

UP/SP-416

BEFORE THE  
SURFACE TRANSPORTATION BOARD

240047

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

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

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February 8, 2016  
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Public Record

**UNION PACIFIC'S REPLY TO BNSF'S MOTION TO STRIKE**

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February 8, 2016

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SURFACE TRANSPORTATION BOARD

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UNION PACIFIC RAILROAD COMPANY

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**UNION PACIFIC’S REPLY TO BNSF’S MOTION TO STRIKE**

The Board should deny BNSF’s motion to strike portions of Union Pacific’s final brief. Contrary to BNSF’s claim, Union Pacific’s brief contains no new evidence or arguments. Rather, in accordance with the Board’s decision directing parties to submit briefs, our brief provides “a concise summary of the parties’ positions” to “help focus the Board’s analysis,” and it properly “summarize[s] the evidence and direct[s] the Board’s attention to the issues [we] deem critical.” Decision served Nov. 30, 2015, at 2.

BNSF claims that Union Pacific’s brief includes a “new” argument, *i.e.*, that BNSF’s success in capturing Lake Charles area traffic is properly measured against Union Pacific’s pre-merger share of traffic. *See* Motion at 3. This claim is frivolous. The argument is not new. We argued on both reply and rebuttal that any comparison of pre- and post-merger competition must recognize that, while Union Pacific served some shippers in the Lake Charles area, Union Pacific did not even serve CITGO before the UP/SP merger. *See* UP Reply at 30-31; UP Reb. at 4. Our brief summarized BNSF’s rebuttal argument and evidence regarding pre- and post-merger competition in the Lake Charles area and contrasted BNSF’s position with our previously expressed position on the appropriate analysis. *See* UP Brief at 7.

BNSF also claims that Union Pacific’s brief includes “new” evidence—namely, a BNSF workpaper reflecting a 2015 study of Rose Bluff Yard that BNSF witness Bredenberg discussed in his rebuttal testimony. *See* Motion at 3-4. As highlighted by the attachment to BNSF’s motion, the 2015 study workpaper undermines Bredenberg’s rebuttal testimony; it contradicts the results of an earlier BNSF study (conducted in December 2014) that Bredenberg also discussed in his rebuttal testimony; and it confirms Union Pacific’s position that no viable time exists during Union Pacific’s operating window for BNSF to operate trains through the yard and over the Rose Bluff Industrial Lead. *See* Motion, Attachment 1. BNSF produced the 2015 study workpaper to Union Pacific shortly after filing its rebuttal. *See* Exhibit A hereto (email chain showing transmittal of Bredenberg workpapers).

While BNSF excluded the 2015 study workpaper from its rebuttal submission,<sup>1</sup> BNSF cannot shield the document from scrutiny by now claiming it is “new” evidence. Union Pacific did not introduce the 2015 BNSF study in our brief. On the contrary, BNSF discussed that study in its rebuttal. *See* BNSF Reb. at 31 & Bredenberg Reb. VS at 5. Our brief points to portions of the 2015 study that do not favor BNSF’s arguments, but providing the Board with a full and fair view of the evidence that BNSF itself presented in support of its case is entirely different from introducing new evidence. *Cf. N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42119, slip op. at 4-5 (STB served Mar. 12, 2015) (Union Pacific did not introduce new evidence by referring to material previously discussed in witness statements). BNSF also complains that we attached the 2015 workpaper to our brief. *See* Motion at 3 n.4. However, the Board’s briefing

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<sup>1</sup> In contrast, BNSF attached the workpapers for its December 2014 study to Bredenberg’s rebuttal testimony.

order did not bar such attachments, so long as the briefs complied with the 20-page limit, which ours did. *See* Decision at 2.<sup>2</sup>

BNSF also claims that Union Pacific’s brief includes “new” evidence because we cite a second Bredenberg workpaper—one that refutes Bredenberg’s assertion that the 50/50 Line has ample capacity to accommodate additional BNSF trains. *See* Motion at 4. Once again, BNSF’s claim is frivolous. BNSF witness Bredenberg introduced this evidence when he selectively referred to information that appears in the workpaper to support an erroneous assertion about the 50/50 Line’s capacity. *See* BNSF Reb., Bredenberg Reb. VS at 4.<sup>3</sup> Our brief simply addresses existing evidence that BNSF’s own witness discussed. *Cf. N. Am. Freight Car Ass’n*, slip op. 4-5.

Finally, BNSF complains that it had “no opportunity to respond to the new evidence.” Motion at 4. This complaint makes no sense. As shown above, the allegedly “new evidence” is evidence that BNSF introduced. Our brief simply explains how that evidence is inconsistent with BNSF’s claims and consistent with evidence we submitted on reply. Our efforts to summarize the evidence and direct the Board’s attention to the issues raised by the evidence are fully consistent with the Board’s briefing order. *See* Decision at 2.

## CONCLUSION

Union Pacific’s final brief contains no new evidence or argument. Accordingly, the Board should deny BNSF’s motion to strike.

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<sup>2</sup> Union Pacific suggested that briefs should contain “no more than 20 pages with no attachments, exhibits, or new evidence,” but the Board’s order stated that final briefs should be “limited to no more than 20 pages, and no new evidence or argument is permitted.” Decision at 1, 2. The Board’s Office of Proceedings confirmed to the parties before the briefs were due that parties could include attachments and exhibits, so long as the briefs remained within the page limits.

<sup>3</sup> BNSF’s counsel identified the set of workpapers containing the information in question as the source of Bredenberg’s claim regarding the capacity of the 50/50 Line when producing them. *See* Exhibit A. If there is any question about Bredenberg’s reliance on the workpapers or the accuracy of our citation, we are prepared to submit the workpapers.

Respectfully submitted,

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*Attorneys for Union Pacific Railroad Company*

February 8, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of February, 2016, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760 (Sub-No. 46).

/s/ Michael L. Rosenthal  
Michael L. Rosenthal

**Rosenthal, Michael**

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**From:** Denton, Peter W. <PDenton@mayerbrown.com>  
**Sent:** Tuesday, November 03, 2015 11:33 AM  
**To:** Rosenthal, Michael; CZorbaugh@bakerandmiller.com; WMullins@bakerandmiller.com; EGreenberg@gkglaw.com; David Monroe  
**Cc:** Steel, Jr., Adrian L.; Sloane, Adam C.  
**Subject:** RE: BNSF Rebuttal

Mike,

These workpapers support the assertion in the third full sentence on page four of the Bredenbergh Rebuttal V.S. The materials are not highly confidential as to UP or BNSF, but are as to the rest of the world.

Thanks,  
Peter

Peter W. Denton  
Associate  
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-----Original Message-----

From: Rosenthal, Michael [mailto:mrosenthal@cov.com]  
Sent: Monday, November 02, 2015 8:32 PM  
To: Denton, Peter W.; CZorbaugh@bakerandmiller.com; WMullins@bakerandmiller.com; EGreenberg@gkglaw.com; David Monroe  
Cc: Steel, Jr., Adrian L.; Sloane, Adam C.  
Subject: Re: BNSF Rebuttal

Peter,

What statements in the Bredenbergh RVS does this support, and why is it highly confidential as to UP?

Mike

From: Denton, Peter W.  
Sent: Monday, November 2, 2015 7:11 PM  
To: Rosenthal, Michael; CZorbaugh@bakerandmiller.com; WMullins@bakerandmiller.com; EGreenberg@gkglaw.com; David Monroe

Cc: Steel, Jr., Adrian L.; Sloane, Adam C.

Subject: RE: BNSF Rebuttal

Please find attached additional workpapers for the Bredenberg Rebuttal V.S. We are designating these as Highly Confidential.

Thanks,  
Peter

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From: Denton, Peter W.  
Sent: Tuesday, October 27, 2015 12:14 PM  
To: 'Rosenthal, Michael'; 'CZorbaugh@bakerandmiller.com'; 'WMullins@bakerandmiller.com';  
'EGreenberg@gkglaw.com'; 'David Monroe'  
Cc: Steel, Jr., Adrian L.; Sloane, Adam C.  
Subject: RE: BNSF Rebuttal

Please find attached workpapers for the Bredenberg Rebuttal V.S. We are designating these as Confidential.

Thanks,  
Peter

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From: Denton, Peter W.  
Sent: Monday, October 26, 2015 7:30 PM

To: 'Rosenthal, Michael'; 'CZorbaugh@bakerandmiller.com'; 'WMullins@bakerandmiller.com';  
'EGreenberg@gkglaw.com'; 'David Monroe'  
Cc: Steel, Jr., Adrian L.; Sloane, Adam C.  
Subject: RE: BNSF Rebuttal

Please find attached workpapers for David Reishus, each marked as Highly Confidential.

Thanks,  
Peter

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LinkedIn<http://www.linkedin.com/in/peterdenton/> Twitter<http://www.twitter.com/dentonpw>

From: Denton, Peter W.  
Sent: Monday, October 26, 2015 3:19 PM  
To: 'Rosenthal, Michael'; CZorbaugh@bakerandmiller.com<mailto:CZorbaugh@bakerandmiller.com>;  
WMullins@bakerandmiller.com<mailto:WMullins@bakerandmiller.com>;  
EGreenberg@gkglaw.com<mailto:EGreenberg@gkglaw.com>; David Monroe  
Cc: Steel, Jr., Adrian L.; Sloane, Adam C.  
Subject: RE: BNSF Rebuttal

A disc containing workpapers for Mike Baranowski will be delivered to each of your offices by 4 p.m. today. We are working through the remaining items on Adrian's list.

Thanks,  
Peter

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From: Steel, Jr., Adrian L.  
Sent: Monday, October 26, 2015 12:56 PM  
To: 'Rosenthal, Michael'  
Cc: Sloane, Adam C.; CZorbaugh@bakerandmiller.com<mailto:CZorbaugh@bakerandmiller.com>; Denton, Peter W.; WMullins@bakerandmiller.com<mailto:WMullins@bakerandmiller.com>; EGreenberg@gkglaw.com<mailto:EGreenberg@gkglaw.com>; David Monroe  
Subject: RE: BNSF Rebuttal

We are preparing the following documents for delivery today or tomorrow:

1. Hard copies of the Highly Confidential and Public versions of BNSF's rebuttal for each law firm.
2. Electronic Confidential versions for each of UP, KCS and CITGO in-house personnel (i.e., each client's HC info/data will not be redacted).
3. Workpapers for Mike Baranowski, David Reishus and Rollin Bredenberg. (Note: the workpapers for Mr. Bredenberg's initial verified statement were produced as BNSF-C-000595(R) to BNSF-C-000614(R)).

Mike -- We would like a BNSF Confidential version of UP's rebuttal as soon as you can provide one.

Please let me know if you have any questions or if I have missed anything. Thank you.

Adrian

From: Rosenthal, Michael [mailto:mrosenthal@cov.com]  
Sent: Monday, October 26, 2015 8:57 AM  
To: Steel, Jr., Adrian L.  
Cc: Sloane, Adam C.; CZorbaugh@bakerandmiller.com<mailto:CZorbaugh@bakerandmiller.com>; Denton, Peter W.; WMullins@bakerandmiller.com<mailto:WMullins@bakerandmiller.com>; EGreenberg@gkglaw.com<mailto:EGreenberg@gkglaw.com>; David Monroe  
Subject: RE: BNSF Rebuttal

Adrian,

Will you please provide a copy of BNSF's workpapers? The filing references Baranowski workpapers, and I presume there are workpapers associated with the two studies discussed in the Bredenberg Rebuttal VS.

Regard,

Mike

From: Denton, Peter W. [mailto:PDenton@mayerbrown.com]  
Sent: Friday, October 23, 2015 5:25 PM  
To: WMullins@bakerandmiller.com<mailto:WMullins@bakerandmiller.com>; Rosenthal, Michael; EGreenberg@gkglaw.com<mailto:EGreenberg@gkglaw.com>; David Monroe  
Cc: Steel, Jr., Adrian L.; Sloane, Adam C.; CZorbaugh@bakerandmiller.com<mailto:CZorbaugh@bakerandmiller.com>  
Subject: BNSF Rebuttal

Attached is the BNSF Rebuttal filed today.

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