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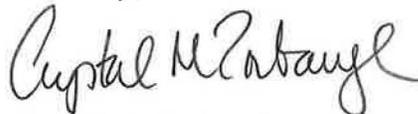
Cynthia T. Brown, Chief  
Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington DC 20423-0001

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  
**EXPEDITED CONSIDERATION REQUESTED**

Dear Ms. Brown:

Enclosed is The Kansas City Southern Railway Company's ("KCSR") Motion to Compel Responses to KCSR's First Set of Discovery Requests Directed to BNSF Railway Company. 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) 663-7831 or by e-mail: [czorbaugh@bakerandmilller.com](mailto:czorbaugh@bakerandmilller.com).

Sincerely,



Crystal M. Zorbaugh

Enclosure

cc: W. James Wochner  
David C. Reeves

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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

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**THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S  
MOTION TO COMPEL RESPONSES TO FIRST SET OF  
DISCOVERY REQUESTS TO BNSF**

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**EXPEDITED CONSIDERATION REQUESTED**

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**Attorneys for The Kansas City Southern  
Railway Company**

**January 15, 2015**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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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 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").

On December 4, 2014, BNSF served its First Set of Discovery Requests ("BNSF's First Request") to KCSR. BNSF's First Request sought operating plans and documents, communications, studies, and analysis, on capacity and congestion. KCSR spent significant time gathering documents and reviewing its records, in an effort to respond to BNSF's First Request

with relevant information as expeditiously as possible. On December 19, 2014, KCSR provided its response to BNSF within the required 15 day window. The same day, KCSR, after reviewing its records and considering what information would be necessary to prepare its verified statements and by extension its' testimony in this proceeding, KCSR served its First Set of Discovery Requests to BNSF ("KCSR's First Request"). As recently acknowledged by BNSF's counsel in an e-mail, KCSR narrowed KCSR's First Request substantially. In fact, KCSR submitted a single document request for the data subject to this Motion to Compel.

BNSF should be compelled to produce the BNSF Traffic Tapes. The data on the BNSF Traffic Tapes is directly relevant to this proceeding, despite BNSF's claims to the contrary in its January 5, 2015 Objections of BNSF to the Kansas Southern Railway Company's First Set of Discovery Requests to BNSF. As explained in the Argument Section, BNSF's general and specific objections are insufficient grounds for refusing to provide the BNSF Traffic Tapes.

#### **BRIEF BACKGROUND**

This dispute originates from the UP/SP merger, which was approved the Board in 1996. As a condition to granting the merger, BNSF purports it received direct trackage rights over nine miles of track in West Lake Charles, LA, jointly owned by UP and KCS, known as the Rosebluff Industrial Lead. See BNSF's Opening Statement and Evidence ("BNSF Opening") at 3. While BNSF has been operating via reciprocal service via UP since 1996, BNSF is now seeking STB action to confirm its "Board-imposed direct trackage rights." Id. at 1.

## ARGUMENT

### **1. THE TRAFFIC TAPES ARE RELEVANT AND KCSR'S ABILITY TO PREPARE ITS CASE WILL BE HINDERED IF DENIED ACCESS TO RELEVANT AND ADMISSIBLE EVIDENCE.**

BNSF should be compelled to produce the BNSF Traffic Tapes. As stated above, this data is directly relevant to this proceeding. KCSR needs the BNSF Traffic Tapes to prepare verified statements and evidence regarding the competitive effectiveness of the Board's remedies imposed in the original UP/SP proceeding. Further, the BNSF Traffic Tapes are directly relevant to potential future capacity constraints issues over the Rosebluff Industrial Lead. As noted by UP's Superintendent of the UP Livonia Service Unit, if KCSR and BNSF were to simultaneously attempt to serve CITGO (just one customer), it could create operational issues for both carriers. KCSR needs the BNSF Traffic Tapes to assure that it can continue to honor its common carrier obligation for all customers along the Rosebluff Industrial Lead. KCSR's concern is valid and access to the traffic tapes is justifiable, because according to BNSF's Opening Statement, BNSF at its sole option may choose direct service or reciprocal service based on the needs of each particular shipper. 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, if BNSF's Terminal Trackage Rights application was to be granted by the STB.

### **2. BNSF'S GENERAL AND SPECIFIC OBJECTION ARE INSUFFICIENT GROUNDS FOR REFUSING TO PROVIDE THE BNSF TRAFFIC TAPES.**

BNSF objects to KCSR's discovery requests through four general objections, and one specific objection, all of which are nothing more than an attempt to hide relevant and admissible evidence. The Board should reject BNSF's attempts to hide information that is necessary for KCSR to prepare its verified statements and present its case.

BNSF offers four general objections, all of which are insufficient bases for refusing to produce the data requested in KCSR's First Request.

**General Objection 1 – Privilege** – Traffic tapes are routinely held in already-identifiable fields and in a readily accessible database used by BNSF in its regular course of business, thus, the information is not attorney work product, nor privileged. Any objection on the grounds of privilege is clearly insufficient grounds for refusing to produce the requested information. Traffic tapes will be subject to the Board's issued protective order.

**General Objection 2 – Relevance/Burden** – The information in KCSR's First Request is clearly relevant, and not available to KCSR. In fact as stated above, traffic tapes are routinely produced by railroads, in their regular course of business. KCSR only has two avenues to obtain BNSF traffic tapes. KCSR was recently forced to file a waybill request, because BNSF objected to its discovery request, and although KCSR's request has been granted the waybill file does not contain the same information that can be obtained from BNSF's traffic tapes. In addition, UP has agreed to provide its traffic tapes. Given that BNSF routinely produces and has the requested data, any objection on the grounds of relevance/burden is clearly insufficient grounds for refusing to produce the requested information.

**General Objection 3- Confidential Information** - Access to the information requested in KCSR's First Request can be limited to B&M, and Dr. Curtis Grimm, and Dr. Robert J. Reynolds (both Dr. Grimm and Dr. Reynolds will be witnesses for KCSR in this proceeding). On December 18, 2014, the Board granted UP's Motion

for a Protective Order. B&M, Dr. Grimm, and Dr. Reynolds are all prepared to sign the protective order, and protect confidential information. Therefore, any objection on the grounds that the information is confidential is insufficient grounds for BNSF refusing to produce the requested information.

**General Objection 4 – Third Party Information** – Litigation often involves this party information, disclosure of which is permissible in the course of litigation. Again, this objection is insufficient grounds for BNSF refusing to produce the requested information.

#### **BNSF's Specific Objection**

BNSF's Specific Objection essentially restates its general objections and adds that KCSR's request for BNSF Traffic Tapes seeks information that is neither relevant to the proceeding, nor reasonably calculated to lead to the discovery of admissible evidence. This objection is most troubling. According to the Board, parties to a proceeding before the Board are 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); Ballard Term. R.R. – Acquisition & Operation Exemption – Woodinville Subdivision, Docket No. FD 35731, slip op. at 3 (STB served Aug. 22, 2013) ("Ballard"). Put simply, it is not BNSF's right to decide what information is relevant and which is not. As explained above, KCSR has presented valid justifications for the necessary information. BNSF on the other hand has offer nothing more than unsupported excuses for failing to produce the information requested in KCSR's First Request.

#### **LEGAL STANDARD**

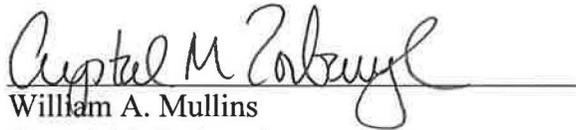
In considering motions to compel, the Board considers whether the discovery sought would be unduly burdensome in relation to the value of the information to be obtained. 49

C.F.R. § 1114.21(c)). Here, the information requested is incredibly valuable for KCSR to produce verified statements and testimony in this proceeding and the burden of production on BNSF is minimal, because BNSF keeps the information requested in its ordinary course of business.

### CONCLUSION

KCSR respectfully requests that the Board consider this motion on an expedited basis and compel 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”).

Respectfully submitted,



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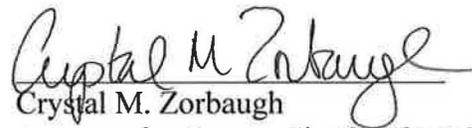
Attorneys for Kansas City Southern Railway  
Company

January 15, 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 First Set of 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 15<sup>th</sup> day of January, 2015.



Crystal M. Zorbaugh  
Attorney for Kansas City Southern Railway  
Company