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January 19, 2016

BY E-FILING

Cynthia T. Brown
Chief, 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:

Enclosed for electronic filing in the above-captioned proceeding is a Public version and a Highly Confidential version of BNSF's Motion to Strike New Argument and New Evidence in Union Pacific's and KCS's Final Briefs.

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

Sincerely yours,



Adrian L. Steel, Jr.

Enclosures

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

Before the
SURFACE TRANSPORTATION BOARD

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

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

APPLICATION FOR TERMINAL TRACKAGE RIGHTS

**BNSF's Motion to Strike New Argument and New Evidence
in Union Pacific's and KCS's Final Briefs**

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January 19, 2016

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

BNSF RAILWAY COMPANY
—TERMINAL TRACKAGE RIGHTS—
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
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**BNSF’s Motion to Strike New Argument and New Evidence in
Union Pacific’s and KCS’s Final Briefs**

Pursuant to 49 C.F.R. §§ 1104.8 and 1117.1, BNSF Railway Company respectfully submits this Motion to Strike all impermissible new argument and new evidence contained in the final briefs filed in this proceeding by UP and KCS on December 30, 2015, as marked in Attachment 1 to this Motion.¹

BACKGROUND

In its petition asking the Board to direct the filing of final briefs, UP requested that the final briefs have “no attachments, exhibits, or new evidence.” In its Order, the Board noted the “extensive record in this matter” and requested a “concise summary of the parties’ positions.” *BNSF Ry. Co.—Terminal Trackage Rights—Kansas City S. Ry. Co. & Union Pac. R.R. Co.*, STB Finance Docket No. 32760 (Sub-No. 46), slip op. at 2 (STB served Nov. 30, 2015) (the “Order”). The Board stated that “no new evidence or argument is permitted” and directed the parties “to summarize the evidence and direct the Board’s attention to the issues they deem critical.” *Id.*,

¹ Attachment 1 contains excerpted pages from the UP and KCS final briefs with suggested redactions of the material that BNSF seeks to strike.

slip op. at 3. The Board further stated that “BNSF’s concern that submission of final briefs will unduly delay this proceeding is unfounded, *as parties will not be permitted to raise new evidence or arguments.*” *Id.*, slip op. at 2 (emphasis added).

The Board’s Order was consistent with established precedent. *See, e.g., Wisc. Power & Light Co. v. Union Pac. R.R. Co.*, STB Docket No. 42051, slip op. at 2 (STB served Nov. 15, 2000) (“*WP&L*”) (noting that “there should be nothing in the briefs that would invite a response” and that “the introduction of new material” in final briefs “is subject to motions to strike and other sanctions”); *Sunbelt Chlor Alkali Partnership v. Norfolk S. Ry. Co.*, STB Docket No. NOR-42130, slip op. at 2 (STB served July 15, 2013) (“*Sunbelt*”) (final briefs should not “answer allegedly improper rebuttal or have the ‘last word’ on matters presented in the record, however novel or complex they may be”); *N. Amer. Freight Car Ass’n v. Union Pac. R.R. Co.*, STB Docket No. 42119, slip op. at 2 (STB served May 11, 2012) (final briefs “may not include attachments, exhibits or new evidence, but may refer to exhibits or other material already in the record”).

ARGUMENT

As set forth below, the new argument and new evidence in the UP and KCS final briefs clearly violate the Board’s Order and “invite a response” from BNSF.² *WP&L*, slip op. at 2. The UP and KCS briefs are therefore “subject to motions to strike and other sanctions.” *Id.* Because BNSF has no opportunity to respond to UP’s and KCS’s improper new arguments and new

² As raised by BNSF on page 2 of its Reply to UP’s Petition for Order Directing Simultaneous Final Briefs, filed in this proceeding on November 3, 2015, UP and KCS improperly filed Rebuttals to CITGO’s Reply in this proceeding on October 23, 2015. UP’s and KCS’s inclusion of new argument and new evidence in their final briefs continue this effort to circumvent the Board’s rules and briefing order in this proceeding.

evidence, fairness requires that the Board strike the impermissible portions of the UP and KCS final briefs, as marked in Attachment 1.³

UP and KCS each included improper “new arguments” in their final briefs, directly contravening the Board’s Order. Both parties argue for the first time that the proper market share comparison is not between BNSF’s share and SP’s historic share, but between BNSF and UP (UP Final Brief at 7-8) or between a combined BNSF/KCS and UP (KCS Final Brief at 7-8). KCS also argues for the first time that only UP, not BNSF, can invoke the Section 11321(a) override provision. KCS Final Brief at 19. We have marked each of these new arguments in Attachment 1. Because neither UP nor KCS raised these arguments in prior pleadings in this proceeding, these are all “new arguments” specifically prohibited by the Board in its Order.

In further contravention of the Board’s order that “no new evidence or argument is permitted,” UP impermissibly attached as “Exhibit A” to its final brief a workpaper produced by BNSF in this proceeding. That workpaper was not already in the record.⁴ UP wrongly relied on this new evidence throughout its argument regarding the practicality of BNSF’s proposed

³ Additionally, rather than present a “concise summary” of their positions and of the evidence in the record in their final briefs as the Board directed, both UP and KCS presented not only the new arguments and new evidence described herein, but also detailed, fact-specific arguments attacking the BNSF Rebuttal, each attempting to “have the ‘last word’ on matters presented in the record.” *Sunbelt*, slip op. at 2. *See, e.g.*, UP Final Brief at 8-17 (consisting largely of new attacks on BNSF’s rebuttal argument and evidence regarding the practicality of BNSF’s proposed service); KCS Final Brief at 6-9 (devoting nearly four pages to a refutation of the testimony provided by BNSF’s economic experts with the BNSF Rebuttal).

⁴ Unlike a recent decision in another proceeding where the Board ruled against a motion to strike impermissible portions of a final brief, here UP not only referred to workpapers in its final brief, but actually “include[d] new attachments or exhibits in its brief” and “introduce[d] new evidence in its final brief.” *Cf. N. Amer. Freight Car Ass’n v. Union Pac. R.R. Co.*, STB Docket No. 42119, slip op. at 4-5 (STB served March 12, 2015) (“*NAFCA*”). Furthermore, unlike the witness in *NAFCA*, Mr. Bredenberg did not “specifically discuss[]” in his Rebuttal Verified Statement the impermissible new evidence attached by UP to its final brief. *Id.*, slip op. at 4. Mr. Bredenberg referred generally to an observational study performed by BNSF employees, *see* Bredenberg Rebuttal V.S. at 5, and the relevant workpaper simply memorializes and serves as a summary of that study.

service. UP similarly cited BNSF workpapers not already in the evidentiary record at page 10 of its brief in support of its position on the practicality of BNSF direct train service. We have marked each of these impermissible inclusions in Attachment 1. BNSF again has no opportunity to respond to the new evidence, and the evidence and related argument should be stricken.

CONCLUSION

BNSF complied in good faith with the Board's Order directing final briefs. In reliance on the Board's assurances in that Order, BNSF did not offer new evidence, new argument, or sur-rebuttal argument to UP's and KCS's prior pleadings. UP and KCS each essentially ignored the Board's Order and introduced new argument and new evidence (in UP's case). Consistent with its Order in this case and long-standing precedent, BNSF requests that the Board strike all impermissible new evidence and new argument contained in the UP and KCS final briefs, as marked in Attachment 1.

Respectfully submitted,



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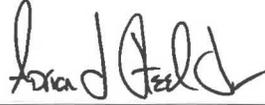
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Dated: January 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2016, copies of the foregoing BNSF's Motion to Strike New Argument and New Evidence in Union Pacific's and KCS's Final Briefs have been served by e-mail on Counsel for UP, KCSR and CITGO.



Adrian L. Steel, Jr.

REDACTED – TO BE PLACED ON PUBLIC FILE

Attachment 1

REDACTED – TO BE PLACED ON PUBLIC FILE

UP/SP-415

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

239810

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

ENTERED
Office of Proceedings
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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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December 30, 2015

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). *CNIC 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, { {

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 { [REDACTED] } 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 { [REDACTED] }—but BNSF is not looking to operate only on { [REDACTED] }, 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

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.

EXHIBIT A

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**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**

BRIEF OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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December 30, 2015

definition of the relevant market is well established in ICC and STB jurisprudence.¹⁰ In fact, Dr. Reishus himself then uses the Lake Charles BEA to reach his own conclusions.

Second, while market shares at a given point of time may not fully reflect the existence competition, market shares over time are indicative of overall competitive trends. Competition is dynamic, and should produce different market shares at different times. One carrier may have a very high market share precisely because it offered substantially lower rates than the other two carriers, or may have a lower market share because of failing to invest in facilities necessary to serve the market.

Dr. Reishus' use of market shares over time to conclude that BNSF is not as effective a competitor as SP had been prior to the merger is the wrong comparison. BNSF was not given the right to handle traffic in the Lake Charles Area to replace SP. UP was the party replacing SP, encompassing and greatly extending SP's route structure. Rather, BNSF and KCS together were to be the competitive check on UP. Thus, in a market that was served only by KCS and SP prior to the merger, the proper market share comparison is whether KCS and BNSF together have, over time, been able to maintain market shares at or near KCS's previous levels.¹¹ Similarly, in the overall Lake Charles Area, the proper comparison is to look at the combined market shares of KCS and BNSF compared to UP's market share. When one views the data in this way, even as modified and

¹⁰ See Grimm, C. "Merger Analysis in the Post-Staggers Railroad Industry," chapter in Competition Policy and Merger Analysis in Deregulated and Newly Competitive Industries, P. Carstensen and B. Farmer, eds., Edgar Elgar Publishing, Northampton, MA 2008; and most recently in Norfolk Southern Railway Company – Acquisition and Operation – Certain Rail Lines of The Delaware and Hudson Railway Company, Inc., FD 35873, Decision No. 6 (STB served May 15, 2015).

¹¹ This was the purpose of the Lake Charles Condition -- BNSF was given access to the Lake Charles Area in addition to KCS to provide a check to a merged UP and SP. As such, the proper analysis is to determine whether KCS and BNSF together are acting as a check on UP so as preserve competition.

corrected by BNSF,¹² the Reynolds/Neels' conclusion that together KCS and BNSF have been able to compete effectively against UP and to maintain a check on UP's rates remains inescapable.¹³

Finally, in criticizing the market definition and use of market shares, Dr. Reishus says that "competition can only be understood within the context of a properly defined market, and no such market has been defined." BNSF-124, VS Reishus at 5. He then gives his view of the definition of a proper market as including other modes, geographic competition, product competition, as well as looking at the origins and destinations of the carriers.¹⁴ His comments ignore the fact that in rail merger cases, the Board's focus has been on intramodal rail competition - counting the number of railroads serving a given market and imposing conditions to ensure that a shipper will not see a reduction in the number of serving carriers from two to one. This was certainly the Board's approach in UP/SP, rejecting calls for remedies in 3-to-2 markets.

The Board even went well beyond this traditional approach with respect to the Lake Charles Area. The Lake Charles Condition actually increased the number of serving railroads from two to three, perhaps the only instance in the entire merger where this occurred. Thus, CITGO had its

¹² BNSF Witness Baranowski claims that Reynolds/Neels misattributed reciprocal switch moves, misclassified KCS hazmat traffic, and omitted 1997 records. Although Reynolds/Neels had no opportunity to review Mr. Baranowski's database to verify or refute his claims, it appears that Mr. Baranowski's 1997 data file is actually not as complete as the file examined by Reynolds/Neels. However, even if everything Mr. Baranowski says is correct, the qualitative findings of Reynolds/Neels would remain unchanged, with perhaps small changes around the margins. In fact, some of Mr. Baranowski's calculations actually establish that UP has the smallest share of the traffic; showing that BNSF and KCS are very effective competitors.

¹³ Dr. Reishus mischaracterizes the price trends analysis by saying some are up and some are down, when, in actuality, the prices are largely flat or declining relevant to industry benchmarks. But he also admits that "BNSF may have provided some competitive discipline on service and pricing by KCS and UP." BNSF-124, VS Reishus at 7.

¹⁴ Dr. Reishus' analysis would be somewhat relevant if this were a market dominance case, although the Board no longer considers product and geographic competition. However, this is not a market dominance case. If such an analysis were applied to the CITGO facility, there is no question that CITGO would be found to have plenty of competitive options as it is served by water, pipeline, and three railroads. As such, there would be absolutely no justification for imposing intrusive BNSF terminal trackage rights.

BNSF also misconstrues the holding of Decision No. 63 in multiple ways. First, the language that BNSF relies upon as supporting its belief that an override may be necessary if a terminal trackage rights application is denied contradicts BNSF's view that the override is automatic. That language shows instead that the Board would be the arbiter of whether an override was necessary. Second, Decision No. 63 also said that "[w]e are not persuaded that the necessity alleged by BNSF is sufficient for anything more than a "bridge the gap" application of the immunity provision." See Decision No. 63, slip. op at 10, n. 31. In effect, the Board was saying that only in the context of granting a terminal trackage rights application for "bridge the gap" terminal trackage rights would the Board use its override powers. As noted previously, BNSF's Application is not a "bridge the gap" application for which the Board can invoke the override provision so as to implement terminal trackage rights.

Finally, even if Section 11321(a) were available and were self-executing, only UP, not BNSF, could invoke it. The statute allows a rail carrier who participated in an approved or exempted proceeding to be exempt from all laws as necessary to allow that rail carrier to own and control the property that it acquired in the approved transaction. While BNSF certainly participated in the proceeding, it was not the carrier that acquired the SP property. The transaction approved was a UP/SP merger, not a BNSF merger. As such, BNSF has no standing to invoke Section 11321(a).

For all the above reasons, the Board cannot use Section 11321(a) to override the many agreements covering the Rosebluff joint facility to impose trackage rights on KCS. BNSF's remedy is to file a terminal trackage rights application and meet the standards of the statute or to invoke whatever contract rights it may have. If the Application is denied, BNSF does not get to invoke unilaterally the Board's override authority to impose something that the Board just denied.