situations are not controlling here because Section 8(n) was imposed by the Board as a merger condition.⁸ See 49 U.S.C. § 11324(c); 49 C.F.R. § 1180.1(d). The Board receives considerable deference in imposing and interpreting its merger conditions. See, e.g., Pennsylvania. v. STB, 290 F.3d 522, 530 (3d Cir. 2002); S. Pac. Transp. Co. v. ICC, 736 F.2d 708, 720-21 (D.C. Cir. 1984).

As previously noted, it is clear that the Board’s merger conditions gave BNSF the option to elect direct or indirect access to all Lake Charles area shippers. Affording BNSF the option to elect its means of access was critical to ensuring that BNSF would provide a strong competitive force in regions where shippers would lose competitive options as a result of the UP/SP merger. See, e.g., UP/SP Decision No. 44, 1 S.T.B. at 387, 416 & n.170, 444; see also UP/SP Decision No. 63, slip op. at 5, 8-9 (refusing to alter the Board’s expanded CMA and BNSF Agreement conditions pertaining to the Lake Charles area). Allowing UP to deny BNSF that choice in circumstances such as these—where UP was aware of another carrier’s co-ownership of the lines, yet granted BNSF access in order to secure merger approval without negotiating with that co-owner—would severely undermine the purpose of the merger conditions and the integrity of the Board’s processes.⁹

⁸ Thus, the Board is not interpreting a private contract, which the agency has concluded is a matter generally reserved for the courts. Cf. Union Pac. R.R.—Discontinuance Exemption—in Okla. City, Okla., AB-33 (Sub-No. 239X), slip op. at 3 (STB served Apr. 13, 2006); Rio Grande/CMW, 5 I.C.C.2d at 983; see also Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760, slip op. at 4-5 & n.5 (STB served Jan. 22, 2009) (clarifying that the Board did not resolve whether UP and BNSF intended to expand the terms of the BNSF Agreement years after the UP/SP merger, and that any such post-merger expansion—which was found inconsistent with the Board’s intent and purpose—had not been imposed as a merger condition).

⁹ We question the idea that UP, in representing to the Board and BNSF in 1996 that it was offering the option of direct access over its lines, nonetheless expected to be relieved of that commitment by simply failing to secure the consent of KCS, a contractual partner. See UP/SP Decision No. 44, 1 S.T.B. at 428 (noting that UP voluntarily extended BNSF’s access under the CMA and BNSF Agreements to West Lake Charles shippers, i.e., those on the Rosebluff Lead). In fact, under Section 14 of the BNSF Agreement, UP and BNSF agreed to “cooperate with each other and make whatever filings or applications, if any, are necessary to implement the provisions of this Agreement” (UP Reply Ex. 2 (Restated & Am. BNSF Agreement) § 14. Neither the BNSF Agreement nor the Board’s other merger conditions suggest that the “lack of sufficient legal authority” language in Section 8(n) created an end-run around the obligation in Section 14 to make any necessary applications (including terminal trackage rights applications) to implement the rights granted under the Agreement.

Thus, to avoid inconsistency with the Board's other merger conditions, the reference in Section 8(n) to a "lack of sufficient legal authority" cannot be read to encompass situations in which UP merely failed to secure the contractual right to grant BNSF trackage rights otherwise afforded under the BNSF Agreement. Before offering trackage rights to BNSF, UP would be expected to make all reasonable efforts to secure the consent, if any, necessary to allow BNSF to exercise its option of direct access (if requested); and, failing that, UP would be expected to coordinate with BNSF in filing a terminal trackage rights application. See UP Reply Ex. 2 (Restated & Am. BNSF Agreement) § 14, discussed at supra n.6.¹⁰

In imposing the BNSF and CMA agreements in UP/SP Decision No. 44, and reaffirming those conditions in UP/SP Decision No. 63, the Board determined that the public interest would be served by giving BNSF the option of direct or reciprocal-switching access to all Lake Charles area shippers. Because the preservation of BNSF's option of direct access is necessary to effectuate the merger conditions imposed in UP/SP Decision No. 44,¹¹ BNSF's requested terminal trackage rights are in the public interest under § 11102(a).

Practicability and Lack of Substantial Impairment

To grant BNSF terminal trackage rights under § 11102(a), the Board must also find that BNSF's use of the terminal facilities would be "practicable" and would not substantially impair the ability of the rail carriers owning the facility (UP and KCS) to handle their own business. 49 U.S.C. § 11102(a); UP/SP Decision No. 44, 1 S.T.B. at 446-47; see also discussion infra at 18.

BNSF has proposed to run at least one unit train over the Rosebluff Lead, through Rosebluff Yard, and directly to (and from) CITGO's West Lake Charles facility without stopping.¹² (See BNSF Rebuttal 28-33 & Bredenberg Rebuttal V.S. 4; CITGO Final Brief 2.) In addition, BNSF has indicated that it eventually intends to directly serve "other customers" on the Rosebluff Lead in "both manifest and unit volumes." (BNSF Rebuttal 32-33 & Bredenberg Rebuttal V.S. 7-8.) However, BNSF has provided no specific proposal regarding who will be

¹⁰ See also Rio Grande Indus., Inc.—Purchase & Related Trackage Rights—Soo Line R.R. Line Between Kan. City, Mo. & Chi., Ill., FD 31505 (ICC served Nov. 15, 1989) (seeking terminal trackage rights over paired track jointly owned by applicants and a non-consenting non-applicant carrier); Rio Grande/CMW, 5 I.C.C.2d at 979-84 (seeking terminal trackage rights over lines jointly owned by, or subject to trackage rights agreements with, non-consenting non-applicant carriers); UP/MP/WP, 366 I.C.C. at 574-76 (addressing request for terminal trackage rights over line operated by applicant and non-consenting non-applicant as "joint trackage").

¹¹ KCS's attempt to reassess competition in the Lake Charles area today (based on the carriers' current market shares) is misdirected. The Board already conducted the relevant competitive analysis in connection with the UP/SP merger in 1996. See generally UP/SP Decision Nos. 44 & 63.

¹² The record indicates that BNSF might add a second direct train to CITGO. (See BNSF Rebuttal 30 & Bredenberg Rebuttal V.S. 4; UP Reply 40 n.30; UP Final Brief 15.)

served or how, and has not yet formally elected direct access to such “other customers” under BNSF Agreement Section 5(d). (BNSF Rebuttal 32-33 & Bredenberg Rebuttal V.S. 7-8; BNSF Final Brief 16.)

BNSF has proposed to operate all of its direct trains during UP’s daily 12-hour window of operations at the Rosebluff Yard. (See BNSF Final Brief 14; Bredenberg Rebuttal V.S. 6, 8.) BNSF has suggested that the CITGO direct train would wait at BNSF’s newly constructed Lacassine Yard (20 miles east of Lake Charles) for a UP-designated window to operate over the Rosebluff Lead. (BNSF Opening 19.) Then, it would traverse the 50/50 Line between Lacassine Yard and the Rosebluff Lead (approximately 30-45 minutes, assuming a clear route), then enter the Rosebluff Lead, run through Rosebluff Yard on any running track designated by UP, and continue on to CITGO’s facility (approximately 25 minutes, assuming a clear route). (*Id.* at 19-20.) BNSF claims that the direct train could pull inside CITGO’s facility and “completely clear” the Rosebluff Lead. (*Id.*)

BNSF argues that its direct service on the Rosebluff Lead would be practicable without substantially impairing the ability of UP and KCS to handle their own business. (BNSF Rebuttal 27-33; BNSF Final Brief 14.) While BNSF acknowledges that operating its direct train(s) during UP’s window may cause UP some operating inconvenience, BNSF argues that any such inconvenience will be minor (e.g., keeping the Yard’s run-through track clear for a short period of time) and will not be enough to overcome the public interest served by BNSF direct service. (BNSF Final Brief 14 & n.9.) More particularly, BNSF asserts that UP’s and KCS’s own documents show the availability of windows at the Yard and on the Lead that would allow BNSF’s direct trains to be run through the Yard without interfering with the other carriers’ operations. (*Id.* at 15-16; BNSF Rebuttal 30-32.) BNSF further states that, because it would sort and process cars in its own Lacassine Yard, BNSF’s use of direct trains would free up capacity and reduce congestion in UP’s Lake Charles Yard and in the Rosebluff Yard (where BNSF’s cars are currently switched). (BNSF Opening 19; BNSF Rebuttal 30 & Bredenberg Rebuttal V.S. 4.) BNSF argues that its direct service will not negatively affect KCS’s operations because the BNSF trains would operate solely during UP’s operating window at the Yard. (BNSF Rebuttal 29.)

CITGO likewise argues that direct service by BNSF would be practicable and would not substantially impair the ability of UP and KCS to operate on the Rosebluff Lead. (CITGO Final Brief 9-10.) CITGO asserts that its facility “has more than ample track space within the CITGO property line to accommodate the 60-car unit trains BNSF is proposing to bring into the CITGO refinery.” (*Id.* at 10 n.15; see also CITGO Reply 5 & Barrett V.S. ¶ 9.) According to CITGO, each BNSF train will move directly into and out of the CITGO facility as a unit without requiring any use of the Rosebluff Lead for staging or similar operations. (CITGO Final Brief 10.) CITGO also argues, like BNSF, that direct unit trains will free up capacity in the Rosebluff Yard. (*Id.*; CITGO Reply 11.) Finally, CITGO notes that—despite UP’s and KCS’s arrangement that each will directly serve only one of two “Zones” on the Lead—KCS has the right to provide direct unit train service to CITGO (located in UP’s Zone 2) and has done so on at least one occasion in the past, thus establishing that direct unit-train service to CITGO by another carrier is practicable. (CITGO Final Brief 11 & n.17 (citing KCS Reply 22; Chappell/Matya Rebuttal V.S. 4).)

UP argues that BNSF's proposed direct service is not practicable and would substantially impair UP's and KCS's ability to handle their own business on the Rosebluff Lead. (UP Reply 32-46; UP Final Brief 8.) UP asserts that BNSF's proposal demonstrates a misunderstanding of operations in Rosebluff Yard and on the Rosebluff Lead. (UP Reply 32-34.) UP argues that the 12-hour operating windows apply only to occupancy of the Rosebluff Yard and not to the Lead south of the Yard, where, according to UP, its trains work a full 24 hours a day, picking up and setting out cars for numerous customers. (*Id.* at 33 (citing Chappell/Matya V.S. 9-13).) UP disputes BNSF's estimates of the availability and length of potential run-through "windows" and asserts that adding BNSF direct trains on the congested Rosebluff Lead would cause cascading delays and impede service to other shippers on the Lead. (*Id.* at 36-39; Chappell/Matya V.S. 22; UP Final Brief 12-16.) In addition, UP asserts that BNSF direct service will consume scarce capacity on the Lead without eliminating the need for any trains currently operating there. (UP Reply 39-41; Chappell/Matya V.S. 22.) Finally, UP criticizes BNSF for its failure to address how it would serve shippers other than CITGO, arguing that without such information, the Board cannot make a finding that BNSF's use of terminal trackage rights would be practicable without substantially impairing UP and KCS's operations. (UP Reply 43-45.)

KCS likewise argues that BNSF has not shown that its proposed operation is practicable and will not substantially impair the ability of KCS and UP to handle their own business. (KCS Reply 52.) KCS asserts that BNSF's proposal is based on incorrect assumptions, including the existence of a consistent "window" for BNSF's direct service, the availability of a clear route over the 50/50 Line from BNSF's Lacassine Yard, and the availability of a clear running track through Rosebluff Yard. (*Id.* at 53-56, 62-63; Sullivan/Ireland V.S. 13-14, 17-19; Scott V.S. 4, 10-11.) According to KCS, there are often delays that cause UP and KCS to overlap each other's operating windows, and having to accommodate an unknown number of fixed windows for BNSF would eliminate much-needed flexibility in operations on the Lead. (KCS Reply 56-57.) Like UP, KCS further argues that BNSF's proposal is "manifestly incomplete" without any concrete description of shipping volumes or how BNSF plans to serve shippers other than CITGO. (KCS Reply 52, 57, 61-62; see also KCS Final Brief 14-15.) Finally, KCS has asserted that, despite having the right to deliver unit trains to CITGO directly, KCS has found it "operationally difficult" to coordinate such shipments and has therefore done so "only rarely" since UP assumed responsibility for switching Zone 2. (KCS Rebuttal 21-22.)

Use is Practicable. Our examination of the evidence leads us to find that BNSF direct service over the Rosebluff Lead (including through the Rosebluff Yard) is practicable. We recognize that the Rosebluff Lead and the 50/50 Line experience sizable traffic volumes and have various capacity constraints that create challenges in accessing shippers.¹³ However, the

¹³ For example, the Rosebluff Lead is mostly single track and serves many industries in a confined area, and many shippers on the Lead have limited space for switching cars within their facilities, requiring railroad crews to use the Lead during switching. (See KCS Reply, Sullivan/Ireland V.S. 3-5, 8; UP Reply, Chappell/Matya V.S. 5-6; 9-13.) Similarly, the portion of the 50/50 Line between BNSF's Lacassine Yard and its connection with the Rosebluff Lead is mostly single track, experiences frequent traffic (averaging 25 trains a day, including six Amtrak
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parties' evidence analyzing traffic on the Lead reveals periods of reduced train activity, providing opportunities for more than one railroad to operate on portions of the Lead at the same time. (See, e.g., BNSF Rebuttal, Bredenberg Rebuttal V.S. 2-7 & Exs. A-D; UP Reply, Counsel's Map Ex. D, Chappell/Matya V.S. 9-14; KCS Reply, Sullivan/Ireland V.S. 8-10.) It is true that such slack periods vary from day to day, and the addition of a third carrier could entail many operational adjustments, some of which may be complicated. But the fact that this would "require coordination of operations" among all the parties does not warrant a finding that such operations are not practicable. UP/MP/WP, 366 I.C.C. at 576; UP/SP Decision No. 44, 1 S.T.B. at 447. We also find, based on this record, that with sufficient notice, the carrier operating in the Yard could clear a running track through the Rosebluff Yard, so that a BNSF direct train could traverse the Yard in order to reach Zone 2 industries. (See, e.g., Bredenberg Rebuttal V.S. 5.) Finally, we also find compelling (1) that local UP personnel were willing and able to develop a plan for BNSF to serve CITGO directly in December 2012 (see BNSF Opening Ex. F¹⁴); and (2) that KCS, despite experiencing operational difficulties, has served CITGO directly by unit train in the past and has maintained its right to do so in the future (see UP Reply, Chappell/Matya V.S. 21; UP Rebuttal, Chappell/Matya Rebuttal V.S. 4; KCS Rebuttal, Mindrup V.S. 3). Overall, the record shows that operations by BNSF on the Rosebluff Lead would be practicable.

Owners Not Substantially Impaired. Despite the challenging nature of operations in these terminal facilities, we find, based on the present record, that with appropriate coordination, BNSF will be able to use the Rosebluff Lead without substantially impairing the operations of UP or KCS. As required by statute, we leave the details regarding how BNSF will use the facilities (including, e.g., scheduling of window(s) of operation, unit vs. manifest volumes, length of train(s), and similar issues) to all three carriers to resolve among themselves. See 49 U.S.C. § 11102(a) ("The rail carriers are responsible for establishing the conditions . . . for use of the facilities."); see also discussion supra at 13.

The Board recognizes that UP and KCS must already engage in detailed coordination under the present operating conditions and that introducing a third carrier would make operations more complex. However, we do not find on this record that any potential BNSF interference with KCS and UP operations would rise to the level of substantial impairment under § 11102(a). Where the statute's public interest prong weighs in favor of granting terminal trackage rights, as it does here, the agency has previously set a fairly high bar for concluding that operations issues

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trains per week), and has a moveable bridge that is occasionally opened for marine traffic. (See KCS Reply, Sullivan/Ireland V.S. 18; UP Reply, Chappell/Matya V.S. 3-5.)

¹⁴ Although UP's witness now claims this was merely a "straw man" proposal meant to facilitate further discussion (see Scott/Lambeth V.S. 5-6), the plain text of Mr. Lambeth's email—which followed several months of UP/BNSF discussions and was entitled "BNSF CITGO Crude Operating Plan"—evidences an intent that BNSF "will begin" unit train operations to CITGO a mere three days after the email was sent. (See id. at 1-5; BNSF Opening Ex. F.) This demonstrates that at least UP and BNSF had agreed that BNSF operations on the Rosebluff Lead would be feasible.

rise to the level of substantial impairment. See Rio Grande/CMW, 5 I.C.C.2d at 983-84 (granting terminal trackage rights despite claims of “serious congestion” due to use by numerous other carriers in busy Chicago terminal area); St. Louis Sw. Ry.—Purchase (Portion)—Gibbons, 363 I.C.C. 323, 370-72 (1980) (granting terminal trackage rights despite allegations of congestion in a St. Louis terminal area, and noting that the “public interest benefits we expect to derive from this purchase outweigh the inconveniences”); UP/MP/WP, 366 I.C.C. at 578 (concluding that “any harm [the terminal trackage rights] might cause to the consolidated system will be more than outweighed by the public benefit of added competition”).

Here, our review of the record shows that BNSF’s direct service will free up capacity and eliminate some of the congestion in Rosebluff Yard, as numerous BNSF cars will no longer be switched or stored there. Moreover, the use of direct unit trains (such as BNSF’s proposed service to CITGO) may well increase the efficiency of operations on the Lead, by reducing the amount of time that trains spend on the Lead itself. Whereas a 30-car manifest train delivering to multiple shippers would likely make multiple stops and maneuvers on the Lead, a 40- or 60-car unit train—despite taking slightly more time to traverse the Yard and Lead—could clear the Lead considerably faster by moving directly into a shipper’s facility. With respect to BNSF’s access to CITGO specifically, because the CITGO facility is in the northern half of Zone 2, it appears that UP will be able to move and switch cars without interference in the southern portion of Zone 2 during a BNSF direct-service window.¹⁵

Again, that is not to say that the presence of a third carrier will not require increased coordination at these facilities.¹⁶ The ultimate question we must address, however, is whether the introduction of a third carrier will so complicate the facility that it will substantially impair the ability of UP and KCS to serve their own customers. On this record, we conclude that despite the potential challenges, BNSF should be able to use the Rosebluff Lead without substantially impairing the operations of UP or KCS. We therefore grant BNSF’s application for terminal trackage rights.¹⁷

¹⁵ While the parties dispute CITGO’s capacity to admit a 60-car unit train into its facility without temporarily blocking a portion of the Lead, this is an operational question that the carriers are well-equipped to resolve by, e.g., limiting the length of the unit trains admissible to particular shippers’ facilities (as UP’s and KCS have previously done). In any event, it does not warrant a finding that BNSF’s use of the Lead, as a general matter, will substantially impair UP and KCS’s operations.

¹⁶ Depending on how the parties work out their on-the-ground operations, it is possible that the impact of moving BNSF’s access from a reciprocal switch by UP to direct access may in some ways be neutral. To the extent that BNSF trains would provide equivalent service to those previously provided by UP (via reciprocal switch), cars that are now being delivered to an industry by a crew with a yellow locomotive (UP) would be delivered by a crew with an orange one (BNSF). The physical nature of the work would be very similar in either case. Indeed, to the extent that BNSF can aggregate sufficient cars to run through the Rosebluff Yard, there may even be improvement in efficiencies relative to what can be obtained via a reciprocal switch.

¹⁷ We believe that the three carriers can, in the interest of efficiency and operating economies, coordinate operations to minimize their interference with one another. Indeed, a
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Our findings here are based on the record currently before us, including the possibility that BNSF may elect to directly serve additional shippers on the Lead. While we have every reason to believe that the parties can arrange their operations in a way that will give BNSF direct access to shippers while minimizing disruption to UP and KCS's business, the unique nature of this case, in which BNSF has filed its terminal trackage rights application twenty years after the merger, may require future adjustments. If three-carrier operations on the Rosebluff Lead cause substantial impairment in the future, any party may petition the Board to reopen today's decision on the basis of new evidence or materially changed circumstances.

Conditions of Use & Compensation

Under the terminal trackage rights statute, “[t]he rail carriers are responsible for establishing the conditions and compensation for use of the facilities.” 49 U.S.C. § 11102(a). If the rail carriers cannot agree, “the Board may establish conditions and compensation for such use under the principle controlling compensation in condemnation proceedings.” *Id.* The compensation must be paid or adequately secured before a rail carrier may begin to use the facilities of another rail carrier. *Id.*

As an initial matter, § 11102(a) cannot be read, as BNSF implies, to exclude the involvement of KCS, a 50% joint owner of the terminal facilities, when establishing conditions and compensation for use. Although the first sentence of Section 11102(a) uses the singular (“owned by a rail carrier”), the statute must encompass situations involving multiple rail-carrier owners. The clear intent of the statute is to give the Board authority to require a carrier's use of terminal facilities that it does not currently own or use, in order to encourage coordination and joint control and to avoid duplication of rail facilities. See *S. Pac. Transp. Co. v. ICC*, 736 F.2d 708, 723 (D.C. Cir. 1984); *Spokane, P. & S. Ry.—Control*, 348 I.C.C. 109, 142 (1975); Hearings on H. R. 4378 [predecessor to § 11102(a)], House Committee on Interstate and Foreign Commerce, Vol. 2, p. 2319 (1919). It would undermine that purpose to preclude the statute's application where the terminal facilities are owned by more than one rail carrier. Indeed, this reading comports with the agency's prior statements regarding § 11102(a). See *Rio Grande/CMW*, 5 I.C.C.2d at 983-84 (ordering compensation “to be determined by the parties” on a line used by multiple carriers under a trackage rights agreement); *UP/MP/WP*, 366 I.C.C. at 576 (considering potential impairment “for any of the carriers involved” in using a jointly

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certain level of interference and delay is common and expected in the railroad industry, as carriers increasingly consolidate operations and enter into agreements to jointly operate on the system's diminishing track space. See *UP/MP/WP*, 366 I.C.C. at 576, 588; see also *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.* (UP/SP Decision No. 95), slip op. at 4 (STB served Feb. 28, 2002) (“UP agreed to [] potential interference when it accepted the conditions, including the terms of the BNSF Agreement, that we imposed when we approved the UP/SP merger.”).

operated track segment).¹⁸ Thus, here, the “rail carriers” that are “responsible for establishing the conditions and compensation” include all affected carriers: BNSF (which seeks access) and UP and KCS (which jointly own the terminal facilities).

Conditions of Use. UP argues that if the Board grants BNSF’s application here, it should require BNSF and UP to develop an operating plan under the process set forth in the BNSF Agreement. (UP Reply 49 (noting BNSF’s apparent agreement at BNSF Opening 18-19).) Although the BNSF Agreement contemplates a process whereby BNSF and UP (alone) will develop an operating plan for BNSF’s use of its trackage rights, that particular language in the merger condition does not contemplate the existence of a third-party joint owner of a line and does not resolve the issue of operations on the Rosebluff Lead in this § 11102(a) proceeding involving all three carriers. (See UP Reply Ex. 2 (Restated & Am. BNSF Agreement) § 5(d).) Thus, we direct BNSF, UP, and KCS to collectively develop conditions governing their use of the Rosebluff Lead, including BNSF’s access (if it so elects) to directly serve shippers other than CITGO. If the parties cannot collectively reach an agreement, they may request that the Board establish conditions of use.

Compensation. The parties contest the issue of compensation for use of the terminal facilities. BNSF argues that 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. (See BNSF Opening 21.) According to BNSF, Section 9 of the BNSF Agreement established the rate to be paid by BNSF, while the CMA Agreement included an escalator of the rate that would be more favorable to its member shippers. (See *id.*; UP Reply Ex. 2 (Restated & Am. BNSF Agreement) § 9; UP Reply Ex. 3 (CMA Agreement) § 7.) BNSF argues that, because these Agreements established compensation as between BNSF and the merged UP/SP, any compensation due to KCS is the responsibility of UP. (See BNSF Opening 21; BNSF Final Brief 33-34.) BNSF also asserts that any potential dispute between UP and KCS regarding the allocation of payment should not delay BNSF’s use of the terminal facilities. (See BNSF Opening 21-22 & n.8; BNSF Final Brief 34 n.19.)

In response, UP argues that if the Board grants BNSF’s terminal trackage rights application, BNSF must pay any incremental costs associated with its exercise of those trackage rights, including any appropriate compensation to KCS. (UP Reply 48; UP Final Brief 18.) KCS argues that BNSF’s proposal for compensation fails to meet the statutory requirements of § 11102(a), as it excludes KCS (which was not a party to the BNSF and CMA Agreements) from the compensation-setting process. (KCS Reply 65-67; KCS Final Brief 17.) KCS further asserts that BNSF’s proposal would provide inadequate compensation to KCS, because the rate set by the merger conditions is lower than the rate that would be established by the Board “under the principle controlling compensation in condemnation proceedings.” (KCS Reply 66-67.)

¹⁸ This reading is also supported by the Dictionary Act. See 1 U.S.C. § 1 (“In determining the meaning of any Act of Congress, unless the context indicates otherwise--words importing the singular include and apply to several persons, parties, or things[.]”).

While the Board would agree that the question of compensation had been settled by the BNSF and CMA Agreements if UP were the only owner of the Rosebluff Lead, the particular language in those merger conditions does not specifically address the existence of a third-party joint owner of the line. As a rail carrier owner of the terminal facilities under § 11102(a), KCS must have a role in establishing compensation for use of those facilities. Thus, all three carriers must attempt to agree upon the terms of compensation for BNSF's use of the Rosebluff Lead, given its ownership structure.¹⁹ If such efforts fail, the Board will establish the compensation. With respect to BNSF's contention that it may begin using the terminal facilities before the parties have agreed upon the terms of compensation, we note that under this decision, all three carriers must also collectively establish conditions for use of the Rosebluff Lead—a process that will necessarily precede BNSF's operations on those facilities. It is therefore most appropriate and efficient for the carriers to concurrently negotiate regarding both the operating conditions and the compensation.

Requested Override of the Joint Facility Agreements

Finally, in its application and opening statement, BNSF has stated that, if its terminal trackage rights application is denied, BNSF seeks an “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.” (BNSF Appl. 5-6 & n.7 (citing the Board's authority under 49 U.S.C. § 11321(a) to override contractual obligations as necessary to carry out an approved merger transaction); BNSF Opening 22-23 (same).) Because we are granting BNSF's application under 49 U.S.C. § 11102(a), we need not decide the contract override issue.²⁰

It is ordered:

1. KCS's motion to strike is denied.
2. BNSF's motion to strike is denied.
3. BNSF's request for oral argument is denied.

¹⁹ Because § 11102(a) provides that the rail carriers are responsible for establishing compensation for the use of terminal facilities, we will not address the specific compensation-related issues raised by the parties at this time.

²⁰ We take no position with regard to interpretation of any provisions of the UP-KCS joint facility agreements. KCS's consent—whether or not required by any of those agreements—is not required to grant terminal trackage rights under the statute. See 49 U.S.C. § 11102(a); UP/SP Decision No. 44, 1 S.T.B. at 446-49 (granting terminal trackage rights over KCS's objection).

4. BNSF's application for terminal trackage rights is granted as discussed above.
5. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.