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November 12, 2015

## VIA 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 is The Kansas City Southern Railway Company's Motion to Strike the evidentiary statements of Richard Weicher which accompanied BNSF Railway Company's opening and rebuttal filings in this proceeding, along with Footnotes 7 and 15 to the argument portion of BNSF's Rebuttal. If there are any questions concerning this filing, please contact me at the address and phone listed above or at [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Respectfully submitted,



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

Enclosures

cc: Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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

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**KANSAS CITY SOUTHERN RAILWAY COMPANY'S MOTION TO STRIKE THE  
VERIFIED STATEMENTS OF RICHARD WEICHER  
AND FOOTNOTES 7 AND 15 TO BNSF'S REBUTTAL ARGUMENT**

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**Attorneys for The Kansas City Southern  
Railway Company**

**November 12, 2015**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**INTRODUCTION**

The Kansas City Southern Railway Company ("KCSR") respectfully submits KCSR's Motion to Strike ("Motion") the verified statements of Richard E. Weicher ("Weicher V.S."), which accompanied BNSF's Opening Statement and Evidence (BNSF-121)("BNSF Opening") and BNSF's Rebuttal in Support of Application for Terminal Trackage Rights (BNSF-124)("BNSF's Rebuttal") and to strike Footnotes 7 and 15 of the argument section in BNSF-124.<sup>1</sup> In this proceeding, Mr. Weicher seeks to serve an impermissible dual role as both counsel representing BNSF Railway Company ("BNSF") and as a fact witness in support of BNSF's application. The ABA Model Code of Professional Conduct makes clear why attorneys are generally prohibited from performing such dual roles. The impropriety of such dual roles is amplified in this case by BNSF's assertion of attorney-client privilege against KCSR discovery requests. Witnesses should not be able to hide information behind attorney-client privilege and

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<sup>1</sup> Should the Board decide to grant KCSR's Motion and if the Board finds such an additional procedural step necessary, KCSR also requests that the Board take the additional step and strike any references to Mr. Weicher's related testimony and evidence that are included in the legal argument section of BNSF-121 and BNSF-124.

then selectively submit some of that information to the determiner of fact. The statement should also be stricken because it is an impermissible effort to introduce parol evidence to interpret agreements that are not ambiguous. Finally, Footnotes 7 and 15 to BNSF's Rebuttal also should be stricken as being inconsistent with prior statements made by BNSF disavowing the 50/50 Line Agreement as a legal basis for direct access to CITGO.

## **ARGUMENT**

### **I. THE BOARD SHOULD STRIKE THE WEICHER V.S. BECAUSE THEY ARE ARGUMENT, NOT EVIDENCE.**

Richard Weicher is a BNSF attorney. He is shown on both BNSF's Opening Statement and BNSF's Rebuttal as counsel representing BNSF in this matter. Mr. Weicher also represented BNSF during the UP/SP proceeding as an attorney, not as a fact witness.

Given Mr. Weicher's extensive history of representing BNSF as counsel with respect to the UP/SP merger, it certainly cannot be said that his testimony is objective and factual. Rather, BNSF wishes to have Mr. Weicher serve as an advocate (attorney) for BNSF's interest, while also providing a verified statement (evidentiary witness) in hopes that such self-serving efforts could sway the Board to interpret the evidence in the light most favorable to BNSF. Such biased and self-serving testimony is clearly unnecessary, and does nothing to resolve the underlying issues in this proceeding. It should be stricken.

The general rule is that attorneys are prohibited from acting as both a witness and advocate in an adjudicatory proceeding, except as to uncontested, ministerial matters which are not relevant here. See ABA Model Code of Professional Conduct, Rule 3.7.<sup>2</sup> The main reason

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<sup>2</sup>“(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or

for this principle is to make clear to the trier of fact what is evidence versus what is advocacy. This policy also makes sense as a matter of fundamental fairness and due process because an attorney witness should not be allowed to submit "evidence" but then claim that the factual background of the evidence is protected by privilege.<sup>3</sup>

The same principles are just as important before the Board as in the courtroom. Indeed, the Board's predecessor agency specifically prohibited lawyers from being witnesses (except in very limited circumstances). See Guy Heavener, Inc. – Extension – Sand (Harleysville, PA), MC-102295 (Sub-No. 27), 127 M.C.C. 168, 174, 1977 MCC LEXIS 74, \*12-16 (ICC served Feb. 10, 1977) and In The Matter Of Doyle G. Owens, EP 481, 1992 MCC LEXIS 193, \*4 (ICC served Dec. 30, 1992). The STB should likewise follow its predecessor's prior position and prohibit a lawyer from being both a lawyer and a witness in the same proceeding.<sup>4</sup>

Presumably, BNSF would argue that Mr. Weicher is simply providing his opinion based upon his personal involvement in the negotiations that led to the CMA Agreement and the BNSF Settlement Agreements. Yet, the Weicher V.S. attempts to portray his opinion as fact. For example, not only does the Weicher V.S. interpret Sections 5(c) and 5(d) of the BNSF Settlement Agreement as providing for trackage rights, but he actually goes as far as to say "it is clear that

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(3) disqualification of the lawyer would work substantial hardship on the client.  
(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."  
See Model Rules of Prof'l Conduct R. 3.7. Available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_7\\_lawyer\\_as\\_witness.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_7_lawyer_as_witness.html).

<sup>3</sup> This is precisely what occurred here where BNSF prevented discovery about certain statements and issues set forth in Mr. Weicher's statements (and others) by asserting attorney-client privilege in response to discovery requests. This alone should be sufficient reason to strike Mr. Weicher's statements as evidence.

<sup>4</sup> But cf., Revised Rules of Practice, EP 55 (Sub-No. 24), 358 I.C.C. 189, 200-201 (1978)(ICC relaxed strict prohibition on attorneys being witnesses).

both the parties and the Board intended that BNSF would have the right to provide service via direct trackage rights.”<sup>5</sup> He then “verifies” this statement as true. Clearly, he cannot verify what both parties intended or what the Board intended. Apparently, BNSF believes the Board intended for BNSF’s desires and wishes to trump all other considerations notwithstanding evidence to the contrary. While these statements may be Mr. Weicher’s or his employer’s opinion or belief, they are not fact.

Even if his opinion is intended to be fact, his “facts” are actually wrong in many instances. A prime example of where his fact/opinion does not equate to the actual fact is where Mr. Weicher claims that the right to provide direct service to CITGO using trackage rights over the Rose Bluff Lead was “granted to BNSF by UP in the CMA Agreement.” Weicher Rebuttal V.S. at 2-3. His statement points to Paragraph 8 of the CMA Agreement as demonstrating that intent. Paragraph 8 of the CMA Agreement granted BNSF the “right to handle traffic of shippers open to all of UP, SP, and KCS at Lake Charles and West Lake, Louisiana.” CITGO is located in West Lake Charles, a station that was not “open to all of UP, SP, and KCS” at the time of the CMA Agreement. Rather, West Lake Charles was served only by SP and KCS and was not open to reciprocal switching by UP. West Lake Charles was not even included in the CMA Agreement at the time it was signed and negotiated.<sup>6</sup> Rather, as the Board said in Decision No. 44, “On brief, applicants extended this relief to incorporate West Lake Charles traffic open to SP and KCS.” UP/SP Decision No. 44, 1996 WL 467636 (S.T.B.) at \*127. Id. at \*2. This is just one of the many instances where Mr. Weicher’s “verified fact” does not match reality.

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<sup>5</sup> Weicher Rebuttal V.S. at 3.

<sup>6</sup> The CMA Agreement also was not structured to require terminal trackage rights. Instead, the CMA Agreement included provisions requiring the payment of switch fees for UP to physically handle Lake Charles Area traffic to the nearest interchange point with BNSF and for UP to provide BNSF with “haulage rights.” There were no financial or operating terms governing “direct” service via terminal trackage rights.

Mr. Weicher's statement should also be stricken on the alternative grounds that it is really no more than an effort to get around the basic parol evidence rule that a court or agency should not look beyond the wording of the document or contract that is complete on its face.<sup>7</sup> Thus, to the extent that the Weicher V.S. is intended to interpret documents, those documents speak for themselves. To the extent that the Weicher V.S. attempts to educate the Board on what the Board's decisions mean, those decisions speak for themselves, and the Board can determine what the Board meant. To the extent that the Weicher V.S. sets forth BNSF's view of Board policy or reasoning, it is not evidence. Given that both of Mr. Weicher's roles are aimed at convincing the Board that it should grant BNSF's terminal trackage rights application based on his own self-serving verification of his own opinion, the Weicher V.S. is at best another section of legal argument, not evidence, and certainly not expert testimony.

Striking the Weicher V.S., as opposed to accepting it as evidence but giving it less weight as the Board often does,<sup>8</sup> is the appropriate remedy so as to avoid Mr. Weicher's sweeping self-serving assertions being treated as "evidence" on which a reviewing court could rely upon in any subsequent review of the Board's decision.<sup>9</sup> Whatever decision the Board makes in this case is likely to be reviewed by a U.S. Court of Appeals under the substantial evidence standard of 5 U.S.C. Section 706(2)(E). By submitting Mr. Weicher's arguments as evidence, BNSF tries to

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<sup>7</sup> The parol evidence rule provides that when parties to a contract have executed a (1) completely integrated written agreement with (2) terms that are plain and unambiguous, no evidence of prior or contemporaneous agreements or negotiations may be admitted which would either contradict or add to the writing. Ozerol v. Howard Univ., 545 A.2d 638, 641 (D.C. 1988), petition for rehearing granted and remanded on other grounds, 555 A.2d 1033 (D.C. 1989).

<sup>8</sup> See CSX Transportation, Inc. – Abandonment Between Dayton and Arcanum – In Darke, Preble, and Montgomery Counties, OH, AB-55 (Sub-No. 336), 1990 ICC LEXIS 234, at \*2-\*3 (ICC served July 12, 1990).

<sup>9</sup> At a minimum, the Board should strike the verification pages and treat Mr. Weicher's statements for what they are – legal argument. Indeed, an attorney cannot verify his own opinion as fact.

tip the scales of review by positioning itself to claim that Mr. Weicher's opinions and arguments are fact. But as KCS has shown, Mr. Weicher's statements are not fact and are sometimes simply wrong. They also go well beyond anything Mr. Weicher can testify to as fact, such as what other parties or the Board intended.<sup>10</sup> While this may be an attorney's argument, it is not "evidence" that a Court of Appeals should have to consider as "evidence" in determining whether the Board's decision is supported by substantial fact. As such, the proper remedy is to strike it, not merely accept it and give it less weight.

**II. THE BOARD SHOULD STRIKE FOOTNOTES 7 AND 15 TO THE BNSF REBUTTAL BECAUSE BNSF DISAVOWED THE 50/50 LINE AGREEMENT AS A BASIS OF THIS APPLICATION AND PREVENTED DISCOVERY ABOUT IT**

In Footnotes 7 and 15 of its rebuttal, BNSF asserts that the 50/50 Line Agreement granted BNSF the trackage rights it seeks in this proceeding. The Board should strike those footnotes because BNSF disavowed that agreement as a basis for its application here and denied discovery about that agreement.

Footnote 7 asserts that the 50/50 Line Agreement "stands alone as 'sufficient legal authority' for implementation of trackage rights on the Rose Bluff Lead" so as to provide trackage rights directly to CITGO. Footnote 15 states that "[a]s discussed above in note 5 [sic], the 50/50 Line Agreement contains a provision granting BNSF trackage rights...including the Rose Bluff Lead" and "represents an independent commitment. . . for UP to accommodate BNSF direct service on the Rose Bluff Lead" so as to serve CITGO.

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<sup>10</sup> For example, Mr. Weicher's rebuttal statement says, "[A]ssertions that BNSF was not granted the right to provide direct service using trackage rights over the Rose Bluff Lead are without foundation. That right was...imposed as a condition of the merger by the Board." Obviously, this statement is not a "fact" or the Board would not have told BNSF in Decision No. 63 that BNSF could file an application like this if its access to the Lake Charles area was blocked.

Yet, BNSF previously disavowed asserting the 50/50 Line Agreement as an independent basis for its access to CITGO. In BNSF-119 filed April 8, 2013, BNSF, in refuting KCS's objection to the use of the 50/50 Line Agreement, stated that "BNSF has consistently maintained that its right to serve CITGO derives from BNSF Settlement Agreement, the CMA Agreement, and the Board's merger condition" and noted that CITGO was not listed as a facility it could serve as a result of the 50/50 Line Agreement. BNSF-119 at 6, footnote 9. In BNSF-121 at 8, footnote 5, BNSF claimed that "[t]he Term Sheet Agreement and the Operating Agreement [which are part of the 50/50 Line Agreement] are not the source of BNSF's right to provide direct service to CITGO and other Lake Charles area shippers. BNSF's right to provide direct service to such shippers is based on the Board's decisions in the UP/SP merger proceeding."

Clearly, BNSF is trying to have it both ways by using the 50/50 Line Agreement when doing so serves BNSF's purpose but denying its use when pressed or asked to produce documents related to it. Of course BNSF is likely now resorting to the 50/50 Line Agreement because it realizes that it has not met the standards required of it for a grant of a terminal trackage rights application and is attempting to use the 50/50 Line Agreement as an end run around those requirements. But having previously denied the 50/50 Line Agreement as a basis for its application and denying discovery about that agreement, BNSF cannot, in rebuttal, rely upon it. As such, Board should strike Footnotes 7 and 15 of BNSF-124 because they assert the opposite of what BNSF previously said.

### **CONCLUSION**

The Board should strike the Weicher verified statements contained in BNSF-121 and BNSF- 124. They violate the spirit of ABA Model Code of Professional Conduct, Rule 3.7. They have been introduced contrary to previous practice and precedent at the ICC. They are not

factual evidence that can be verified and are introduced as a means of getting around the parole evidence rule. They violate the integrity of the Board's processes and are an attempt to force the Board to accept as "evidence" what an attorney says was the Board's intent. In the end, they are merely legal argument that should be treated as such. The Board should also strike Footnotes 7 and 15 because they are directly contrary to BNSF's previous assertions in this matter.

Respectfully submitted,



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Attorneys for The Kansas City Southern Railway  
Company

November 12, 2015

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Strike the evidentiary statements of Richard Weicher which accompanied BNSF Railway Company's opening and rebuttal filings in this proceeding and to strike Footnotes 7 and 15 to the argument portion of BNSF's Rebuttal was served by first-class mail, postage prepaid, or by a more expeditious manner, this 12th day of November 2015 on counsel for BNSF Railway Company, Union Pacific Railroad Company, and any other party of record.



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Attorney for The Kansas City Southern  
Railway Company