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March 11, 2015

BY HAND DELIVERY

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

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

237927

ENTERED
Office of Proceedings
March 11, 2015
Part of
Public Record

Dear Ms. Brown:

I am writing on behalf of BNSF Railway Company (“BNSF”) in response to the letter submitted by counsel for Union Pacific Railroad Company (“UP”) in the above-referenced proceeding on March 6, 2015. In the letter, UP argued that “discovery disputes involving a subset of parties should not be used as a device to obtain rulings on critical merits issues,” and UP “urge[d] the Board not to resolve the pending discovery disputes in a way that prejudices the merits.”

Contrary to UP’s assertion, the critical “merits” issues pertinent to the discovery disputes already have been decided by the Board in Decision Nos. 44 and 63 in this proceeding. Thus, discovery concerning those issues is unnecessary. As BNSF has established in its replies to two motions to compel filed in this proceeding by The Kansas City Southern Railway Company (“KCSR”), the “competitive effectiveness” of the Lake Charles Condition is not at issue in this proceeding, and the Board has already conclusively resolved the “public interest” component of the terminal trackage rights analysis in Decision Nos. 44 and 63 in this proceeding. *See* BNSF Feb. 5, 2015 Reply at 4-6; BNSF Feb. 26, 2015 Reply at 3-6. Therefore, any BNSF or CITGO information sought by KCSR in order to assess the “competitive effectiveness” of BNSF service over the Rosebluff Industrial Lead would not “affect the outcome of this proceeding,” and is not “relevant to the subject matter involved in this proceeding.” *See* BNSF Feb. 5 Reply at 2-3; BNSF Feb. 26 Reply at 6 (citing *Waterloo Ry.—Adverse Aband.—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)). KCSR therefore has no right under the Board’s rules to seek discovery of such information. CITGO concurs. *See* CITGO Mar. 2, 2015 Reply at 2-5.

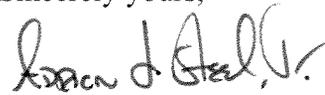
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The BNSF Settlement Agreement, the CMA Agreement, and the incorporating merger conditions mandated that shippers would have the right – at their choice – to be served by BNSF direct train service via trackage rights. To deny, alter, or limit CITGO’s right to that direct service would require that the merger proceeding be reopened, with the participation of the necessary parties to those agreements whose rights would be also affected. Discovery as to issues relating to whether or not pre-merger competition has been preserved absent BNSF direct service is not germane to the terminal trackage rights issues to be decided in this proceeding, and the “merits” issues which UP claims it needs to submit evidence and legal argument on cannot be addressed here in any event.

UP and KCS should not be allowed to leverage their apparent desire to re-litigate the scope of the issues in this matter into open-ended discovery concerning matters that were settled long ago. Accordingly, BNSF stands by its discovery objections, including the relevance objections, and submits that they should be resolved in accordance with the Board’s procedures and direction.

BNSF also notes that it expects to be able to resolve its concerns with the responses of UP and KCSR to BNSF’s Second Discovery Requests, and thus BNSF does not presently intend to pursue motions to compel. The only outstanding discovery disputes are therefore those raised by KCSR’s motions to compel, which have been fully briefed and are ready for decision by the Board.

Sincerely yours,



Adrian L. Steel, Jr.

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