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February 6, 2015

VIA E-FILING
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 – Kansas City Southern Railway Company and Union Pacific Railroad Company

EXPEDITED CONSIDERATION REQUESTED

Dear Ms. Brown:

Enclosed is The Kansas City Southern Railway Company's ("KCSR") Motion to Compel Responses to KCSR's Second Discovery Requests Directed to BNSF Railway Company "(Motion"). The Motion contains an Appendix A and B. Appendix B consists of Confidential or Highly Confidential documents which have been produced in discovery. Appendix B is being filed under seal as a Highly Confidential document consistent with the Board's protective order issued on December 18, 2014. KCSR requests expeditious consideration of the issues addressed herein. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: *wmullins@bakerandmiller.com*.

Sincerely,

William A. Mullins

APPENDIX B IS FILED UNDER SEAL AND CONTAINS HIGHLY CONFIDENDTIAL DOCUMENTS

cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S MOTION TO COMPEL RESPONSES TO SECOND DISCOVERY REQUESTS DIRECTED TO BNSF RAILWAY COMPANY

EXPEDITED CONSIDERATION REQUESTED

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February 6, 2015

BEFORE THE
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BNSF RAILWAY COMPANY
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EXPEDITED CONSIDERATION REQUESTED

Pursuant to 49 CFR § 1114.31(a), The Kansas City Southern Railway Company ("KCSR") hereby moves for an order compelling BNSF Railway Company ("BNSF") to answer certain discovery requests that were contained in KCSR's Second Discovery Requests ("KCSR 2nd Requests") directed to BNSF Railway Company, served on January 13, 2015 ("Motion"). The Motion is necessary because BNSF has either refused or only partially responded to the majority of the discovery requests propounded in KCSR 2nd Requests. Yet, KCSR's 2nd Requests go directly to several of the statutory elements as set forth in 49 U.S.C. §11102(a) and as applicable to BNSF's terminal trackage rights application:

(1) Is BNSF's request for direct terminal trackage rights "practicable and in the public interest" in order for BNSF to comply with the Board's decision granting BNSF access to Lake Charles in the first place;

(2) Would the addition of BNSF direct service cause operational issues so that KCSR and UP service to other shippers would be substantially impaired;

(3) What is the intended scope of BNSF's terminal trackage rights application? To serve only CITGO or does BNSF believe that its application, if granted, covers other shippers as well; and finally,

(4) What are BNSF's plans for compensating KCSR for access over KCSR's jointly owned facility?

Yet, while BNSF has asked the Board to grant its terminal trackage rights application based on conditions it purports were granted to it in the UP/SP merger[1], it simultaneously seeks to avoid discovery obligations for the production of the very same relevant materials that go directly to the statutory elements that BNSF must meet in order to meet its burden under 49 U.S.C. 11102(a). Instead, despite KCSR's conscientious efforts to narrow its requests, BNSF continues to refuse to answer the majority of KCSR's discovery requests on the basis that the requested information is unduly burdensome, not directly relevant (in BNSF's sole opinion), not

[1] This dispute originates from the UP/SP merger, which was approved by the Board in 1996. After the written record had closed and shortly before oral argument and issuance of a final decision, UP and BNSF entered into an agreement, along with what was then known as the Chemical Manufacturers Association, to grant BNSF access to certain shippers served by a nine mile track jointly owned by UP and KCSR. The Board adopted this voluntary agreement as a condition to the merger and expanded on it. However, none of the parties bothered to obtain KCSR's consent to BNSF's access; who was a 50% owner of the tracks at issue, was not a merger applicant, and notwithstanding the existence of agreements which all parties acknowledge require KCSR's consent for UP to grant BNSF direct terminal trackage rights over the joint tracks. Now, although it has served the various shippers for over eighteen years via a switching and haulage arrangement with UP (which one could argue does not violate the joint facility agreements), BNSF seeks direct operating rights and seeks to avoid KCSR's consent requirement by filing its terminal trackage rights application. Granting another carrier (BNSF) direct operating rights over the private property of KCSR and UP in direct contradiction to private agreements governing that private property is an extraordinary remedy that should only be undertaken in the rarest of instances and only after careful and considerate development of the record, which cannot occur as long as BNSF continues to refuse to comply with valid discovery requests.

likely to lead to discovery of admissible evidence, confidential, or overbroad. Put simply, BNSF cannot have it both ways. They cannot, on the one hand, file a terminal trackage rights, which the Board told them to do in Decision No. 63 as the proper statutory means by which to seek access over KCSR's and UP's private property, but then avoid producing the very same documents that go to the heart of the statutory standards applicable to granting a terminal trackage rights application.

ARGUMENT

Although BNSF has produced some information relevant to the operational issue of whether BNSF's operation would harm KCSR and UP's ability to handle their own business, BNSF steadfastly refuses to produce information related to any of the other statutory elements that must be met in order to grant the application, especially with respect to the public interest standard and whether BNSF is already fulfilling the competitive role that the Board envisioned it to fulfill. BNSF simply issues general objections on the grounds that the issue of BNSF's competitiveness, and other issues, are simply not relevant. However, in Board proceedings, KCSR is entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 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." Waterloo Ry.—Adverse Aban.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. in Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003). Further, it "is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 49 C.F.R. § 1114.21(a)(2). See also Ballard Term. R.R. – Acquisition & Operation Exemption – Woodinville Subdivision, FD 35731, slip op. at 3 (STB served Aug. 22, 2013) and

Seminole Electric Coop., Inc. v. CSX Transport, Inc., FD 42110, at 2 (STB served Feb. 17, 2009).

As will be detailed below, BNSF has refused to produce any documents or respond to any interrogatories on several issues that are relevant to a 49 U.S.C. 11102(a) analysis and where such documents "might be able to affect the outcome of a proceeding."[2] For example, information regarding whether or not BNSF is already competing successfully as envisioned by the Lake Charles condition and is doing so without the need for direct, operationally intrusive trackage rights, goes precisely to the issue of whether the public interest requires the Board to grant BNSF's application. Likewise, there are many operational questions which BNSF has not yet fully addressed, and other than blanket assertions that UP would owe KCSR compensation, BNSF refuses to disclose information that would be relevant to setting the compensation. The Board should not condone such stonewalling.[3] KCSR's requests will elicit relevant materials

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[2] For KCSR to meet its burden that the document are relevant, it need not prove that the documents "will" affect the outcome, but rather such documents "might" affect the outcome or could otherwise lead to other admissible evidence.). "The requirement of relevance means that the information might be able to affect the outcome of a proceeding." Appl. of the Nat'l R.R. Passenger Corp. Under 49 US C. § 24308(a)-Can. Nat'l Ry., FD 35743, slip op. at 8 (STB served Sept. 23, 2014)(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)).

[3] BNSF also refuses to answer two of KCSR's discovery requests on the grounds that disclosure could cause BNSF to violate 49 U.S.C. § 11904 (concerning disclosure of shipper or consignee information). While this statement would be true absent a protective order, such disclosures are actually deemed essential under the protective order issued by the Board on December 18, 2014 and not a violation of the statute. Specifically, Paragraph 13 states:

> To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced or otherwise disclosed by a Party in this Proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains shall be deemed essential for the disposition of this and any related proceedings and shall not be deemed a violation of 49 U.S.C. 11323, 11904, or any other relevant provision of the ICC Termination Act of 1995.

that are necessary to allow KCSR the opportunity to fully participate in this proceeding. Consistent with established precedent, a party is entitled to all relevant and possibly admissible evidence; thus, BNSF should be required to provide the requested information.

In summary, KCSR propounded 22 requests (four Requests for Admission, four Interrogatories, and fourteen Document Requests). Based upon a thorough analysis, it appears BNSF answered (or referenced documents that it provided to UP in response to UP's discovery) that answer at most six (including partial responses) of KCSR's 22 discovery requests. In light of the importance of the requested information, BNSF's objections are insufficient grounds for refusing to provide the requested information. Accordingly, KCSR asks the Board to order BNSF to promptly respond to the following KCSR 2nd Requests: Interrogatories 1 and 2 and Document Requests 1, 2, 3, 4, 5, 8, 10, and 12.

I. KCSR'S INTERROGATORIES AND DOCUMENT REQUESTS ARE RELEVANT, AND RESPONSES ARE NECESSARY FOR KCSR TO PREPARE EVIDENCE IN RESPONSE TO BNSF'S TERMINAL TRACKAGE RIGHTS APPLICATION.

BNSF should be compelled to respond to Interrogatories No. 1 and 2 and Document Requests No. 1, 2, 3, 4, 5, 8, 10, and 12 because the requested information is directly relevant to the Board's decision in this proceeding. These discovery requests are relevant to the resolution of several issues: (1) the Board's ability to enforce a remedy in a merger proceeding against a non-party to the proceeding, when the remedy will deprive the non-party of its property, and the non-party was not afforded an opportunity to comment on a proposed condition before it was adopted; (2) whether BNSF operations could substantially impair the ability of the rail carriers owning the facilities or entitled to use the facilities to handle their business; (3) the extent to

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Therefore, BNSF's attempts to avoid disclosure of relevant evidence because it contains shipper information should be rejected.

which BNSF's expansion plans may affect capacity on the line presently and in the future; (4) the impact of BNSF's direct service on non-CITGO shippers over the Rosebluff Industrial Lead; (5) CITGO's alleged service deficiencies due to BNSF's service being provided via reciprocal switch or haulage rights via the UP; (6) the adequacy, inadequacy, level of, and/or market effectiveness of BNSF rates vis-à-vis the rates provided by UP, KCSR, or any other transportation mode for any product transported to/from CITGO's Lake Charles facility; (7) the potential cost savings BNSF may incur by providing direct unit train service to CITGO's Lake Charles area facility instead of continuing to serve CITGO via a reciprocal switch provided by UP; and, (8) operational problems that would arise from BNSF providing direct service rather than continuing to compete through reciprocal switching, on a case-by-case basis.

As previously noted, these issues are at the very crux of what the statute requires BNSF to establish in its application. In its Opening Statement and Evidence, BNSF asserts that its use of the terminal facilities is practicable and in the public interest, and such use will not substantially impair the ability of the rail carriers owning the facilities or entitled to use the facilities to handle their business. As explained below, KCSR seeks information to evaluate whether BNSF's terminal trackage rights application satisfies the statutory requirements, and how the granting of such relief by the Board would impact KCSR's and UP's operations.

INTERROGATORIES

KCSR's Interrogatories 1 and 2 seek information on operational issues that could arise from BNSF's direct service over the Rosebluff Industrial Lead, which is relevant to the statutory requirements under which terminal trackage rights may be ordered. KCSR's Interrogatories also seek information on the extent to which BNSF direct service over the line will initially affect KCSR and UP operations, as well as any foreseeable future impact of BNSF providing direct

service over the Rosebluff Industrial Lead (including restraints on capacity). BNSF did not answer these interrogatories.

KCSR Interrogatory No. 1 requests information on an operational issue posed by Roger Lambeth, Superintendent of the UP Livonia Service Unit, in an e-mail referred to by BNSF as the "BNSF Citgo Crude Operating Plan." BNSF objects generally citing that the request is unduly burdensome, overbroad, not relevant, not likely to lead to discovery of admissible evidence, or speculative; BNSF does state that operations would closely resemble the "BNSF Citgo Crude Operating Plan" proposed by UP on December 18, 2012; that service to CITGO will closely resemble the operating plan outlined by Rollin D. Bredenberg in his Verified Statement ("RDB V.S."), submitted on December 31, 2014 as an attachment to BNSF's Opening Statement; and, that KCSR could look to the documents BNSF produced pursuant to UP's First Set of Discovery Requests to BNSF for an answer.

KCSR has reviewed this answer and is simply perplexed. KCSR asked a question based on the "BNSF Citgo Crude Operating Plan," and were told to look at the exact e-mail upon which KCSR based its question and the very same RDB V.S. operating plan (which is based upon the same e-mail) for an answer. The answer is not there, and the answer is directly relevant to the impact of BNSF direct service on KCSR operations. KCSR seeks information that is likely to be of great value, could impact the proceeding, is relevant, is not overbroad, and should not be unduly burdensome for BNSF to respond. Indeed, it is BNSF that has the burden of proof to establish that its terminal trackage rights would not interfere with KCSR's or UP's operations, and accordingly, it cannot avoid producing documents that are relevant to that issue by simply saying "see the application." The whole point of discovery is to allow parties to look behind the words of the application. Therefore, the Board should compel BNSF

to provide an answer, as to why BNSF direct operations would not interfere with KCSR's operations.

Like Interrogatory No. 1, KCSR Interrogatory No. 2 was directed at determining whether BNSF direct operations would substantially impair the ability of KCSR and UP to handle their business. KCSR was able to ascertain answers to Interrogatories No. 3 and 4 from the information BNSF provided; however, its review of the documents BNSF produced pursuant to UP's First Set of Discovery Requests to BNSF has raised some concerns over future capacity issues if BNSF elects to initiate direct service for additional customers over the Rosebluff Industrial Lead. Interrogatory No. 2 seeks information concerning whether BNSF intends to serve others shippers. This is because BNSF has only produced an operating plan directed at serving CITGO, but then equivocates on whether it intends to serve other shippers. If it does, KCSR is entitled to know that and KCSR is entitled to determine whether such plans would interfere with its own operations. Such information is necessary to determine the true impact of BNSF direct service on the ability of KCSR and UP to handle their business over the foreseeable future.[4]

Because KCSR is seeking information necessary to determine whether BNSF direct service would impacts on KCSR's service to customers both directly and via UP's reciprocal switching, and on UP's service, and because BNSF has refused to answer the questions, KCSR

[4] BNSF did produce what it claims were relevant documents, but then heavily redacted those very same documents on the basis that the information contained therein was highly confidential and its disclosure would violate 49 U.S.C. §11904. Given that there is a protective order in place that was designed to protect precisely such information, KCSR asks the Board to order BNSF to unredact BNSF-HC-000400-BNSF-HC-000401, BNSF-HC-000410-BNSF-HC-000411, BNSF-HC-000426, BNSF-HC-000428-BNSF-HC-000430, BNSF-HC-000426, BNSF-HC-000428-BNSF-HC-000430, BNSF-HC-000432, BNSF-HC-000434, BNSF-HC-000436-BNSF-HC-000438. This information would only be reviewed by outside counsel and consultants, consistent with the protective order approved by the Board on December 18, 2014.

asks the Board to order BNSF to promptly respond to Interrogatories 1 and 2. The parties and Board need evidence, not empty assurances, to evaluate the effect of BNSF direct service on operations over the Rosebluff Industrial Lead.

DOCUMENT REQUESTS

Likewise, KCSR's Document Requests seek information relevant to how BNSF direct service will impact operations, given both KCSR and UP operate over the line, and also seek information relevant to whether it is in the public interest for BNSF to have direct trackage rights over the jointly-owned property of KCSR and UP to ensure the effective implementation of the condition imposed in UP/SP.

1. Effect Of BNSF Direct Service On KCSR And UP Operations

On the first issue, KCSR is concerned that adding BNSF direct service will substantially impair the ability of KCSR and UP to use the facilities to handle their own business. Therefore, Document Requests 1, 3, 4, 5, and 8 seek documents related to the capacity of the CITGO facility and of the Rosebluff Lead; the financial justification for BNSF's new Lacassine Yard (which BNSF says will support its proposed operations); BNSF's plans to directly serve other Lake Charles area shippers if BNSF is able to provide direct service to CITGO; operational impacts to any non-CITGO Lake Charles area shipper facility; current service levels (including type of service and quality of service); and communications between BNSF and UP over service levels, including any communications that evaluate the impact of BNSF direct service upon UP's and KCSR's abilities to use the facilities to handle their business. These are precisely the types of documents that "might" or "could" affect the outcome of this proceeding.

For Document Request No. 1, BNSF directed KCSR to the documents produced by BNSF in response to UP's First Set of Discovery Requests to BNSF. While those documents

contain many plans and proposed operations for the CITGO plant, the current operational capacities remain unclear. Despite BNSF's objections, this request is not overbroad and providing any documents in its possession on existing operational capacities and completion dates for anticipated operational expansion plans should not be unduly burdensome. Accordingly, KCSR asks the Board to compel BNSF to provide documents relating to BNSF's existing operational capabilities for the CITGO facility as well as any information relevant to other operational plans and the completion dates for such plans.

For Document Request No. 3, BNSF objects to the request on the grounds that it is burdensome, overbroad, not relevant, and it relates to different trackage than is at issue in this proceeding (the Rosebluff Industrial Lead). BNSF again directs KCSR to the documents BNSF produced pursuant to UP's First Set of Discovery Requests. KCSR strongly disagrees with BNSF over the relevancy of documents pertaining to the Lacassine Yard. The documents are highly relevant because BNSF itself states that it will use its Lacassine Yard to serve shippers over the Rosebluff Industrial Lead. Therefore, the Lacassine Yard (its capacity and service structure) will directly impact service over the Rosebluff Industrial Lead.

Our review of the documents BNSF produced to UP reveals that several documents exist that may shed light on KCSR's concerns. Again, these documents while labeled highly confidential were highly redacted. Given that there is a protective order in place, KCSR asks the Board to order BNSF to unredact BNSF-HC-000007, BNSF-HC-000009-BNSF-HC-000011, BNSF-HC-000052-BNSF-HC-000054, BNSF-HC-000056, BNSF-HC-000058, BNSF-HC-000060-BNSF-HC-000062, BNSF-HC-000155, BNSF-HC-000177, and BNSF-HC-000400.[5]

[5] In order for the Board to review KCSR's claims, these documents are included in Appendix B, which is being filed under seal and as Highly Confidential. If this information is unredacted,

Additionally, KCSR asks that the Board compel BNSF to provide any additional documents related to the operating structure or plans for the Lacassine Yard. The evidentiary value of the documents and the potential ramifications for KCSR, UP, and other Rosebluff Industrial Lead shippers warrant disclosure, and strongly outweigh any burden in production for BNSF.

For Document Request No. 4, BNSF again objects on the grounds that the information sought is burdensome, overbroad, not relevant, and it relates to different trackage than is at issue in this proceeding (the Rosebluff Industrial Lead). BNSF directs KCSR to the documents BNSF produced pursuant to UP's First Set of Discovery Requests. As explained in Interrogatory No. 2 and Document Request No. 2, any BNSF expansion plans, which may lead to increased traffic along the Rosebluff Industrial Lead in the foreseeable future, could negatively affect KCSR and UP's ability to serve their customers (unless BNSF agrees that its application, like its operating plan, is limited to CITGO). A response to KCSR's Document Request is necessary to evaluate potential operational impacts for all shippers, KCSR and UP. A review of the documents produced to UP, shows that BNSF does in fact have documents and information relevant to this issue; thus, KCSR is not asking for a speculative answer, but rather is asking that BNSF provide information about customers it intends to serve, which could adversely affect KCSR and UP's abilities to serve their customers. Therefore, KCSR asks the Board to compel BNSF to provide any available documents on additional shippers BNSF intends to serve.

Document Request No. 5 seeks information on potential operational impacts that may occur at any non-CITGO Lake Charles area shipper facility if BNSF provides direct service to CITGO's Lake Charles Facility. BNSF again objects on the grounds that the information sought is burdensome, overbroad, not relevant, and it relates to different trackage than is at issue in this

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which it should be, it would only be reviewed by outside counsel and consultants, consistent with the protective order approved by the Board on December 18, 2014.

proceeding (the Rosebluff Industrial Lead). KCSR strongly disagrees with BNSF's objection. The requested information is highly relevant. BNSF asserts that it can provide direct service to CITGO without substantially impairing the ability of KCSR and UP to handle their business over the Rosebluff Industrial Lead. KCSR merely seeks whatever evidence BNSF relies on to support that assertion, including information on any studies, analyses, or other documents that BNSF used to arrive at the conclusion that direct service to CITGO will not cause any significant operational impacts for KCSR, UP, or other shippers that operate over the Rosebluff Industrial Lead. Accordingly, KCSR asks that the Board compel BNSF to provide all available documents and studies that support BNSF's claims that it can provide direct service without substantially impacting KCSR or UP.

Document Request No. 8 seeks all documents relating to the adequacy, inadequacy, level of, and/or quality of BNSF's prior or existing service to CITGO's Lake Charles area facility. BNSF claims in its Opening Statement that UP's service to CITGO has become "increasingly unsatisfactory for CITGO." Opening Statement at 9. KCSR seeks whatever information BNSF has to support that statement. BNSF objects generally and directs KCSR to the documents BNSF produced pursuant to UP's First Set of Discovery Requests. Given that alleged deficiency of reciprocal switching service is the principal reason cited for BNSF's proposed direct trackage rights service, Document Request No. 8 has the potential to produce highly relevant evidence. Thus, KCSR asks that the Board compel BNSF to provide any documents in its possession that demonstrate why a change from reciprocal switch service via UP to BNSF direct service is warranted.

2. The Public Interest Justification For BNSF Direct Access Over KCSR and UP Property Must be Proven Conclusively, Not Assumed to Be Established

On December 31, 2014, as directed by the Board in Decision No. 63, BNSF filed an application for terminal trackage rights seeking to invoke the independent authority of that statute in order to implement a condition to a merger that happened over eighteen years ago. BNSF asserted that its request for terminal trackage rights clearly satisfies the requirements set forth in 49 U.S.C §11102 by simply presuming that public interest requirement of the statute was already established as a condition to the UP/SP merger and that such justification remains solely the same some eighteen years later and notwithstanding the fact that BNSF has had access to Lake Charles shippers in compliance with the merger condition all these years. See BNSF Opening Statement and Evidence at 14. Further, BNSF's testimony indicated that "[f]or CITGO to have the competitive option that the Board deemed critical, BNSF must be able to provide direct service so that competition – and not KCS and UP – will control the cost and efficiency of shipments to CITGO." Id., at 17.

In order for BNSF to prevail in its terminal trackage rights application, it must conclusively prove all statutory elements of 49 U.S.C §11102. It has never made the showing required by Section 11102 and by the Board's direction in Decision No. 63 (and reinforced by the Board's December 1, 2014 order) that terminal trackage rights is in the public interest. Moreover, to the extent that BNSF attempts to rely on the Board's actions in August of 1996 in conditioning the grant of the UP-SP merger, BNSF has not shown that anything the Board may have considered 18 years ago is relevant today. KCSR is in the process of evaluating the competitive role envisioned by the Board in granting BNSF access, against the effect of BNSF direct access on KCSR operations, and the overall public interest justification for such access. BNSF's filing clearly indicates that it believes direct service is necessary for it to fulfill the

competitive role that the Board envisioned that "[f]or CITGO to have the competitive option that the Board deemed critical, BNSF must be able to provide direct service." KCSR should be allowed to test these claim. Obviously, if BNSF is already successfully competing and already providing CITGO with the competitive option that BNSF claims the Board deemed "critical," there is no justification for the grant of intrusive terminal trackage rights. Accordingly, KCSR requested, through Document Request nos. 2, 10 and 12, documents relevant to BNSF's claims about competition and BNSF's desires to switch to direct service, versus continuing with service via reciprocal switch. This is precisely the type of information that could affect the outcome of the proceeding.

More specifically, document Request No. 2 seeks information concerning Documents relating to efforts by BNSF to market, solicit, obtain, and transport products to/from the CITGO facility and copies of any contracts, proposals or tariffs governing such movements. Document Request No. 10 seeks information concerning Documents relating to the adequacy, inadequacy, level of, and/or market effectiveness of BNSF's rates vis-à-vis the rates provided by UP, KCSR, or any other transportation mode for any product transported to/from CITGO's Lake Charles facility, and Document Request No. 12 seeks related studies, analyses, or reports, relating to any cost savings BNSF may incur by providing direct unit train service to CITGO's Lake Charles Facility instead of continuing to serve CITGO via a reciprocal switch provided by UP. BNSF claims it must provide direct service to CITGO to be provide competitive rail service. Thus, KCSR seeks evidence to support that assertion through Document Requests 2, 10 and 12.

In response to these Document Requests, BNSF claims that the requested information is unduly burdensome, overbroad, not relevant, and seeks information that could cause BNSF to violate 49 U.S.C. § 11904. However, as explained above, with respect to the Section 11904

issues, disclosure of shipper specific information is permitted under a protective order, such as the one issued in this proceeding, on December 18, 2014 (see footnote 3).

BNSF's general objections are an insufficient basis for refusing to produce the information requested. BNSF's argument that it cannot disclose third party information, because it could cause BNSF to violate 49 U.S.C. § 11904, is simply contrary to the plain wording of the Protective Order which is intended to address that specific situation.[6]

BNSF also argues that issues related to the competitiveness of BNSF's service to CITGO vis-à-vis UP's and KCSR's service are not "relevant" and has refused to provide its traffic tapes and respond to Document Requests 2, 10, and 12. Why those issues were not relevant in BNSF's opinion was not articulated until its February 4, 2015 reply to KCSR's motion to compel the discovery of BNSF's traffic tapes where BNSF's relevance argument is, for the first time, finally articulated. According to BNSF, the Board has already determined that BNSF's access to Lake Charles is in the public interest and has already determined that 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."

But what BNSF does not inform the Board is that the "necessary to implement a condition" standard BNSF sets forth was articulated in the context of two terminal trackage rights applications that were filed as part of the merger application, and that after analysis of all of the statutory factors applicable to terminal trackage rights (public interest, operating issues, whether the facilities were terminals in the first place, the level of compensation, etc…), the

[6] In effect, by producing highly confidential documents, and then further redacting those documents as noted in footnote 4, BNSF has created a new category of documents: Highly, Highly Confidential documents. This is not provided for in the protective order and this practice should be disavowed.

Board determined that in those two narrow factual circumstances, it would not apply the Midtec standard[7] and instead would apply a "fill in the gap" standard so as to allow BNSF to implement its massive set of trackage rights that were imposed as a condition to the merger and thus grant the terminal trackage rights application.[8]

Contrary to what BNSF claims, however, the Board has not "already ... 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" so that the public interest standard of §11102(a) has already been met with respect to Lake Charles some eighteen year later. How could it? BNSF had not, at that time, filed a terminal trackage rights application seeking direct terminal trackage rights over the Rosebluff Lead. One will search long and hard to find any language in Decision Nos. 44 or 63 for language that indicates that the Board has presumed that the public interest standard articulated for the so-called "fill the gap" terminal trackage rights application should apply to a terminal trackage rights application filed eighteen years after a merger in an entirely different factual circumstance than the "fill the gap" terminal trackage rights applications that were granted. Indeed, the Board, knowing the statutory standards for a terminal trackage rights application, specifically required BNSF to file such an application if it could not come to

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[7] Midtec Paper Corp. v. Chi. & Nw. Transp. Co., 3 I.C.C. 2d 171 (1986), aff'd sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988).

[8] Absent the grant of the terminal trackage rights, BNSF could not have implemented the trackage rights that BNSF received and that formed the crux of the competitive conditions because there would have been sections of track (gaps) owned by KCSR for which BNSF would not have had the legal right to operate over and such gaps would have frustrated the entire purpose of the trackage rights conditions. To fill these gaps, BNSF filed two terminal trackage rights applications seeking authority to operate over KCSR track. Unlike what BNSF seeks here, those terminal trackage rights did not involve granting BNSF any rights to serve any shippers located on or adjacent to KCSR's tracks.

agreement with UP and KCS on access in the Lake Charles area. The Board's decisions that BNSF must meet the public interest standard, as well as the other standards of Section 11102, could not be clearer.

The issue of what the "public interest' requires in the context of this terminal trackage rights application is an open question and one which has yet to be decided by the Board. The Board has never determined what type of access BNSF needs to provide competition to UP and KCSR. Indeed, for eighteen years, BNSF has served the area via a reciprocal switch from UP or via haulage rights provided by UP. It is only now, after BNSF has determined that it wants to save money on moving unit trains of crude oil directly to CITGO (and apparently other shippers, although it presents no evidence relevant to shippers other than CITGO) does BNSF seek terminal trackage rights. As such, this is the first opportunity for the Board to address the public interest standard within the context of BNSF's service to Lake Charles and to address the other statutory factors applicable to Section 11102(a).

Furthermore, even if one were to accept BNSF's own articulated standard, i.e. that the "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," KCSR is entitled to challenge that notion and to argue that direct terminal trackage rights are not "necessary" for BNSF to be an effective competitor. In fact, even under BNSF's own standards, documents regarding whether or not BNSF's access over the past eighteen years has been sufficient for competition to be "preserved and protected" are highly relevant. While the Board need not yet decide what public interest standard it will apply for purposes of ruling on this Motion, clearly the documents (and traffic tapes) that KCSR seeks are relevant to these issues and "might" or "could" affect the outcome of the proceeding. That is the only standard KCSR

must meet at this time to have its motion compel granted. KCSR needs the requested information to undertake a complete public interest analysis under Section 11102. Accordingly, KCSR renews its request that BNSF be compelled to produce its traffic tapes[9] and the responses to Document Request Nos. 2, 10 and 12.

II. THE DOCUMENTS BNSF PRODUCED PURSUANT TO UP'S FIRST SET OF DISCOVERY REQUESTS ARE INCOMPLETE; THUS, THE BOARD SHOULD REQUIRE BNSF TO SUPPLEMENT ITS RESPONSES.

In responding to KCSR' Discovery Requests, BNSF repeatedly directs KCSR to the documents BNSF produced pursuant to UP's First Set of Discovery Requests to BNSF. KCSR has reviewed those documents (which are included in Appendix B, filed under seal) and has found BNSF's submission to be incomplete as follows:

	BNSF Bates Number	Documents Missing
1	BNSF-C-000043	Need response to questions posed in BNSF-C-000043-BNSF-C-000044 and identity of individual asking questions
2	BNSF-C-000102	Need Attachment (Citgo Pipeline Report) Spreadsheet
3	BNSF-C-000210	Need Attachment
4	BNSF-C-000259	May 27, 2014 E-mail to Becky Murchison - Capacity Questions – Summary to improvements made track and unloading operation for last year – Tally of Cars Interchanged (Partial Answer Provided in BNSF-HC-000583 but e-mail noted additional answers anticipated).
5	BNSF-HC-000064	12/19/12 E-mail – Answer to question posed
6	BNSF-HC-000066	12/19/12 Answers / plan to questions
7	BNSF-HC-000086	Need answer to 04/30/13 M.S. Question
8	BNSF-HC-000141	Need answer to D.S. question
9	BNSF-HC-000146	(2/20/14 - e-mail) Need answer to question
10	BNSF-HC-000197 to BNSF-HC-000207	Need documents that are missing in between Tabs
11	BNSF-HC-000216 to BNSF-HC-000217	Need answer to questions posed on 2/21/12 and 2/24/12
12	BNSF-HC-000223 to BNSF-HC-000225	Need PowerPoint attachment (BNSF-HC-000223)
13	BNSF-HC-000227	Need Attachments (Lake Charles MOU and ITA)
14	BNSF-HC-000260	Missing attachments

[9] KCSR is willing to limit its request for the past three years of traffic tapes and to data relevant to Lake Charles originations and terminations.

	BNSF Bates Number	Documents Missing
15	BNSF-HC-000266	NBR - missing attachment
16	BNSF-HC-000487	Missing PowerPoint attachment (BNSF-HC-000487)
17	BNSF-HC-000490	Missing meeting notes and PowerPoint attachment (BNSF-HC-000490)
18	BNSF-HC-000508	Missing PowerPoint attachment (BNSF-HC-000508)
19	BNSF-HC-000525	Missing meeting notes and PowerPoint attachment (BNSF-HC-000525)
20	BNSF-HC-000536	Missing two PDF attachments (BNSF-HC-000536)

KCSR requests that the Board order that BNSF provide the documents that appear to be missing from its response to UP. On the basis of the incomplete responses provided, KCSR believes this information could potentially affect the outcome of this proceeding and lead to other admissible evidence.

As explained in Argument Section No. 1, KCSR also requests that the Board order BNSF to unredact documents BNSF produced pursuant to UP's First Set of Discovery Requests to BNSF, as follows: BNSF-HC-000007, BNSF-HC-000009-BNSF-HC-000011, BNSF-HC-000052-BNSF-HC-000054, BNSF-HC-000056, BNSF-HC-000058, BNSF-HC-000060-BNSF-HC-000062, BNSF-HC-000155, BNSF-HC-000177, BNSF-HC-000400-BNSF-HC-000401, BNSF-HC-000410-BNSF-HC-000411, BNSF-HC-000426, BNSF-HC-000428-BNSF-HC-000430, BNSF-HC-000432, BNSF-HC-000434, BNSF-HC-000436-BNSF-HC-000438. BNSF-HC-000485, BNSF-HC-000572, and BNSF-HC-000590. KCSR's outside counsel and consultants have all executed the protective order in this proceeding; thus, as explained above any objection on the grounds that the documents contain confidential or third party information should be rejected.

EXPEDITED CONSIDERATION REQUESTED

KCSR respectfully requests expedited consideration for this Motion in order to provide KCSR with sufficient time to incorporate any responses into its March 2 comments. Throughout

this proceeding, KCSR has conscientiously narrowed its discovery requests, and responded as expeditiously and as completely as possible to other counsel's discovery requests; unfortunately, KCSR has not consistently received the same thorough responses from BNSF. Instead, BNSF refused, on the basis of relevancy, to provide its traffic tapes (a standard process in many Board proceedings and one in which UP timely responded and produced). Now, as detailed in this Motion, BNSF has similarly refused to provide any information relevant to the public interest standard, again on the basis of relevancy. Yet, it was not until its February 4, 2015 reply to KCSR's first motion to compel that BNSF finally articulated its rationale for refusing to provide such information.[10] Accordingly, this is the first time KCSR has had an opportunity to address the merits of BNSF's relevancy argument.

As the procedural schedule currently stands, KCSR's response is due on March 2, 2015. Under the Board's rules, BNSF has twenty days (until February 26, 2015) to respond to this Motion (which, as noted above, is being filed as expeditiously as possible). Assuming BNSF waits until February 26th to respond, the Board would have very little time to issue a decision, order the relevant documents produced (if it is inclined to do so), and then KCSR would have virtually no time to analyze the documents and incorporate them into its pleading. Accordingly, KCSR requests that either the Board move expeditiously, or, given that there is clearly a discovery dispute that requires time to resolve, KCSR suggests that the Board may want to refer

[10] KCSR was prepared to file this Motion earlier with respect to some of the missing documents relate to the operational and other issues, but shortly before doing so, learned that BNSF would be producing more information. Accordingly, to be fair to BNSF, KCSR needed to wait to review those documents before filing this Motion, which technically is not due until Monday. Those additional documents came late in the evening on February 3 after business hours when BNSF produced two CD's of highly confidential and confidential documents in response to KCSR 2nd Requests. While these materials were intended to supplement BNSF's first responses, the delay in getting these documents and the time necessary to review them and incorporate them into this Motion pushed back KCSR's filing of this Motion.

the case to an administrative law judge ("ALJ") and grant an extension of the procedural schedule in order to allow sufficient time for resolution of the numerous discovery disputes.[11]

CONCLUSION

KCSR respectfully requests that the Board consider this motion on an expedited basis and compel BNSF to promptly provide its traffic tapes and promptly produce the information responsive to Interrogatories 1 and 2 and Document Requests 1, 2, 3, 4, 5, 8, 10, and 12. KCSR also requests that the Board order BNSF to supplement its responses to UP's First Set of Discovery Requests to account for the incomplete and missing documents. Finally, KCSR requests that the Board order BNSF to unredact the redacted portion of documents that are already designated highly confidential.

KCSR believes that the Document Requests that are the subject of this Motion are reasonable and relevant as they could affect the precise issues the Board will analyze under Section 11102 and the answers would aid KCSR, UP, and the Board in evaluating whether BNSF operations could substantially impair the ability of the rail carriers owning the facilities or entitled to use the facilities to handle their business. The Board should, if necessary, also refer these issues to an ALJ and grant an extension of time for UP and KCSR to reply to BNSF's Opening Statement in order to provide sufficient time to resolve the various discovery disputes.

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[11] Indeed, just yesterday, on February 5, BNSF filed its First Set Of Interrogatories And Second Set of Document Requests to both KCSR and UP. From KCSR, BNSF seeks answers to 10 interrogatories and propounds 7 extensive document requests. As BNSF does not need this information until it files its rebuttal statement, currently scheduled for March 31, the timing of such requests is tenuous, coming as it does right in the middle of KCSR's efforts to obtain discovery and file its reply to BNSF's Opening Statement. Of course it is highly likely that KCSR will produce some documents and object to others, possibly necessitating BNSF filing its own motion to compel. This provides further support for the notion that all of these discovery issues may be resolved through use of an ALJ.

Respectfully submitted,

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Attorneys for Kansas City Southern Railway Company

February 6, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by mailing copies of Motion to Compel Responses to KCSR's Second Discovery Requests Directed to BNSF Railway Company via prepaid first class mail to all parties of record in these proceedings or by more expeditious means of delivery.

Dated at Washington, D.C. this 6th day of February, 2015.

William A. Mullins
Attorney for Kansas City Southern Railway Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
MOTION TO COMPEL RESPONSES TO
SECOND DISCOVERY REQUESTS DIRECTED TO BNSF RAILWAY COMPANY

APPENDIX A

BNSF'S WRITTEN RESPONSE TO KCSR'S
SECOND DISCOVERY REQUEST

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

RESPONSES AND OBJECTIONS OF BNSF TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S SECOND SET OF DISCOVERY REQUESTS TO BNSF

BNSF Railway Company ("BNSF") responds as follows to the Kansas City Southern Railway Company's ("KCSR") Second Set of Discovery Requests to BNSF:

GENERAL RESPONSES

The following General Responses apply to each of KCSR's document requests:

1. Where BNSF states that it will produce documents, BNSF will conduct a reasonable search for responsive, non-privileged documents, subject to any other qualifications specified in its response and the terms of the Protective Order in this proceeding.

2. Production of documents does not necessarily imply that they are relevant to or admissible in this proceeding and is not to be construed as waiving any of the general or specific objections stated below.

GENERAL OBJECTIONS

BNSF objects to KCSR's discovery requests on the following grounds:

1. **Privilege.** BNSF objects to KCSR's discovery requests to the extent that they call for information or documents subject to the attorney work product doctrine, the attorney-client privilege or any other legal privilege or protection. Any production of privileged or otherwise

protected documents is inadvertent and shall not constitute a waiver of any claims of privilege or other protection.

2. **Relevance/Burden.** BNSF objects to KCSR's discovery requests to the extent that they seek information or documents that are not directly relevant to this matter, to the extent that they seek documents in a form not maintained by BNSF in the regular course of business, to the extent that a response would impose an unreasonable burden on BNSF, and to the extent that they seek information or documents that are as readily, or more readily, available to KCSR as BNSF.

3. **Confidential Information.** BNSF objects to the KCSR discovery requests to the extent that they seek information or documents that constitute or disclose confidential, proprietary, or sensitive nonpublic information. Subject to and without waiving this objection, BNSF will produce information responsive to KCSR's discovery requests, if not otherwise objectionable, subject to the terms of the Protective Order in this proceeding. BNSF reserves the right to seek additional protection as needed.

4. **Third Party Information.** BNSF objects to the KCSR discovery requests to the extent that they seek information or documents that constitute or disclose information that would result in the violation of any contractual obligation to a third party, or in the violation of 49 U.S.C. § 11904, which relates to the disclosure of certain shipper or consignee information.

5. **Settlement/Mediation.** BNSF objects to production of documents prepared in connection with, or information relating to, possible settlement or mediation of this or any proceeding.

6. **Instruction No. 11.** BNSF objects to Instruction No. 11 as unduly burdensome, overbroad, and seeking information that is neither relevant nor reasonably calculated to lead to

the discovery of admissible evidence. Where BNSF agrees to produce responsive documents, BNSF will only search for and provide information created on or after January 1, 2012 to December 15, 2014.

7. BNSF incorporates these General Objections into each Response below as if fully set forth therein.

OBJECTIONS AND RESPONSES TO KCSR DISCOVERY REQUESTS

KCSR Requests for Admission

KCSR Request for Admission No. 1: "Admit or Deny: UP has the right to grant KCSR operating rights to directly serve all shippers on the 50/50 line without BNSF's consent."

BNSF Response: BNSF objects to this Request on the grounds that it is overbroad and it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it seeks an admission related to the legal interpretation of contracts that do not relate to this proceeding, namely the February 12, 1998 Term Sheet Agreement between UP and BNSF and the September 1, 2000 Operating Agreement between UP and BNSF. Subject to these objections and without waiving the General Responses and General Objections set forth above, BNSF states that Section 4.1 of the Operating Agreement with respect to the 50/50 Line defines the Parties' rights to admit third parties' to the Line. To the extent not expressly admitted herein, BNSF denies the Request.

KCSR Request for Admission No. 2: "In the event of a future merger or control transaction between UP and any other Class I carrier besides KCSR or BNSF, UP has the right, as part of a settlement agreement between UP and any other party, to grant KCSR operating rights to directly serve all shippers on the 50/50 line without BNSF's consent."

BNSF Response: BNSF objects to this Request on the grounds that (1) it is overbroad and it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it seeks an admission related to the legal interpretation of contracts that do not relate to this proceeding, namely the February 12, 1998 Term Sheet Agreement between UP and BNSF and the September 1, 2000 Operating Agreement between UP and BNSF, and (2) it seeks an admission with respect to a vague and hypothetical scenario.

KCSR Request for Admission No. 3: "In the event of a future merger or control transaction between UP and any other Class I carrier besides KCSR or BNSF, [and] UP has in fact granted, without BNSF's consent, KCSR the right, as part of a settlement agreement between UP and any other party, to operate over the 50/50 line to directly serve all shippers on the 50/50 line that the STB could impose that settlement agreement as a condition to the merger and override any contractual provisions that might have prevented UP from granting KCSR such access."

BNSF Response: BNSF objects to this Request on the grounds that (1) it is overbroad and it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it seeks an admission related to the legal interpretation of statutory provisions and of contracts that do not relate to this proceeding, namely the February 12, 1998 Term Sheet Agreement between UP and BNSF and the September 1, 2000 Operating Agreement between UP and BNSF, and (2) it seeks an admission with respect to a vague and hypothetical scenario. Subject to these objections and without waiving the General Responses and General Objections set forth above, BNSF states that 49 U.S.C. §§ 11321(a) and 11324(c) set forth the STB's legal authority to impose a condition to a merger and to override contractual provisions as hypothesized in this Request.

KCSR Request for Admission No. 4: "In the event of a future merger or control transaction between UP and any other Class I carrier besides KCSR or BNSF, UP has in fact granted, without BNSF's consent, KCSR the right, as part of a settlement agreement between UP and a shipper or shipper trade organization, to operate over the 50/50 line to directly serve all shippers on the 50/50 line and the STB has imposed that settlement agreement as a condition to the merger that BNSF would be entitled to receive compensation from KCSR for KCSR's use of the 50/50 line and such compensation would be in addition to, not in lieu of, any compensation that UP may owe BNSF for UP's use of the 50/50 line."

BNSF Response: BNSF objects to this Request on the grounds that (1) it is overbroad and it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it seeks an admission related to the legal interpretation of statutory provisions and contracts that do not relate to this proceeding, namely the February 12, 1998 Term Sheet Agreement between UP and BNSF and the September 1, 2000 Operating Agreement between UP and BNSF, and (2) it seeks an admission with respect to a vague, hypothetical, and abstract scenario in that the STB lacks authority to order that KCSR could "directly serve all shippers on the 50/50 line." Subject to these objections and without waiving the General Responses and General Objections set forth above, BNSF states that the referenced agreements and 49 U.S.C. §§ 11102(a) govern BNSF's right to compensation in the hypothetical scenario described in this Request.

KCSR Interrogatories

KCSR Interrogatory No. 1: "In the event that KCSR and BNSF both have a cut of 30 or more cars ready to be placed into the CITGO yard, which is a potential operational issue that

could arise as noted by Roger Lambeth, Superintendent of the UP Livonia Service Unit, and BNSF's cars are placed first, explain why that does not interfere with KCSR's operations."

BNSF Response: BNSF objects to this Request on the grounds that it is unduly burdensome, overbroad and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it seeks documents related to speculative operating characteristics. Subject to these objections and without waiving the General Responses and General Objections set forth above, BNSF states that BNSF service, which would closely resemble the "BNSF Citgo Crude Operating Plan" proposed by UP on December 18, 2012, would effectively replace UP service for BNSF's reciprocal switch cars, and BNSF plans to hold its cars in the Lacassine Yard until UP gives BNSF a window to operate, thus the operating scenario would not be materially different from the current situation. BNSF further states that the frequency, volume, timing of delivery and operating characteristics of trains BNSF will use to perform service to CITGO will vary, but BNSF expects that service to CITGO will closely resemble the operating plan outlined by Rollin D. Bredenberg in his Verified Statement, submitted on December 31, 2014 as an attachment to BNSF's Opening Statement in this proceeding. BNSF further directs UP to the Verified Statement of Rollin D. Bredenberg and to the documents BNSF is producing pursuant to UP's First Set of Discovery Requests to BNSF.

KCSR Interrogatory No. 2: "Is your request for direct terminal trackage rights over the Rosebluff Industrial Lead limited to serving only CITGO and no other shippers located on, or connecting to, the Rosebluff Industrial Lead? If no, list all other shippers BNSF would attempt to serve in the event its Application is granted and the STB's decision does not limit BNSF's access only to CITGO."

BNSF Response: Subject to and without waiving the General Responses and General Objections set forth above, BNSF states that at this time BNSF identifies CITGO as the only shipper that it will initially serve using the proposed terminal trackage rights. Upon approval of the proposed terminal trackage rights, BNSF anticipates that additional shippers will request BNSF service using the proposed terminal trackage rights. BNSF cannot speculate as to which other shippers it may seek to serve with these rights. BNSF further directs KCSR to the Verified Statement of Rollin D. Bredenberg, submitted on December 31, 2014 as an attachment to BNSF's Opening Statement in this proceeding, and to the documents BNSF is producing pursuant to UP's First Set of Discovery Requests to BNSF.

KCSR Interrogatory No. 3: "Is your request for direct terminal trackage rights over the Rosebluff Industrial Lead limited to serving CITGO via unit trains only? If yes, what is the minimum and maximum number of cars BNSF intends to utilize in such unit trains?"

BNSF Response: BNSF objects to this Request on the grounds that it is unduly burdensome, overbroad, seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it seeks documents related to speculative operating characteristics, and is vague in that the term "unit train" is used differently by different rail carriers. Subject to these objections and without waiving the General Responses and General Objections set forth above, BNSF states that its request for direct terminal trackage rights over the Rosebluff Industrial Lead is not limited to serving CITGO via unit trains only, and that BNSF intends to move all manifest traffic as well as trains carrying multiple cars up to the total number of cars that the CITGO facility may hold.

KCSR Interrogatory No. 4: "In the event BNSF's Application is denied, will BNSF continue to serve CITGO via switching provided by UP?"

BNSF Response: BNSF objects to this Request on the ground that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it seeks documents related to speculative operating characteristics. Subject to that objection and without waiving the General Responses and General Objections set forth above, BNSF states that it will continue to serve CITGO consistent with BNSF's common carrier obligation through whatever service options are available to BNSF at the time CITGO requests service.

KCSR Document Requests

KCSR Document Request No. 1: "Provide copies of all Documents relating to BNSF's operational capabilities of providing existing or future rail service to CITGO's Lake Charles area facility."

BNSF Response: BNSF objects to this Request on the grounds that it is unduly burdensome and is overbroad. Subject to these objections and without waiving the General Responses and General Objections set forth above, BNSF directs KCSR to the documents produced by BNSF in response to UP's First Set of Discovery Requests to BNSF.

KCSR Document Request No. 2: "Provide copies of all Documents involving efforts by BNSF to market, solicit, obtain, and transport any fuel, lubricant, petrochemical and other industrial product to/from CITGO's Lake Charles facility, including copies of any prior, existing, or future contracts, proposals, or tariffs."

BNSF Response: BNSF objects to this Request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it seeks documents unrelated to the standards for terminal trackage rights under 49 U.S.C. §11102. Subject to these objections

and without waiving the General Responses and General Objections set forth above, BNSF directs KCSR to the documents produced by BNSF in response to UP's First Set of Discovery Requests to BNSF.

KCSR Document Request No. 3: "Provide copies of all Documents relating to BNSF's $26 million investment in its new multi-track yard at Lacassine and all studies, presentations, or plans to serve Lake Charles area Shippers via the yard."

BNSF Response: BNSF objects to this Request on the grounds that it is unduly burdensome, overbroad and it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it seeks documents that do not relate to this proceeding, namely with respect to trackage that is different than the trackage at issue in this proceeding (the Rosebluff Industrial Lead). Subject to and without waiving these objections or the General Responses and General Objections above, BNSF directs KCSR to the documents produced by BNSF in response to UP's First Set of Discovery Requests to BNSF.

KCSR Document Request No. 4: "Provide copies of all Documents relating to any plans, intentions, or discussions by BNSF to serve any other Lake Charles area Shipper in the event BNSF is able to directly operate over the Rosebluff Industrial Lead to serve CITGO's Lake Charles facility."

BNSF Response: BNSF objects to this Request on the grounds that it is unduly burdensome, is overbroad and it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that the request seeks documents related to speculative shippers and service and to the extent that the request seeks documents that do not relate to this proceeding, namely with respect to trackage that is different than the trackage at issue in this proceeding (the Rosebluff Industrial Lead). Subject to and without

waiving these objections or the General Responses and General Objections above, BNSF directs KCSR to the documents produced by BNSF in response to UP's First Set of Discovery Requests to BNSF.

KCSR Document Request No. 5: "Provide copies of all Documents relating to any rail operational impacts that may occur at any non-CITGO Lake Charles area Shipper facility if BNSF provides direct rail service to CITGO's Lake Charles facility."

BNSF Response: BNSF objects to this Request on the grounds that it is unduly burdensome, is overbroad and it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that the request seeks documents related to speculative shippers and service and to the extent that the request seeks documents that do not relate to this proceeding, namely with respect to trackage that is different than the trackage at issue in this proceeding (the Rosebluff Industrial Lead). Subject to and without waiving these objections or the General Responses and General Objections above, BNSF directs KCSR to the documents produced by BNSF in response to UP's First Set of Discovery Requests to BNSF.

KCSR Document Request No. 6: "Provide copies of all Documents that relate to BNSF's level and/or quality of service to any Lake Charles area Shipper other than CITGO where such service either currently involves BNSF service, or formerly involved BNSF service and whether such service was via reciprocal switch from UP and/or via BNSF's use of the 50/50 line."

BNSF Response: Subject to and without waiving the General Responses and General Objections above, BNSF objects to this Request on the grounds that it is unduly burdensome, is overbroad and it seeks information that is neither relevant nor reasonably calculated to lead to

the discovery of admissible evidence in that the request seeks documents related to speculative shippers and service and to the extent that the request seeks documents that do not relate to this proceeding, namely with respect to trackage that is different than the trackage at issue in this proceeding (the Rosebluff Industrial Lead). Subject to and without waiving these objections or the General Responses and General Objections above, BNSF directs KCSR to the documents produced by BNSF in response to UP's First Set of Discovery Requests to BNSF.

KCSR Document Request No. 7: "Provide copies of all Documents that led BNSF to "reasonably assume[]" (See BNSF's Opening Statement and Evidence at 8) that KCSR's objection relating to BNSF's direct access to CITGO or any other Lake Charles area Shipper had been resolved.

BNSF Response: Subject to and without waiving the General Responses and General Objections above, BNSF states that it will produce the Restated and Amended Settlement Agreement (RASA), the February 12, 1998 Term Sheet Agreement between UP and BNSF, and the September 1, 2000 Operating Agreement if requested by KCSR.

KCSR Document Request No. 8: "Provide copies of all Documents relating to the adequacy, inadequacy, level of, and/or quality of BNSF's prior or existing service to CITGO's Lake Charles area facility."

BNSF Response: Subject to and without waiving the General Responses and General Objections above, BNSF directs KCSR to the documents produced by BNSF in response to UP's First Set of Discovery Requests to BNSF.

KCSR Document Request No. 9: "Provide copies of all Documents reflecting any communications between BNSF and UP relating to the adequacy, inadequacy, level of, and/or

quality of UP's switching services, including any requests by BNSF to UP requesting improvements in, or changes to, such switching service."

BNSF Response: BNSF objects to this Request on the grounds that it is unduly burdensome, is overbroad and it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence to the extent that the request seeks documents that do not relate to this proceeding, namely with respect to historic UP switching services that do not relate to BNSF's intended future use of terminal trackage rights on the Rosebluff Industrial Lead. Subject to and without waiving these objections or the General Responses and General Objections above, BNSF directs KCSR to the documents produced by BNSF in response to UP's First Set of Discovery Requests to BNSF.

KCSR Document Request No. 10: "Provide copies of all Documents relating to the adequacy, inadequacy, level of, and/or market effectiveness of BNSF's rates vis-à-vis the rates provided by UP, KCSR, or any other transportation mode for any product transported to/from CITGO's Lake Charles facility."

BNSF Response: Without waiving the General Responses and General Objections above, BNSF objects to this Request on the grounds that it (1) is unduly burdensome, (2) is overbroad, (3) seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it seeks documents unrelated to the standards for terminal trackage rights under 49 U.S.C. §11102, and (4) seeks information that could cause BNSF to violate 49 U.S.C. § 11904, as explained above in General Objection No. 4.

KCSR Document Request No. 11: "Other than any information or statements included in BNSF's December 31, 2014 Opening Statement and Evidence, provide any other Documents supporting BNSF's statement that its direct "use of the trackage is practicable without

substantially interfering with the ability of KCSR or UP to handle their own business." (See BNSF's Opening Statement and Evidence at 10).

BNSF Response: Subject to and without waiving the General Responses and General Objections above, BNSF directs KCSR to the documents produced and answers provided by BNSF in response to UP's First Set of Discovery Requests to BNSF.

KCSR Document Request No. 12: "Provide copies of all Documents, including any studies, analyses, or reports, relating to any cost savings BNSF may incur by providing direct unit train service to CITGO's Lake Charles are facility instead of continuing to serve CITGO via a reciprocal switch provided by UP."

BNSF Response: Without waiving the General Responses and General Objections above, BNSF objects to this Request on the grounds that it (1) is unduly burdensome, (2) is overbroad, (3) seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it seeks documents unrelated to the standards for terminal trackage rights under 49 U.S.C. §11102, and (4) seeks information that could cause BNSF to violate 49 U.S.C. § 11904, as explained above in General Objection No. 4.

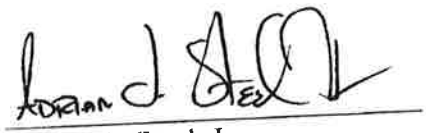
KCSR Document Request No. 13: "Provide copies of all Documents supporting BNSF's claim that it is BNSF's "sole option" to choose either direct service or reciprocal switching, on a case-by-case basis, irrespective of the agreements between UP and KCSR, or any operational issues that arise from vacillating between the two access provisions."

BNSF Response: Subject to and without waiving the General Responses and General Objections above, BNSF states that it will produce the Restated and Amended Settlement Agreement (RASA), the February 12, 1998 Term Sheet Agreement between UP and BNSF, and the September 1, 2000 Operating Agreement if requested by KCSR.

KCSR Document Request No. 14: "Provide copies of all Documents reflecting any communications between BNSF and CITGO relating to the capacity, lack of capacity, adequacy, inadequacy, and/or operational capabilities of CITGO's yard at its Lake Charles facility to load, unload, or store BNSF cars."

BNSF Response: BNSF objects to this Request on the grounds that it is burdensome and overbroad. Subject to and without waiving these objections or the General Responses and General Objections above, BNSF directs KCSR to the documents produced by BNSF in response to UP's First Set of Discovery Requests to BNSF.

Respectfully submitted,



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Dated: January 28, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2015, copies of the foregoing Responses and Objections of BNSF to KCSR's Second Set of Discovery Requests to BNSF have been served by e-mail on counsel for Union Pacific Railroad Company, 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).

Adrian L. Steel, Jr.

HIGHLY CONFIDENTIAL
FILED UNDER SEAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
MOTION TO COMPEL RESPONSES TO
SECOND DISCOVERY REQUESTS DIRECTED TO BNSF RAILWAY COMPANY

APPENDIX B

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DISCOVERY DOCUMENTS CITED IN MOTION