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September 16, 2013

## VIA E-FILING

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

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

Dear Ms. Brown:

On September 11, 2013, BNSF Railway Company (“BNSF”) filed a letter in this proceeding, submitting a copy of a decision issued September 9 by the United States District Court for the Western District of Louisiana (“BNSF Letter”). The BNSF Letter states that in light of the September 9 ruling, the Surface Transportation Board (“STB”) must move forward with BNSF’s terminal trackage rights application in this docket because “there are simply no other means for BNSF to obtain the relief it seeks than through Board action.” BNSF Letter at 2. BNSF is incorrect, and its request should be denied.

BNSF is wrong that there is no alternative other than proceeding with its terminal trackage rights application. The alternative is to actually follow what Decision No. 63 said long ago and that is to negotiate in good faith with the owners of the facilities – The Kansas City Southern Railway Company (“KCS”) and Union Pacific (“UP”) - to use the property. In the 17 years since issuance of Decision No. 63, BNSF has not once requested KCS to negotiate over BNSF’s access to the Lake Charles joint facilities. Indeed, because of BNSF’s long failure to take this obvious step, KCS has sent the attached letter to BNSF inviting BNSF to make an offer to KCS for obtaining KCS’s consent to the use of the joint facility property and to explain how

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and when BNSF proposes to use the property and what it offers to pay for that use.<sup>1</sup> This anomalous invitation – asking BNSF to actually ask for what it wants – is made necessary by BNSF’s position that it doesn’t need to ask (or to pay) for what it wants to use. Until this basic step occurs, there is no need for the Board to move forward with BNSF’s terminal trackage rights application.<sup>2</sup>

Indeed, processing BNSF’s application at this time is also premature because BNSF still has not followed the other procedure available to it if negotiations failed. As Decision No. 63 set forth, if the parties could not successfully negotiate terms for BNSF access, BNSF could seek arbitration under the agreements, and if BNSF’s access was still blocked, BNSF could file for terminal trackage rights. Not only has BNSF refused to negotiate with KCS, it also has not requested arbitration either. Furthermore, BNSF cannot show that its access is “blocked” so as to require consideration of BNSF’s access via a terminal trackage rights application.<sup>3</sup>

BNSF is not blocked from accessing Westlake/West Lake Charles shippers. While BNSF has not had direct trackage rights to serve these shippers (there is no indication that BNSF’s access was ever required to be via direct trackage rights<sup>4</sup>) BNSF has had access by reciprocal switching for many years. BNSF has admitted that it accesses the area through reciprocal switching and that it entered into an agreement where UP would deliver cars to shippers on behalf of BNSF. See, e.g., BNSF Reply to KCS Motion to Dismiss or Hold in Abeyance at 9 (referring to “existing indirect BNSF service”). CITGO Petroleum Corp. (“CITGO”) likewise acknowledged that it is “served directly by UP, and indirectly by BNSF and KCS.” CITGO Petition to Intervene at 1. Indeed, KCS and BNSF entered into an agreement to cooperate on traffic to and from the Lake Charles area. See KCS Reply to BNSF Terminal Trackage Rights Application at 6-7. Accordingly, there is simply no basis to move forward with

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<sup>1</sup> KCS has previously offered to negotiate with BNSF. Those offers were either ignored or rejected.

<sup>2</sup> KCS commits to negotiating in good faith with BNSF about the access issue and is willing to submit to Board-sponsored mediation if private negotiations fail. But private, good faith negotiations must be tried first. Indeed, while its suit was pending in Louisiana, KCS voluntarily provided maps of the Westlake/West Lake Charles joint facilities to BNSF which BNSF could use in developing a proposal for service.

<sup>3</sup> “If the parties (KCS, BNSF, and UP/SP) are unable to agree and the arbitral interpretation produces a situation where BNSF access to the Lake Charles area is blocked, BNSF may return to the Board to seek approval of a terminal trackage rights application.” Decision No. 63, 1996 WL 691928 at \*5. (Emphasis added.)

<sup>4</sup> At the time of Decision No. 63, whether BNSF should have access to Westlake/West Lake Charles shippers via reciprocal switching was also in question. *Id.* at \*4. That issue was resolved long ago, with KCS and UP allowing such access.

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the terminal trackage rights application at this time, and BNSF is incorrect that “there are simply no other means for BNSF to obtain the relief it seeks than through Board action.”

The BNSF letter is correct in one respect. BNSF is correct that the court determined that the Board has exclusive jurisdiction to interpret its own order. But KCS has not and does not dispute the STB’s authority to interpret its own rulings. Instead, KCS sought a contract interpretation from the court that BNSF has no legal right, as a matter of contract, to operate on KCS-owned facilities covered by those contracts without KCS’ consent. KCS sought this declaration because BNSF had argued that it had both an STB right and a contract right to use KCS-owned property to directly serve the CITGO facility.<sup>5</sup> KCS’s position was - and still is - that BNSF had no such contract rights.

Contrary to the impression BNSF presents, the court’s decision did not reject KCS’s view that BNSF had no contractual right to use the joint facility properties, but rather actually upheld KCS’s view. Judge Foote found that “BNSF does not dispute the meaning of the four joint use agreements.” Decision at 11, n. 9. Because the court found that BNSF agreed with the legal meaning of the agreements and thus had no contractual right to use the property, there was no case or controversy concerning the interpretation of those agreements. As a result, the court correctly found that any rights BNSF may have would be a result of STB decisions, which remain within the purview of the STB, not the courts, to decide.

Now that it is clear that BNSF has no contractual right to direct access over the joint facility properties, and notwithstanding the Board’s directives to BNSF to negotiate and then arbitrate, BNSF wants to skip those steps and have the Board impose such forced trackage rights through a terminal trackage rights application<sup>6</sup> because assertedly “there are simply no other means for BNSF to obtain the relief it seeks than through Board action.”

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<sup>5</sup> BNSF has made numerous statements that UP granted BNSF contractual rights to directly operate over the joint facility properties. Under the joint facility agreements, UP has no contractual right to grant access to a third party without KCS’s consent. Any dispute between UP and BNSF under contracts between them can be settled by them under those contracts, but will not change KCS’ rights under its joint facility contracts with UP, which require KCS’s consent to access by another party.

<sup>6</sup> A ruling in BNSF’s favor would be unprecedented even in the context of a merger proceeding. Agency precedent is clear that it cannot compel non-applicant railroads (as KCS was in the UP/SP proceeding) to grant trackage rights to other carriers in connection with a control or merger proceeding. See Canadian National Ry., et al – Control – Illinois Central Corp., et al., STB Docket No. FD 33556 (Decision No. 37) (STB served May 25, 1999) (“CN/IC”), slip op. at 32; Rio Grande Industries, et al.—Pur. & Track. – CMW Ry. Co., 5 I.C.C.2d 952, 978 (1989); and Rio Grande Industries, Inc., et al. – Purchase and Related Trackage Rights – Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL, Finance Docket No. 31505,

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If BNSF means that there are no other means for it to obtain uncontrolled access to the joint facilities other than negotiation, arbitration, and without paying adequate compensation, then perhaps BNSF's statement would be true. On the other hand, if BNSF means that it cannot bring a bona fide offer to KCS, specifying proposed access terms (including payment, not simply saying that payment is Union Pacific's responsibility, as in its application), then BNSF is flatly wrong, as evidenced by the attached KCS letter and by the Board's Decision No. 63. KCS is more than open to such an offer and negotiation and it is premature of BNSF to suggest that such negotiations would be "futile" (unless BNSF intends to make negotiation futile).

In the end, there are several avenues of relief for BNSF to pursue before the Board embarks on a complicated, time consuming, and unprecedented course of action. Until such time as BNSF can prove that it cannot obtain some form of relief via other means – i.e., that its access is "blocked" - the Board should not begin a terminal trackage rights proceeding, especially while BNSF's current access allows BNSF to more than effectively compete against UP and KCS.

Sincerely,



William A. Mullins

Enclosure

cc: All Parties of Record

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Decision No. 6, slip op. at 8 (ICC served Nov. 15, 1989). Of course this is precisely what BNSF seeks – the imposition of direct trackage rights over lines owned, either in whole or in part, by KCS, who was not a merger applicant in the UP/SP proceeding.

# KANSAS CITY SOUTHERN

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September 13, 2013

**VIA E-MAIL:** Richard.Weicher@bnsf.com  
Richard E. Weicher, Esquire  
Vice President & General Counsel - Regulatory  
BNSF Railway Company  
2650 Lou Menk Dr.  
Fort Worth, TX 76131-2830

Re: The Kansas City Southern Railway Company v. BNSF Railway Company  
U.S. District Court, Western District of Louisiana  
Civil Action No. 13-00098; Order Entered September 9, 2013

Dear Rick:

As you are aware, Judge Foote of the U.S. District Court for the Western District of Louisiana on Monday granted BNSF Railway Company's motion to dismiss the above-entitled action. This letter is to invite BNSF to submit a specific proposal and to negotiate to obtain KCSR's consent to access the joint facilities of KCSR and Union Pacific Railroad Company at Westlake and West Lake Charles, LA, consistent with Judge Foote's ruling.

Judge Foote found that "BNSF does not dispute the meaning of the four joint use agreements," and indicated, therefore, that the Court believed there was no case or controversy concerning interpreting the agreements governing access to the Westlake and West Lake Charles joint facilities. Decision at 11, n. 9. BNSF's filing of the decision with the Surface Transportation Board Wednesday in Finance Docket No.32760 (Sub-No. 46) confirms that BNSF agrees with Judge Foote's findings and conclusions.

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The joint facility agreements clearly require KCSR's consent to admission of another party to the Westlake/West Lake Charles joint facilities. Now that BNSF agrees with that fact, as the Court has found, KCSR understands that BNSF has receded from BNSF's prior position that it does not need and will not negotiate for KCSR's consent to access the joint facilities.

KCSR invites BNSF to submit a proposal for the access it desires to the joint facilities, including proposed times and means of access and compensation to be paid to KCSR for use of these facilities that KCSR owns in whole or in part. Also, please propose some times when it would be convenient for you to meet after we have had time to review BNSF's proposals.

I look forward to receiving BNSF's proposal seeking KCSR's consent for BNSF's proposed access to the joint facilities.

Sincerely,

A handwritten signature in black ink, appearing to read "W. James Wochner".

W. James Wochner  
Chief Legal Officer  
The Kansas City Southern Railway Company

Cc: Surface Transportation Board  
Parties of Record, FD 32760 (Sub-No. 46)