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Before the
SURFACE TRANSPORTATION BOARD

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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

APPLICATION FOR TERMINAL TRACKAGE RIGHTS

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In Decision No. 63 in the UP/SP merger proceeding, the Board stated that, if BNSF Railway Company (“BNSF”), Union Pacific Railroad Company (“UP”), and The Kansas City Southern Railway Company (“KCS”)¹ could not come to an agreement to allow BNSF direct access to shippers in the Lake Charles, Louisiana area (including shippers at West Lake Charles, Louisiana), and an arbitration proceeding failed to provide BNSF direct access to Lake Charles area shippers, BNSF could file a terminal trackage rights application to obtain the direct BNSF access to such shippers that was granted in the CMA Agreement and in Decision No. 44. Despite months of negotiation, KCS and UP continue to refuse to allow BNSF direct access to shippers at West Lake Charles, and KCS has invoked various joint facility agreements to which BNSF is not a party as a basis for refusing to permit BNSF to use track jointly owned by KCS and UP to directly serve shippers at West Lake Charles. Despite the Board’s clear expectation

¹ The acronyms used herein are the same as those in Appendix B to Decision No. 44.

that an arbitration would be held to address issues not resolved through negotiation,² KCS and UP have not initiated arbitration to resolve the question of BNSF's access. In fact, not only do UP and KCS not even concede that BNSF has a right to serve West Lake Charles area shippers directly, but KCS has filed a declaratory judgment action in Federal district court seeking a declaration that, under the four joint facility agreements, KCS's consent is required before BNSF may enter upon the joint facility trackage to directly serve shippers in the Lake Charles area. *See Kansas City Southern Railway Co. v. BNSF Railway Co.*, Civ. A. No. 5:13-CV-98 (W.D. La.) (filed Jan. 15, 2013). Thus, in order to prevent further delay of BNSF's provision of direct competitive service, BNSF is filing this Application for terminal trackage rights.

By this Application, BNSF seeks terminal trackage rights over the Rosebluff Industrial Lead, a single track that is purportedly jointly owned by KCS and UP.³ The Rosebluff Industrial Lead extends from the former Southern Pacific Transportation Co. ("SP") Lafayette Subdivision between Dawes, Texas and Avondale, Louisiana that is now jointly and equally owned by BNSF and UP (hereinafter referred to as the "50/50 Line") at MP 223.3, approximately nine miles to the south. As explained below, these terminal trackage rights are required to enable BNSF to implement the rights it was granted in the UP/SP merger proceeding to handle traffic of shippers open to all of UP, SP, and KCS in the area of Lake Charles, Louisiana.

In order to provide alternative competitive service for SP competition in the Lake Charles area which was lost as a result of the UP/SP merger, BNSF has agreed to move traffic from certain crude oil shippers in Oklahoma to a CITGO refinery facility located at West Lake

² *See* Decision No. 63, slip op. at 10.

³ In the complaint referred to above, KCS asserts that the referenced track is jointly owned by KCS and UP. *See* KCS's First Am. Compl. for Declaratory J. ¶ 30 ("Track needed to physically serve [the CITGO facility] is jointly owned by UP and KCS and is covered by various joint use agreements previously mentioned."). Based on this representation, BNSF has named both KCS and UP, as joint owners of the terminal facilities, as parties to this proceeding.

Charles, Louisiana pursuant to rights granted to BNSF in the RASA, the CMA Agreement, and the 50/50 Line agreement. KCS has, however, refused to recognize BNSF's right to directly serve the CITGO facility, and UP has indicated that it will block direct access by BNSF to the facility. The terminal trackage rights sought in this Application would permit BNSF, in competition with UP and KCS, to directly serve CITGO and other customers in the West Lake Charles area, thereby enabling BNSF to fulfill important aspects of the competition-preserving role that the Board established for BNSF under the merger conditions relating to Lake Charles area shippers.

As we explain below and expect to demonstrate in further detail in this proceeding (pursuant to the Proposed Procedural Schedule set forth below), the terminal trackage rights sought in this Application satisfy the standards set forth in 49 U.S.C. § 11102: BNSF is seeking rights to use "terminal facilities" as that term has been construed under Section 11102, and the use of those facilities is "practicable and in the public interest" and will not "substantially impair[] the ability of the rail carrier[s] owning the facilities or entitled to use the facilities to handle [their] own business." *Id.* § 11102(a).

I

INTRODUCTION

In Decision No. 44, the Board imposed trackage rights conditions on the UP/SP merger pursuant to the BNSF Settlement Agreement and the CMA Agreement that allow BNSF (i) to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and Westlake; and (ii) to handle traffic of shippers open to SP and KCS at West Lake Charles. (The Board also authorized BNSF to interchange traffic to or from the Lake Charles area with KCS at Shreveport and Texarkana.)

The trackage rights conditions imposed by the Board arose from concerns expressed by the Chemical Manufacturers Association (“CMA”) to the Board that the original BNSF Settlement Agreement did not go far enough in preserving competition in the rail freight market in Gulf Coast chemicals, including in the Lake Charles area. *See* CMA-7, filed March 28, 1996, at 17 (the BNSF Settlement Agreement should be expanded to include “3-to-2” points such as Lake Charles where only the merged UP/SP system can serve particular routes). Accordingly, Section 8 of an agreement among UP, BNSF, and CMA (the “CMA Agreement”) provided BNSF with access to Lake Charles area shippers as described above “on the same basis as is provided for in the BN/Santa Fe Settlement Agreement for ‘2-to-1’ points.”⁴ That access includes both direct train service and reciprocal switch.

In a motion to reconsider Decision No. 44, KCS challenged the Board’s grant of BNSF access to Lake Charles area shippers. KCS further belatedly contended for the first time on reconsideration that UP/SP could provide BNSF with access via direct train service to facilities at Westlake and West Lake Charles (and possibly Lake Charles as well) *only* with KCS’s consent and that the Board could order such access only if a terminal trackage rights application were to be filed under 49 U.S.C. § 11103 (now § 11102). KCS based its argument on four joint facility agreements between KCS and T&NO (an SP predecessor). KCS claimed that UP/SP was precluded from unilaterally providing BNSF direct train service access to the Lake Charles area since the four agreements, in KCS’s view, expressly or implicitly require KCS’s consent to grant such access to another carrier.⁵

⁴ The Board summarized the CMA Agreement in Decision No. 44. *See* 1 S.T.B. at 254-55.

⁵ KCS also contended that BNSF access could not be effected under the immunizing power of 49 U.S.C. § 11341(a) because an override is available only if “necessary,” and that the availability of a terminal trackage rights application precludes a finding of such necessity.

In Decision No. 63 (served December 4, 1996), the Board denied KCS's challenge to the Lake Charles area conditions and reconfirmed the importance of the conditions and BNSF access in preserving competition for Lake Charles area shippers. In so doing, the Board expressed its expectation that the parties would negotiate an agreement on the issues raised by KCS with regard to the four joint facility agreements and, in the absence of such an agreement, would submit the issues to arbitration by KCS or SP under the terms of their joint facility agreements. Given the fact that BNSF was not a party to these agreements, it was expected that UP (as SP's successor) would, if needed, initiate arbitration on BNSF's behalf.⁶ The Board further indicated that, if the parties were unable to agree and the arbitration produced a situation where BNSF access to Lake Charles area shippers was blocked, BNSF could return to the Board to seek approval of a terminal trackage rights application. The Board also noted that, if and to the extent a terminal trackage rights application were to be denied, an override of the terms of the four joint facility agreements might be necessary. Pursuant to former 49 U.S.C. § 11341(a) (current 49 U.S.C. § 11321(a)), which has been deemed to extend to contracts, the Board has the authority to override any terms of the joint facility agreements that could be invoked to prevent or impede BNSF's access to Lake Charles area shippers under the UP/SP merger conditions. *See Norfolk & W. Ry. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 130 (1991) (because "[a] contract has no legal force apart from the law that acknowledges its binding character," "the exemption in § 11341(a) from 'all other law' effects an override of contractual obligations, as necessary to carry

⁶ *See* Decision No. 63 at 10 n.29 ("We expect ... that, if and to the extent BNSF so requests, SPT will invoke [the] arbitration remedy on behalf of BNSF.")

out an approved transaction, by suspending application of the law that makes the contract binding”).⁷

In early 1998, BNSF and UP entered into a “Term Sheet Agreement” whereby they agreed to jointly own and operate the 50/50 Line—the former SP Lafayette Subdivision between Dawes, Texas and Avondale, Louisiana. As BNSF will show when it submits its Opening Statement and Evidence pursuant to the Proposed Procedural Schedule set forth below, the CITGO facility at West Lake Charles is situated just south of the 50/50 Line and is connected to that line by the Rosebluff Industrial Lead, which, according to KCS, is covered by the joint facility agreements between KCS and UP. The “Term Sheet Agreement” provided that BNSF access would be on the “same basis” that BNSF serves “2-to-1” customers under the BNSF Agreement. That “basis” includes direct train service.

Given that the STB directed UP and KCS in Decision No. 63 to resolve whether the provisions of the four joint facility agreements in fact required KCS to consent for BNSF to operate over the joint facility trackage, BNSF reasonably assumed that issues relating to BNSF’s access to Lake Charles area shippers had been resolved. Indeed, in 1998, UP again granted and confirmed BNSF’s rights to provide service to the Lake Charles area through direct train service pursuant the Term Sheet Agreement, and at no time did UP purport to make that grant contingent upon KCS’s consent or the conclusion of any other legal proceedings. Since that time, BNSF has served shippers in the Lake Charles area indirectly—largely through reciprocal switching provided by UP.

⁷ Thus, if the Board denies this Application, BNSF will seek an override of the terms of the joint facility agreements that KCS has invoked as a basis for blocking BNSF’s direct access to Lake Charles area shippers.

In May 2012, CITGO, a large West Lake Charles shipper, asked BNSF to provide direct unit train service for crude oil destined to its facility. UP reciprocal switch service for unit trains is not cost effective, and BNSF cannot effectively compete for unit train service without direct access. In a letter dated May 24, 2012, BNSF notified UP of its intent to provide the direct service requested by CITGO. *See* Ex. 1.⁸ Alleging operational difficulties and the alleged need for KCS's "operational concurrence," UP refused in a June 21, 2012 letter to allow BNSF to access the trackage subject to the four joint facility agreements. *See* Ex. 2.

Over the next several months, UP and BNSF personnel corresponded and met to address UP's operational concerns. In the course of these communications, it became clear to BNSF that both UP and KCS opposed BNSF's efforts to obtain the direct access to Lake Charles area shippers that the Board had mandated in Decision No. 44 and Decision No. 63. BNSF also recognized that it could not break the deadlock by initiating the arbitration contemplated by the Board in Decision No. 63, because BNSF is not a party to the joint facility agreements—only KCS and UP are. Moreover, BNSF realized that an arbitration between KCS and UP at this point may serve only to further impede and delay efforts by BNSF to obtain direct access to Lake Charles area shippers. Pursuit of a KCS-UP arbitration proceeding, in which two competitors of BNSF would arbitrate between themselves the scope of BNSF's rights of competitive direct access for years to come, is not only impractical, but untenable in light of the standstill in progressing such efforts since BNSF first gave UP notice of its intent to initiate direct service in May of 2012.

Stymied in its efforts to reach a mutually acceptable agreement enabling BNSF direct service to the Lake Charles area, on November 2, 2012, BNSF wrote a letter to UP setting forth

⁸ Exhibit 1 and the other exhibits cited in this Application are attached.

BNSF's intention to serve CITGO directly beginning November 20, 2012. *See* Ex. 3. BNSF's letter addressed UP's previously-expressed concerns about the use of six-axle locomotives to serve the CITGO facility and about the need for KCS's concurrence for direct BNSF service to the CITGO facility. *See id.* Referring to BNSF's ongoing discussions with UP about the operational issues UP had raised—discussions that included two on-site meetings with UP personnel—BNSF noted that it had attempted to work with UP for “the past four months” (*id.*) on UP's concerns, and referred UP to an attached July 2012 email exchange that outlined BNSF's communications with UP and BNSF's position with regard to the issues. (The email exchange is attached to Exhibit 3.) UP's November 20, 2012 response appeared to have acquiesced to BNSF's direct service to the facility (subject to certain volume restrictions), and sought further discussions only about the means for mitigating the impacts of additional traffic on the affected track. *See* Ex. 4. As a result of further discussions about the issues, in mid-December, key persons within UP confirmed that the operational issues had been resolved.

Thus, BNSF, in an email sent on December 14, 2012, notified KCS that it intended to operate a train to serve the CITGO facility directly. *See* Ex. 5. In an email sent on December 18, 2012, KCS refused to allow BNSF to enter the terminal facility trackage to directly serve the CITGO facility, but rather required BNSF to interchange the train to UP, which ultimately delivered the train to CITGO in reciprocal switch service. *See* Ex. 6.

On January 9, 2013, BNSF sent a letter to UP reiterating BNSF's rights to provide direct service to the Lake Charles area, demanding that UP promptly resolve the issue of BNSF's direct competitive access through negotiation or arbitration, and requesting confirmation of UP's willingness to honor the commitments it had made in the UP/SP merger proceeding and the parties' agreements to afford BNSF direct access to Lake Charles area shippers. *See* Ex. 7. UP

replied in a letter dated January 18, 2013, erroneously characterizing BNSF as demanding that it be given priority over KCS and UP in serving Lake Charles area shippers and implying for the first time since BNSF served notice of its intent to initiate direct competitive service in May 2012 that BNSF does not have rights to provide direct service. UP also suggested three-carrier discussions on the service issues, although it did not concede that direct BNSF service to the Lake Charles area would be the goal of such discussions. *See* Ex. 8.

Three days before UP's January 18 letter, KCS filed a complaint in Federal district court in Louisiana, seeking a declaration that, under the four joint facility agreements, KCS's consent is required before BNSF may enter upon the joint facility trackage to directly serve shippers in the Lake Charles area.⁹ Soon after the KCS lawsuit was filed, UP sent a letter to BNSF and KCS on February 4, 2013, suggesting that all three carriers meet to discuss how they can serve the Lake Charles area. *See* Ex. 9. To date, neither UP nor KCS has initiated arbitration, notwithstanding BNSF's repeated requests for both railroads to take the steps contemplated by the Board to assure BNSF's direct access to the CITGO facility and other Lake Charles area customers. Indeed, KCS's complaint firmly establishes that KCS has no interest in resolving the issue by arbitration, as KCS claims unequivocally (without even mentioning the word "arbitration") that:

BNSF likewise has never sought approval of a terminal trackage rights application under 49 U.S.C. § 11102(a) or an override of the terms of the four joint use agreements under 49 U.S.C. § 11321(a). All of these are available alternatives that the STB suggested to BNSF in Decision No. 63 if BNSF desired to operate over the tracks subject to the four joint use agreements to physically serve area shippers. [These] two courses of action are the only two procedures by which the STB could potentially and

⁹ In a motion filed February 25, 2013, BNSF moved to dismiss the KCS declaratory judgment action on the ground that the Board has exclusive jurisdiction over the matters raised by KCS in its complaint. In the alternative, BNSF moved to refer the matters raised by KCS to the Board under 28 U.S.C. § 1336 on the basis of the Board's primary jurisdiction.

lawfully grant BNSF the ability to operate over either KCSR's track or the joint use track without KCSR's consent....

Am. Compl. ¶ 28 (emphasis added). As a result, this Application invokes one of the only two procedures that even KCS acknowledges are proper to address the situation before the Board

In the face of KCS's and UP's failure to resolve the issues, and in light of the futility of any attempt to require KCS and UP to arbitrate among themselves on an issue they largely agree with each other about, BNSF's last resort is this Application for terminal trackage rights. Thus, pursuant to the Board's guidance in Decision No. 63, and in the absence of a clear path to resolve the matter through other means, BNSF respectfully requests the imposition of terminal trackage rights in the interests of ensuring that direct competitive service can finally be established by BNSF, as envisioned by the CMA and the Board years ago in Decision No. 44.

II

DESCRIPTION OF THE TERMINAL TRACKAGE

By this Application, BNSF seeks terminal trackage rights over the Rosebluff Industrial Lead, a former SP-operated single track, nine miles in length. The Rosebluff Industrial Lead begins on the former SP Lafayette Subdivision between Dawes, Texas and Avondale, Louisiana at MP 222.3 and extends to the south. Approximately 0.50 miles south of the 50/50 Line, the Rosebluff Industrial Lead runs through Rosebluff Yard, which consists of five yard tracks and one running track.¹⁰

¹⁰ Rosebluff Yard also is referred to in some maps and charts as "Maplewood Yard."

III

THE REQUESTED TERMINAL TRACKAGE RIGHTS SATISFY THE CRITERIA OF 49 U.S.C. § 11102 AND SHOULD BE GRANTED

Under 49 U.S.C. § 11102(a) (and former 49 U.S.C. § 11103(a)), the Board may require use of “terminal facilities, including main-line tracks for a reasonable distance outside of a terminal,” if the Board finds that use to be “practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business.” *Id.* The requested terminal rights satisfy each of these criteria.

First, in Decision No. 63, the Board noted that KCS apparently had conceded that the tracks covered by the joint facility agreements *are* “terminal facilities” within the meaning of the Section 11103(a). KCS’s concession is well-founded. As BNSF will show when—pursuant to the Proposed Procedural Schedule set forth below—it submits its Opening Statement and Evidence, the short segments at issue here are classic terminal facilities. *See Rio Grande Indus. — Purchase & Trackage Rights — CMW Ry.*, 5 I.C.C.2d 952, 979 (1989) (“The term ‘terminal facilities’ should be interpreted broadly because the purpose of the section is highly remedial.”); *SPT Co. v. ICC*, 736 F.2d 708, 723 (D.C. Cir. 1984) (“The Commission has long held that the [term] ‘terminal facilities’ should be broadly construed because the purpose of the section is highly remedial.”); *CSX Corp. — Control — Chessie Sys., Co. & Seaboard Coast Line Indus., Inc.*, 363 I.C.C. 521, 585 (1980) (“[S]ince our power to make terminal facilities of one carrier available to another is remedial in nature, the term should be construed liberally.”).

Second, the requested terminal trackage rights are clearly in the public interest. The Board already has found (in Decision No. 44), and then confirmed again (in Decision No. 63), that direct BNSF service is one component of the solution to the potential loss of competitive

options that Lake Charles area shippers would face as a result of an inadequately-conditioned UP/SP merger. Thus, in response to concerns raised by various plastic and chemical shippers in the Lake Charles area, the STB expanded the BNSF trackage rights and the terms of BNSF access to Lake Charles area shippers that had been set forth in the CMA Agreement. *See* Decision No. 44, 1 S.T.B. at 427-29.

Among other things, in imposing the Lake Charles area conditions on the UP/SP merger, the Board removed certain geographic limitations that had been incorporated in the CMA Agreement and amended BNSF Agreement and removed a fee provision that, in effect, would have required BNSF to pay a fee for services that UP and SP would not, in fact, have been providing. *See id.* at 426-29, 474. The “principal effect” of the removal of the geographic restrictions “will be to allow BNSF to handle, via *single-line service*, traffic moving to Houston and to other points on BNSF” (*id.* at 474) (emphasis added). *See also id.* at 426 (discussing removal of “restrictive destination conditions and ‘phantom’ haulage charges that together would have unduly inhibited BNSF’s ability to offer *direct*, competitive service to” Lake Charles area shippers) (emphasis added); *id.* at 428 (“[A]pplicants must remove the . . . geographic restrictions on *direct* BNSF service to Lake Charles, West Lake, and West Lake Charles shippers and permit BNSF to serve all destinations from these points.”) (emphasis added). The Board’s order that BNSF be permitted to provide direct, single-line service for Lake Charles area shippers was quite significant because it eliminated the need for BNSF to rely on interline movements with other carriers, reciprocal switching, or haulage arrangements.

As the Board noted in Decision No. 44, numerous parties had insisted that BNSF’s ability to provide single-line, direct service to shippers in the Lake Charles area was crucial to mitigating the potential competitive harm that those shippers would have suffered as a result of

the UP/SP merger. *See id.* at 319-20, 373, 426. In rejecting KCS's petition for reconsideration of the Board's Lake Charles area conditions, the Board in Decision No. 63 further explained the reasons for providing BNSF with direct access to Lake Charles area shippers:

We carefully considered the issues raised by KCS in Decision No. 44. We explained there that it was necessary to expand the voluntary settlement agreements involving UP/SP, BNSF, and CMA, and that giving BNSF additional rights was the most effective way to assure continued competition for Lake Charles area shippers. [Citing Decision No. 44, slip op. at 105-07, 133]. In spite of its service to the Lake Charles area, KCS lacks a sufficient route structure to be competitive with UP/SP in many corridors on a single-line basis. As KCS now acknowledges, it needs to interline traffic destined to New Orleans, Houston, and Laredo. Moreover, as various Lake Charles area shippers (Montell, Olin, and PPG) point out, and as we discussed in Decision No. 44, KCS must interline to offer competitive service to the St. Louis gateway.

The competitive loss to Lake Charles area shippers was stressed by several parties in their original comments, including Montell, Olin, PPG, SPI, and KCS. KCS specifically noted that this area should be deemed, not a "3-to-2" point, but a "2-to-1" point due to the routing limitations faced by KCS in getting to Houston and New Orleans. . . . We must reject KCS' efforts to retract its prior testimony that the merger would cause a significant competitive problem for these shippers. Moreover, we continue to believe that the conditions we imposed, by building upon a privately negotiated settlement agreement, as endorsed by all relevant shippers, offer a better competitive solution than KCS has offered.

Decision No. 63, slip op. at 8-9 (footnotes omitted).

Since the Board wrote these words, there has been no change in circumstances that would detract from the conclusion that direct BNSF access to Lake Charles area shippers is strongly in the public interest. Because the use of the track at issue in this Application is necessary for BNSF to directly serve Lake Charles areas shippers, the use of the trackage clearly is in the public interest. Without it, BNSF cannot play the competition-preserving role that the Board designated for it, and shippers will suffer competitive harm. The importance of direct BNSF

service is underscored by CITGO's request that BNSF provide such service to CITGO's West Lake Charles facility.

UP and KCS have effectively negated BNSF's right to direct access to West Lake Charles shippers. Without direct access to the Rosebluff Industrial Lead, which connects the 50/50 Line to CITGO and other West Lake Charles facilities, BNSF cannot serve as the remedy to competitive harms envisioned in the UP/SP merger decision and settlement agreements. Accordingly, BNSF seeks terminal trackage rights to connect the 50/50 Line to the West Lake Charles CITGO facility (and other West Lake Charles facilities) to which the Board mandated that BNSF have direct access.

Third, BNSF's use of the trackage is practicable without substantially interfering with the ability of KCS or UP to handle their own business. As BNSF will demonstrate in detail in this proceeding (pursuant to the Proposed Procedural Schedule set forth below), the Rosebluff Industrial Lead runs through the Rosebluff Yard, which consists of five yard tracks and one running track. KCS and UP both use the yard for switching and storing cars originating from or destined to West Lake Charles customers. BNSF, however, will not use the yard for switching or storage, but rather will use only the running track in the yard. BNSF will directly serve the CITGO facility and will bypass all switching yards. Because UP currently provides reciprocal switch service on behalf of BNSF for all West Lake Charles customers of BNSF (receiving the BNSF cars at UP's Lake Charles Yard), BNSF believes that direct service could reduce congestion at both UP's Lake Charles Yard and at the Rosebluff Yard that is jointly used by KCS and UP.

As BNSF also will show in its Opening Statement and Evidence, BNSF expects to work with KCS and UP to coordinate operations on the Rosebluff Industrial Lead. Inspections of the

trackage and discussions among UP and BNSF operating personnel confirm that there are no material operational impediments to BNSF service on the terminal trackage facilities, and BNSF does not anticipate that there will be any difficulty in coordinating joint operations on the track. To the contrary, operations on the Rosebluff Industrial Lead will be similar to operations along the 50/50 Line where all three railroads operate 24-7 without incident.

The evidence that BNSF expects to submit will show that, for service to the CITGO facility (and other shippers at West Lake Charles), BNSF anticipates that it will initially use four-axle locomotives and bypass all switching yards. Once inside the CITGO facility, BNSF will run around its train and pick up empties to return to BNSF's Lafayette Yard.¹¹

Finally, 49 U.S.C. § 11102(a) provides that compensation for joint use of terminal facilities is to be established by the carriers or, if they cannot reach an agreement, by the Board. Section 11102(a) further provides that “[t]he compensation shall be paid or adequately secured before a rail carrier may begin to use the facilities of another rail carrier under this section.” Given that the obligation to provide BNSF with the ability to access Lake Charles area shippers via direct train service rests with *UP* under the parties’ agreements and the Board’s merger conditions, any terminal trackage rights compensation due to KCS is the responsibility of *UP*. However, the Board should not require that such compensation payable by *UP* to KCS be established before BNSF begins use of the terminal facilities to provide the benefits envisioned by the BNSF and CMA agreements and procompetitive conditions previously imposed by the

¹¹ In correspondence with BNSF, *UP* has raised concerns that a curve onto the Rosebluff Industrial Lead cannot accommodate six-axle locomotives. As the evidence that BNSF will submit will show, BNSF has inspected this curve and has concluded that it could be engineered and staked, a relatively simple and minor repair process routinely implemented consistent with industry custom and practice, in order to bring the line up to standard for six-axle locomotives.

Board in the UP/SP merger, since the compensation to be paid by BNSF to UP for merger-related access is in place and was established years ago.

In *UP/MP/WP*, the Interstate Commerce Commission gave the parties the opportunity to negotiate compensation terms, and, if no agreement were reached, the Commission would set terms under the statutory condemnation standard. 366 I.C.C. 462, 576 n.114 (1982). However, the parties were permitted to commence trackage rights operations immediately upon consummation of the consolidation. The compensation terms to be later established were required to accrue from the start of trackage rights operations, and to be payable after terms were determined. This approach was specifically affirmed and held to satisfy former 49 U.S.C. § 11103(a), which was substantively identical to Section 11102(a), in *Southern Pacific Transportation Co. v. Interstate Commerce Commission*, 736 F.2d 708, 723-24 (D.C. Cir. 1984). A similar approach should be following in this proceeding: Upon approval of this Application, BNSF should be permitted to commence operations on the Rosebluff Industrial Lead while UP and KCS negotiate the terminal trackage rights compensation payable by UP to KCS (or, failing such negotiations, while compensation terms are imposed by the Board) so that the public benefits of the Lake Charles area condition may finally be achieved without further unnecessary delay.

IV

PROCEDURAL REQUEST AND PROPOSED PROCEDURAL SCHEDULE

Neither the Board's regulations nor its precedent set out the procedures applicable to terminal trackage rights applications, particularly in a case in this procedural posture—that is, a case in which there are no related proceedings currently pending when a railroad has sought terminal trackage rights pursuant to the Board's imposition of merger conditions. In the face of

this procedural uncertainty, BNSF respectfully suggests that the Board conduct this proceeding under the modified procedures set forth in 49 C.F.R. § 1112.

The use of the modified procedures is warranted here because “substantially all material issues of fact can be resolved through submission of written statements, and efficient disposition of the proceeding can be accomplished without oral testimony.” *Id.* § 1112.1. Indeed, many of the issues that might otherwise complicate a terminal trackage rights application have already been resolved: KCS already has conceded that the trackage at issue is within a terminal area, and the Board already has determined that the public interest warrants direct service to Lake Charles area shippers by BNSF. The outstanding issues, to our knowledge, relate to readily-resolvable operational questions. Thus, this is an appropriate case for the use of the modified procedures.¹²

Consistent with the mandate in 49 U.S.C. § 11102(d) for the completion of proceedings under Section 11102(a) and (b) within 180 days, BNSF’s proposes the following procedural schedule:

PROPOSED PROCEDURAL SCHEDULE

Day 1	Filing of the instant Application
Day N	Board adoption of procedural schedule
Day N + 30	BNSF Opening Statement and Evidence Due
Day N + 60	Replies and Reply Evidence Due
Day N + 90	BNSF Rebuttal Argument and Evidence Due
Day 180	Board Decision

¹² In the event that the Board determines not to order the use of the modified procedures in this proceeding, BNSF requests that it be provided an opportunity to submit its evidence in support of this Application within 30 days of the Board’s order on the procedures to be applied to this proceeding.

V

CONCLUSION

For the reasons stated above, Applicant BNSF Railway Company respectfully requests that this Application be accepted, that the Board commence a proceeding on this Application under the Board's modified procedures, that the Proposed Procedural Schedule be adopted, and that this Application for terminal trackage rights as herein described be GRANTED.¹³

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Counsel for BNSF Railway Company

Dated: February 27, 2013

¹³ If this Application is denied, BNSF will promptly request, consistent with the Board's conclusion in Decision No. 63, that the Board override any provisions in the four joint facility agreements that may require KCS's consent to BNSF's use of joint UP/KCS trackage in order for BNSF to directly access shippers in the Lake Charles area.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2013, copies of the foregoing Application of BNSF Railway Company for Terminal Trackage Rights has been served by first-class U.S. Mail on all parties as listed on the Board's website for the service list in Finance Docket No. 32760.

A copy of the Application of BNSF Railway Company for Terminal Trackage Rights has also been served on counsel Union Pacific Railway Company and Kansas City Southern Railway Company.

Adrian L. Steel, Jr.

EXHIBIT 1



Chris Bigoness
*Manager Merger Customer
Access
Network Strategy*

BNSF Railway Company
2500 Lou Menk Drive
AOB 3rd Floor
Fort Worth, TX 76131
Phone: 817-867-6697
Fax: 817-352-7154
Email: chris.bigoness@bnsf.com

May 24, 2012

Mr. Daniel P. Hartmann
Senior Director Interline
Union Pacific Railroad Company
1400 Douglas Street, STOP 1350
Omaha, NE 68179

Re: Change of Service to 50/50 Customer – Citgo in West Lake Charles, LA

Dear Dan,

Pursuant to an Agreement between BNSF and UP dated September 1, 2000, Section 2.1(e) ("50/50 Line Agreement"), this letter shall serve as notice of BNSF's intent to change its method of service to Citgo at 4401 Highway 108, Lake Charles, LA 70601.

BNSF intends to change its method of service by instituting direct service to the Citgo facility. This change of service is planned to commence 180 days from the date of this letter (November 20, 2012) and will be in conformity with the terms of any applicable agreements between BNSF and UP. BNSF's local Operations personnel will contact UP's local Operations personnel to discuss any concerns.

In accordance with Section 2.1(e) of the 50/50 Line Agreement, you are required to notify BNSF in writing of your approval or disapproval of the manner in which the service will be provided within 22 days (June 15, 2012) of receipt of this letter.

Sincerely,

Christopher P. Bigoness
Manager Merger Customer Access
BNSF Railway

EXHIBIT 2

June 21, 2012

Mr. Chris Bigoness
Manager Network Development
BNSF Railway
2500 Lou Menk Drive, 3rd Floor AOB-3
Fort Worth, TX 76131

Re: Change of Service to 50/50 Customer – Citgo, W. Lake Charles, LA

Dear Chris:

Union Pacific received your letter, dated May 24, 2012, regarding BNSF's request to change its method of service to Citgo at 4401 Highway 108, Lake Charles, LA 70601. BNSF requested a change in the service to direct service by BNSF to the Citgo facility. UP currently handles BNSF cars to and from Citgo via a switch from the Rosebluff Yard that requires a multiple of UP moves to get in and out of the complex.

You asked for UP's response by June 15. However, the unique circumstances at Lake Charles required UP to conduct an extensive internal review. As a result, we have identified several major issues relating to BNSF's request and we are unable to agree to BNSF's direct access at this time. The obstacles to approval of BNSF's proposal include the following:

- The track needed to access the Citgo complex runs through the Rosebluff Yard, a yard that is jointly owned and shared by UP and KCS. KCS manages the yard area and allocates to UP a twelve hour window to operate within the yard and coordinate 10 daily switch jobs needed to serve Citgo and an additional ten customers in the area. KCS has the other twelve hour window to serve its customers in the Lake Charles area. BNSF direct access to Citgo would impede and severely impair UP and KCS operations needed for other customers in Lake Charles. BNSF would need operational concurrence from KCS in order to operate through the yard and related track.
- BNSF's operating officers in the Lake Charles area previously indicated to UP that BNSF would use six-axle locomotives to serve the Citgo facility directly. However, the track structure coming off UP's Lafayette subdivision cannot support six-axle road locomotives. Significant track infrastructure improvements would need to be made to support road locomotives.
- The track layout within Citgo's facility is not designed to receive or handle unit train volumes. A loop track would need to be constructed within the facility to support unit train volumes without impairing other operations in and around the Citgo facility.
- The track configuration from the main line to the complex, the Rosebluff Industrial Lead, includes a near 90 degree turn. This configuration makes unit train operations challenging and time consuming, if not virtually impossible without impeding service to other Lake Charles area customers. Significant track infrastructure improvements would need to be made to address this issue.



These and other critical issues lead UP to conclude that BNSF direct access to Citgo's refinery, especially for unit trains using six axle road locomotives, is not feasible now and unlikely to be feasible by November 20 -- BNSF's projected start-up date. Unless and until major track infrastructure improvements are completed in this area and KCS provides its operational concurrence, UP cannot agree to BNSF's election to serve the Citgo facility directly. The addition of BNSF's direct operations in this area would have a major impact on UP's ability to operate efficiently and serve the myriad of customers in Lake Charles who get rail service via the same track structure that BNSF would have to use for its direct service.

We are willing to explore this further with you and others at BNSF. Please provide any additional information you might want UP to consider.

Sincerely,



Daniel Hartmann
Senior Director – Interline Marketing
Network and Industrial Development
402 544 3169

dphartma@up.com

CC: B. Maher, L. Wzorek, E. Davies, G. Sturm, O. Durkin, C. Sanford, M. White

EXHIBIT 3



Chris Bigoness
*Manager Merger Customer
Access
Network Strategy*

BNSF Railway Company
2500 Lou Menk Drive
AOB 3rd Floor
Fort Worth, TX 76131
Phone: 817-867-6697
Fax: 817-352-7154
Email: chris.bigoness@bnsf.com

November 2, 2012

Mr. Daniel P. Hartmann
Senior Director Interline
Union Pacific Railroad Company
1400 Douglas Street, STOP 1350
Omaha, NE 68179

Re: Change of Service to 50/50 Customer – Citgo in West Lake Charles, LA

Dear Dan,

BNSF has received UP's reply of June 21, 2012 regarding BNSF's change of service notification for Citgo at 4401 Highway 108, Lake Charles, LA 70601.

In its reply, UP highlighted several issues related to unit train service and KCS approval that prevented it from agreeing to BNSF's plan for direct service to Citgo. For the past four months, BNSF has attempted to work with UP to address these alleged issues. With respect to KCS, please see the attached email dated July 30, 2012.

UP's concerns regarding unit train service are not relevant at this time as BNSF will serve Citgo directly using four axle locomotives to move traffic in manifest quantities. This service will begin on November 20, 2012 as stated in our original service notification. BNSF will coordinate operations with local UP and KCS operating personnel as needed.

Sincerely,

Christopher P. Bigoness
Manager Merger Customer Access
BNSF Railway

Bigoness, Chris

From: Bailiff, Sarah W
Sent: Monday, July 30, 2012 4:00 PM
To: George Sturm
Cc: Daniel P. Hartmann; Christopher C. Dale; Larry E. Wzorek; Elisa B. Davies; Bigoness, Chris; Estes, Courtney B; Rankin, David T; Stephens, William M
Subject: RE: BNSF Change of Service Request for Citgo - UP Response

George,

Thanks for looking into this per our conversation last week.

We were not planning to respond to UP's June 21 letter until we had a better understanding of UP's operational concerns and perhaps an opportunity to address them. The concerns we discussed last week were (1) the perceived inability to get much dialogue going on a priority basis with your local operating team; and (2) UP's initial stance on the KCS issues as referenced in Dan Hartmann's June 21 letter.

As for the status of responses, etc., here is some of the chronology, as I understand it:

July 3, 2012 - Dan Hartmann and Chris Bigoness discussed UP's June 21, 2012 letter, as Chris wanted clarification of some issues. I'm advised by Chris that Dan had suggested that rather than exchange a volley of emails and documents back and forth, that the operational issues might be better addressed by a designated operating contact.

July 9, 2012 - Dan Hartmann forwarded contact info for Mr. Chris Dale, MTO, and Chris Bigoness responded by email to Dan Hartmann on that same date, advising he had forwarded Chris's contact info on to Marc Stephens, BNSF's General Director based in Spring.

July 10, 2012 - Dan Hartmann forwarded to Chris Bigoness additional contact info for Mr. Charles Schlatre, Director Transportation Services (presumably Mr. Hale's superior).

July 24, 2012 - Marc Stephens spoke with Mr. Schlatre, who was unprepared to discuss UP's access issues at Lake Charles. Marc requested a meeting, and Mr. Schlatre was not going to be available for another couple of weeks.

Today - Marc Stephens sent another email to Mr. Schlatre requesting an on site meeting.

As for the KCS issues, as I mentioned last week, the question of whether BNSF has the right to access Citgo at Lake Charles, over objection of KCS was resolved a long time ago. KCS's petition to reject BNSF's direct access to Lake Charles, Westlake, and West Lake Charles (granted pursuant to the CMA Agreement, the original UP/SP Settlement Agreement and Decision 44) was denied by the STB back in 1996 in Decision No. 63, FD 32760. Certainly, some dialogue concerning integration of our direct service along with UP and KCS may be appropriate, but ultimately we do not believe KCS concurrence (whether that concurrence is phrased as "operational" or otherwise) is an appropriate condition on our direct access as Mr. Hartmann had suggested in his June 21 letter. Accordingly, while we will certainly have our local operating personnel make efforts to resolve any issues that should reasonably be addressed concerning joint operations into Citgo, we do not believe outright denial of direct access previously granted to BNSF would be appropriate.

Sarah
817-352-2354

From: George Sturm [mailto:GSTURM@up.com]
Sent: Monday, July 30, 2012 9:58 AM
To: Bailiff, Sarah W
Cc: Daniel P. Hartmann; Christopher C. Dale; Larry E. Wzorek; Elisa B. Davies
Subject: Fw: BNSF Change of Service Request for Citgo - UP Response

Sarah,

This is in regard to the discussion you and I had about Lake Charles. To my knowledge, UP has not received any written response from BNSF to Dan Hartmann's note of July 9 (below) or to his letter of June 21, 2012. Has BNSF contacted Mr. Dale? Please let me know. Thanks.

From: Daniel P. Hartmann/UPC
To: Chris.Bigoness@BNSF.com
Cc: Larry E. Wzorek/UPC@UP, George Sturm/UPC@UP, Owen J. Durkin/UPC@UP, Chris Sanford/UPC, Christopher C. Dale/UPC@UP
Date: 07/09/2012 10:45 AM
Subject: Citgo and GT Logistics UP Operating Contact

Chris,

As we discussed, please have your local operating personnel contact the following UP Manager of Terminal Operations in Lake Charles, LA regarding the following items:

1. BNSF's operating plan to hold unit trains on its line in the event GT Logistics, Port Arthur, TX is unable to receive the train.
2. BNSF's questions regarding the operating challenges involved with moving unit trains to Citgo, West Lake Charles, LA.

Mr. Christopher Dale
Manager Terminal Operations
Union Pacific Railroad
Ph: (402) 501-4552

Please let me know if you have any questions.

Thank you,
Dan H.

Daniel P. Hartmann
Sr. Director Interline Marketing
Union Pacific Railroad | Marketing & Sales
Ph: 402.544.3169 | Fax: 402.501.2243

----- Forwarded by George Sturm/UPC on 07/30/2012 09:23 AM -----

From: Daniel P. Hartmann/UPC
To: Chris.Bigoness@BNSF.com
Cc: james.titsworth@bnsf.com, connie.wilson@bnsf.com, Brian G. Maher/UPC@UP, Larry E. Wzorek/UPC@UP, George Sturm/UPC@UP, Owen J. Durkin/UPC@UP, Chris Sanford/UPC, Mark White/UPC@UP

Date: 06/21/2012 11:06 AM
Subject: BNSF Change of Service Request for Citgo - UP Response

Chris,

Attached please find UP's response to your letter dated May 24, 2012 concerning BNSF direct access to Citgo, West Lake Charles, LA. Please contact me if you have any questions.

Best regards,

Dan H.

(See attached file: Citgo, Change in Service Request - 06212012 - Final.pdf)

Daniel P. Hartmann
Sr. Director Interline Marketing
Union Pacific Railroad | Marketing & Sales
Ph: 402.544.3169 | Fax: 402.501.2243

**

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EXHIBIT 4

November 20, 2012

Mr. Chris Bigoness
Manager Network Development
BNSF Railway
2500 Lou Menk Drive, 3rd Floor AOB-3
Fort Worth, TX 76131

Re: Change of Service to 50/50 Joint Line Customer – Citgo, W. Lake Charles, LA

Dear Chris:

Union Pacific received your letter, dated November 2, 2012, regarding BNSF's request to change its method of service to Citgo at 4401 Highway 108, Lake Charles, LA 70601. In your letter, you stated that UP's concerns regarding direct unit train service to the facility are not relevant at this time as BNSF will serve Citgo directly using four axle locomotives to move traffic in manifest quantities.

Citgo's rail operations are governed by a tri-party Industry Track Agreement (ITA) between Citgo, UP and KCS. In order to maintain fluidity for all users, BNSF must abide by the same volume restrictions as UP, and agreed upon by Citgo in the ITA. Please refer to the Capacity Section of the ITA below for a description of those restrictions (a complete copy of the ITA is attached for your further reference). Please note that the parties are currently in negotiations concerning increasing the maximum daily restriction from 24 cars per day to 30 cars per day.

With the current track structure supporting this location, the facility at which the Track is located (the "Facility") can accommodate maximum volumes of 24 railcars per day and 480 railcars per month. If at any time Industry projects or reasonably should anticipate that it will exceed these volumes, Industry shall immediately so notify Railroad. Prior to exceeding these volumes, Industry shall provide, at its cost, such rail infrastructure improvements and/or improved operating procedures to support the increased volumes as may be required by Railroad in its sole discretion. Such required improvements may relate to Industry or Railroad owned trackage. Industry shall submit all plans for infrastructure improvements to Railroad in advance for approval.

Please notify UP in advance if BNSF wishes to serve Citgo with unit train service at some future point so UP and BNSF can conduct detailed discussions regarding mitigating the operational impacts that unit train operations will create.

As stated in your letter, your commitment to coordinating operations with local UP and KCS operating personnel is appreciated. We will be monitoring operations in the area to ensure service does not deteriorate for other customers and will work with BNSF if any concerns arise.



Sincerely,



Daniel Hartmann
Senior Director – Interline Marketing
Network and Industrial Development
402 544 3169

dphartma@up.com

CC: B. Maher, L. Wzorek, E. Davies, D. Hughes, G. Sturm, O. Durkin, C. Sanford, M. White

EXHIBIT 5

From: Weicher, Richard E
Sent: Friday, December 14, 2012 2:57 PM
To: jwochner@kcsouthern.com
Cc: DReeves@KCSouthern.com; Rankin, David T; Weicher, Richard E
Subject: Lake Charles

Jim-

In reference to my call and message, this is to outline the background of BNSF's rights to access at lake Charles in light of an issue that seems to have arisen concerning the upcoming movement of a train at Lake Charles.

- As a result of the UP/SP merger, BNSF was granted trackage rights to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles.
- After the merger, KCS filed a petition with the Board seeking to reject BNSF's direct access to Lake Charles, which was denied by the Board in Decision No. 63, FD 32760.
- In Decision 63, KCS argued that neither UP nor the Board could authorize BNSF to conduct trackage rights operations in the Lake Charles area subject to four old joint facility agreements between KCS and UP, which prohibit UP from granting BNSF access without KCS' consent.
- The Board declined to resolve the matter and stated that if UP, BNSF and KCS could not come to an agreement as to the terms of the old joint facility agreements, KCS could submit the matter to arbitration. To our knowledge, KCS has not submitted such a question to arbitration.
- The Board further decided that if KCS and UP were to arbitrate the old joint facility agreements and the arbitration resulted in a situation where BNSF access were blocked, BNSF could return to the Board and seek approval of a terminal trackage rights application.
- On September 1, 2000, UP and BNSF entered into the 50/50 agreement whereby UP gave BNSF direct access on the 50/50 line to the Lake Charles area.
- On May 24, 2012, BNSF notified UP of its intention to institute direct service to Citgo at Lake Charles.
- If KCS has a concern with the direct service authorized by the Board and memorialized in our agreements with UP then it may initiate arbitration with UP under its agreement as suggested by the Board; but it may not unilaterally act to deny BNSF access.

I look forward to discussing further. I think you have all my numbers, but my cell for later today or over the weekend is
Thanks much. .

Rick Weicher

CONFIDENTIALITY NOTICE-

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified

EXHIBIT 6

From: Jim Wochner [mailto:JWochner@KCSouthern.com]
Sent: Tuesday, December 18, 2012 4:29 PM
To: Weicher, Richard E
Subject: BNSF Access Westlake

Rick

In response to your December 14, 2012 email and your phone call, KCS does not agree that BNSF has the right to directly serve any shipper in the Westlake/West Lake Charles KCS/UP joint facility ("Joint Facility"). The various UP/SP merger decisions allow BNSF to receive traffic in the Joint Facility via an interchange with either Union Pacific or KCS, but BNSF does not have the right to physically enter onto Joint Facility tracks and physically serve shippers in this Joint Facility.

Service to Joint Facility shippers is governed, either in whole or in part, by five separate agreements between KCS and UP's predecessors. The terms of the various contracts, applicable to the Joint Facility agreement, require the consent of both UP **and** KCS to admit additional carriers. These agreements provide that neither UP nor KCS can sell, lease, transfer, assign, or otherwise grant an interest in or the right to use the Joint Facility tracks to another carrier (e.g., BNSF) without the consent of the other party to the agreements. Thus, while BNSF may have believed it obtained contractual rights to operate over the tracks in the Joint Facility to directly serve CITGO and other shippers, UP could not grant such rights absent KCS's consent, which KCS has not given. Any attempt by UP to grant BNSF such rights without KCS's consent is ineffective to transfer any rights to BNSF.

Indeed, following these long standing principles, BNSF was required to file terminal trackage rights applications under §11102 in order to compel KCS to allow BNSF access over small segments of KCS track in Beaumont and Shreveport. This process was required even though BNSF's access was necessary to implement the BNSF Settlement Agreement and notwithstanding that UP (SP) had, prior to the merger, certain contractual rights to operate over those small segments of KCS track. Contrary to BNSF's position here, UP simply (or SP) could not, as a matter of contract, grant BNSF access over KCS's tracks without applying under §11102. Likewise, when CSX, in the Conrail transaction, sought to obtain access over the Gateway Western's tracks (a non-applicant carrier) in order to implement portions of that merger, CSX was required to file a terminal trackage rights application notwithstanding the fact that Conrail also had contractual rights to operate over the Gateway Western and such rights were being transferred to CSX. Conrail could not simply assign or sell its rights to CSX absent Gateway's consent without applying under §11102.

For BNSF to directly serve shippers in the Westlake/West Lake Charles Joint Facility, an agreement with KCS **and** UP must be reached voluntarily or BNSF must be granted access via arbitration or an STB order compelling KCS to provide direct BNSF access. KCS has not consented to BNSF serving CITGO directly.

Hopefully, this issue can be resolved through negotiation rather than extended litigation and/or arbitration.

Sincerely,

This email and any attachments to it may be privileged, confidential and/or otherwise protected from disclosure. If you believe you have received this email in error, please contact the sender immediately and delete all copies. If you are not the intended recipient, you may not copy this message or disclose its contents to anyone.

EXHIBIT 7



SARAH W. BAILIFF
*Assistant Vice President
Contracts and Joint Facilities*

BNSF Railway Company
2600 Lou Menk Drive
Fort Worth, Texas 76161-0034
P.O. Box 961034
Email: Sarah.Bailiff@bnsf.com
Phone: (817) 352-2354
Fax: (817) 352-7529

January 9, 2013

Mr. George Sturm
General Manager, Joint Facilities
Union Pacific Railroad Company
1400 Douglas Street, MS 1180
Omaha, Nebraska 68179

Re: Direct Access to CITGO at West Lake Charles, LA

Dear George:

As you are aware, on May 24, 2012, BNSF advised UP by letter that BNSF intended to serve a Lake Charles, Louisiana area facility owned by CITGO by direct BNSF train service. BNSF has the right to provide direct service under Section 5(c) of the Restated and Amended Settlement Agreement ("RASA") (which was imposed as a condition to the UP/SP merger by the Surface Transportation Board ("Board" or "STB")) as well as Section II.2 of the February 12, 1998 Term Sheet Agreement between UP and BNSF pursuant to which two carriers exchanged equal 50 percent interests in the former SP line between Dawes, TX and Avondale, LA. Section 2.1(e) of the September 1, 2000 50/50 Line Operating Agreement also provides BNSF with the right to use direct service.

On the eve of the long-planned cutover to direct service, UP informed BNSF that it would not permit BNSF direct access to the Lake Charles area. The reason cited by UP for denying such access at the eleventh hour was that UP was acquiescing to KCS's resurrected claim that KCS' consent was required under four joint facility agreements between KCS and T&NO (an SP predecessor).

In the STB's 1996 Decision No. 63 in the UP/SP merger proceeding, KCS petitioned the STB to reopen and reconsider the STB's prior approval of trackage rights provided for in the CMA Settlement Agreement, as modified by Decision No. 44, to allow BNSF: (1) to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and Westlake, LA; and (2) to handle traffic of shippers open to SP and KCS at West Lake Charles, LA. KCS's petition was denied at that time, and the Board acknowledged that if the parties were unable to come to an agreement on BNSF access, any differences could be submitted to arbitration by KCS or SP under the terms of their joint facility agreements.

Upon the issuance of Decision No. 63 in 1996, it became incumbent on UP to resolve -- either by mutual agreement or by arbitration -- KCS's claim that BNSF direct access to Lake Charles area shippers is allegedly prohibited under the joint facility agreements as anticipated by the Board. It has, however, now been over 16 years since the Board's decision, and apparently UP and KCS have still not taken any steps to resolve the access dispute between them. Meanwhile, BNSF's rights were never revoked by the STB, and they remain operative.

Accordingly, BNSF requests confirmation of UP's intent to honor its agreements to provide BNSF direct access to the CITGO facility as contemplated in the RASA, Decision No. 44, Decision No. 63, the 50-50 Line Agreement and the CMA Agreement. If such access requires resolution of the UP-KCS dispute under agreements to which BNSF is not a party, UP has had ample notice that it should have undertaken arbitration as noted by the Board in order to provide such access within the time frames set forth in the RASA. If UP continues, in coordination with KCS, to deny rights of direct effective competitive access previously granted by UP and approved by the STB, BNSF will be forced to immediately pursue all of its rights and remedies, including seeking enforcement from the STB.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sarah W. Bailiff".

Sarah W. Bailiff

AVP Contracts and Joint Facilities

EXHIBIT 8

UNION PACIFIC RAILROAD COMPANY

1400 Douglas Street,
Omaha, Nebraska 68179-1180

George M. Sturm, General Manager
Joint Facilities

Via Electronic Mail

January 18, 2013

Sarah Bailiff
Assistant Vice President, Contracts and Joint Facilities
2600 Lou Menk Drive
Fort Worth, TX 76161-0034

Re: Access to CITGO at West Lake Charles, Louisiana

Dear Sarah:

This letter responds to your January 9, 2013 letter regarding access to CITGO at West Lake Charles, Louisiana.

UP disagrees with BNSF's characterization of its rights to the Lake Charles, West Lake and West Lake Charles area. UP also disagrees with BNSF's characterization that, upon the issuance of Decision No. 63 in 1996, it somehow became incumbent upon UP to resolve the access issue with KCS. BNSF's assertion is in clear contravention of the STB decision and the process the STB outlined for resolution described in Decision 63. The most productive path forward is for the three rail carriers to discuss how service can be accomplished in a way that promotes safe and efficient service by any of the carriers to all customers on the line.

In the events leading up to Decision No. 63 in the UP/SP merger proceeding, BNSF maintained that it had the right to access the West Lake Charles area by reciprocal switch. Note that there is no discussion as to direct service in the Decision. Furthermore, the Board specifically stated that it was not resolving the issue of access in Decision No. 63 (at page 5). Rather, the Board set forth a procedure for resolving the questions of access.

The Board specified the following process:

- (1) "[A]s to the terms of the four KCS/T & NO Joint Facilities Agreements, if the parties (KCS, BNSF, and UP/SP) are not able to come to an agreement, any differences in interpretation of the four joint facilities agreements may be submitted to arbitration under the terms of those agreements."
- (2) The Board footnotes that, to the extent the parties (KCS, BNSF, and UP/SP) cannot first agree, BNSF may then request that "SPT" invoke arbitration under the four joint facilities agreements.



January 18, 2013
Sarah Bailiff, BNSF

(3) And that, "if the parties (KCS, BNSF, and UP/SP) are unable to agree and the arbitral interpretation produces a situation where BNSF access to the Lake Charles area is blocked, BNSF may return to the Board to seek approval of a terminal trackage rights application under new 49 U.S.C. §11102(a)...."

In its communications with UP, it seems that BNSF now claims a preferential right over KCS and UP, the owning carriers of the branch line, which would interfere with KCS and UP service to CITGO and other customers. BNSF is not entitled to more favorable access than either KCS or UP. All three carriers have to cooperate to ensure fluid operations and to avoid impeding service.

Finally, your letter mischaracterizes UP's responsiveness to BNSF on this topic. You portray UP as having prevented BNSF direct access to CITGO traffic since 1996. That is false. BNSF has accessed and delivered traffic to the area via reciprocal switch by UP for years. BNSF stated its insistence on direct service for the first time on May 24, 2012 – not 16 years ago.

In an effort to clarify the facts, I attach a brief synopsis of the communications that led to this letter exchange. UP has indicated and stands by its willingness to assist in the facilitation of conversations with KCS in order to accommodate UP, KCS and BNSF's service to customers in the West Lake Charles area.

Sincerely,


George M. Sturm

cc: Gayla L. Thal, Senior Vice President and General Counsel, UP
William J. Wochner, Senior Vice President and Chief Legal Officer, KCS



SUMMARY OF COMMUNICATION

- May 24, 2012 - BNSF sent a letter notifying UP of its intention to change its method of service to CITGO from reciprocal switch to direct service.
- June 21, 2012 - UP responded with a letter describing the operational challenges surrounding BNSF directly serving CITGO including track conditions that could lead to derailments. UP denied the request, but expressed willingness to explore this further with BNSF together with KCS.
- July 30, 2012 – BNSF emailed UP requesting an on-site meeting to inspect the operational issues UP identified in its June 21 letter.
- October 2012 – UP/BNSF on-site meeting among local operating officers to inspect the tracks/operations.
- November 2, 2012 - BNSF sent a letter notifying UP that (i) UP's unit train concerns are not relevant, (ii) BNSF will directly serve the facility with 4 axle locomotives in manifest quantities effective as of November 20, 2012, and (iii) BNSF will coordinate operations with local UP and KCS operating personnel as needed.
- November 20, 2012 - UP responded with a letter reminding BNSF of the ITA in place between UP-KCS-CITGO and BNSF's obligation to abide by the volume restrictions and other ITA provisions.
- December 17th - December 20th, 2012 – Various UP/BNSF communications regarding impending unit train delivery into CITGO facility. UP responded that UP/BNSF/KCS must agree on a plan that ensures safe operations, shared and managed use of capacity (including cost sharing).



EXHIBIT 9

UNION PACIFIC CORPORATION
1400 Douglas Street, Stop 1580
Omaha, Nebraska 68179

Gayla L. Thal Sr. Vice President, Law & General Counsel

P 402 544 4831
gaylathal@up.com

February 4, 2013

William J. Wochner
KCS Railway
Chief Legal Officer
427 W 12th Street
Kansas City, MO 64105

Roger Nober
BNSF Railway Company
Chief Legal Officer
2650 Lou Menk Drive
Fort Worth, TX 76131

Re: Access to CITGO at West Lake Charles, Louisiana

Gentlemen:

As you both know, as a result of the Surface Transportation Board's decision in *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996), BNSF has the right to handle traffic of shippers who were open to SP and KCS in West Lake Charles prior to the UP/SP merger. Since the UP/SP merger, BNSF has handled such traffic through interchange with UP and KCS. However, BNSF requested direct access to CITGO's West Lake Charles facility in mid-2012. UP pointed out in response to BNSF the need to resolve operational issues. Before those issues were resolved, BNSF insisted on moving its own trains directly to CITGO. KCS objected to such access.

The STB has previously addressed the issue of BNSF access to shippers in West Lake Charles and the Lake Charles area more generally. In *Union Pacific/Southern Pacific Merger*, Decision No. 63 (served Dec. 4, 1996), the STB addressed KCS's assertion that KCS has veto power over BNSF access as the result of the terms of the joint facility agreements governing UP's rights in the Lake Charles-area tracks at issue. The STB did not resolve the matter at that time. Rather, the STB set forth a procedure for resolving disputes over access. The STB directed the parties (KCS, BNSF, and UP): (i) to attempt to mutually agree on BNSF access, and (ii) in the event of the parties are unable to come to an agreement, to pursue arbitration under the joint facilities agreements. The Board also said that in the event an arbitration produces a situation in which BNSF access to the Lake Charles area is blocked, BNSF may return to the Board to seek approval of a terminal trackage rights application, and if the application is denied, an override of the joint facility agreements might be necessary under old 49 U.S.C. 11341(a).

In order to attempt to resolve this issue by mutual agreement pursuant to the STB's directive in Decision No. 63, UP would like to invite KCS and BNSF to meet and discuss and resolve how all three carriers can serve the Lake Charles area. We suggest that each railroad send one representative each from our Operating and Law departments. Union Pacific would be happy to host, but defer to your direction on where it would be most convenient to meet.

We look forward to hearing from you and meeting face-to-face to discuss these issues.

Sincerely,

Gayla L. Thal

cc: Lance Fritz, Executive Vice President Operations, UP

