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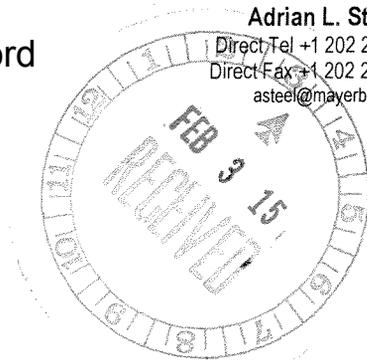
February 4, 2015

BY HAND DELIVERY

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

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding are the original and ten (10) copies of BNSF Railway Company's Reply to KCSR's Motion to Compel. A CD is also enclosed with the text of the pleading in Word Format.

I would appreciate it if you would date-stamp the enclosed extra copy and return it to the messenger for our files.

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

Sincerely yours,

A handwritten signature in black ink that reads "Adrian L. Steel, Jr.".

Adrian L. Steel, Jr.

Enclosures

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

Before the  
SURFACE TRANSPORTATION BOARD

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

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

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**APPLICATION FOR TERMINAL TRACKAGE RIGHTS**

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**BNSF's Reply to KCSR's Motion to Compel**

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COUNSEL FOR BNSF RAILWAY COMPANY

February 4, 2015

Before the  
SURFACE TRANSPORTATION BOARD

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

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**APPLICATION FOR TERMINAL TRACKAGE RIGHTS**

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**BNSF's Reply to KCSR's Motion to Compel**

BNSF Railway Company ("BNSF") hereby replies to The Kansas City Southern Railway Company's ("KCSR") Motion to Compel Responses to First Set of Discovery Requests to BNSF ("Motion") filed in the above-referenced proceeding on January 15, 2015. As explained below, because the BNSF documents requested by KCSR could not affect the outcome of this proceeding, the documents are not relevant to the subject matter of the proceeding, and KCSR's Motion should be denied.

**I. Background**

As described in more detail in BNSF's Opening Statement filed on December 31, 2014, at 4, the Board imposed trackage rights conditions on the UP/SP merger that provide BNSF the right (1) to handle traffic of shippers open to all of UP, SP, and KCSR at Lake Charles and Westlake; and (2) to handle traffic of shippers open to SP and KCSR at West Lake Charles (collectively, the "Lake Charles Condition"). *See* Finance Docket No. 32760, Decision No. 44, 1 S.T.B. 233 (served Aug. 12, 1996) ("Decision No. 44"). The rights that the STB granted to BNSF include both direct train service and reciprocal switch. *See* Exhibit 1 to BNSF's Opening

Statement, BNSF Settlement Agreement, Section 5(c). In its Application and Opening Statement, BNSF has requested that the Board confirm the Lake Charles Condition through the imposition of terminal trackage rights over the Rosebluff Industrial Lead at West Lake Charles.

The KCSR Motion to Compel concerns a request made by KCSR to BNSF on December 19, 2014, for BNSF to “produce in computer-readable format the BNSF 100% traffic tapes for each year from the period beginning December 31, 1996, and ending with the date of the response, along with information necessary to read the data (e.g. record layout, field names and definitions, definitions of terms or abbreviations used in the fields) (‘BNSF Traffic Tapes’)”. Motion at 2. On January 5, 2015, BNSF submitted a timely response to the KCSR request, objecting to the request on a number of grounds, including that the request “is overbroad and seeks information or documents that are neither relevant to the subject matter involved in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence.” BNSF Objection at 2.

## **II. The Board Should Deny the KCSR Motion to Compel Because the BNSF Traffic Tapes Are Not “Relevant to the Subject Matter” of this Proceeding.**

### **A. Relevance Standard**

In Board proceedings, parties are entitled to discovery only of information that is “relevant to the subject matter involved in a proceeding.” *Appl. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Can. Nat’l Ry.*, Finance Docket No. 35743, slip op. at 8 (STB served Sept. 23, 2014) (“*Amtrak*”) (quoting 49 C.F.R. § 1114.21(a)(1)). “The requirement of relevance means that the information might be able to affect the outcome of a proceeding.” *Id.* (quoting *Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me.*, AB 124 (Sub-No. 2) et al., slip op. at 2 (STB served Nov. 14, 2003)). As shown below, KCSR is seeking information that could not “affect the outcome of

the proceeding,” because the information relates to issues decided years ago by the Board and is irrelevant even to the issues as set forth by KCSR. Thus, the information sought by KCSR is not relevant, and KCSR’s motion should be denied.

In its Motion, KCSR bears the burden of establishing the relevance of the BNSF Traffic Tapes to this proceeding. *See Amtrak*, slip op. at 9 and 10 (denying a motion to compel as to three discovery requests because the movant, respectively, “failed to establish the relevance of documents,” “has not demonstrated that such documents are relevant to the issue in this proceeding,” and “has not demonstrated that a response to this interrogatory is reasonably likely to lead to information that is relevant to the issues in this proceeding.”); *see also Cartagena v. Centerpoint Nine, Inc.*, 303 F.R.D. 109, 112 (D.D.C. 2014) (“The party moving to compel production of documents bears the initial burden of explaining how the requested information is relevant” (citation omitted)).

Rather than meeting that burden, or even clearly establishing the correct standard, KCSR instead offers a series of overlapping and conclusory assertions lacking factual support. KCSR argues that the BNSF Traffic Tapes are relevant for two reasons: (1) KCSR needs the Tapes in order to prepare evidence “regarding the competitive effectiveness” of the Board’s merger conditions; and (2) the Tapes are relevant to “potential future capacity constraints issues” on the Rosebluff Industrial Lead. Motion at 4. KCSR restates its relevancy arguments slightly differently at another point: “KCSR needs access to the BNSF Traffic Tapes to perform an analysis on whether BNSF’s proposed remedy is competitively justified and how BNSF direct service would affect KCSR’s operations.” *Id.* At no point, however, does KCSR establish why or how the Tapes could “affect the outcome of the proceeding.” *Amtrak*, slip op. at 8.

## **B. Competitive Effectiveness**

First, as a threshold matter, the “competitive effectiveness” of the Lake Charles Condition is *not* at issue in this proceeding. In Decisions Nos. 44 and 63 of the UP/SP merger proceeding, the Board decided that the Lake Charles Condition was competitively necessary in order to address the potential loss of competition resulting from the UP/SP merger. On its face, the Lake Charles Condition means what it says: BNSF has the right to serve shippers in the Lake Charles Area by direct service over trackage rights or by reciprocal switch. KCSR’s attempt to raise an issue concerning the “competitive effectiveness” of that condition now is nothing more than a transparent attempt to re-litigate an issue that was resolved adversely to KCSR years ago. KCSR sought reconsideration in 1996 of the Lake Charles Condition, and the Board specifically rejected the KCSR competition argument in Decision No. 63, including the argument that KCSR itself provided a sufficient remedy for the loss of competition resulting from the UP/SP merger. *See* BNSF Opening Statement at 5-7.<sup>1</sup> The Lake Charles Condition cannot now be changed absent a reopening of the UP/SP merger.<sup>2</sup>

Second, KCSR’s suggestion that it needs the BNSF Traffic Tapes to analyze the “competitive effectiveness” of the Lake Charles Condition and the question of whether direct BNSF train service is “competitively justified” is disingenuous and invokes a completely

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<sup>1</sup> In rejecting KCSR’s argument, the Board stated: “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.” Finance Docket No. 32760, Decision No. 63, slip op. at 8 (STB served Dec. 4, 1996).

<sup>2</sup> The Board’s merger conditions vested rights not only in BNSF but also in shippers, and KCSR cannot seek to modify a merger condition, including the Lake Charles Condition, without the participation of all beneficiaries of the merger conditions. *See* Decision No. 44, 1 S.T.B. at 247 n.15. *See also* Finance Docket No. 32760 (Sub-No. 21), Decision No. 21, slip op. at 6 (STB served Dec. 20, 2001) (BNSF and shippers have independent rights to seek Board intervention “to ensure that the conditions [the Board] imposed on the merger are implemented in a manner that effectively preserves pre-merger competition.”).

irrelevant standard. In this proceeding, the Board may grant BNSF terminal trackage rights to use the Rosebluff Industrial Lead 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.” 49 U.S.C. § 11102(a); *see* BNSF Opening Statement at 15-22. In Decision No. 44, the Board clearly enunciated the standard for determining whether the imposition of terminal trackage rights in a merger proceeding is in the “public interest,” holding that the statutory “public interest” requirement is met if the terminal trackage rights are necessary to ensure the effective implementation of a condition imposed to preserve and protect competition.<sup>3</sup> 1 S.T.B. at 448. The Board already has conclusively determined (in Decision No. 44), and then reconfirmed (in Decision No. 63), that direct BNSF service through the Lake Charles Condition is a vital and necessary component in resolving the loss of competitive options to Lake Charles area shippers as a result of an inadequately-conditioned UP/SP merger. *See* BNSF Opening Statement at 15-18. Therefore, the “public interest” component of the terminal trackage rights analysis has already been decided adversely to KCSR. It is not in issue now.

The requested BNSF Traffic Tapes, which contain historical data on all BNSF operations nationwide over the last 18 years, thus have nothing to offer with respect to the Board’s “public interest” standard that controls in this proceeding. In its Motion, KCSR advances no argument justifying, or even proposing, a departure from the Board’s previously-articulated public interest standard, and KCSR’s bald assertions that some sort of competitive analysis is required or appropriate have no merit or support. Put simply, KCSR fails to meet its burden of establishing

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<sup>3</sup> In Decision No. 44, 1 S.T.B. at 448-49, the Board determined that it was inappropriate to apply the “anticompetitive act” standard as proposed by KCSR for terminal trackage rights set forth in *Midtec Paper Corp. v. CNW*, 3 I.C.C.2d 171 (1986), and the Board instead applied the broad “public interest” standard described above.

the relevance of the BNSF Traffic Tapes by showing how its use of the Tapes to prepare evidence “regarding the competitive effectiveness” of the Board’s merger conditions would affect the outcome of this proceeding.

**C. Potential for Interference**

KCSR’s unsupported claim that it needs the BNSF Traffic Tapes to analyze the potential for interference with its operations on the Rosebluff Industrial Lead similarly provides no basis for an order requiring BNSF to produce the Tapes. This putative rationale for compelling the production of the BNSF Traffic Tapes fails because KCSR has not explained how it could use the historical BNSF operational data contained on the Tapes to analyze the potential for future interference with KCSR operations. KCSR’s assertion that it needs the Tapes for this purpose cannot standing alone meet the burden that it carries.<sup>4</sup>

Furthermore, KCSR’s claim that it needs the BNSF Traffic Tapes to analyze the potential for interference with its operations on the Rosebluff Industrial Lead is misleading because, even if historical traffic tape data theoretically could provide some insights into future Rosebluff Industrial Lead operations, the facts here are that BNSF’s proposed terminal trackage rights operations on the Rosebluff Industrial Lead will not affect KCSR operations. BNSF’s operations would effectively replace UP’s deliveries and pickups of BNSF reciprocally-switched cars at the CITGO facility, and thus the situation at the facility would not be materially different than it is today. Moreover, as noted in BNSF’s Opening Statement at 19, BNSF would hold its cars in

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<sup>4</sup> It should be noted that KCSR has received UP’s traffic tapes for the last three years and that KCSR made a waybill request which was granted by the STB. *See* Motion at 5. KCSR also has its own traffic tapes. KCSR makes no attempt to explain why all of this traffic data is insufficient for its needs other than a conclusory statement that the waybill sample file which it received from the STB “does not contain the same information that can be obtained from BNSF’s traffic tapes.” *Id.*

BNSF's Lacassine Yard until UP gives BNSF a clear operating window, thereby eliminating any risk of interference at the Rosebluff Yard or on the Lead itself.

Finally, BNSF's Vice President of Capacity Planning and Operations Research, Rollin D. Bredenberg, with more than 50 years of railroad operations experience (including six years with responsibility over SP's Lake Charles operations), set forth in detail how BNSF would operate on the Rosebluff Industrial Lead to serve the CITGO facility if the requested terminal trackage rights are granted. *See* V.S. Bredenberg at 7-8. KCSR can analyze and counter Mr. Bredenberg's testimony that BNSF's direct train service, which would, under the UP proposed operating plan, occur during a two hour window provided by UP during UP's 12-hour operating period (*see id.* at 7), will not cause substantial interference with KCSR's operations. The Traffic Tapes will not, however, inform that analysis and thus are irrelevant.

#### **D. Overbreadth**

Finally, even assuming *arguendo* that *some* of the data on the BNSF Traffic Tapes are relevant to this proceeding, KCSR's request for Tapes dating back to December 31, 1996, is overly broad and unjustified, as is KCSR's failure to limit the tapes requested to traffic originating or terminating in the Lake Charles area.<sup>5</sup> *See, e.g., Can. Pac. Ry.—Control—Dakota, Minn. & E. R.R.*, Finance Docket No. 35081, slip op. at 6 (STB served Mar. 27, 2008) (denying a KCSR motion to compel with respect to a similarly expansive KCSR document request because the request was "overbroad and not particularly relevant to the theories . . . advanced by KCS[R]"). The only traffic that could conceivably be relevant here for any purpose is traffic

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<sup>5</sup> In discussions between KCSR and BNSF counsel concerning KCSR's request for the Tapes, KCSR offered to limit its request to the Tapes from the prior five years with respect to BNSF traffic originating or terminating at stations in the Lake Charles area. However, in its Motion, KCSR reverted to its prior request for Tapes covering the prior 18 years without geographic limitation.

pertaining to movements to and from the Lake Charles area, and any traffic data older than three years would have no probative value with respect to future traffic in the Lake Charles area. KCSR makes no argument otherwise, and it accepted such a limitation for the traffic tapes which UP produced.

### **III. Conclusion**

For the reasons stated above, BNSF respectfully requests that the Board deny the KCSR Motion to Compel.

Respectfully submitted,

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Counsel for BNSF Railway Company

Dated: February 4, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of February, 2015, copies of the foregoing BNSF's Reply to KCSR's Motion to Compel have been served by e-mail on Counsel for UP, KCSR and CITGO, and 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 (Sub-No. 46).

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Adrian L. Steel, Jr.