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January 19, 2021

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

Dear Ms. Brown:

The Kansas City Southern Railway Company (“KCS”) hereby files, via e-filing, KCS’s Reply to BNSF’s Petition To Establish Conditions Of Use, which BNSF filed on December 18, 2020 in the above-captioned matter. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,

/s/ William A. Mullins

William A. Mullins

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

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

KCS'S REPLY TO BNSF'S PETITION TO ESTABLISH CONDITIONS OF USE

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KCS'S REPLY TO BNSF'S PETITION TO ESTABLISH CONDITIONS OF USE

SUMMARY OF ARGUMENT¹

Seventy-one years ago, KCS and a predecessor of UP purchased 4.788-miles of government surplus lead track and 1.6-miles of related yard and industry track left over from World War II. In the following seventy-one years, KCS and UP's predecessors maintained and grew that track to perhaps twice its original size, extending service now to well over a dozen major industrial facilities. BNSF contributed nothing to that development.

Twenty-four years ago during the UP/SP merger, in a last-minute behind-the-scenes deal, UP (without consulting KCS) agreed to grant BNSF limited access to Lake Charles area shippers via tracks that were jointly owned between UP and KCS. The Board, in Decision No. 44, vastly expanded BNSF's access contrary to established precedent. Subsequently KCS objected. The Board denied KCS's request to revoke BNSF's access, but in doing so, the Board directed BNSF

¹ KCS refers the Board to the Background established in the Board's July 5, 2016 decision ("Decision No. 3") for an expanded procedural history of the proceeding. KCS also adopts the various short citations and abbreviations that it has previously used throughout this proceeding.

to file a terminal trackage rights if all other remedies were unsuccessful.² No such application was filed for approximately 16 years.

In lieu of direct service, since 1996, UP and BNSF have operated under an arrangement whereby UP provided BNSF with access to the Lake Charles Area shippers via a combination of switching and haulage rights. These charges were not market based nor were they set in accordance with any Board recognized methodology. Rather, it was the rate negotiated as part of the global settlement between UP and BNSF and reflected the give and take of various rights and obligations. KCS has received none of the compensation that BNSF has paid UP for these past 24 years; indeed, KCS has itself been providing switching to BNSF essentially at cost because UP does not tell KCS whether the traffic that KCS switches for UP, at cost, is UP or BNSF traffic.

BNSF's access at below market rates has resulted in BNSF gaining significant market share, in large part at KCS's expense. By most estimates, confirmed by the evidentiary record, today, BNSF has about half of the linehaul business from shippers on the Rosebluff Lead. BNSF gained this significant market share without having direct terminal trackage rights and without having to pay any contribution to KCS's seventy-one years' worth of capital investment into the region or to pay KCS any compensation. BNSF has yet to offer to pay KCS for use of KCS's property.

² BNSF's December 18 Petition to Establish Conditions of Use ("BNSF's Petition") states that "[t]he Board addressed UP's failure to obtain KCS's consent for BNSF direct access by directing BNSF to file a terminal trackage rights application if BNSF sought to directly serve Lake Charles area customers and KCS refused to consent to such BNSF operations." Petition at 5. This is incorrect. Decision No. 63 said, "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...". BNSF skipped the first two steps. It never negotiated with KCS nor did it seek arbitration. Instead, 16 years after the UP/SP merger, it filed a terminal trackage rights application.

Almost a year ago, on February 21, 2020, the Board approved BNSF's operating plan to serve LyondellBasell ("Lyondell") and cleared BNSF to begin operating without waiting to resolve the compensation issue.³ Yet, BNSF did not begin operating direct service. Instead, 10 months later, BNSF filed its Petition, complaining that its bid to secure Lyondell's traffic failed because it was not able to directly serve Lyondell and blaming, in part, obstruction by KCS and UP. BNSF provided no evidence for its assertions.

Even if BNSF is correct that its failure to provide direct service was responsible for losing Lyondell's business, which it is not, the fault lies solely with BNSF, not UP or KCS. Despite being granted direct trackage rights to serve Lyondell, despite being granted exclusive use of the Rosebluff Lead for up to 4 hours to serve Lyondell, despite being cleared by the Board to begin operating when it resolved the non-rate issues, despite already handling a large portion of Lyondell's traffic and despite Lyondell's statement that it was ready for BNSF to provide direct service,⁴ BNSF did nothing. Instead, BNSF filed its Petition, not directed at Lyondell, but seeking to avoid complying with 49 U.S.C. §11102 for future access to other shippers.

BNSF's Petition should be quickly denied. There is no evidence in the record supporting the assertions in the Petition or the need for further Board action to ensure that BNSF is an effective competitor as envisioned by the Lake Charles Condition. The evidence of record

³ The Board noted that BNSF would have to obtain rights to operate over certain private industrial track to fully begin serving Lyondell via direct service. BNSF has still not secured those private operating rights.

⁴ See Lyondell letter of March 26, 2018, Board Document No. 245438, <https://dcms-external.s3.amazonaws.com/MPD/17248/4AFCDF3BD124B9EC8525826B0049FFC0/245438.pdf> at 2.

LyondellBasell requires direct BNSF service to the West Lake Charles facility in order to receive predictable, effective, and competitive rail service. ... After learning that the Board granted BNSF terminal trackage rights over the Rosebluff Lead, LyondellBasell requested that BNSF provide such direct service.

establishes that BNSF does not need direct rail service to fulfill the Board's goal of having BNSF be an effective competitor. As such, there is no need to adopt the Petition, which seeks to avoid the statutory requirements applicable to seeking terminal trackage rights to serve shippers other than Lyondell. Furthermore, given that Lyondell has awarded its traffic to UP for what KCS understands to be the next six years, this entire proceeding, which was based on serving Lyondell, is basically moot and should be held in abeyance⁵ or dismissed.

ARGUMENT

I. BNSF HAS BEEN AND WILL BE AN EFFECTIVE COMPETITOR FOR ROSEBLUFF LEAD TRAFFIC WITHOUT THE NEED FOR ANY FURTHER PROCEEDINGS AND WITHOUT THE NEED FOR DIRECT TRACKAGE RIGHTS

KCS agrees that the Lake Charles condition was intended to ensure that BNSF, along with KCS, was to be an effective competitor to the merged UP/SP. KCS vehemently disagrees, however, with BNSF's statement that "[s]hippers cannot gain the full benefits from the competition-preserving Lake Charles Merger Conditions until BNSF can provide direct service." BNSF-143 at 4. BNSF may say this and claim this, but there is no evidence in this entire proceeding establishing that BNSF has not been and cannot be an effective competitor via switching and haulage rights and requires "direct service" to be an effective competitor. Indeed, the evidence shows the opposite.

The evidence of record shows that BNSF's access via switching and haulage has enabled BNSF to be more than adequate competition to UP. BNSF's access via switching and haulage

⁵ The Board has broad discretion to determine whether to hold a proceeding in abeyance, and its decision "to do so in any particular situation is highly dependent on the facts and circumstances of the case." E.I. DuPont de Nemours & Co. v. Norfolk S. Ry., NOR 42125 et al., slip op. at 4 (STB served Nov. 29, 2012). Doing so here, and relatively quickly, will save the parties and the Board from continuing to spend a significant amount of resources on determining a compensation methodology that will be outdated the moment it is issued and could also potentially eliminate the significant time and expense associated with litigating an appeal.

has resulted in vigorous competition between UP, BNSF, and KCS. KCS witnesses Drs. Reynolds and Neels showed that over a nearly 18-year period, BNSF's market share of Lake Charles Area traffic has steadily grown, even before BNSF invested in Lacassine Yard to support its operations in the area. BNSF has a substantial market share of both inbound and outbound traffic. KCS August 24, 2015 Reply at 77-93. Drs. Reynolds and Neels also established that rates have either held steady or actually gone down relative to overall rate trends in the marketplace, showing that the three carriers are competing effectively. Id. As such, BNSF's existing access through switching and haulage rights has allowed BNSF to fully replicate the competition that would have otherwise been lost when SP merged into UP. Dr. Reynolds' and Dr. Neels' evidence and conclusions were confirmed by Professor Julie Carey's testimony in KCS's Feb. 24, 2019 comments in response to Decision No. 6.

The only BNSF evidence of record even remotely touching on the issue of whether BNSF has been an effective competitor was BNSF's analysis by Dr. Reishus, which BNSF again cites in its Petition. Importantly, Dr. Reishus' verified statement was directed as BNSF's request to serve CITGO, not Lyondell. Dr. Reishus' testimony was filed far prior to the Lyondell issue. Even if relevant, however, nowhere did Dr. Reishus claim that BNSF was not currently an effective competitor or had not been an effective competitor. He certainly didn't prove that direct terminal trackage rights were necessary to resolve an alleged loss of competitive options for CITGO, Lyondell, or other any other shipper.

KCS addressed the fundamental flaws of Dr. Reishus' testimony in its June 25, 2018 Reply to BNSF Railway Company's Opening Statement as Supplemented on May 11, 2018. Suffice it to say, there is no evidence in Dr. Reishus' testimony to show that the lack of direct service was the reason why BNSF gave up trying to serve CITGO. Neither does that testimony

establish that BNSF's failure to submit the winning bid for Lyondell's traffic was due to BNSF's inability to provide direct service or was caused by the actions of UP and KCS.

BNSF's Petition likewise does not prove that BNSF's failure to submit a winning bid for Lyondell's traffic resulted from BNSF's failure to exercise the trackage rights granted by the Board. Nor does BNSF prove that "opposition by KCS and UP and continued litigation induced delay" was the result of BNSF losing the Lyondell business. BNSF simply got out-competed by UP.

That Lyondell was able to bid its Lake Charles traffic out to three carriers proves KCS's point – Lake Charles shippers have competitive options now, and have since 1996. There is no need for BNSF to have direct trackage rights in order to serve Lyondell or any other Lake Charles shipper.⁶ The simple fact is that there is no evidence in the record of this entire proceeding establishing that direct service by BNSF is required for shippers to benefit from the Lake Charles Condition. Access via switching and haulage has more than fulfilled the Board's goal to ensure effective competition in the Lake Charles Area. There is no need to adopt some expedited procedure for BNSF to obtain direct service, especially when direct terminal trackage rights are not necessary for BNSF to be an effective competitor.⁷

⁶ The Board need not rely on waybill data and expert opinion to establish that BNSF is already an effective competitor for Lake Charles Area traffic without direct trackage rights. The record includes several documents produced during discovery establishing that BNSF is already an effective competitor without the need for terminal trackage rights. KCS August 24, 2015 Reply at 40-46.

⁷ Precedent makes it clear that direct terminal trackage rights should only be imposed as a "last resort" and only if there are no other available competitive remedies. See Shenango Inc., et. al. v. Pitts., Chartiers & Youghioghney Ry. Co., 5 I.C.C.2d 995,1002 (1989) (as an ameliorative condition, "[t]rackage rights are a remedy of last resort for use when less intrusive remedies such as rate relief and reciprocal switching are insufficient"); Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, et al., STB Docket No. NOR 41987, et al. (STB served Jul. 28, 1997), slip op. at 7 ("[a]s we have stated on several occasions, the prescription of terminal trackage rights is an extraordinary remedy, one to be afforded only when

II. ADOPTION OF BNSF'S PETITION IS INCONSISTENT WITH SECTION 11102(a)

Ignoring all of the above and the evidentiary record, BNSF now wants the Board to apply the public interest and operating findings in Decision No. 8 that were specific to Lyondell for every shipper on the Rosebluff Lead. The Board should reject this approach. 49 USC §11102(a), as noted, should only be applied when no other remedy is available to achieve the competitive result. The statute requires a three-step showing: (1) that the public interest requires the granting of direct terminal trackage rights; (2) that the proposed operations to serve a particular shipper are “practicable” and would not “substantially impair[] the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business;” and (3) the applicant pays the owner “compensation for use of the facilities under the principle controlling compensation in condemnation proceedings.”

A. The Statute Requires That BNSF Show That A Shipper Is Covered By The Lake Charles Condition

BNSF's Petition skips Step No. 1 altogether. This should be rejected. BNSF should not be allowed to skip the “public interest” step in the future and rely upon the Board's general “public interest” findings in Decision No. 3 for any other Lake Charles Area shipper it desires to serve in the future. The identity of the shipper, location of the shipper, and an examination of its current competitive situation are all factual predicates in determining whether the Lake Charles Condition should even apply to that shipper. If BNSF seeks to directly serve such a shipper, BNSF should be required to show that such a shipper is covered by the Lake Charles Condition and that the “public interest” justifies direct BNSF service. KCS and UP should be given the

less intrusive remedies such as rate relief, alternative through routes, or reciprocal switching are insufficient”) (citations omitted). Here, the other available remedy of switching and haulage has fulfilled the Lake Charles Condition for 18+ years. The adoption of some expedited process for BNSF to obtain direct service is not warranted and is not consistent with precedent.

right to reply and rebut such a showing. The Petition provides no means for such procedural due process rights for KCS or UP. Even if BNSF could show that the public interest under Section 11102 justifies BNSF direct service, BNSF should then, at a minimum, be required to provide an operating plan directed at the shipper it seeks to serve, and for which the parties can comment and upon which they can provide evidence. The statute requires nothing less.

B. BNSF's Proposal For An Accelerated Procedural Schedule Is Inconsistent With The Statute And At This Time Is Unwarranted

BNSF's Petition also seeks to short-circuit the statutory requirement to show that its proposed operating to a new shipper is "practicable" and would not "substantially impair[]" KCS's (and UP's) ability "to handle its own business." BNSF wants the Board to rubber stamp application of the Lyondell-specific operational findings of Decision No. 8 to future shippers in an expedited process. This too should be rejected. The fact that BNSF presented a separate operating plan for Lyondell than it did for CITGO and the fact that the Board required BNSF to present details of an operating plan to serve Lyondell show that there is not a "principle" that can paper over the differences between individual locations or that would excuse BNSF having to prove that its proposed service to a location would not substantially impair KCS's or UP's ability to handle their existing business.

If BNSF desires to serve another shipper, and BNSF has first shown that the shipper meets the public interest requirement and is covered by the Lake Charles Condition as noted above, KCS is not opposed to working cooperatively with BNSF and UP to develop an operating plan to serve that shipper.⁸ However, operational findings specific to Lyondell cannot and should not be automatically applied to other Rosebluff Lead shippers simply because BNSF's

⁸ This of course assumes that the Board's various decisions are not overturned (or remanded) by the U.S. Court of Appeals for the District of Columbia. KCS's appeal is pending and is currently being held in abeyance, at the Board's insistence.

proposed operating plan to serve that shipper, in BNSF's view, "mirrors" that adopted by the Board in Decision No. 8.

BNSF claims this is justified because the "extensive evidence submitted and considered in the proceeding allowed the Board to establish general principles that should govern other movements using the Rosebluff Lead." BNSF cites to no legal precedent or Board decision to justify this proposition. Certainly Section 11102(a) does not provide for the applicability of "general principles." Section 11102(a) specifically requires BNSF to prove that its operations are "practicable" and would not "substantially impair[]" KCS's ability "to handle its own business." The statute, especially in light of the fact that terminal trackage rights are to be remedy of last resort, requires specific findings to specific requests. BNSF's "mirror" test fails that requirement.

Moreover, BNSF's claim that Decision No. 8 established "principles" to be 'mirrored' is completely a creation by BNSF. Nowhere does the Board say in Decision No. 8 that it is establishing principles of access. The Board issued findings specific to Lyondell, not "principles". All 7 mentions of "principles" in the decision relate to compensation, not operation. The idea that Decision No. 8 creates a set of access principles that BNSF can "mirror" whenever it wishes is a construct of BNSF's imagination, not of the Board's decision.

Likewise, in the event parties can't agree or the operational situation does not "mirror" that of Decision No. 8, BNSF requests an "accelerated" review that provides KCS with only 20 days to reply to any proposed operating plan. Such an accelerated review is not consistent with KCS's due process procedural rights under the statute. KCS could not even take discovery or present expert testimony in such a short timeframe. KCS suggests that in the event parties cannot in the future agree on a proposed new operating plan, the Board can set a proper

procedural schedule at that time that ensures due process. There is no basis or need to set an “accelerated” process in place now, especially when BNSF has not identified any other potential shipper it seeks to serve and Lyondell no longer requires BNSF direct service.⁹ Whatever process is set forth in the future should guarantee KCS’s statutory right to show that BNSF’s operations are not practicable and would impair KCS’s ability to serve its own shippers. The statute requires nothing less.

C. Compensation Is Fact Specific And Cannot Be Applied To All Shippers Equally

Finally, BNSF claims it intends to demonstrate that the compensation evidence submitted to serve Lyondell, which hasn’t even been submitted yet, should apply to future shippers regardless of where they are located on the Rosebluff Lead and regardless of the SSW principles that would apply at that time. Petition at 8, n. 7. As previously noted, there is no need at this time to proceed with BNSF’s Petition or with the compensation stage of this proceeding. If the Board does proceed with the compensation stage, KCS will address the applicability of a “one size fits all” compensation proposal at that time. At this time, KCS notes, however, that whether the Board applies RCNLD, Capitalized Earnings, or a market-based approach (or a combination thereof), the compensation amount is wholly dependent upon the location of the shipper on the Lead, i.e., how much of the Lead is being used, and on the type of commodity being moved, which impacts car types, costs, earnings, and profitability (which is relevant to a CE approach and a market-based approach).

⁹ BNSF’s anxiousness to establish quick procedures to obtain operating rights in the future stands in stark contrast to its actions to implement Decision No.8 and to serve Lyondell. BNSF still has not shown that it has obtained operating rights over the 0.4 miles of Connecting Track, which KCS believes is shipper owned track, or the Montell Lead track, which is private track owned by the Port of Lake Charles. Indeed, if BNSF did lose Lyondell’s business due to the failure to be able to provide direct service, BNSF only has itself to blame.

III. UNTIL THESE ISSUES ARE RIPE, THERE IS NO NEED TO MOVE FORWARD WITH ANY FURTHER PROCEEDINGS AT THIS TIME

At this time, there is nothing for the Board to decide. Decision No. 8 was directed at serving Lyondell and no other shipper. Indeed, the ordering paragraph specifically says: “It is ordered: (1) The conditions for BNSF’s use of the Rosebluff Lead to provide direct service to Lyondell are set forth above.” Decision No. 8 at 17. Decision No. 8 did not set forth “general principles” for BNSF to serve any Rosebluff Lead shipper it desired to serve. The evidence pertained to serving Lyondell, and only Lyondell, and the decision was likewise limited to Lyondell. BNSF is, in effect, asking the Board to revise Decision No. 8 without meeting the standards for reconsideration/reopening.¹⁰ The Board should reject such an approach.

Furthermore, having lost the current contract for Lyondell’s business, BNSF admits that it will no longer be able to serve Lyondell via direct service until the end of the contract, which based upon KCS’s information and belief is six years. It also is not clear whether BNSF under RASA can simply pick and choose between direct service and switching/haulage on a shipper by shipper basis or whether RASA would even allow BNSF to provide direct service to Lyondell when the contract expires.¹¹ This is yet another reason why the Board should not move forward with any proceeding at this time.¹² As such, and given that Decision No. 8 was directed solely at

¹⁰ BNSF is already trying to change the terms of Decision No. 8 by claiming that the parties should have “flexibility” if BNSF completes its operations later than anticipated. Petition at 9. This is in stark contrast to the words of Decision No. 8 that require BNSF to cede back access “as soon as practicable.” Decision No. 8 at 10.

¹¹ BNSF has the option of serving a shipper covered by the BNSF Settlement Agreement, filed March 1, 2002 (“RASA”), via direct service or via switching/haulage rights. However, once it has chosen which type of service it desires to provide, BNSF cannot change that service for five years. RASA, ¶5(d).

¹² In addition to not being ripe because BNSF can no longer serve Lyondell via direct service until the UP contract expires, as noted previously, BNSF has not shown that it has secured rights to operate over the Montell Lead (owned by the Port of Lake Charles) or the 0.4 mile segment of

Lyondell, the issue of service to Lyondell under Decision No. 8 is no longer ripe for consideration.

Currently, the record reflects that there is not a single shipper that is requesting direct service from BNSF. Until such time as there is a shipper requesting direct service and BNSF has all contractual rights to serve that shipper, there is no need for the Board to move forward on the Petition, or on the compensation stage of the proceeding. Regardless of whether SSW is used, compensation is directly related to a specific shipper, the car type, the commodity, and the assets used on the Rosebluff Lead. The Board need not move forward with either this Petition or the compensation stage of this proceeding until there is an actual shipper who can avail themselves of BNSF direct service. In the meantime, BNSF is more than able to compete and fulfill the Lake Charles Condition via switching and haulage rights, as they have done for over 24 years.

CONCLUSION

BNSF's access to the Lake Charles Area shippers via a combination of switching and haulage rights over the past 24 years has resulted in BNSF gaining, by most estimates and the evidentiary record, approximately half of the linehaul business from shippers on the Rosebluff Lead. BNSF gained this significant market share without having direct terminal trackage rights.

Today, there is not a single shipper requesting BNSF direct trackage rights service. CITGO no longer needs or wants BNSF direct service. Lyondell has awarded a long term contract to UP and has no need for BNSF direct service for what KCS believes is the next six years. BNSF has not shown that it secured any rights to operate over the .40 miles of connecting track or the Montell Lead, which serves Lyondell and the Port of Lake Charles. Given these facts, and the competitive situation whereby BNSF has previously handled approximately 50%

track as the Board authorized it to do. Without those contractual rights, BNSF cannot serve Lyondell even if compensation is set and even if Decision No. 8 remains viable.

of the traffic on the Lead without direct service, and given that the statute requires evidentiary findings on operations and compensation, both of which are shipper specific, there is no legal basis for moving forward with the Petition or the compensation stage of this proceeding. The matter simply is not ripe at this time and should be held in abeyance until such time as there is a true case or controversy for the Board to decide.¹³

If, in the future, BNSF identifies a specific shipper that requests direct service, and UP, KCS, and BNSF cannot agree on BNSF providing service to that shipper, at BNSF's request, the Board can remove the proceeding from abeyance and determine, based upon evidence that would be filed specific to that shipper, whether, at that time, the shipper qualifies under Decision No. 3 or whether Decision No. 8 is still applicable. The Board can also, at that time, have a proceeding to set the appropriate level of compensation. As the facts stand now, this proceeding is no longer ripe and there is no basis to move forward with the Petition.

¹³ Norfolk S. Ry.—Pet. to Set Trackage Rights Comp.—Norfolk & Portsmouth Belt Line R.R., FD 36223 (STB served July 25, 2019)(holding SSW compensation proceeding in abeyance until such time as the trackage rights compensation becomes relevant, which wouldn't occur until after resolution of a court proceeding on antitrust claims); see also, BNSF Railway Company and Musket Corporation v. Union Pacific Railroad Company, FD 35740 (STB served Dec. 31, 2013)(dismissing declaratory order because there was no longer a case and controversy for the Board to decide); Texas v. United States, 523 U.S. 296, 300 (1998)(A claim is not ripe “if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”)

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January 19, 2021

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Attorneys for The Kansas City Southern
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of The Kansas City Southern Railway Company's Reply to BNSF Railway Company's Petition To Establish Conditions Of Use was served by first-class mail, postage prepaid, or by a more expeditious manner, this 19th day of January, 2021, on counsel for BNSF Railway Company, Union Pacific Railroad Company, and all other parties of record.

/s/ William A. Mullins

William A. Mullins

Attorney for The Kansas City Southern
Railway Company