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

UNION PACIFIC RAILROAD COMPANY'S FINAL BRIEF

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I. INTRODUCTION

The Board should deny BNSF's application for terminal trackage rights. BNSF already fully enjoys the access it obtained to CITGO and other Lake Charles area shippers in the UP/SP merger and is providing the competition contemplated by the BNSF Settlement Agreement ("Agreement") and the Board. Here, BNSF seeks rights different from those it agreed to accept, and different from those the Board required Union Pacific to provide when imposing the Agreement as a condition on the merger. BNSF expressly agreed to Section 8(n) of the Agreement, which provides that if Union Pacific lacks sufficient legal authority to carry out any promised grant of trackage rights, BNSF will accept alternative access. The re-interpretation of Section 8(n) that BNSF offers on rebuttal is contrary to the plain language of the Agreement.

BNSF also has not proved its proposed use of terminal trackage rights "to be practicable and in the public interest without substantially impairing the ability of the rail carrier[s] owning the facilities ... to handle [their] own business." 49 U.S.C. § 11102(a). BNSF's argument that the Board should adopt a new "public interest" test for trackage rights imposed as merger conditions rests entirely on the false premise that the Board in fact imposed a trackage rights condition here, and adopting BNSF's proposed test would violate the principle that a merger may not be used as an excuse to impose trackage rights over lines of a non-applicant (here KCS). BNSF's operating evidence is a jumble of contradictions that fails to establish that BNSF could use the rights it now seeks without substantially impairing Union Pacific's and KCS's service to customers.

Lacking legal or factual support for trackage rights, BNSF resorts to a partial quotation of an email to attack Union Pacific's motives. But our motives (as the email quoted in full below shows) are straightforward and pro-competitive: Union Pacific is fulfilling its obligations under the BNSF Settlement Agreement and its joint facility agreement with KCS, and trying to protect

shippers from the serious operating problems that would result if BNSF were allowed to add new trains on the already congested Rose Bluff Industrial Lead.

II. NEITHER THE BNSF SETTLEMENT AGREEMENT NOR THE UP/SP MERGER CONDITIONS GIVE BNSF AN UNQUALIFIED RIGHT TO OBTAIN TRACKAGE RIGHTS OVER THE ROSE BLUFF INDUSTRIAL LEAD.

BNSF is incorrect when it claims that the BNSF Settlement Agreement and the Board’s merger conditions give it an unqualified right to trackage rights over the Rose Bluff Industrial Lead. BNSF’s right is qualified by Section 8(n) of the Agreement, where it expressly agreed to accept “alternative” access “[i]n 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.” C.E. 2, § 8(n).¹

In this particular case, Union Pacific lacks sufficient legal authority to carry out a grant of trackage rights over the Rose Bluff Industrial Lead because KCS has not consented to a grant of trackage rights access to BNSF, as required under the consent provision of the joint facility agreement governing the Lead. *See* UP Reply 19 & C.E. 9, § 19. Thus, in this case, the BNSF Settlement Agreement and the Board’s merger conditions require Union Pacific to provide BNSF “an alternative ... means of access of commercially equivalent utility.” C.E. 2, § 8(n).

Put another way, Union Pacific agreed that BNSF would have the right to elect to serve Lake Charles area shippers using trackage rights—but only to the same extent that BNSF can elect to serve shippers at 2-to-1 points using trackage rights. Indeed, BNSF concedes that its access to Lake Charles area shippers is ““on the same basis as’ BNSF’s access to ‘2-to-1’ points.” BNSF Reb. at 14. And, at all points covered by the BNSF Settlement Agreement, the

¹ “C.E.” refers to the Counsel’s Exhibits submitted with Union Pacific’s reply and rebuttal.

terms of which were imposed as a merger condition, BNSF's right to access shippers using trackage rights is qualified by Section 8(n). *See* UP Reply 18-25.

BNSF denies that Section 8(n) applies. Weicher says Section 8(n) does not apply where *Union Pacific* lacks sufficient legal authority to carry out a grant of trackage rights, but only where *BNSF* cannot obtain legal authority necessary "for the implementation of trackage rights" (such as "a required environmental or other regulatory approval"). Weicher Reb. VS at 5 & n.2. But Weicher is twisting Section 8(n)'s language, which expressly refers to situations where trackage rights "cannot be implemented because of the lack of sufficient legal authority to carry out such grant." C.E. 2, § 8(n).² This language plainly addresses the situation presented here, where *Union Pacific* lacks sufficient legal authority to carry out a grant of trackage rights because it lacks contractually required consent.

As *Union Pacific* witness Rebensdorf showed, 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 Agreement might be covered by pre-existing agreements that would restrict *Union Pacific*'s ability to grant access to *BNSF*. *See* Rebensdorf RVS at 3. *Union Pacific* was careful not to make commitments it could not keep. *See id.* Weicher now says *BNSF* never would have agreed to give *Union Pacific* an "escape hatch." Weicher Reb. VS at 5. But Section 8(n) is the opposite of an escape hatch: if *Union Pacific* cannot carry out a particular grant of trackage rights, it must provide "access of commercially equivalent utility"—which *BNSF* already enjoys here. C.E. 2, § 8(n).

² The parties addressed the need to obtain legal authority to implement the provisions of the *BNSF* Settlement Agreement separately, in Section 14 of the Agreement. *See* C.E. 2, § 14 ("The parties agree to cooperate with each other and make whatever filings or applications, if any, are necessary to implement the provisions of this Agreement . . .").

BNSF also tries to avoid Section 8(n) by claiming that Union Pacific only recently raised the issue of KCS's consent. But KCS raised the issue in 1996, in the proceeding that resulted in Decision No. 63. At the time, BNSF accepted access to the Rose Bluff Industrial Lead via reciprocal switching based on its rights and Union Pacific's obligations as described under Section 8(n). When BNSF demanded trackage rights over the Lead 16 years later, it did not mention Decision No. 63 or the BNSF Settlement Agreement; instead, it invoked the 50/50 Line Agreement. *See* C.E. 15. In contrast, Union Pacific immediately raised both operating issues and the need for KCS's concurrence in response. *See* C.E. 16. Union Pacific also cooperated when BNSF seemed interested in understanding the operating issues and encouraged BNSF and KCS to engage in substantive discussions about BNSF's interest in trackage rights. We made clear well before these legal proceedings began, however, that we could not carry out a grant of trackage rights without KCS's concurrence. *See* Scott/Lambeth RVS at 1-5.³

Lacking any other support, BNSF tries to avoid its agreement to Section 8(n) by impugning Union Pacific's motives. It misleadingly quotes only the first sentence of a paragraph in an email between Union Pacific operating officials about BNSF's proposed access to CITGO. *See* BNSF Reb. at 8. As the full paragraph quoted below makes clear, Union Pacific's sole concern was potential harm to operations:

{{

³ In its rebuttal, BNSF mischaracterizes an email between Union Pacific employees about these cooperative efforts. *See* BNSF Reb. at 6 n.4. {{

}}

}} BNSF Reb., Counsel's Exhibit 2.

This concern is exactly the same as those we have described in our public filings.

Finally, BNSF claims that its current access to the Rose Bluff Industrial Lead via switching does not satisfy Section 8(n) because it is not "commercially equivalent" to the access it would have using trackage rights. BNSF Reb. at 14. The record does not support that position, either. BNSF (through Union Pacific's switching of BNSF cars) already carries the {{ }} share of CITGO's rail traffic. *See* UP Reply at 16; UP Reb. at 10. And, in its rebuttal, BNSF boasts that it recently won the business of two additional shippers on the Lead, and it says it might not even want to serve them using trackage rights. *See* Bredenberg Reb. VS at 7-8.

In sum, BNSF's entire argument that the BNSF Settlement Agreement and the Board's merger conditions provide an unqualified right to trackage rights over the Rose Bluff Industrial Lead depends on its claim that Section 8(n) does not mean what it says. BNSF agreed to Section 8(n). By applying for terminal trackage rights, BNSF is breaking its promise and seeking rights different from those the Board imposed and BNSF agreed to accept.

III. BNSF HAS NOT SHOWN ITS PROPOSED USE OF TERMINAL TRACKAGE RIGHTS "TO BE PRACTICABLE AND IN THE PUBLIC INTEREST WITHOUT SUBSTANTIALLY IMPAIRING THE ABILITY OF THE RAIL CARRIER[S] OWNING THE FACILITIES ... TO HANDLE [THEIR] OWN BUSINESS."

In Decision No. 63, the Board discussed the circumstances in which BNSF could seek approval of a terminal trackage rights application under 49 U.S.C. § 11102(a). *See* Decision No. 63 at 9. In Decision No. 2 in this proceeding, the Board said BNSF has the same right to file an application for terminal trackage rights as any rail carrier. *See* Decision No. 2, at 3 n.8 (served Dec. 1, 2014) ("[A]ny rail carrier may file a terminal trackage rights application ... without permission from the Board"). If the Board evaluates BNSF's application using the standards applicable to any other rail carrier, it should deny the application.

A. BNSF terminal trackage rights are not “in the public interest.”

The Board has identified two situations in which a grant of terminal trackage rights might be in the public interest: (i) when the rights are necessary to ameliorate anticompetitive conduct, and (ii) when the rights are necessary to bridge a gap within broader trackage rights imposed on merger applicants. *See Canadian National, et al.—Control—Illinois Central, et al.*, 4 S.T.B. 122, 173-75 (1999). But, even in those two situations, terminal trackage rights are a disfavored remedy, “one to be afforded only when less intrusive remedies such as ... reciprocal switching are insufficient.” *Western Fuels Serv. Corp. v. The Burlington N. & Santa Fe Ry.*, NOR 41987, slip op. at 7 (STB served July 28, 1997). Neither public interest justification exists here.

BNSF does not attempt to show any anticompetitive conduct on the part of Union Pacific or KCS, nor could it. *See* UP Reply at 27. Instead, it quotes selectively from Decision No. 44 in an attempt to bolster its claim that a broader public interest test applies when terminal trackage rights are necessary “to make the agency’s overall merger conditions effective.” BNSF Reb. at 15 (quoting Decision No. 44, 1 S.T.B. at 448). However, the full context and subsequent cases make clear that the Board was simply discussing its “bridge the gap” exception, which applies when terminal trackage rights are “*designed to bridge a gap within broader trackage rights imposed on applicants and deemed necessary to remedy or mitigate anticompetitive effects in the transaction.*” *CN/IC Control*, 4 S.T.B. at 173 (discussing Decision No. 44) (emphasis added); *see also* UP Reply at 28-29 (discussing the Board’s “bridge the gap” precedent).

On rebuttal, BNSF makes a cursory attempt to fit its application into the “bridge the gap” exception by arguing that terminal trackage rights would bridge a gap between its former trackage rights over the jointly-owned 50/50 Line and “shippers on the Rose Bluff Lead.” BNSF Reb. at 16. But this would not be bridging a gap “within broader trackage rights”—it would be using trackage rights to access shippers. *See* UP Reply at 28-30. If the Board could grant

trackage rights in these circumstances, little would remain of its rule against using “the pendency of a consolidation proceeding as an excuse for imposition of trackage rights over the lines of a non-applicant” (in this case KCS). *CN/IC Control*, 4 S.T.B. at 174. And, unlike in a genuine “bridge the gap” case, terminal trackage rights are not necessary here. BNSF has used switching over the past 19 years to compete very successfully for business in the Lake Charles area. *See* UP Reply at 30-32; *see also* Bredenberg Reb. VS at 7-8.

On rebuttal, BNSF argues that its access via switching has not allowed it to capture SP’s pre-merger share of Lake Charles area traffic. *See* BNSF Reb. at 19. However, any comparison appropriately focuses on a comparison with pre-merger traffic handled by one or the other of the merger parties, so it is equally or more appropriate to focus on *Union Pacific’s* share of traffic, especially in the Lake Charles area. *Cf.* Decision No. 44, 1 S.T.B at 427-28 (explaining the Lake Charles area conditions as addressing a loss of KCS-Union Pacific joint-line competition against SP). As BNSF’s own expert shows, before the UP/SP merger, SP had a larger share of traffic in the Lake Charles area than Union Pacific. *See* Reishus Reb. VS at 5, Fig. 2. In fact, Union Pacific did not even have access to CITGO and other shippers on the Rose Bluff Industrial Lead prior to the UP/SP merger. *See* UP Reply at 6. CITGO and other shippers on the Lead are thus undeniably in a better competitive position than before the UP/SP merger. *See id.* at 30-31; UP Reb. at 4. Moreover, according to BNSF’s own expert, { {

}} *See* Reishus Reb. VS at 4, Fig. 1. And, because BNSF’s study ends in 2013, it does not account for BNSF’s recent success in capturing additional business of shippers on the Lead.⁴

BNSF is simply wrong when it claims that “the requested terminal trackage rights are necessary to implement the Lake Charles Condition.” BNSF Reb. at 17. The UP/SP merger conditions give BNSF access to Lake Charles area shippers on the same terms it has access to shippers at 2-to-1 locations—and those terms include Section 8(n). The Board’s conditions do not require BNSF to serve Lake Charles area shippers using trackage rights, nor do they give BNSF the unqualified right to elect to serve those shippers using trackage rights. *See* UP Reply at 20-24. The public interest is fully satisfied by the assurance under Section 8(n) that BNSF will obtain a “means of access of commercially equivalent utility.” C.E. 2, § 8(n).

B. BNSF’s proposed service is not practicable and would substantially impair Union Pacific’s and KCS’s ability to handle their own business.

BNSF has not proved that its use of terminal trackage rights over the Rose Bluff Industrial Lead is “practicable ... without substantially impairing the ability of [Union Pacific and KCS] to handle [their] own business.” 49 U.S.C. § 11102(a). BNSF attempts to duck its burden of producing evidence, asserting that it “will accept a nonexclusive operating window at any time within UP’s 12-hour operating period.” BNSF Reb. at 29. Put to the test, however, BNSF cannot explain how it could operate even a single train to and from CITGO, much less the multiple unit trains and manifest trains it says it might operate on the Lead. BNSF’s minimal and contradictory evidence regarding operations on the Lead actually reinforces the conclusion that a

⁴ BNSF says it would have lower variable costs if it could serve customers directly, *see* BNSF Reb. at 27, but (i) BNSF told the Board it could compete effectively under the compensation terms it negotiated, (ii) the Board found that the reciprocal switching and haulage fees were “appropriate,” Decision No. 44, 1 S.T.B. at 429, and (iii) the evidence shows that BNSF competes effectively for traffic in the Lake Charles area.

workable operating window does not exist and could not be created without substantially impairing Union Pacific's and KCS's ability to serve all customers on the Lead.

1. BNSF's December 2014 study does not support BNSF's use of terminal trackage rights.

BNSF says it studied the operations of Rose Bluff Yard and the Rose Bluff Industrial Lead in December 2014, just days before filing its opening evidence. *See* BNSF Reb. at 30 & Bredenberg Reb. VS, Ex. A. BNSF did not mention any study on opening, and even a cursory review of its study results suggests several reasons why BNSF put aside that study, until it recognized that it could not continue to rely solely on Bredenberg's cursory and flawed opening testimony. *See* UP Reply at 32-36 (discussing errors in Bredenberg's operating evidence).

First, BNSF now says it will not operate through Rose Bluff Yard during KCS's operating window, but the December 2014 study does not identify any opportunity for BNSF to remove cars from CITGO during Union Pacific's window. On the contrary, it recommends that BNSF operate during KCS's window: it reports a {

}—right in the middle of KCS's window. Bredenberg Reb. VS, Ex. A (BNSF-C-000596(R)). BNSF still seems unaware that the study assumes it would operate during KCS's window. BNSF says the study shows a clear route exists through Rose Bluff Yard during at least { }% of Union Pacific's operating window. *See* BNSF Reb. at 30; Bredenberg Reb. VS at 4-5. That claim is wrong for several reasons, but one undisputable reason is that the figure they cite combines data from both Union Pacific's and KCS's operating windows.⁵

⁵ BNSF did not provide the pages from the study containing its percentage calculations in its exhibit, but it produced them in discovery. *See* BNSF-C-000615(R). The pages BNSF does provide make clear that the study analyzed data over a full 24-hour period, not just Union Pacific's 12-hour window. *See* Bredenberg Reb. VS, Ex. A (BNSF-C-000601(R) & 000602(R)).

Second, BNSF now assumes it will have a clear route from its Lacassine Yard to CITGO, but the December 2014 study did not include operations on the 50/50 Line between Lacassine Yard and the Rose Bluff Industrial Lead. *See* Bredenberg Reb. VS, Ex A (BNSF-C-000597(R)). Thus, even if the study accurately identified times when BNSF would have a clear route through Rose Bluff Yard, which it does not, it does not address whether BNSF would have a clear route between Lacassine Yard and the Lead, which it would need to take advantage of the supposed yard openings. On rebuttal, Bredenberg claims that the 50/50 Line is not a constraint because it has excess capacity. *See* Bredenberg Reb. VS at 3-4. However, the workpapers BNSF produced to support this claim show that the { { } } which means that even during the period that Bredenberg chose to highlight, the 50/50 Line was already near or above capacity almost every day, even before adding BNSF’s proposed new trains to and from CITGO and other shippers on the Rose Bluff Industrial Lead. *See also* Chappell/Matya RVS at 3 (“The Lafayette Subdivision is a very busy line that currently handles an average of 25 trains a day . . .”).⁶

Third, BNSF initially proposed a fixed window for its movement of trains to and from CITGO, but the December 2014 study, as flawed as it is, shows no fixed window of opportunity exists. The study identifies windows on certain days—it reports that { }—but BNSF is not looking to operate only on { }, and the study does not identify any single hour in which a window consistently existed, even during the short study period. *See* Bredenberg Reb. VS, Ex. A (BNSF-C-000600(R) & 000601(R)).

⁶ While Bredenberg refers to the maximum number of trains that moved over the portion of the 50/50 Line managed by Union Pacific, he carefully avoids making any claims about the quality of service when the number of trains exceeds the fluid capacity.

2. BNSF’s new study and analysis do not support its proposed use of terminal trackage rights.

BNSF’s reluctance to rely on the December 2014 study is understandable in light of BNSF’s more recently developed evidence—specifically, a new study directed by Bredenberg and a traffic data analysis performed by BNSF witness Baranowski. The new study and analysis undermine key conclusions of the December 2014 study and confirm Union Pacific’s and KCS’s evidence that an operating window for BNSF trains does not exist and could not be created without substantially impairing Union Pacific’s and KCS’s ability to handle their own business. *See* Chappell/Matya RVS at 8-9, 16-22; KCS Reply, Bartoskewitz RVS at 4-7.

BNSF did not submit its new study with its rebuttal, but the summary it produced as a workpaper is attached to this brief as Exhibit A. The new study confirms that there is no viable time during Union Pacific’s window for BNSF to operate over the Rose Bluff Industrial Lead. The December 2014 study claimed that a {

} Bredenberg Reb. VS, Ex. A (BNSF-C-000596(R)). BNSF’s new study contradicts that conclusion, reporting that {

} The new study says that even though {

} Baranowski’s analysis is consistent with these new assertions. It shows KCS trains {{ }} *See* Baranowski Reb. VS at 13, Fig. 2.

Bredenberg now says BNSF does not need a fixed window to operate through Rose Bluff Yard: “if KCS overstays its 12-hour operating period,” Union Pacific “would adjust the time for BNSF’s window accordingly, and BNSF will leave its Lacassine Yard in sufficient time in order to arrive at the Rose Bluff Lead at the appointed time.” Bredenberg Reb. VS at 3. But that is speculation—not a viable plan—and BNSF’s unsupported claim that the railroads would

somehow accommodate BNSF operations on this *ad hoc* basis provides the Board with no factual basis to make the findings required by § 11102(a).

Union Pacific's evidence explains the cascading delays that would result if KCS *never* overstayed its window and Union Pacific had to hold train YRB86 south of CITGO until BNSF moved its train to that facility. *See* Chappell/Matya RVS at 17-20. That evidence is un rebutted. KCS's overstay would exacerbate the situation. Union Pacific's evidence assumed BNSF could enter Rose Bluff Yard immediately upon KCS's departure. But in reality, BNSF could not stop its trains on the 50/50 Line to wait for KCS to exit the yard—that could block the single-track main line for hours. Bredenberg suggests that BNSF would stage its trains in Lacassine Yard and delay their departure until KCS was ready to leave Rose Bluff Yard. *See* Bredenberg Op. VS at 7. But that would add at least an hour to YRB86's wait south of CITGO.⁷ As a result, YRB86 would be even more likely to miss its connections in North Yard, and Union Pacific's other trains would have even less time to finish their work in Rose Bluff Yard, and they would be even more likely to impinge on KCS's window, adding to the cycle of overstay. *See* Chappell/Matya RVS at 18-19.

Bredenberg's rebuttal testimony is vague, but if he is suggesting that BNSF could enter Rose Bluff Yard after YRB86 exits, that also is not a viable plan. As Union Pacific's evidence shows, YRB65 typically starts sorting cars and building blocks as soon as YRB86 clears the west end of the yard. *See id.* at 11. If YRB65 could not start its work until BNSF trains move through

⁷ Bredenberg estimated that a train could travel the 20 miles from Lacassine Yard to the Rose Bluff Industrial Lead in 30 to 45 minutes, and then over the Lead to CITGO in 25 minutes. *See id.* at 7-8. However, his workpapers addressing the 50/50 Line show average train speeds below 20 mph. Moreover, BNSF's local trains would have lower priority than Amtrak and through trains on the 50/50 Line. *See* Chappell/Matya RVS at 20. This means that to avoid a conflict with higher priority trains, the locals could be held even longer before exiting Lacassine Yard.

Rose Bluff Yard, YRB65's start would be delayed for several hours. BNSF trains could not leave Lacassine Yard until YRB86 clears the route by entering North Yard. Nor would it be feasible for YRB65 to start work, stop to clear a route for BNSF, wait while BNSF trains travel from Lacassine Yard through Rose Bluff Yard, and then resume its work. *See id.* at 19-20.⁸ Again, Union Pacific's un rebutted evidence establishes that the ensuing delay and disruption would substantially impair service to customers on the Rose Bluff Industrial Lead. *See id.* at 20.⁹

BNSF's new study confirms Union Pacific's evidence. The new study confirms that, during Union Pacific's operating window in Rose Bluff Yard, its "crews operate over all six tracks in yard." *Id.* at 7. The new study contradicts the December 2014 study, reporting that the { } Exhibit A. The new study does say cars could be moved to clear a path through the yard, but that was never the issue. Rather, the issue is the resulting disruption and delay if Union Pacific had to suspend its operations, clear a path, and then resume work. On this critical point, the new study is conspicuously silent.

Bredenberg does not seem to have reviewed the study with much care. He says the problem the study identifies is that Union Pacific and KCS both "placed small cuts of cars on each of the six tracks in the Yard before going off duty thus eliminating any of the tracks as running tracks." Bredenberg Reb. VS at 5. However, the study does *not* say that; rather, it refers to the presence of cars on all the tracks while Union Pacific switches the yard during its window. *See* Exhibit A. Indeed, Union Pacific and KCS must leave a running track open at the end of

⁸ As Union Pacific's un rebutted evidence explains, BNSF trains could not leave Lacassine Yard until Rose Bluff Yard is clear to ensure they do not block the 50/50 Line while waiting for a clear route through the yard. *See id.* at 19.

⁹ A BNSF train and YRB86 could not occupy Rose Bluff Yard at the same time. YRB86 usually must leave a cut of cars on Track 4, which would prevent BNSF from running through the yard, and YRB86 also needs access to all the yard tracks as it sets out cars for KCS and picks up cars that KCS left for Union Pacific and BNSF. *See id.* at 10.

their windows, so the other railroad can move into the yard. The problem with accommodating a BNSF train once KCS exits the yard is that it would create cascading delays to Union Pacific's work—a point that BNSF never denies.

Baranowski's analysis also confirms the absence of an opportunity to move BNSF trains through Rose Bluff Yard. The analysis shows that on most days there is no gap, or just a very brief gap, between the time YRB86 exits the yard and the time YRB65 starts work in the yard. *See* Baranowski Reb. VS at 15, Fig. 4.¹⁰ Moreover, even the few, brief gaps would be closed well before BNSF trains could travel to the yard from their starting point at Lacassine Yard. In addition, although Baranowski suggests that slightly longer openings may sometimes exist between YRB65's exit from the west end and YAK63's arrival at the east end of Rose Bluff Yard, that is incorrect. Baranowski's analysis ignores that, after YRB65 exits the yard, it moves down the Rose Bluff Industrial Lead, setting out cars for switching into customer facilities. *See* Chappell/Matya RVS at 11.¹¹ As a result, BNSF trains that enter the yard between YRB65's

¹⁰ In addition, some of the apparent "openings" would disappear if Figure 4 showed when KCS overstayed its window, as is shown in Figure 2. *See* Baranowski Reb. VS at 13, Fig. 2. And, Figure 2 by itself does not show "openings" for BNSF trains, because it does not show how YRB86 blocks the Rose Bluff Industrial Lead as it moves into Rose Bluff Yard. Also, as Baranowski concedes, it does not include information on YAK63. In addition, as discussed below, neither Figure 2 nor Figure 4 shows how YRB65 blocks the Lead as it sets out cars after exiting the yard.

¹¹ Baranowski's separate analysis of switching times on the Rose Bluff Industrial Lead addresses Union Pacific trains that switch cars into and out of customer facilities, but not YRB86's role in picking up the cars that were switched out of customer facilities and set out along the Lead and taking them into Rose Bluff Yard, and not YRB65's role in taking cars from Rose Bluff Yard and setting them out along the Lead to be switched into customer facilities. *See* Baranowski Reb. VS at 16, Table 8.

departure to the west and YAK63's arrival from the east would get stuck behind YRB65, preventing YAK63 from entering the yard and performing its scheduled work.¹²

Substantial impairment of Union Pacific service would result if one additional BNSF train operated through Rose Bluff Yard to CITGO. But BNSF also would have to move that train from CITGO back through the yard during Union Pacific's window to return to Lacassine Yard, requiring Union Pacific to clear the Rose Bluff Yard a second time. Moreover, BNSF apparently contemplates moving at least two trains each way—as reflected in its reference to “both manifest and unit train cars destined for CITGO,” Bredenberg Reb. VS at 4—for a total of at least four daily movements through Rose Bluff Yard. And, Bredenberg actually appears to contemplate moving at least { } trains each way, which would mean { } additional daily movements through Rose Bluff Yard. See *id.* at 6. BNSF's evidence does not come anywhere close to showing that any of this would be possible.

3. BNSF's belief that Union Pacific documents show a window for BNSF trains reflects Bredenberg's continued lack of understanding of operations on the Rose Bluff Industrial Lead.

Bredenberg claims that BNSF could “run up to { } direct trains through the Yard and over the Lead just as UP does when it simultaneously operates a total of { } trains on the Lead in the afternoon.” Bredenberg Reb. VS at 6. However, Union Pacific never operates more than one train through Rose Bluff Yard at one time: YRB86 moves up the Rose Bluff Industrial Lead to and through Rose Bluff Yard in the morning en route to North Yard, and YAK63 moves from North Yard to and through Rose Bluff Yard en route to the Lead in the afternoon. See Chappell/Matya RVS at 10, 11. Union Pacific at times has four trains operating south of Rose

¹² Baranowski's Figure 4 also exaggerates the size of the few so-called “available openings” by including time within KCS's window as part of the “available openings.”

Bluff Yard on the Lead, but as Bredenberg's exhibit shows, these trains are switching cars for defined groups of customers in distinct areas—they never move through Rose Bluff Yard while other trains are operating in the yard. *See* Bredenberg Reb. VS, Ex. C; *see also* Chappell/Matya RVS at 10-13.

Union Pacific's present operations thus provide no support for BNSF's proposal to move any additional trains through Rose Bluff Yard and over the Rose Bluff Industrial Lead. To the contrary, because the Lead is non-dispatched territory, Union Pacific carefully arranges operations to minimize the likelihood that two crews will operate in the same area at the same time to ensure the safety of employees and minimize disruption of the delicate operational balance. *See* Chappell/Matya RVS at 13-14. BNSF's proposal to operate up to { } additional trains through Rose Bluff Yard and on the Lead would multiply potential conflicting operations and increase the risks of accidents. It is no coincidence that Union Pacific and KCS have long agreed to divide responsibility for serving customers on the Lead to avoid such conflicting operations and reduce safety risks to employees.¹³

4. BNSF's reliance on CITGO's supposed expansion plans ignores the evidence that CITGO has no plans to expand.

Bredenberg also says CITGO has plans to expand its facility that will mitigate any operating issues at the facility. *See* Bredenberg Reb. VS at 7. In fact, CITGO stated that it "has *no current plans* for further expansion of its rail infrastructure at the CITGO Lake Charles refinery based on current market and operational conditions." C.E. 12 at 4 (emphasis added).

¹³ Bredenberg also points to a KCS study to support BNSF's claim that the tracks in Rose Bluff Yard are blocked only { }% of the time, but that study included KCS's occupancy period. *See* Bredenberg Reb. VS at 6; *see also* Baranowski Reb. VS at 13-14. In addition, the study did not examine whether the 50/50 Line or the Rose Bluff Industrial Lead was blocked at times when the yard tracks were not blocked, so it provides no useful information about whether BNSF could operate trains to CITGO or other shippers on the Lead during Union Pacific's window.

Moreover, any expansion of CITGO's own infrastructure would do nothing to reduce the harms associated with additional trains moving over the Rose Bluff Industrial Lead and through Rose Bluff Yard.

5. BNSF fails to address critical distinctions between the Rose Bluff Industrial Lead and other joint facilities where BNSF and Union Pacific both operate.

Finally, Bredenberg repeats his claim that operations on Union Pacific's Baytown "Branch" and Sabine Lead provide evidence that the two railroads could coordinate operation on the Rose Bluff Industrial Lead. *See* Bredenberg Reb. VS at 9. On reply, Union Pacific explained in great detail why operations on its Baytown Subdivision and Sabine Lead are not comparable to operations on the Rose Bluff Industrial Lead because these two properties have greater capacity than the Lead and lack a choke point similar to Rose Bluff Yard. *See* Scott/Lambeth RVS at 7-8. Bredenberg does not address these critical differences. He blithely claims that communication between the two railroads is all that is needed for successful joint operations on the Rose Bluff Industrial Lead. *See* Bredenberg Reb. VS at 9. But Bredenberg never explains how communications somehow would create capacity when no capacity exists.

IV. THERE IS NO COMPELLING REASON FOR THE BOARD TO OVERRIDE THE CONSENT PROVISION IN THE 1948 JOINT FACILITY AGREEMENT.

BNSF's argument that an override of the 1948 Joint Facility Agreement is required if its application is denied rests entirely on the false premise that it has unqualified right to serve Lake Charles area shippers using trackage rights. *See* BNSF Reb. at 35-36. It does not. BNSF's claimed right is, and always has been, expressly qualified by Section 8(n) of the BNSF Settlement Agreement. *See* pp. 2-4, *supra*.

On rebuttal, BNSF alters language from Decision No. 63 to support its claim that it can obtain an override if BNSF trackage rights are blocked, *see* BNSF Reb. at 35-36, but the Board

there was addressing a hypothetical situation in which BNSF's "access to the Lake Charles area is blocked," Decision No. 63 at 9 (emphasis added). BNSF's "access" to CITGO and other shippers on the Rose Bluff Industrial Lead plainly has not been "blocked." Moreover, as BNSF concedes on rebuttal, "an override cannot be deemed necessary if other means are available to obtain the sought-after merger benefits." BNSF Reb. at 35; *see also* UP Reply at 47. Here, the evidence (including the share of CITGO's business that BNSF has won to date) establishes that CITGO and other shippers on the Lead are enjoying the benefits of robust BNSF competition with Union Pacific. Even absent this evidence, an override could not be deemed "necessary" because BNSF can invoke Section 8(n)'s alternative access remedy. *See* UP Reply at 47 (citing *CN/IC Control*, 4 S.T.B. at 174-75).

V. IF THE BOARD AWARDS BNSF ANY RELIEF, BNSF SHOULD BE REQUIRED TO PAY ALL ADDITIONAL COSTS ASSOCIATED WITH ITS OPERATIONS OVER THE ROSE BLUFF INDUSTRIAL LEAD.

BNSF argues that the Board should not impose any costs on BNSF if terminal trackage rights are authorized in this proceeding. *See* BNSF Reb. at 33-34. But BNSF's responsibility to compensate the facilities' owners for use of terminal trackage rights is not only common sense, it is the law, as the Board made clear when it awarded BNSF terminal trackage rights over KCS in Decision No. 44. *See* UP Reply at 48 (citing Decision No. 44, 1 S.T.B. at 449 and C.E. 31). BNSF's failure to address this precedent constitutes a concession that its position lacks merit. *See* BNSF Reb. at 33-34.

BNSF's responsibility should be no different if it gains trackage rights over KCS through a contractual override. If BNSF obtains a contractual override when it could have exercised its rights under Section 8(n), it should bear any associated costs. *See* UP Reply at 49.

VI. CONCLUSION

The Board should deny BNSF's application for terminal trackage rights and its request for an override of KCS's contractual right to deny BNSF's trains admission to the Rose Bluff Industrial Lead.

Respectfully submitted,



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December 30, 2015

EXHIBIT A

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2015, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760 (Sub-No. 46).



Michael L. Rosenthal