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December 30, 2015

VIA E-FILING

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

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

Dear Ms. Brown:

The Kansas City Southern Railway Company (“KCS”) hereby files, via e-filing, its Brief in opposition to BNSF’s terminal trackage rights application. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

BRIEF OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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Railway Company**

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SUMMARY OF ARGUMENT

Nearly twenty years ago, UP, BNSF,¹ and what was then known as the Chemical Manufacturers Association (“CMA”) negotiated an agreement to resolve the competitive concerns that many chemical and plastic shippers had with the UP/SP merger. The CMA Agreement was later fully incorporated into the BNSF Settlement Agreement and imposed as a condition to the merger.² Part of the CMA Agreement dealt with certain infrastructure and competitive issues related to the Lake Charles Area and, as incorporated in the BNSF Settlement Agreement, granted BNSF “the right to handle traffic of shippers open to...SP and KCS at West Lake Charles.”³ How BNSF would “handle” this traffic was left open by Decision No. 63.

¹ Acronyms and Capitalized terms have the meaning set forth in KCS’s Reply and KCS’s Rebuttal. Citations to pleadings filed in this proceeding are to pages in the Highly Confidential version of the pleadings.

² The last 2 recitals of the BNSF Settlement Agreement (p. 2 of the March 1, 2002 filing) clearly state that the agreement incorporates all changes agreed to by UP and BNSF and imposed by the Board, "(including the CMA Agreement, as modified by the STB)." BNSF's argument that the CMA Agreement granted BNSF trackage rights on the Rosebluff Lead directly conflicts with the March 1, 2002 joint BNSF-UP filing of the BNSF Settlement Agreement. See KCS Reply 20-24.

³ CITGO is in West Lake Charles.

The purpose of the Lake Charles Condition was to ensure that in a post-merger environment the shippers in Lake Charles would continue to have alternative competitive choices to UP. After some dispute over what that condition meant and whether it was justified, the Board issued Decision No. 63. Since then, BNSF has served the Lake Charles Area via switching and haulage rights. Such switching access by BNSF actually improved CITGO's competitive position from being served by only two carriers (SP and KCS) to three (UP, KCS, and BNSF).

Sixteen years later, BNSF sought to change its access. But there is no basis to change BNSF's access. The presence of both KCS and BNSF has provided CITGO with the strong competitive alternatives to UP contemplated by the Lake Charles Condition. There is, simply, no competitive harm to CITGO from the UP/SP merger that remains to be remedied, certainly not by the imposition of intrusive terminal trackage rights.

BNSF says the issue of whether it is competing doesn't matter because the Lake Charles Condition gave it trackage rights, and the Application is a mere technicality to implement those trackage rights. However, application of Section 11102 is not a mere technicality. The terms in the statute have meaning and precedent behind them. BNSF, like any other shipper or carrier seeking to invoke Section 11102(a), must meet these standards. BNSF has not met any of those tests.

As an initial matter, BNSF is wrong that the agreements between UP and BNSF, which the Board imposed, granted BNSF trackage rights on the Rosebluff Lead. Those agreements and conditions for West Lake Charles contained only switching and haulage terms, not terms of trackage rights. BNSF was merely granted the "right to handle" such traffic, which it has been doing and quite effectively.

However, even if BNSF's access was intended to be via trackage rights, the Board cannot implement those trackage rights through Section 11102 without complying with the terms and precedents of that statute. BNSF has not met those standards. First, BNSF has not met any of the

three well-established public interest standards under Section 11102(a). Second, BNSF has not presented a practicable operating plan or shown that it would not substantially impair KCS's and UP's service to other shippers served by the Rosebluff Lead. Finally, BNSF's refusal to pay for use of KCS property is also fatal to the Application.

If its Application is denied, BNSF claims that the Board should simply override the terms of any agreement that would prevent BNSF access. But BNSF's request for an override under Section 11321(a) is deficient. An override cannot be considered "necessary," or even invoked, if the override involves terminal tracks for which Section 11102 applies. Even if Section 11321(a) could be invoked by BNSF, such a right is not self-executing in this case. It would require a Board finding. Further, BNSF has not identified what contractual provisions it believes the Board should override. BNSF is also the wrong party to assert its use. That party is UP. The override request should be denied.⁴

In short, this proceeding is not about whether BNSF can fulfill the competitive role envisioned by the Board in the Lake Charles Area. BNSF has in fact been fulfilling that role for nearly twenty years. This proceeding is really about BNSF trying to obtain forced access over the private property of KCS, in direct contradiction to private contracts governing that property and to long-standing jurisprudence. BNSF's Application should be denied.

⁴ BNSF is not without other remedies. BNSF can seek to reopen the merger and seek modifications to the Lake Charles Condition. BNSF can also seek, either in court or through arbitration, an authoritative judicial interpretation of what the joint facility contracts governing the Rosebluff Lead mean. Failing any relief, if BNSF believes it has certain contractual rights that can't be implemented, BNSF can pursue any contractual claims it may have with UP.

ARGUMENT

I. ACCESS BY BNSF TO LAKE CHARLES HAS MORE THAN FULFILLED THE PURPOSE UNDERLYING IMPOSITION OF THE LAKE CHARLES CONDITION

A. The Purpose Of The Lake Charles Condition Was To Preserve Competition

The Lake Charles Condition stems from the CMA Agreement, which resolved competitive concerns raised by chemical and plastics shippers. The CMA Agreement gave BNSF certain rights to handle traffic of Lake Charles and Westlake shippers. It did not grant BNSF access to West Lake Charles, i.e. the Rosebluff Lead. The CMA Agreement did not contain financial or operating terms for terminal trackage rights in the Lake Charles Area. Instead, the CMA Agreement provided switch fees for UP to physically handle Lake Charles Area traffic and provided BNSF with haulage rights. Even the closing UP/SP briefs that extended the BNSF Settlement Agreement to include West Lake Charles did not add any trackage rights terms.

In Decision No. 44, the Board adopted the BNSF settlement as amended by the CMA Agreement and the subsequent UP-BNSF modifications to them. Because of concerns regarding KCS's (then) limited route structure (See Decision No. 63, slip. op. at 8) and the adequacy of yard and storage space for plastics and chemicals shippers, the Board expanded BNSF's access to the Lake Charles Area in various ways.⁵ KCS disagreed with that expansion, which led to Decision No. 63. Most importantly, however, neither Decision No. 44 nor Decision No. 63 granted trackage rights. Decision No. 44 never used the term "trackage rights" to describe BNSF's access. BNSF was merely given the right to "handle traffic of shippers open to ...SP and KCS at West Lake Charles." The "how to handle" such traffic was left up to the parties.⁶ Decision No. 63 made clear

⁵ See Decision No. 44, slip op. at 152-154.

⁶ Decisions No. 44 and 63 did speak of "direct" service and "single-line" service. But as KCS has previously noted, KCS Rebuttal at 8-9, these terms are marketing terms and were not intended to imply or establish that BNSF was to have physical access via terminal trackage rights. UP has likewise noted that the use of the word "direct" or "single-line" did not mean trackage rights. UP

that Decision No. 44 did not grant BNSF trackage rights on the Rosebluff Lead. Instead, it provided how BNSF could seek such rights if access to shippers there was blocked. BNSF access was not blocked. The parties implemented the Lake Charles Condition via switching and haulage access.

B. Waybill Data And Expert Testimony Shows That BNSF And KCS Are Providing A Competitive Balance To UP, Fulfilling The Lake Charles Condition

The fundamental question of this proceeding should be: are KCS and BNSF providing effective competitive alternatives to UP, fulfilling the purpose of the Lake Charles Condition? The answer to that question is yes. Because that narrowly tailored remedy⁷ is working, the Board has no legal authority to impose something else, particularly not terminal trackage rights which are the remedy of last resort.⁸

The evidence of record shows that BNSF's access via switching and haulage has enabled KCS and BNSF to be more than adequate competition to UP. BNSF's access via switching and haulage has resulted in vigorous competition between UP, BNSF, and KCS. KCS witnesses Drs. Reynolds and Neels showed that over a nearly 18-year period, BNSF's market share of Lake Charles Area traffic has steadily grown, even before BNSF invested in Lacassine Yard to support its operations in the area. Today, BNSF has a substantial market share of both inbound and outbound traffic. KCS Reply at 77-93. Drs. Reynolds and Neels also established that rates have either held

Reply at 21. In fact, BNSF today markets its service to the Lake Charles Area as "single-line" or "direct" service even though UP provides BNSF with either a switch or haulage.

⁷ See UP/SP, Decision No. 44, slip op. at 144-145.

⁸ See Shenango Inc., et. al. v. Pitts., Chartiers & Youghiogheny Ry. Co., 5 I.C.C.2d 995,1002 (1989) (as an ameliorative condition, "[t]rackage rights are a remedy of last resort for use when less intrusive remedies such as rate relief and reciprocal switching are insufficient"); Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, et al., STB Docket No. NOR 41987, et al. (STB served Jul. 28, 1997), slip op. at 7 ("[a]s we have stated on several occasions, the prescription of terminal trackage rights is an extraordinary remedy, one to be afforded only when less intrusive remedies such as rate relief, alternative through routes, or reciprocal switching are insufficient") (citations omitted).

steady or actually gone down relative to overall rate trends in the marketplace, showing that the three carriers are competing effectively. Id. Their conclusion is that BNSF does compete with both UP and KCS, and quite effectively. As such, BNSF's existing access through switching and haulage rights has allowed BNSF to fully replicate the competition that would have otherwise been lost when SP merged into UP.

Rather than disproving the analysis of Drs. Reynolds and Neels, the rebuttal by BNSF witnesses actually confirms that BNSF is an effective competitor for Lake Charles Area traffic. BNSF's analysis by Dr. Reishus took issue with the use of market shares and the definition of markets. Dr. Reishus' verified statement ("VS") claimed that BNSF has not effectively replaced SP; that the failure to properly define the market makes any rate analysis unreliable; and that past and current evidence does not show that BNSF could be an effective competitor in the future.

However, nowhere did Dr. Reishus claim that BNSF was not currently an effective competitor or had not been an effective competitor. He certainly didn't prove that terminal trackage rights are necessary to resolve an alleged loss of competitive options for CITGO or other Lake Charles Area shippers. At most, he claims that the inability of BNSF to deliver unit trains directly into the CITGO facility is "inconsistent with the preservation of competition that could have been provided by an independent SP." BNSF-124, VS Reishus at 3.⁹

There are several fundamental flaws in Dr. Reishus' analysis. As an initial matter, KCS's study reflected the use of the Lake Charles BEA as the relevant market. Using a BEA as the

⁹ Of course this statement completely ignores the fact that BNSF is seeking better access to CITGO than what KCS itself has. KCS is limited to delivering unit trains of no less than 25 and no more than 30 cars directly into the CITGO facility. BNSF is seeking authority to deliver manifest traffic as well as unit trains of 60, 90, or even 120 cars.

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

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

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

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

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

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

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

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

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

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

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

competitive options increased, not reduced. Under the Board's jurisprudence and standard merger analysis, CITGO is considered as served by three carriers, not two. As such, CITGO is much better off now than before the merger. UP, the SP replacement, is much larger than SP. KCS's network is now substantially larger than it was at the time of the merger,¹⁵ and BNSF has the right to handle CITGO's traffic as well. There is no competitive harm to CITGO from the UP/SP merger.

The rest of Dr. Reishus' testimony largely focuses on the role of crude oil and the need to be able to provide unit train service to respond to a changing market environment. KCS agrees with many of the points, especially with his point that railroads "operate at a cost disadvantage to pipeline and water transportation." BNSF-124, VS Reishus at 10. CITGO has access to both water and pipeline transportation. KCS suffers from the same difficulties as BNSF in competing against these other modes. Unlike BNSF, however, KCS does not originate any crude oil movements and must rely upon interchanges with other carriers, some of which are hampered by papers barriers that BNSF itself has invoked to prevent KCS from efficiently delivering crude oil to CITGO in competition with BNSF. See KCS Reply at 42-43.

BNSF serves CITGO today, and quite effectively. In fact, BNSF has the largest share of crude oil delivery by rail to CITGO. Clearly, BNSF and CITGO are not seeking to remedy a competitive problem caused by the UP/SP merger. Rather, they are attempting to use the guise of a merger condition to obtain competitive advantages that they could not otherwise obtain, such as attempting to lower BNSF's costs,¹⁶ and gain preferred access over KCS and UP. Improving

¹⁵ The size of the then-existing KCS network gave rise to the Board's concerns about KCS not being a sufficient check on UP and provided justification, in the Board's view, for giving BNSF the right to handle Rosebluff Lead traffic. Decision No. 63, slip op. at 8. Since the UP/SP merger, KCS acquired the Gateway lines in Missouri and Illinois, and gained improved access to Mexico (a focus of the original CMA Agreement) through its affiliation with The Texas Mexican Railway Company and Kansas City Southern de Mexico, S.A. de C.V.

¹⁶ BNSF-124, VS Baranowski at 8-11. During the discovery process, BNSF consistently objected to providing information regarding BNSF's costs and profitability, but then, on rebuttal, after KCS

BNSF's profitability was not the point of the Lake Charles Condition;¹⁷ providing Rosebluff Lead shippers the choice to use BNSF or KCS as competitive options to UP was the point. CITGO has that choice, and uses that choice. There is no justification to change the condition when the condition works precisely as envisioned.

C. BNSF's Own Documents And Statements Show That BNSF Competes Effectively Against UP And KCS In The Lake Charles Area Without Terminal Trackage Rights

The Board need not rely on waybill data and expert opinion to establish that BNSF is already an effective competitor for CITGO and Lake Charles Area traffic. The record includes several documents establishing that BNSF is already an effective competitor without the need for terminal trackage rights. KCS Reply at 40-46. These documents also show that BNSF's failure until recently to invest in adequate yard space, not the lack of terminal trackage rights, limited BNSF's ability to compete. Id.

BNSF's longstanding failure to invest in adequate yard space to serve the Lake Charles Area has now been remedied through BNSF's \$31 million investment in its new yard in Lacassine, to improve BNSF's storage and service capacity. BNSF-124, VS Bredenberg at 10. BNSF would not have made such an investment if it did not believe its costs could be recouped. The record reflects that BNSF believed that the cost of the yard was fully justified notwithstanding its inability to serve CITGO through terminal trackage rights. KCS Reply at 45-46. In fact, during the pendency of this proceeding, and notwithstanding that BNSF service is currently via switching and with no commitment that it will provide direct service to shippers via terminal trackage rights, "BNSF has

had no further chance to provide an evidentiary filing, BNSF analyzed its supposed costs and profitability. BNSF's cost evidence is improper rebuttal that should be disregarded. Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway Company, NOR 42130, 2014 STB LEXIS 150, *17-18 (STB served June 20, 2014)(striking rebuttal evidence that should have been submitted in the case-in-chief).

¹⁷ Neither BNSF nor Mr. Baranowski provide any analysis or statements that BNSF's cost savings would be shared with CITGO rather than simply used to increase BNSF's profits.

competed for and won the business of two additional customers in West Lake Charles – Westlake Chemical and LyondellBasell.” BNSF-124, VS Bredenberg at 7. BNSF won this business even though it admits that it may continue to serve these customers via switching. *Id.* at 7-8. Investing in a \$31 million yard and winning the business of two major shippers using service via switching are not the actions of a carrier that believes it cannot compete without terminal trackage rights.

II. BNSF HAS NOT ALREADY BEEN GRANTED TRACKAGE RIGHTS ON THE ROSEBLUFF LEAD, AS IT CONTENDS

BNSF has also argued that the “competitive effectiveness” of the Lake Charles Condition is “not at issue in this proceeding,” BNSF-124 at 17, because, in BNSF’s views, the Lake Charles Condition always included terminal trackage rights and such rights have already been found to be in the public interest. Therefore, BNSF believes that the grant of its Application is a foregone conclusion, and there is no need to undertake a competitive analysis. BNSF’s argument ignores that its access has not been blocked and that its access has resolved the competitive problem the Board was attempting to resolve.¹⁸ More fundamentally, however, BNSF ignores that it was never granted trackage rights over the Rosebluff Lead in the first place.¹⁹ The Rosebluff Lead is not a line listed in Exhibit A of the BNSF Settlement Agreement over which BNSF was given trackage rights, and is not a “Trackage Rights Line” as defined in the BNSF Settlement Agreement. KCS Reply at 21-22; KCS Rebuttal at 9. Likewise, the CITGO facility does not meet the definitions of “‘2-to-1’

¹⁸ BNSF argues (BNSF-124 at 18-19) that KCS’s position requiring BNSF to provide evidence on competitive effectiveness of the Lake Charles Condition would mean that anytime a railroad or a shipper sought to change the way a merger condition has been implemented, such an approach would require the Board to perform a competitive analysis. In BNSF’s view, the Board could not have intended to create such an exacting process. BNSF is wrong. Over the past nineteen years there have been numerous disputes over precisely what the BNSF Settlement Agreement meant, what type of access BNSF should have, what the rates for that access should be, what the trackage rights fee should be, and numerous other issues.

¹⁹ The CMA Agreement did not provide BNSF trackage rights to CITGO over the Rose Bluff Lead. CITGO is located in West Lake Charles, a station that was not originally included in the CMA Agreement. Subsequent expansion of the Lake Charles Condition by UP and the Board merely gave BNSF the “right to handle” CITGO traffic, not trackage rights.

Shipper Facilities,” “Existing Transload Facilities,” and “New Shipper Facility” which BNSF could serve via trackage rights. Id. That BNSF was never granted trackage rights on the Rosebluff Lead as part of the Lake Charles Condition is also affirmed by UP. See UP/SP-411, UP Reply at 4-8; 18-24.

Decision No. 63, while not a model of clarity, confirmed that the Board did not view Decision No. 44 as granting BNSF terminal trackage rights. Otherwise, the Board would have said so, and would never have said that if BNSF access was blocked, BNSF could apply for terminal trackage rights. Instead, the Board directed BNSF to seek rights under the contracts, and if its access to handle traffic of Lake Charles Area shippers was blocked, to come back and pursue a terminal trackage rights application. BNSF's access was never blocked, and still isn't.

At no time to KCS's knowledge during the next nearly 16 years did BNSF take any action or assert in any communication that it believed it had the right to operate over the Rosebluff Lead via trackage rights. It was not until BNSF desired to gain additional competitive advantage over KCS that BNSF asserted that its rights were being denied, and filed its Application. But BNSF never had the rights it claimed. BNSF was not given trackage rights. It was given the “right to handle” Lake Charles Area traffic. It has exercised that right via switching and haulage rights. BNSF access to Rosebluff Lead Shippers has not been blocked, and BNSF's exercise of that access has more than fulfilled the purpose underlying the Lake Charles Condition.

III. EVEN IF THE BOARD AGREES WITH BNSF THAT THE LAKE CHARLES CONDITION CONTEMPLATED THE POSSIBILITY OF TRACKAGE RIGHTS, THE BOARD CANNOT GRANT BNSF'S APPLICATION BECAUSE BNSF HAS FAILED TO MEET THE STANDARDS OF SECTION 11102

A. BNSF Has Not Met The Public Interest Standard

Even if BNSF were correct that UP intended to grant BNSF trackage rights, the Board still cannot find BNSF's Application to be in the public interest under Section 11102. The Board has only three public interest standards applicable to terminal trackage rights applications – service

interruption; bridge the gap (applicable to limited segments connecting larger trackage rights in the context of a merger), and Midtec. Regardless of the context of the application, those are the only three standards defining “public interest” under Section 11102.

As discussed in the KCS Reply (See Section II, pp. 29-34) and the KCS Rebuttal at 14-19, the Application does not fit within the “bridge the gap” exception to Midtec or the service inadequacy test developed since the UP/SP merger. As such, the only applicable standard is Midtec. BNSF’s Application does not meet the Midtec standard. See KCS Reply at 30-32. For the Board to now grant the Application, the Board would have to create out of whole cloth another exception to Midtec. Such an approach is not legally justified to preserve competition because competition has already been preserved, and it would not be narrowly crafted, as is required of merger conditions.

B. BNSF Has Not Shown That Its Proposed Operations Are Practicable And Would Not Impair KCS’s Ability To Serve Its Own Shippers

Section 11102(a) requires BNSF to show that its proposed use of another carrier’s facilities is “practicable...without substantially impairing the ability of the rail carrier owning the facilities ...to handle its own business.” 49 U.S.C. Section 11102(a). BNSF’s application fails this test. BNSF’s ever-changing operating "plan" is extremely vague and hides the extensive interference that its operations would cause. BNSF speaks of the availability of operating “windows” in between UP and KCS operations, but it purposely avoids saying how many “windows” it would actually demand. BNSF also claims that it may attempt to serve other shippers, but then provides no plan for serving those shippers, except indicating that it would require still more windows and would provide switching service for them, creating still further operational interference.

KCS's Reply challenged BNSF's failure to specify how many operating windows BNSF sought for its proposed operation.²⁰ BNSF's Rebuttal avoids a direct answer, but indirectly shows that BNSF might demand up to *14 windows per day* to serve CITGO alone. Dr. Reishus' statement says: "The CITGO Lake Charles refinery, for example, is rated at 470,000 barrels per day. A unit train is reported to move 'up to 81,000 barrels,' while a 50-car trainload is roughly 34,000 barrels." BNSF-124, VS Reishus at 10 (footnote omitted). Based on this data, it would take 13.8 fifty-car trains *per day*, or 5.8 one hundred nineteen-car unit trains *per day* to supply CITGO's plant. No one contends that CITGO's plant is capable of receiving even a single 119-car train. Thus, Dr. Reishus shows that BNSF could seek as many as 14 operating windows *per day* to supply CITGO. Though CITGO doubtless could not unload 14 trains per day, Dr. Reishus' statement indirectly confirms that BNSF is seeking an unlimited opportunity to force as many windows through UP and KCS operations as possible.

BNSF's Rebuttal also shows that BNSF would likely demand an unknown number of operating windows to serve shippers other than CITGO. Mr. Bredenberg says that BNSF recently was awarded business by two customers on the Rosebluff Lead who "desire BNSF direct service." BNSF-124, VS Bredenberg at 7. If BNSF prevails in this proceeding, Mr. Bredenberg says, BNSF may choose to demand windows for trains to these shippers as well, *id.* at 8, though he presents no plan for how that would occur.

BNSF's rebuttal also suggests that BNSF will interfere even further with UP and KCS operations by performing switching on the Rosebluff Lead. BNSF's operating plan for CITGO said that BNSF would simply transit the Lead without stopping, chambering the entire train in CITGO's plant. BNSF-121, VS Bredenberg at 7-8. BNSF doesn't even attempt to show that any shipper's

²⁰ KCS Reply argument at 57-58, VS Bartoskewitz at 11.

facilities other than CITGO's could accommodate such a move.²¹ Therefore, other shippers (and perhaps CITGO) would require switching, which would require BNSF stopping on and occupying the Rosebluff Lead. As if anticipating that possibility, BNSF says that it would run trains to other customers with "both manifest and unit volumes,"²² and if "there are manifest volumes still moving on UP or KCS, BNSF would be willing to switch those volumes for UP and KCS at a standard switch fee."²³ BNSF-124, VS Bredenberg at 8. BNSF offers no explanation how it could interchange such traffic with UP or KCS or deliver the traffic to customers without switching on the Lead. BNSF using the Rosebluff Lead for switching would create even more operational interference with existing operations.

BNSF acknowledges that creating windows for BNSF trains would disrupt UP's operation on the Rosebluff Lead. "UP should be expected to provide BNSF with a window...for each direct service train [i.e., up to 14 per day for CITGO, plus an undisclosed number for any other shipper BNSF chooses] to and from the Rose Bluff Lead. Doing so may cause UP some operating inconvenience." BNSF-124 at 28. Clearly, BNSF expects its proposed operations to substantially interfere with UP's operations.

Mr. Bredenberg also suggests that UP and KCS must reorganize their operations in Rosebluff Yard to create clear tracks for BNSF. BNSF-124, VS Bredenberg at 5. In other words, BNSF believes that KCS and UP should change fifty years of carefully-coordinated operating

²¹ See KCS Reply, VS Bartoskewitz at 10: "BNSF's proposal to chamber a train inside the CITGO facility, even if feasible there, would not be possible with customers with more limited or different track layouts."

²² Under the BNSF Settlement Agreement, BNSF cannot choose to operate only unit trains to a shipper and must serve that shipper by both manifest and unit trains. See KCS Reply at 58.

²³ To be clear, BNSF arrogantly suggests that KCS should pay BNSF for using KCS's property to switch KCS's traffic, while BNSF pays KCS nothing for the right to use KCS's property.

practices and to give BNSF trains priority over KCS and UP operations, regardless of the impacts on KCS and UP operations.

Forcing BNSF operating windows during UP's operation in Rosebluff Yard would also significantly disrupt KCS service. If BNSF delays UP's operations - "operating inconvenience" as BNSF calls it -- UP's operation will delay KCS's Rosebluff operation even more often than now.²⁴ KCS'S access to switch the shippers it serves adjacent to Rosebluff Yard thus will be even further delayed, ultimately affecting those shippers' plant operations.

BNSF cannot create more hours in a day. Creating a window for BNSF operations through Rosebluff Yard necessarily reduces the time available for UP and KCS to operate. Yet, BNSF wants the Board to write BNSF a blank check to force UP and KCS to disrupt their operations on the Rosebluff Lead by creating an unspecified number of operating windows for BNSF. Forcing UP or KCS to create a multitude of windows for BNSF trains will necessarily disrupt the already congested Rosebluff Yard operation described by KCS witnesses Rick Bartoskewitz and Jimmy Wayne Scott, and by UP's witnesses. BNSF's ever-changing "plan" to serve CITGO, coupled with additional "plans" to force its trains through to serve other shippers, will substantially impair KCS's service to shippers it serves. Such a plan does not satisfy the requirement of Section 11102(a).

C. BNSF Has Not Complied With The Other Requirements Of Section 11102

BNSF does not deny that if its Application is granted, the statute requires it to pay compensation for the use of the Rosebluff Lead. But, it claims, the rate BNSF should pay KCS as compensation for the use of KCS's portion of the Rosebluff Lead has already "been conclusively determined in the UP/SP merger . . . [as] the rate set by the BNSF Settlement Agreement as

²⁴ As Mr. Scott's verified statement showed, KCS was able to enter Rosebluff Yard at or before the start of its operating window only 4 days of the 62 days on which KCS kept a record. KCS Reply, VS Scott at 7-8. In the month studied in the Sullivan/Ireland verified statement, UP cleared out of Rosebluff Yard on time only 4 of 31 days. KCS Reply, VS Sullivan/Ireland at 12, Figure 3.

escalated by the CMA Agreement and confirmed by the Board.” BNSF-124 at 33. BNSF says that it will then pay that rate to either UP or KCS as that is the rate that has already been confirmed as the appropriate rate for the trackage rights contemplated by the Application. This argument is nonsensical and not consistent with the statute.

The rate set forth in the UP/SP decisions is the rate that BNSF must pay UP for the use of UP's tracks for implementing the various trackage rights. Those trackage rights did not include a grant of terminal trackage rights over the Rosebluff Lead, and included a swap of trackage rights from BNSF to UP. KCS was not a party to the UP/BNSF agreements and BNSF's proposal includes no compensation to KCS, contrary to Section 11102's requirements.

The only way BNSF could obtain use of KCS's 50% ownership of the Rosebluff Lead is by the grant of terminal trackage rights. Under the statute, BNSF has to provide compensation to KCS for the use of that property. As there is no contract between BNSF and KCS nor a previous Board order governing BNSF's use of KCS's property, the statute would require BNSF and KCS to negotiate compensation. Absent a consensual arrangement, the Board has the right to set that rate, and that rate must at least be the constitutional minimum. Furthermore, until that rate is either negotiated or set by the Board and paid or adequately secured, BNSF cannot operate over KCS's property; i.e., the Rosebluff Lead. See KCS Reply at 65-68.

IV. BNSF'S REQUEST FOR A SECTION 11321(A) OVERRIDE SHOULD BE DENIED

Finally, BNSF claims that if its Application is denied, it can simply use the alleged "self-executing" authority of Section 11321(a) to override any provision of the 1948 Joint Facility Agreement that could be considered as requiring KCS's consent to any third party use of the Rosebluff Lead. BNSF-124 at 34. Curiously, BNSF then claims that the actual 1948 contract provision really doesn't need to be overridden because it applies only to changes in ownership and

not to third party usage. Thus, it “is not an obstacle to BNSF trackage rights and should not need to be overridden.” Id., at 34-35.

BNSF’s statement is surprising to say the least. Whether the contracts were or were not an obstacle to BNSF access is precisely why the Board ordered arbitration in Decision No. 63 and why KCS originally sought a declaration in state court in the first place; i.e., to obtain an authoritative ruling on what precisely did the contracts mean. Yet, BNSF refused to require UP to arbitrate the question and opposed any state court proceeding. If BNSF had allowed either process to proceed and received the result that it now postulates, then BNSF’s access would be governed by whatever agreements exist between UP and BNSF and this proceeding would not have been necessary.²⁵

Even though the contracts prohibit BNSF access, BNSF cannot invoke the override provision. An override cannot be considered “necessary,” or even invoked, if a terminal trackage rights remedy is available.²⁶ BNSF ignores the language of Decision No. 63, n. 31 and of the CSX/NS case because those authorities contradict BNSF’s position that an override is appropriate. In CSX/NS, the Board made it clear with respect to access via terminal trackage rights that the Board cannot and will not invoke its override authority to impose trackage rights on terminal tracks owned by non-applicant carriers because the proper remedy is to invoke Section 11102. If a Section 11102 case fails, that’s the end of the inquiry.

²⁵ If BNSF’s Application (including the override request) is denied, BNSF can still seek arbitration, a declaration of the contract’s meaning, or seek an alternative resolution with UP.

²⁶ KCS Reply at 68-72; Decision No. 44, slip op. at 170 & n.217; Decision No. 63, n. 31, (“[A]n override cannot be considered “necessary” if a terminal trackage rights remedy under old 49 U.S.C. 11103(a) or new 49 U.S.C. 11102(a) is available”); and CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operation Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation, 3 S.T.B. 196, 1998 STB LEXIS 1559, *228-229 (1998)(“CSX/NS”)(refusing to invoke its override authority to override an anti-assignment provision in contracts governing joint facility terminal tracks because CSX’s remedy was to file a terminal trackage rights application if it desired to operate over the terminal tracks owned by a non-applicant carrier).

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

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

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

CONCLUSION

BNSF, as the party with the burden of proof in this case, must establish that its Application meets the standards of 49 U.S.C. §11102(a). BNSF's Application fails. The Application is not necessary to implement the Lake Charles Condition for BNSF to fulfill the competitive role that the Board envisioned it to fulfill. The Application also fails to meet the public interest standard of 49 U.S.C. 11102(a), and fails to show that BNSF's proposed operations are practicable and would not interfere with UP's and KCS's operations. The Application also fails to compensate KCS, as required by the statute. The Application should be denied, and an override is not justified.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of The Kansas City Southern Railway Company was served by first-class mail, postage prepaid, or by a more expeditious manner, this 30th day of December, 2015, on counsel for BNSF Railway Company, Union Pacific Railroad Company, and any other party of record.



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