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ENTERED
Office of Proceedings
October 23, 2015
Part of
Public Record

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October 23, 2015

VIA E-FILING

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

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

Dear Ms. Brown:

The Kansas City Southern Railway Company (“KCS”) hereby files, via e-filing, its Rebuttal to the reply comments filed by CITGO Petroleum Corporation on August 24, 2015. KCS’s rebuttal filing is public and contains no Highly Confidential or Confidential information as those terms are defined in the Board’s December 18, 2014 Protective Order issued in this proceeding. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

REBUTTAL OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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October 23, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

REBUTTAL OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

BRIEF BACKGROUND AND SUMMARY

In this proceeding, BNSF Railway Company (“BNSF”) asks the Surface Transportation Board (“STB” or “Board”) to misuse the Board’s authority under 49 U.S.C. §11102 to compel The Kansas City Southern Railway Company (“KCS”) and Union Pacific Railroad Company (“UP”) to provide BNSF preferential, no cost trackage rights over the Rosebluff Lead while ignoring decades-long operating practices, contractual and ownership rights of KCS and UP, and the threatened disruption of service to a multitude of shippers, all in the hope that BNSF can lower its operating cost to serve CITGO Petroleum Corporation (“CITGO”). BNSF’s terminal trackage rights application (“Application”) fails to meet any requirement of the statute that the Application purports to invoke. It is not needed to remedy any competitive problem resulting from the UP/SP merger as CITGO already has access to three carriers, BNSF, KCS and UP¹ and already utilizes BNSF’s services and rates quite extensively. It does not meet the public interest

¹ Prior to the UP/SP merger, CITGO had access to only two carriers – SP and KCS. As a result of the merger, CITGO gained access not only to a larger and stronger newly merged UP system, but also to the newly merged and larger BNSF. Since that time, KCS’ system has also expanded, through its connection to Kansas City Southern de Mexico. Lake Charles is perhaps the only place in the entire UP/SP merger where shippers actually saw their competitive options increased from two to three.

test under 49 U.S.C. §11102 and would substantially interfere with KCS and UP operations. Accordingly, BNSF's Application should be denied.

In its August 24 reply to BNSF's Application, CITGO argues that the Board should grant the Application because BNSF was granted "direct" operating rights to CITGO's facility in the decision approving the UP/SP merger, and that the Board simply needs to activate those rights by finding that such rights meet the public interest standard of Section 11102. CITGO also argues that KCS and UP have taken blocks of 25 to 50 cars into the CITGO facility without operational issues and therefore BNSF should be able to take unit trains of up to 60 cars into CITGO's facility without operational interference.

CITGO is wrong on both counts. The BNSF Settlement Agreement did not grant BNSF trackage rights to Lake Charles Area shippers, nor did the Board's decision adopting and modifying the BNSF Settlement Agreement by imposing the Lake Charles Condition grant BNSF such rights. Instead, BNSF was granted the "right to handle" traffic of Lake Charles Area shippers, nothing more. Furthermore, UP had no contractual or other right to grant BNSF trackage rights without KCS's consent. All parties acknowledge that KCS has not given such consent.

BNSF already has what it was given -- the right to handle traffic of Rosebluff Lead shippers by quoting single-line rates with physical delivery via a UP reciprocal switch. Indeed, this is the same type of access utilized by KCS for virtually all traffic to Zone 2 shippers, such as CITGO, because the substantial operational complexities and congestion of the Rosebluff Lead make it extremely difficult for KCS, let alone BNSF, to directly serve the CITGO facility via unit trains BNSF has used this right to handle traffic to Rosebluff Lead shippers for many years to compete quite effectively against KCS and UP for CITGO traffic.

But BNSF wants more than what KCS has or what BNSF was granted in the merger. BNSF claims that it has the legal right for trackage rights directly into the CITGO facility. But the Board, using its conditioning powers under 49 U.S.C. §11324(c) had no legal authority to grant BNSF such trackage rights over the tracks of KCS – a non-applicant carrier. The only way such rights could have been granted at the time was for BNSF to file a terminal trackage rights application as part of the merger and meet the public interest test under 49 U.S.C. §11102, which BNSF did not do. Having only now filed such a terminal trackage rights application, BNSF's Application must meet the exacting standards of Section 11102(a). The Application fails that test.

CITGO is also incorrect in asserting that previous deliveries by UP and KCS into CITGO's facility show the practicability of BNSF's proposed service. Contrary to CITGO's assertions, previous attempts by KCS to deliver blocks of 25 cars or more have happened only on rare occasions, because limited track infrastructure and the operating protocols required to serve many shippers on that limited infrastructure make such service extremely complex and difficult. CITGO's claims that BNSF could deliver unit trains of 60 cars without operational problems and without interference with KCS's service to other shippers ignore this history and ignore the operating realities.

ARGUMENT

I. CITGO HAS FAILED TO ESTABLISH THAT BNSF'S TERMINAL TRackage RIGHTS APPLICATION SHOULD BE GRANTED

All parties admit that for the Board to grant the Application, the Board must, among other findings, conclude that the Application is "in the public interest." 49 U.S.C. §11102(a).

CITGO's and BNSF's main argument is that in imposing the Lake Charles Condition, the Board already granted BNSF unfettered and unlimited trackage rights over the Rosebluff Lead and that,

therefore, the Board has already determined that such rights meet the “public interest” standard of Section 11102(a). Accordingly, CITGO and BNSF claim that the Board needs merely to use Section 11102 as the means to implement its previously granted trackage rights and without the need to apply Midtec or even the “bridge the gap” exception to Midtec.

The problem with this argument is that neither UP, the language of the BNSF Settlement Agreement, the language of the Board's decisions, or BNSF's course of conduct supports the notion that BNSF was granted trackage rights which can now be imposed without application of the “public interest” tests under Section 11102(a). And even if UP and BNSF had negotiated for BNSF to have trackage rights over the Rosebluff Lead, the Board could not have imposed such a condition because the Board had no legal authority to compel KCS, a non-applicant carrier, to allow BNSF trackage rights over its property absent an application by BNSF under Section 11102. Because BNSF filed no such terminal trackage rights application prior to the Board's approval of the UP/SP merger, the Board's decisions and the conditions they imposed did not grant BNSF trackage rights on the Rosebluff Lead.

A. The Lake Charles Condition Only Granted BNSF The Right To Handle Lake Charles Traffic; It Did Not Grant BNSF Trackage Rights To CITGO's Facility

According to CITGO, “the language in the Board's decisions in the UP/SP merger case, as well as the agreements upon which the Board's merger conditions are based, make clear that BNSF was granted direct access to the Rosebluff Industrial Lead.” CITGO Reply at 14. CITGO cites Decision No. 44 at 428 (requiring removal of "geographic restrictions on direct BNSF service" to Lake Charles shippers); the BNSF Settlement Agreement, § 5(c)(stating that BNSF access to 2-to-1 shippers shall be by direct or reciprocal switch service); and the CMA Agreement, § 8 (providing for BNSF access to Lake Charles shippers on the same basis as

available for 2-to-1 shippers in the BNSF Agreement) as supporting its assertions.² Accordingly, CITGO contends, the Board can use Section 11102, without actually applying the “public interest” tests under that statute, to implement the trackage rights CITGO believes were already approved.

The deficiency of CITGO's position is that the language cited in the statements above shows that BNSF was not granted trackage rights, as opposed to access via other means.³ All parties agree that the Lake Charles Condition has its genesis in the CMA Agreement, which was later adopted and modified by the Board as part of the BNSF Settlement Agreement. BNSF was not a party to the CMA Agreement. That agreement was negotiated between UP and the association then known as the Chemical Manufacturers Association. UP's August 24th Reply

² The March 2002 Restated and Amended BNSF Settlement Agreement, filed jointly by BNSF and UP, incorporates all conditions imposed by the Board in the UP/SP merger, including the CMA Agreement and the Lake Charles Condition. The fifth and sixth recitals of the March 2002 agreement say,

"WHEREAS, UP and BNSF have reached agreement with respect to the implementation of the conditions imposed by the STB on the UP/SP merger, as modified and clarified, and certain other matters relating to their rights and obligations under the 1995 Agreement, the CMA Agreement, the Term Sheet Agreement and the TX-LA Line Sale Agreement; and

"WHEREAS, UP and BNSF now wish to amend and restate the 1995 Agreement to incorporate the conditions imposed by the STB on the UP/SP merger (including the CMA Agreement, as modified by the STB) and the agreements they have reached relating to those conditions and other related matters.

"NOW, THEREFORE, the parties agree to amend and restate the 1995 Agreement as follows:..."

Accordingly, when KCS refers herein to the BNSF Settlement Agreement, unless the context otherwise requires, KCS is referring to the 2002 Restated and Amended BNSF Settlement Agreement, which incorporates the CMA Agreement and the Board's Lake Charles Condition. That restated and amended agreement has, of course, been on file with the Board for over a dozen years.

³ CITGO equates the word “direct” with “trackage rights” but that is nowhere stated in Decision No. 44. As noted in UP's Reply at 21, the word “direct,” in context, is meant to distinguish between single-line ratemaking authority versus joint-line ratemaking authority.

makes clear that UP did not agree in the negotiations with CMA to grant “direct trackage rights” for BNSF to directly serve CITGO. Instead, as UP notes, BNSF was merely given the right “to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and West Lake, Louisiana,” and that it was left to UP and BNSF “to determine the specific method BNSF would use to access shippers pursuant to the BNSF Settlement Agreement, including Section 8(n).” UP Reply at 19 and 21, respectively. As UP states, how BNSF was to “handle” the Lake Charles Area traffic was not addressed in the CMA Agreement but rather was left up to the parties and governed by separate provisions of the BNSF Settlement Agreement. UP Reply at 22.⁴

In then determining and negotiating how to implement the “right to handle” the traffic of Lake Charles Area shippers, UP's options were, in turn, limited by UP's shared ownership with KCS of the Rosebluff Lead and contracts between UP and KCS predating the UP/SP merger that govern that facility. Those limitations were acknowledged by the Board in Decision No. 63, which directed BNSF to negotiate and arbitrate with UP and KCS, and, if that resulted in BNSF access being blocked, to file a terminal trackage rights application with the Board.

UP's statements that BNSF access under the CMA Agreement was left subject to future determination, negotiation, and implementation, and thus was not, at the time, to mean BNSF was already granted trackage rights on the Rosebluff Lead, is consistent with KCS's views at the time as well. KCS's brief – briefs were the last evidentiary filings parties were allowed to make and were filed after announcement of the CMA Agreement – specifically noted that there were many unresolved issues with the BNSF Settlement Agreement and the CMA Agreement. See KCS-60 at 26. Indeed, KCS specifically pointed to statements by Mr. Ice in his rebuttal

⁴ The 2002 Restated and Amended BNSF Settlement Agreement specifically says that UP and BNSF had reached agreement on implementation of the CMA Agreement and the Lake Charles Condition, and that those agreements are contained in the 2002 Restated and Amended BNSF Settlement Agreement.

deposition (Mr. Ice is now President and CEO of BNSF) where he noted that many issues of access under the CMA and BNSF agreements were still outstanding and that numerous negotiations over “reciprocal switching issues; traffic that will move under haulage or trackage; and the specific geographic locations of the two-to-one points” needed to be resolved. Id. Accordingly, the notion that the 1995 BNSF Settlement Agreement or the CMA Agreement established that BNSF was to have trackage rights on the Rosebluff Lead is simply not consistent with the record. All that UP and CMA had agreed was that BNSF was to have the “right to handle” Lake Charles Area traffic. That is the only right that the Board imposed. As UP’s Reply noted, how BNSF’s rights to handle such traffic would be implemented was initially unresolved, though later resolved and incorporated into the 2002 Restated and Amended BNSF Settlement Agreement.

CITGO ignores this record and points to the Board’s removal of the geographic restrictions on “direct” BNSF service to Lake Charles shippers as evidence that the Board intended to grant BNSF trackage rights access. UP’s Reply addressed this point. As UP noted, in removing the geographic restriction on BNSF access to the Lake Charles Area shippers, the Board did refer to "direct" BNSF service, but in context, the term “direct” did not mean trackage rights over joint property owned by KCS and UP. Rather, the phrase was a meant to distinguish BNSF’s ability to quote single-line rates to Lake Charles Area shippers (which it can do under the Lake Charles Condition using UP switching) from BNSF being required to quote and use only joint-line rates.⁵ Use of the term “direct” was not intended to change the parties’ understanding so as to make a distinction between BNSF access using trackage rights and BNSF

⁵ Such a reading is also consistent with 49 U.S.C. §10706(a)(1)(B)’s definition of “single-line” as implicitly noting that a carrier can provide single-line access even though it is not the party providing the switching or terminal services.

access using reciprocal switching, nor was it intended to affect the alternative access provision in Section 8(n) of the BNSF Settlement Agreement. UP Reply at 21.

CITGO and BNSF also point to §§ 5(b), 5(c) and 8 of the BNSF Settlement Agreement as establishing BNSF's authority for trackage rights over the Rosebluff Lead. As the KCS Reply discusses, however, those sections do not support these claims. Those provisions did grant BNSF trackage rights to "'2-to-1' Shipper Facilities," "Existing Transload Facilities," and to a "New Shipper Facility." Most importantly, however, is that none of the definitions of those phrases encompasses the CITGO facility. KCS Reply at 21-22. CITGO and BNSF ignore this fact. Similarly, the "Rosebluff Lead," is not listed in Exhibit A to the BNSF Settlement Agreement as a line on which BNSF was granted trackage rights, nor is it a "Trackage Rights Line" as defined in the final 2002 Restated and Amended BNSF Settlement Agreement which encompassed the CMA Agreement and the Lake Charles Condition. Therefore, the provisions argued by CITGO and BNSF as evidence of the Board's intent to provide BNSF with trackage rights do not support such an argument,⁶ and they certainly cannot be read as the Board having already found that trackage rights to CITGO, as opposed to "the right to handle" CITGO traffic, are in the "public interest" under Section 11102.

The argument that BNSF's access was always intended to be via trackage rights also is not consistent with Decision No. 63 or with BNSF's conduct over the past 19 years. As the Board is aware, after the Board approved the UP/SP merger, KCS sought reconsideration on the basis that neither UP nor the Board could grant BNSF any form of access to the Lake Charles Area. It was KCS's position that the underlying contracts did not even allow UP to provide

⁶ Indeed, while Decision No. 44 does speak in terms of "direct" BNSF access and BNSF "single-line" access (which BNSF provides via its switching arrangement with UP), there is not one instance where the decision used the phrase "direct trackage rights" or even "trackage rights" when discussing BNSF's access to Lake Charles Area shippers.

BNSF with access via switching nor was the Board justified in granting any form of BNSF direct access (other than providing BNSF with the ability to quote joint-line rates with KCS) because Lake Charles was not a "2-to-1" location. UP and BNSF argued that nothing in the agreements prevented UP from providing BNSF with access via reciprocal switching and that the Board was justified in imposing the Lake Charles Condition.

Although the Board reaffirmed BNSF's right to handle Lake Charles Area traffic and its imposition of the Lake Charles Condition, the Board explicitly rejected BNSF's request to prescribe trackage rights or to override the contracts governing UP's and KCS's operations.⁷ Instead, the Board told BNSF that it was to negotiate and arbitrate for "access" with UP and KCS, and only if negotiations between all three parties resulted in BNSF's "access" being "blocked, BNSF may return to the Board to seek approval of a terminal trackage rights application under new 49 U.S.C. 11102(a)." Decision No. 63, at *16-*17. Thus, rather than supporting the notion that the Board imposed trackage rights, as CITGO and BNSF argue, Decision No. 63 clearly establishes that it was up to the parties to determine the form of access and only if that "access"(in whatever form that was to take) was "blocked" was BNSF to return to the Board. Finally, putting to rest any notion that BNSF's terminal trackage rights application would merely be rubber-stamped by the Board, Decision No. 63 provided that the Board might consider a contractual override "if and to the extent that application is ultimately denied." Id. at

⁷ That the Board has not granted BNSF trackage rights became particularly clear when the Board in Decision No. 63 required BNSF to file a terminal trackage rights application. This would have been a completely useless requirement if, as BNSF contends, the Board had already mandated that BNSF have trackage rights access.

*17.⁸ Of course, BNSF's "access" was never blocked as BNSF has provided single-line service since the merger and is an effective competitor to UP and KCS

BNSF's course of conduct for the past 19 years also confirms that BNSF viewed the type of access it obtained as subject to negotiation and that its "right to handle" Lake Charles Area traffic did not necessitate trackage rights and could be implemented via other means, i.e. through haulage or switching. Although BNSF never negotiated with KCS regarding trackage rights on the Rosebluff Lead, BNSF did reach an arrangement with UP whereby UP provided BNSF with access to all of the Lake Charles Area shippers via switching, an arrangement that has been in place now for 19 years.

KCS has not challenged this arrangement; indeed, KCS has, over the years, facilitated this switching, as it is likely that UP has interchanged to KCS for delivery in Zone 1 (the zone switched by KCS) cars that had previously moved in BNSF linehaul service and that were given to UP for switching to KCS for Zone 1 delivery. If BNSF believed that it had obtained trackage rights and was entitled to such rights, then why did BNSF wait over 16 years to attempt to enforce those "rights"? The simple answer is that the Board's decision meant what it said: only if BNSF's "access" was blocked was BNSF entitled to return to the Board. Since BNSF's access was not blocked, and still is not blocked, there has been no violation of the Board's Lake Charles Condition. That condition has been fulfilled and fully implemented through the reciprocal switching arrangement.

CITGO's argument is clearly not consistent with the actual language of the BNSF Settlement Agreement, the language of the STB decisions, or BNSF's course of conduct. Instead, CITGO wants the Board to hold that it has already imposed unlimited and unfettered

⁸ Clearly the Board foresaw the possibility that a terminal trackage rights application might not meet the standards of Section 11102.

trackage rights for BNSF to access CITGO's facility so that the grant of the Application is a mere formality, but such a reading is simply an attempt rewrite history, is not consistent with the record, nor is it consistent with the requirements of Section 11102.

B. The Board Had No Underlying Legal Authority To Grant BNSF Trackage Rights

Even if there was language in the Board's order approving the UP/SP merger that could be misconstrued as granting BNSF trackage rights, such a grant would not have been legally enforceable. In a merger, the Board has no legal authority to compel trackage rights over a non-applicant carrier like KCS, absent a terminal trackage rights application. No such application was filed by BNSF before issuance of the decisions or entry of the agreements that CITGO and BNSF contend granted trackage rights on the Rosebluff Lead.⁹ Thus, prior decisions in the UP/SP merger could not have legally granted BNSF trackage rights on the Rosebluff Lead even if the Board had wanted to. Having now filed an Application whereby, in actuality, BNSF is seeking rights which it was never granted in the first instance, BNSF must meet the exacting public interest standard applicable to terminal trackage rights applications, which it has not done.

As an initial point, the Board's decisions approving the UP/SP merger cannot be read as granting BNSF trackage rights over the Rosebluff Lead because the Board could not have legally imposed BNSF trackage rights over KCS track under the Board's general merger conditioning authority. The Board's power to condition mergers is found at 49 U.S.C. §11324(c)(formerly, §11344), which, as relevant here, states:

The Board may impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights and access

⁹ The only terminal trackage rights granted over a non-applicant carrier in the UP/SP merger were granted to UP and BNSF for compulsory access over two small segments of KCS track pursuant to the terminal trackage rights application filed in the Sub No. 9 docket in FD 32760, and in granting those rights, the Board had to specifically overrule application of Midtec in order to create its "bridge the gap" exception.

to other facilities. Any trackage rights and related conditions imposed to alleviate anticompetitive effects of the transaction shall provide for operating terms and compensation levels to ensure that such effects are alleviated.

It was this section that was used to impose the BNSF Settlement Agreement and the corresponding grant of trackage rights between UP and BNSF. Decision No. 44, 1 S.T.B. 233, *418; 1996 STB LEXIS 220, **395. Even then, UP and SP, the applicants, had the choice to accept the conditions by proceeding with their proposed merger or to reject the conditions and not merge. By contrast, KCS, which was not an applicant, had no such choice.

Because non-applicant carriers do not have the choice to accept or reject an approved condition, the Board has developed long-standing precedent holding that the Board does not have the power to impose trackage rights on the tracks of a carrier that is not part of the transaction, i.e. a non-applicant carrier. See In Rio Grande Industries, et al.—Pur. & Track. – CMW Ry. Co., 5 I.C.C.2d 952, 978 (1989) (the Interstate Commerce Commission explained that it could not use its “plenary” authority under former section 11341 (now section 11324) “to compel a [non-applicant] carrier to grant trackage rights over its line to another carrier.”). See also Rio Grande Industries, Inc., et al. – Purchase and Related Trackage Rights – Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL, FD 31505, Decision No. 6 slip op. at 8 (ICC served Nov. 15, 1989) where the ICC re-stated its position that it could not use the pendency of a consolidation proceeding as an excuse for imposing trackage rights over the lines of a non-applicant.¹⁰

¹⁰ This principle was later confirmed when the Board, in a post-UP/SP merger decision, refused to grant a third party trackage rights over KCS-owned lines where KCS was a non-applicant participant in the Canadian National/Illinois Central merger proceeding. Canadian National Ry., et al – Control – Illinois Central Corp., et al., FD 33556 (Decision No. 37) (STB served May 25, 1999) (“CN/IC”), slip op. at 32.

KCS was a non-applicant carrier in the UP/SP merger and was not part of the negotiations between UP and BNSF. KCS's ownership interest in the Rosebluff Lead is equal to UP's. Accordingly, even if the Board had intended to grant BNSF trackage rights over the Rosebluff Lead in Decision No. 44, the Board had no legal authority to do so in the absence of a terminal trackage rights application. Because BNSF did not file a terminal trackage rights application for the Rosebluff Lead prior to Decision No. 44, that decision modifying the BNSF Settlement Agreement with the CMA Agreement and imposing that modified agreement as a merger condition, could not have granted BNSF trackage rights on the Rosebluff Lead.

C. CITGO Did Not Establish That The Application Meets The Public Interest Standard

The only means by which the Board can impose trackage rights on a non-applicant carrier in the context of a merger is via a terminal trackage rights application. Likewise, outside of the merger context, Section 11102 provides the only means to compel terminal trackage rights on another carrier. In either case, the application must meet the public interest standards of Section 11102 as those have developed throughout the years. The BNSF Application fails this test.

A terminal trackage rights application is precisely what UP and BNSF did as part of the original UP/SP merger application where they filed (in Sub-No. 9) an application seeking trackage rights over two small segments of KCS track in Shreveport and one small segment of KCS track in Beaumont. At the time, KCS argued that the only applicable standard was Midtec and the applications failed that standard. In granting the application over KCS's objections, the Board acknowledged that there was language from previous decisions supporting KCS's view, but specifically overruled such prior language and created a new standard applicable only to terminal trackage rights applications filed in the context of a merger – the “bridge the gap” standard. Decision No. 44, 1 S.T.B. 233, *448; 1996 STB LEXIS 220, **462. Thus, an

exception to Midtec was created, but this exception was to be rarely applied and only in limited circumstances. See CN/IC, slip op. at 51-52 (citation omitted)(decided two years later)(noting that the Board has required non-applicant carriers to grant terminal trackage rights to another carrier only in limited circumstances where the rights were designed to bridge a gap within broader trackage rights imposed on applicants to remedy or mitigate anticompetitive effects in the transaction).

By filing its Application, BNSF has at least acknowledged that KCS could only be compelled to grant BNSF trackage rights via a terminal trackage rights application. On that, KCS and BNSF agree, but on little else.

The applicable “public interest” test is one issue on which KCS differs from CITGO and BNSF. CITGO and BNSF take the position that the Board has already granted BNSF trackage rights and that, therefore, the Board has already determined that the public interest standard of Section 11102 has been satisfied. As such, “it seems self-evident that the grant of trackage rights necessary to allow BNSF to fulfill its common carrier obligation to serve CITGO is also in the public interest.” CITGO Reply at 12.

The problem with CITGO's argument as discussed above is that BNSF was not already granted trackage rights over the Rosebluff Lead. As such, it cannot be said that the Board has already determined that BNSF terminal trackage rights over the Rosebluff Lead is “in the public interest;” certainly not as that phrase has been defined under Section 11102. It may be that the “public interest” required a Section 11324 condition providing BNSF with the “right to handle” traffic for Lake Charles Area shippers so as to preserve shipper’s pre-merger competitive

options, but that is not the same “public interest” standard applicable to Section 11102 proceedings. They are two wholly independent and different tests.¹¹

Perhaps if BNSF had filed a terminal trackage rights application during the merger for terminal trackage rights to the Rosebluff Lead, the Board could have analyzed the appropriate public interest standard for those factual circumstances and perhaps created yet another exception to Midtec besides “bridge the gap.” But it did not do so. The Board cannot now create yet another exception to Midtec and grant BNSF’s application based upon facts and competitive conditions present in the record from sixteen years ago – certainly not without reopening the merger. Accordingly, the Board needs to review the facts and circumstances as they are now, when BNSF filed its application, and apply the public interest test applicable to Section 11102 applications as that phrase has been defined in the intervening years to the facts and circumstances as they exist now.

Since the UP/SP merger, the Board has developed three – and only three - public interest standards applicable to terminal trackage rights applications, whether filed in the context of a merger or not - service interruption;¹² bridge the gap (applicable to limited segments connecting

¹¹ Cf. Decision No. 44, 1 S.T.B. 233, *362-363, 1996 STB LEXIS 220, **273-274 defining the “public interest” standard applicable to approval of a merger and imposition of a merger condition, with Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, et al., STB Docket No. NOR 41987, et al. (STB served Jul. 28, 1997), slip op. at 7, decided after UP/SP and similar to this proceeding in that it also involved an effort to obtain terminal trackage rights as a result of actions and conditions flowing from a previous decision of the Board, where the Board rejected arguments that the Board could apply the public interest language of 49 U.S.C. 11102 without regard to the competitive access regulations and Midtec; See also, CN/IC, slip op. at 51-52 (describing the exceptions to Midtec); and San Jacinto Rail Limited -- Construction Exemption -- And The Burlington Northern and Santa Fe Railway Company -- Operation Exemption -- Build-Out to the Bayport Loop Near Houston, Harris County, Texas: Availability of Final Environmental Impact Statement, FD 34079 2003 STB LEXIS 268, *91 (STB served May 2, 2003)(“It is well settled that terminal trackage rights, under 49 U.S.C. 11102, are remedies only for anti-competitive practices.”).

¹² See 49 C.F.R. Part 1146 and Part 1147.

larger trackage rights in the context of a merger); and Midtec. As discussed in the KCS Reply, the Application does not fit within the “bridge the gap” exception to Midtec or the service inadequacy test developed since the UP/SP merger. As such, the only applicable standard is Midtec. See KCS Reply (See Section II, pp. 29-34). BNSF’s Application does not meet the Midtec standard.

Midtec is the appropriate standard. Although tangentially related to the merger, BNSF’s Application was not filed for well over a decade after the merger was completed, and clearly is not a necessary component for implementing the merger like the “bridge the gap” applications were. BNSF’s Application is no different than any other application filed outside of a merger proceeding. Indeed, as articulated in Decision No. 2 in this proceeding, BNSF was not required to follow the steps outlined in Decision No. 63 before filing its Application because “any rail carrier may file a terminal trackage rights application under 49 U.S.C. § 11102 without permission from the Board” at any time. See FD 32760 (Sub-No. 46), Decision No. 2, n. 8. This rationale equating BNSF's Application with all other non-merger Section 11102 applications shows that BNSF must abide by the Board’s well-articulated standards under Section 11102. That standard is the Midtec standard.

Notwithstanding all of the above, even if the Application could be considered as simply the means to implement the Board’s finding that there would be an anticompetitive effect of the UP/SP merger for Lake Charles Area shippers absent BNSF access, which is the position advocated by BNSF and CITGO, the Application still should be denied. This is because even if there was an anticompetitive effect at Lake Charles due to the merger, the Board is obligated to impose the most narrowly crafted condition to remedy that effect and must not put the proponent of the condition in a better position than before the merger. Decision No. 44, 1 S.T.B. 233, *419.

Terminal trackage rights are to be the remedy of last resort.¹³ Here, a less intrusive remedy is already being utilized: BNSF service via switching. In addition, granting terminal trackage rights would, contrary to precedent, actually put CITGO in a better competitive position than it had prior to the merger, with 3 carriers having rights to operate trains to the facility and BNSF having unfettered, unlimited rights broader than the contractual rights SP or KCS had – or even KCS has now.

Accordingly, even if the Board could ignore the actual language of Decision No. 44 and the BNSF Settlement Agreement and use Section 11102 to implement a condition imposed via Section 11324(c) by also ignoring the public interest standards of Section 11102, CITGO and BNSF would still need to show that the narrowly crafted condition of switching has not been effective in preserving CITGO's pre-merger competitive options and that the Lake Charles Condition therefore requires imposing terminal trackage rights. But neither BNSF nor CITGO have established that CITGO's pre-UP/SP merger competitive options have diminished. Indeed, the only evidence of record regarding BNSF's competitiveness was presented by Doctors Reynolds and Neels. Their testimony showed that BNSF does compete with both UP and KCS, and quite effectively. Clearly, BNSF's existing access through switching and haulage rights has allowed BNSF to more than fully replicate the competition that would have otherwise been lost

¹³ See Shenango Inc., et. al. v. Pitts., Chartiers & Youghioghney Ry. Co., 5 I.C.C.2d 995,1002 (1989) (as an ameliorative condition, “[t]rackage rights are a remedy of last resort for use when less intrusive remedies such as rate relief and reciprocal switching are insufficient”); Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, et al., STB Docket No. NOR 41987, et al. (STB served Jul. 28, 1997), slip op. at 7 (“[a]s we have stated on several occasions, the prescription of terminal trackage rights is an extraordinary remedy, one to be afforded only when less intrusive remedies such as rate relief, alternative through routes, or reciprocal switching are insufficient”)(citations omitted).

when SP merged into UP.¹⁴ Therefore, even if the Board were to apply some wholly unprecedented and newly created broad public interest exception to Midtec based upon an analysis of whether or not BNSF has replicated the competition that would have otherwise been lost when SP merged into UP, BNSF fails to meet that standard as well.

II. BNSF UNIT TRAIN MOVEMENTS INTO THE CITGO FACILITY ARE NOT PRACTICABLE AND WOULD SIGNIFICANTLY IMPAIR KCS'S ABILITY TO SERVE EXISTING CUSTOMERS

Through the testimony of Mr. Barrett, CITGO attempts to prove that UP's and KCS's service is insufficient and to establish the operational feasibility of BNSF unit train service. As to the alleged service insufficiencies, that is not the appropriate public interest analysis unless CITGO is attempting to meet the service inadequacy standards under 49 C.F.R. Part 1146 or 1147, which, even viewing Mr. Barrett's comments in the most favorable light, CITGO has failed to meet. Furthermore, as KCS's Reply (Section III(C) at pp. 46-52) showed, any service problems experienced by CITGO were largely the fault of limited infrastructure and CITGO's own car ordering practices, and were not because BNSF could not operate trackage rights trains directly into the CITGO facility.

The operational infeasibility of BNSF unit train service has been extensively briefed in UP's Reply and KCS's Reply (Section IV and the verified statements of Steven Sullivan and John Ireland ("Sullivan/Ireland VS"), Richard Bartoskewitz ("Bartoskewitz VS"), and Jimmy Wayne Scott ("Scott VS"). All of the UP and KCS operating testimony shows that the proposal by CITGO and BNSF to bring unit trains, especially unit trains of 60 cars or more, into the CITGO facility via trackage rights over the Rosebluff Lead is not practicable and would

¹⁴ Indeed, if there has been any anticompetitive conduct, it has been conduct undertaken by BNSF to foreclose KCS's ability to provide CITGO with unit trains of crude oil from Oklahoma origins. See BNSF-HC-000667-000669.

substantially impair the ability of UP and KCS to handle their business serving other customers on the Rosebluff Lead.

A. The July/August 2015 Shipment Shows The Difficulty Of Unit Train Service To CITGO

Attempting to prove the feasibility of unit train service into the CITGO facility, Mr. Barrett discusses a shipment in late July/early August of 2015 whereby KCS attempted to use its contractual right to bring blocks of 25 or more cars into the CITGO facility. He claims that KCS had planned to deliver that train itself on August 2, 2015, rather than have UP switch those cars into the facility, and that this indicates the feasibility of such service and that the delivery would have occurred except that “UP blocked KCS from providing this service.” CITGO Reply, Verified Statement of Mr. Michael Barrett (“Barrett VS”) at ¶15.

Rather than proving the operational feasibility of the proposed BNSF unit train service, this example actually proves the exact point that KCS’s operating witnesses have made: due to the extreme complexity of existing operations and the limited infrastructure of the Rosebluff Lead, it is very difficult to obtain an operating window whereby any carrier - even an owner of the track with its own operating window in Rosebluff Yard and a contractual right to deliver directly to CITGO - can deliver unit trains into the CITGO facility.

The attached verified statement by Mr. Shawn Mindrup, Senior Sales & Market Account Executive for Energy Markets at KCS (“Mindrup VS”), explains the factual circumstances surrounding the shipment described by Mr. Barrett in ¶15 and explains why Mr. Barrett’s conclusions and factual assertions are wrong. As discussed by Mr. Mindrup, in June 2015 (not July), he and other KCS employees were invited by Mercuria, a major supplier of crude oil to CITGO, to a joint meeting between CITGO, KCS and Mercuria in Lake Charles to discuss the possibility of having KCS serve the CITGO facility via KCS’ operating rights with 30-car

blocks. Mindrup VS at 1-2. The meeting took place on June 25, 2015 and lasted about three and one-half hours. During this meeting, KCS personnel did look at CITGO's track infrastructure, but never left the CITGO facility to examine the connection off the Rosebluff Lead Track, as claimed by Mr. Barrett. Id. at 2.

These activities were followed by further discussions. During those further discussions, no operating plans were discussed and KCS never committed to a window for delivery. Further, KCS did not commit to move 30 car blocks to CITGO on a regular basis. Mindrup VS at 2. Rather, CITGO was advised that the delivery of such a train would require coordination with UP, which KCS had not yet even spoken to. Id.

In July, KCS received 30 cars of crude oil destined for CITGO. Id. KCS had planned to deliver this 30-car block to CITGO itself on August 2 during KCS's operating window; however, upon contacting UP and discussing the operational logistics for such a delivery, it became clear that it would be extremely difficult to obtain an operating window that day that would allow KCS to move the 30-car block from Mossville to the CITGO facility via the Rosebluff Lead. Mindrup VS at 2. Extensive discussions continued over several days, but from these discussions, KCS determined that CITGO would receive the traffic more rapidly, and with less disruption to service to the other shippers on the Rosebluff Lead, if KCS would follow its standard practice and interchange this traffic to UP for UP delivery via switch rather than continuing to wait for a window by which KCS could directly deliver the 30 car block. Mindrup VS at 2-3.

Contrary to Mr. Barrett's claims (Barrett VS at ¶ 15), UP did not "block" KCS. Mindrup VS at 3. Rather, UP and KCS operating personnel were in constant communication in an attempt to find an operating window for KCS to deliver the 30-car block. The fact that KCS found it operationally difficult to coordinate and deliver a 30-car block to the CITGO facility is not

surprising. As the UP and KCS operating witnesses discussed, operations in the area are difficult and require extensive cooperation and coordination. This is why KCS has only rarely operated into the CITGO facility since UP took over switching Zone 2 consistently about fifteen years ago.¹⁵

B. Having The Legal Ability To Move Unit Trains Does Not Equate To Operational Feasibility

CITGO, through Mr. Barrett, seems to believe that its perceived service inadequacies would all be resolved if only BNSF were allowed to fulfill its proposal of providing CITGO with unit trains of 60 cars via trackage rights. Yet, as KCS has learned, having the legal right and the will to move unit trains directly into the CITGO facility does not equate to physically being able to do so and does not equate to better and more efficient service. KCS has the contractual and ownership right to use the Rosebluff Lead to take blocks of 25 or more cars directly to CITGO, and KCS has done so before, but such movements are extremely complicated, require extensive coordination, and are done very, very rarely. See, e.g., Scott VS at 7-10; and Bartoskewitz VS at 7. Delays in switching traffic from KCS to UP are often due to such factors as track structure problems, equipment breakdowns, surges in traffic, and other regular facets of rail operation. Scott VS at 9. As further discussed in KCS's Reply, delays and disruptions are also caused by CITGO's own loading, unloading, and car ordering practices, and in some instances are due to problems in CITGO's own refinery process, which has caused plant shutdowns and outages. Trackage rights delivery by either KCS or BNSF would do nothing to resolve problems resulting from CITGO's own operations.

¹⁵ See UP-WLC 0000978 to UP-WLC 00000986 as another example from July 2013 where it was quite complicated for KCS to arrange with UP to deliver a 30-car block to CITGO, and such action required extensive coordination with UP.

BNSF's proposal to deliver 60 car unit trains to the CITGO facility is simply not compatible with the busy, constrained operating environment on the Rosebluff Lead. Creating a fixed operating window for a third carrier would cause significant service problems for other KCS customers, and would substantially impair KCS's ability to serve those customers. See e.g., Sullivan/Ireland VS at 16-20; Scott VS at 10-11; Bartoskewitz at 9-12. As these witnesses discuss, merely moving the train during UP's window is not going to eliminate the disruption to service that the train would cause. UP often overstays its window in Rosebluff Yard. Disrupting UP's service on the Rosebluff Lead to accommodate a BNSF train would likely lead to more overstays and greater difficulties in coordinating service to other shippers on the Rosebluff Lead.

CONCLUSION

CITGO's argument that the Board, in Decision No. 44, has already found that BNSF trackage rights over the Rosebluff Lead are in the public interest so that the public interest standard of Section 11102 is irrelevant, is wrong. The UP/SP merger did not grant BNSF trackage rights over the Rosebluff Lead. BNSF was granted the "right to handle" CITGO traffic, nothing more. That condition has already been fulfilled, and BNSF handles CITGO traffic to compete quite effectively against KCS and UP. What BNSF is really seeking is new, cost-free access under the guise of implementing a merger condition which was never imposed; access that would be even better than what KCS has under the existing zone switching agreement. Having filed a terminal trackage rights application because a "rail carrier may file a terminal trackage rights application without permission from the Board" at any time (Decision No. 2, n. 8), BNSF is required to meet at least one of the existing public interest standards of Section 11102(a), but it has not done so. As such, BNSF's Application should be denied.

CITGO's other argument - that KCS and UP have taken unit trains of 25 to 50 cars into the CITGO facility, proving that BNSF could take unit trains of up to 60 cars into CITGO's facility without operational interference - is also wrong. Contrary to CITGO's assertions, KCS's previous efforts to deliver blocks of 25 cars or more actually shows why the existing track infrastructure and operating protocols make it impracticable for BNSF to deliver unit trains of 60 cars without significantly interfering with KCS's service to other shippers. As such, BNSF's Application also fails the operational standards of Section 11102(a).

Respectfully submitted,

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Attorneys for The Kansas City Southern
Railway Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Rebuttal of The Kansas City Southern Railway Company to CITGO's August 24, 2015 Reply to BNSF's Application was served by first-class mail, postage prepaid, or by a more expeditious manner, this 23rd day of October, 2015, on counsel for CITGO Petroleum Corporation, BNSF Railway Company, Union Pacific Railroad Company, and any other party of record.



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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

REBUTTAL OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

**VERIFIED STATEMENT OF SHAWN MINDRUP
SENIOR SALE & MARKET ACCOUNT EXECUTIVE FOR ENERGY MARKETS
THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

**VERIFIED STATEMENT OF SHAWN MINDRUP,
SENIOR SALES & MARKET ACCOUNT EXECUTIVE FOR ENERGY MARKETS,
THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

My name is Shawn Mindrup. I am the Senior Sales & Market Account Executive for Energy Markets at The Kansas City Southern Railway Company ("KCS").

I am providing this statement to rebut and address the statement provided by Michael Barrett ("Barrett Statement") in support of CITGO Petroleum Corporation's ("CITGO's") reply in support of BNSF's Application for terminal trackage rights in this proceeding. Mr. Barrett is Area Manager for Oil Movement for CITGO.

The Barrett Statement says that in July 2015 and after examining CITGO's track facilities and the connection off of the Rosebluff Lead track, KCS advised CITGO that KCS wanted to deliver 30 crude oil tank cars to CITGO's Lake Charles Refinery rather than having them switched into the facility by UP. (Barrett Statement ¶ 15). Mr. Barrett further states that UP blocked KCS from providing this service. (Barrett Statement ¶ 15). But these statements are wrong, as explained further below.

In June 2015, I, along with other KCS employees, were invited by Mercuria, CITGO's major supplier of crude oil, to a joint meeting between CITGO, KCS and Mercuria in Lake

Charles to discuss the possibility of having KCS delivering blocks of cars to the CITGO Lake Charles Refinery itself, rather than via UP switching. The meeting took place on June 25, 2015, not July as stated by Mr. Barrett, and lasted about 3.5 hours. During this meeting, we did look at CITGO's track infrastructure, but we never left their facility to examine the connection off the Rosebluff Lead Track, as claimed by Mr. Barrett. (*See Barrett Statement ¶ 15*).

These activities were followed by further discussions. We told CITGO that we needed to discuss internally whether KCS could deliver to CITGO the volume of cars that CITGO was requesting and in the manner that Mercuria was proposing. However, no actual operating plans were developed, and KCS never committed to providing a window for delivery or to delivering 30 car blocks to CITGO on a regular basis. We also told CITGO that the delivery of a 30 car block directly to CITGO would require coordination with UP, with which KCS had not yet spoken.

In July, KCS received 30 cars of crude oil destined for CITGO. KCS had initially scheduled delivery of these 30 cars to CITGO for August 2, 2015, during KCS's operating window. However, upon contacting UP and discussing the logistics for such a delivery, it became clear that it would be extremely difficult to obtain an operating window for that day that would allow KCS to deliver the 30 cars itself from Mossville directly into the Lake Charles Refinery via the Rosebluff Lead.

Discussions with UP about the logistics of KCS delivering the cars to CITGO continued over the next several days. As a result of these discussions, KCS determined that CITGO would receive the cars more rapidly, and with less disruption of service to the other shippers on the Rosebluff Lead, if KCS followed its normal practice of interchanging this traffic to UP for UP delivery via reciprocal switch, rather than continuing to wait for an opportunity by which KCS

could deliver the 30 car block. Thus, the 30-car block was delivered to the CITGO facility on August 8, 2015 through a UP reciprocal switch.

To be clear, UP did not “block” KCS, as Mr. Barrett claims (Barrett Statement ¶ 15); rather, UP and KCS operating personnel were in constant communication in an attempt to find an operating window for KCS to deliver the 30-car block. After several days of communication, it became clear that KCS delivering the block of cars would be difficult to accomplish in a timely, safe, and efficient manner, and that a reciprocal switch would be the better option.

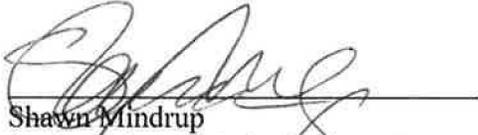
KCS does have the legal right to take unit trains of 25 cars or more directly to CITGO, but it is my understanding based upon my experience, my discussions with Jimmy Wayne Scott and Richard T. Bartoskewitz, and my review of their verified statements previously submitted in this proceeding that such movements are extremely complicated, require extensive coordination, and have occurred very, very rarely. As I understand, delays in switching traffic from KCS to UP are often due to such factors as track structure problems, equipment breakdowns, surges in traffic, and other regular facets of rail operation, including CITGO’s own facility and operational limitations.

Thus, although I am not in Operations, I do share the opinion of KCS operating personnel that due to the extreme complexity of existing operations and inadequate infrastructure, it is very difficult to obtain an operating window whereby any carrier, let alone BNSF, can deliver unit trains into the CITGO facility. That is why KCS has rarely exercised its legal rights to move unit trains into the facility.

VERIFICATION

I, Shawn Mindrup, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing verified statement.

Executed on this 23 day of October, 2015 at Kansas City, Missouri.



Shawn Mindrup
Senior Sales & Market Account Executive for Energy Markets
The Kansas City Southern Railway Company