

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, ET AL.
—CONTROL—
KANSAS CITY SOUTHERN, ET AL.

**BNSF'S REPLY TO KCS'S MOTION TO REDESIGNATE THE
CONFIDENTIALITY DESIGNATION OF CERTAIN DOCUMENTS
PRODUCED BY BNSF IN DISCOVERY**

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On June 15, 2022, KCS¹ filed a “Motion to Redesignate the Confidentiality Designation of Certain Documents Produced by BNSF in Discovery” (the “Motion”), requesting that the Board order BNSF to redesignate 46 files produced by BNSF in this proceeding from “highly confidential” to “confidential.”

BNSF respectfully requests that the Board deny the Motion as improper and premature. Instead, BNSF requests that the Board instruct KCS to comply with the discovery procedures the Board prescribed in *Decision No. 3*, and require KCS’s counsel to meet and confer with BNSF’s counsel. KCS never asked BNSF to redesignate 45 of the 46 documents at issue here before requesting Board intervention, and BNSF could have quickly addressed the KCS request if KCS’s counsel had simply asked BNSF’s counsel. Moreover, as required by *Decision No. 3* of this proceeding, KCS should have first raised any

¹ Unless otherwise defined in this reply, the acronyms and defined terms used in these comments are the same as those used in the KCS Motion.

unresolvable discovery concerns with Administrative Law Judge Thomas McCarthy, not the Board.

Despite KCS's improper and premature motion, BNSF is willing to discuss redesignation of the 46 documents at issue in the Motion in a meet-and-confer with KCS. The meeting will allow the parties to seek to narrow the issues and permit BNSF to present questions to KCS about such issues as the "limited list" of KCS personnel that will have access to any redesignated files, as KCS has suggested in its motion.

The April 2, 2021 Protective Order states that "[a]ny party producing material in discovery to another party to these proceedings . . . may in good faith designate and stamp particular Confidential Information, such as material containing shipper-specific rate or cost data or other competitively sensitive or proprietary information, as "HIGHLY CONFIDENTIAL." *Decision No. 1*, slip op. at 4, para. 6. BNSF designated the 46 production documents at issue as "Highly Confidential" in good faith. BNSF considers these documents to be "competitively sensitive or proprietary information."

Applicants' own discovery instructions state that "Applicants will cooperate with counsel for BNSF to identify information that would warrant a confidential or highly confidential designation." (*See* Ex. 1 at 6, para. 5, Applicants' Third Set of Discovery Requests to BNSF). There was no cooperation here – KCS ignored its own instructions. In *Decision No. 3*, the Board assigned and authorized Judge McCarthy "to entertain and rule upon discovery matters and to resolve initially all disputes concerning discovery in this proceeding." *See Decision No. 3*, slip op. at 3. KCS ignored this Board direction, too.

As apparent support for their redesignation request, KCS complains about a BNSF “delay” in producing documents on June 1, 2022, two days prior to the June 3 deposition of BNSF’s witness Paul Hirsch. (Motion at 3.) Applicants did not protest the timing of BNSF Production No. 6 prior to or during the deposition of Mr. Hirsch, and only do so now – 12 days after the deposition. KCS also complains that BNSF designated “all” of the BNSF Production No. 6 documents as Highly Confidential. (*Id.*) While these complaints have no bearing on the KCS redesignation request, Applicants have taken similar actions in their document production practices in this proceeding.

For example, Applicants made four document productions during the week of February 14, 2022, in advance of the February 18 deposition of Raymond A. Elphick and John F. Orr. One of the productions was made at 11:11 pm on the night before the deposition. Applicants have also designated entire productions as “highly confidential,” including a blanket designation of more than 8,600 files from Production No. 16 on February 15, 2022.

BNSF has diligently complied with Applicants’ discovery requests and cooperated well with Applicants through the meet-and-confer process throughout this proceeding. For example, in response to a prior KCS request by email for redesignation of BNSF-0001598 from “Highly Confidential” to “Public”, BNSF consented and made the redesignation. BNSF will continue to take the same approach with KCS about its latest redesignation requests.

The Board should direct KCS to take the proper procedural discovery steps and meet and confer with BNSF on these matters, as the Board has directed parties to do in other proceedings. *See, e.g., Consumers Energy Co. v.*

CSX Transp., Inc., NOR 42142, slip op. at 2 (STB served Apr. 3, 2015) (“Because the parties have not yet conferred on the issues raised in Consumers’ motion to compel discovery, and because it appears that many of these issues can be resolved without Board intervention, the parties are directed to meet and confer on these discovery issues.”). If the parties are unable to resolve the issue, the Board should direct KCS to raise the remaining issues with Judge McCarthy.

Respectfully submitted,

/s/ Anthony J. LaRocca

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Dated: June 21, 2022

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—CONTROL—
KANSAS CITY SOUTHERN, ET AL.

Exhibit 1

Applicants' Third Set of Discovery Requests to BNSF

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET No. 36500

**CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY
COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC
RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD
CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY,
INC. CANADIAN PACIFIC RAILWAY LIMITED, ET AL.**

– CONTROL –

**KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY
COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS
MEXICAN RAILWAY COMPANY**

APPLICANTS’

THIRD SET OF DISCOVERY REQUESTS TO BNSF RAILWAY COMPANY

Pursuant to 49 C.F.R. Part 1114, Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively, “Canadian Pacific” or “CP”) and Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, “KCS”; together with CP, the “Applicants”) request that BNSF Railway Company respond to the following discovery requests as soon as possible, and no later than 15 days from the date of service hereof.

DEFINITIONS

1. “UP” means Union Pacific Railroad Company, its parent companies; subsidiaries; controlled, affiliated, and predecessor firms; divisions; subdivisions; components; units; instrumentalities; partnerships; and joint ventures.

2. “Application” means the Railroad Control Application (Volume 1 “CP-25/KCS-13” and Volume 2 “CP-26/KCS-14”) filed by Applicants in Finance Docket No. 36500 on October 29, 2021.

3. “ARTF” means the Agencia Reguladora del Transporte Ferroviario, a unit of the Mexican government.

4. “BNSF” means BNSF Railway Company; its parent companies; subsidiaries; controlled, affiliated, and predecessor firms; divisions; subdivisions; components; units; instrumentalities; partnerships; and joint ventures.

5. “COFECE” means Comisión Federal de Competencia Económica.

6. “Comments” means the Comments of BNSF Railway Company filed as BNSF-9 in Finance Docket No. 36500 on February 28, 2022.

7. “Communication” shall mean any oral or written representation, promise, conversation, statement, message, or transmission of information, electronic or otherwise, and should be construed in the broadest sense possible. Requests to produce or identify Communications encompass text messages, emails, instant messages on any platform, agendas, meeting notes, talking points, and presentation slides, and include information that was displayed or shown to another party without being transmitted to that party.

8. “Concerning” means relating to, referring to, describing, evidencing, or constituting.

9. “Document” means any writing or other compilation of information, whether printed, typed, handwritten, recorded, or produced or reproduced by any other process, including but not limited to intra-company communications, correspondence, presentations, telegrams, memoranda, contracts, instruments, studies, projections, forecasts, summaries or

records of conversations or interviews, minutes or records of conferences or meetings, records or reports of negotiations, diaries, calendars, photographs, maps, tape recordings, computer tapes, computer disks, other computer storage devices, computer programs, computer printouts, models, statistical statements, graphs, charts, diagrams, plans, drawings, brochures, pamphlets, advertisements, circulars, trade letters, press releases, invoices, receipts, financial statements, accounting records, worksheets, drafts, revisions of drafts, and original or preliminary notes.

Further, the term “Document” includes

- (a) both basic records and summaries of such records (including computer runs);
- (b) both original versions and copies that differ in any respect from original versions; and
- (c) both documents in the possession, custody or control of BNSF and documents in the possession, custody or control of consultants or others who have assisted BNSF in the creation of said documents.

10. “FXE” or “Ferromex” means Ferrocarril Mexicano, S.A. de C.V., its parent companies; subsidiaries; controlled, affiliated, and predecessor firms; divisions; subdivisions; components; units; instrumentalities; partnerships; and joint ventures.

11. “HBT” means the Houston Belt and Terminal Railway.

12. “Houston Terminal” means that trackage in the Houston area as discussed using the term “Houston terminal” in Decision No. 44 in STB Finance Docket No. 32760 or in the Restated and Amended Settlement Agreement filed jointly by UP and BNSF in STB Finance Docket No. 32760 and STB Finance Docket No. 32760 (Sub-No. 21) on March 1, 2002.

13. “I-5 Prop Rate Agreement” means a proportional rate agreement adopted between UP and BNSF incorporating the terms of the “Term Sheet for UP/SP-BNSF Proportional

Rate Agreement Covering I-5 Corridor” attached as Exhibit B to the Restated and Amended Settlement Agreement filed jointly by UP and BNSF in STB Finance Docket No. 32760 and STB Finance Docket No. 32760 (Sub-No. 21) on March 1, 2002.

14. “IFT” means Instituto Federal de Telecomunicaciones, a unit of the Mexican government.

15. “Including” means “including, but not limited to.”

16. “KCSM” means KCS’s affiliate, Kansas City Southern de México, S.A. de C.V.

17. “KCS Trackage Rights” means the trackage rights granted to The Texas Mexican Railway Company (“TM”) in Decision No. 44 in STB Finance Docket No. 32760, Sub Nos. 13 and 14 and by the “clear route” condition imposed by the STB in Decision No. 10 in STB Finance Docket No. 32760 (Sub-No. 26), and under agreements (including amendments thereto) entered between TM and either UP or HBT pursuant to said grants and authorities.

18. “Proposed CP-KCS Transaction” means the proposed combination of CP and KCS for which Applicants are seeking STB approval in Finance Docket No. 36500.

19. “SCT” means Secretaría de Infraestructura, Comunicaciones y Transportes, a unit of the Mexican government.

20. “Texas Gulf Route” shall have the meaning used in BNSF’s Comments.

21. “Train Event Data” means information for BNSF road train movements to, from, within, or through lines on the BNSF system (including on lines owned in whole or in part by other railroads over which BNSF operates via trackage rights or otherwise), including:

- (a) Unique Train Identification Symbol and/or Number;
- (b) Train Date;
- (c) Train Type (intermodal, unit, merchandise, foreign, etc.);

- (d) Actual and scheduled event date/time stamp;
- (e) Event type indicator specifying if the event was an arrival, a departure, an intermediate handling event, or an instantaneous time as in the case of a non-dwell event (e.g., passing a scanner);
- (f) Event Station, State or Province, SPLC, and FSAC;
- (g) Number of loaded cars;
- (h) Number loaded intermodal units;
- (i) Number of empty cars;
- (j) Number of empty intermodal units;
- (k) Trailing net tons;
- (l) Trailing gross tons;
- (m) Length of train;
- (n) Number of active locomotives;
- (o) Horsepower of active locomotives;
- (p) Direction of travel;
- (q) Interchange Indicator specifying if the train was received or delivered in interchange;
- (r) Identification of Interchange Railroad;
- (s) Industry Handling Indicator specifying if the train pulled cars from origin or placed cars at destination;
- (t) Time elapsed at event location;
- (u) Time elapsed between event locations; and
- (v) Miles between event locations.

22. “You” and “Your” mean BNSF.

INSTRUCTIONS

1. Discovery responses should be supplemented when a supplemental response is required pursuant to 49 C.F.R. § 1114.29.
2. References to railroads, shippers, consultants or companies include affiliates, subsidiaries, predecessors, successors, officers, directors, employees, attorneys, agents and representatives thereof.
3. All uses of the conjunctive include the disjunctive and vice versa. Words in the singular include the plural and vice versa.
4. Unless otherwise specified, the time period for these requests is from January 1, 2018, through the date of the response.
5. To the extent materials called for herein are confidential, Applicants will protect them from disclosure to third parties in accord with the Protective Order entered in this proceeding and will solely use those materials for the purpose of this proceeding, and not for any other business, commercial, or other competitive purpose. Applicants will cooperate with counsel for BNSF to identify information that would warrant a confidential or highly confidential designation.
6. BNSF is requested to contact Adam Paris of Sullivan & Cromwell ((310) 712-6663, or parisa@sullcrom.com), or Jason Heflin of Sullivan & Cromwell ((202) 956-7635, or heflinj@sullcrom.com) to discuss any questions regarding these requests.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Produce Train Event Data since January 1, 2018 for trains operating in whole or in part in Alabama, Kansas, Minnesota, Missouri, Nebraska, Tennessee, and Wisconsin.

2. Produce system-wide car and container event data for 2019 including, but not limited to:

- (a) Car initial and number (and container initial and number where applicable);
- (b) Loaded empty status;
- (c) Event time stamp;
- (d) Event location station/Standard Pointe Location Code;
- (e) Event location railroad;
- (f) Reporting railroad;
- (g) Event type code.

3. Produce all documents relating to the testimony of Mr. Hirsch regarding foreclosure by KCS at pages BNSF-9-196 to -201.

4. Produce all data and analyses underlying Figure 3, titled “BNSF Carload and Automotive Traffic over the Laredo Gateway: 2000–2019,” in Your Comments.

5. Produce all Documents concerning the characteristics of forecasted traffic growth across all Mexican gateways, by product type, and including empty car movements, that were provided by BNSF to members of its management (directors and officers, and their direct reports) since 2004.

6. Produce all Documents containing BNSF service frequency and transit time commitments, as well as consistency requirements, regarding traffic moved by or on behalf of (including via haulage for) BNSF through all Mexican gateways.

7. Produce all Documents concerning BNSF’s competition with UP or KCS for rail traffic to/from Mexico from 2004 to present.

8. Produce all Documents from 2004 to present studying, analyzing, discussing, or evaluating the suitability of the El Paso, Eagle Pass, and Brownsville gateways as substitutes for the Laredo gateway.

9. Produce all Documents from 2004 to present studying, analyzing, discussing, or evaluating traffic at the El Paso, Eagle Pass, Laredo, and Brownsville gateways.

10. Produce all Documents since 2004 studying, analyzing or discussing the potential for shifting rail traffic moving to/from Mexico from routes via the Laredo gateway to routes via the Eagle Pass or El Paso gateways.

11. Produce all Documents concerning investments, new services, or other developments since 2004, including the timing of such services, investments and other developments, that affected shippers' choices among the Laredo, Brownsville, El Paso, and Eagle Pass gateways.

12. Produce all Documents concerning service level commitments and standards for rail traffic moving to/from Mexico via the El Paso, Eagle Pass, Laredo, and Brownsville gateways.

13. Produce all Documents since 2004 concerning investments by UP, BNSF, FFXE, or others, including the timing of such investments, to improve the capabilities of the Eagle Pass gateway.

14. Produce all Documents studying, analyzing, or discussing the transportation options in Mexico available to shippers of rail traffic between the United States and Mexico, including without limitation service offered by KCSM, FFXE, trucks or vessel.

15. Produce all Documents studying, analyzing, or discussing the cross-border transportation options available to shippers of rail traffic between the United States and Mexico, including without limitation service offered by UP, KCS, BNSF, trucks or vessel.

16. Produce all Documents studying, analyzing, or discussing capacity of rail lines and facilities over which KCS operates between Laredo and Beaumont, TX.

17. Produce all Documents studying, analyzing, or discussing plans or projects to alter the capacity of rail lines and facilities over which KCS operates between Laredo and Beaumont, TX.

18. Produce all Documents analyzing or discussing capacity, including any studies commissioned or reviewed by BNSF regarding capacity, of rail lines and facilities owned by Applicants over or across which BNSF operates, including, without limitation, the Neches River Bridge and trackage in Ottumwa, IA.

19. Produce all Documents since 1998 studying, analyzing, or discussing plans or recommendations for improvements in capacity on rail lines in the Houston area.

20. Produce all Documents since 2010 studying, analyzing, or discussing the impact on BNSF's operations in the Houston area or at Houston-area facilities of operational changes made by UP or KCS.

21. Produce all documents since 2018 studying, analyzing, or discussing the impact on Houston-area facilities of operational changes made by UP associated with its implementation of Precision Scheduled Railroading, including without limitations its decision to close the Pine Bluff hump yard, shelve the planned Brazos Yard, and reassign work from Settegast yard to Englewood Yard.

22. Produce all documents since 2010 studying, analyzing, or discussing the impact of changes (or potential changes) in BNSF's operations on the Houston area or at Houston-area facilities.

23. Produce data on the length of BNSF's trains operating to, from, or through Houston since 2018 at the most detailed level maintained by BNSF.

24. Produce all Documents concerning, discussing, or derived from the pending Texas Department of Transportation Houston-Beaumont Region Freight Study, a draft report of which was issued in August 2021.

25. Produce all Documents concerning, discussing, or derived from the Texas Department of Transportation, Rail Division, Neches River Bridge Study, Jefferson and Orange Counties, CSJ: 7220-01-001.

26. Produce, for each line segment on BNSF's network, maps or other documents sufficient to reflect the line capacity (in terms of maximum and/or sustainable number of trains as calculated by BNSF), the actual levels of traffic (in terms of numbers of trains), and the relationship between train counts and available capacity covering each year from 2004 to present.

27. Produce all Documents related to any rail traffic modeling and/or modeling conducted using Rail Traffic Controller ("RTC") software offered by Berkeley Simulation Software, LLC that BNSF reviewed or conducted, including work conducted by any third party BNSF engaged, since 2004 relating to lines over which KCS or CP operates, or lines that cross CP or KCS lines, including, but not limited to, inputs to and outputs of any such modeling, the modeling files themselves, and any analysis of such modeling. Direct any third party who conducted the RTC modeling for you to do the same.

28. Produce all Documents concerning analysis of capacity on rail lines in Houston and/or in facilities used by carriers to service traffic, to, from, or through Houston, and all Documents concerning any potential or actual investments to increase capacity on these rail lines.

29. Produce all Documents, including those underlying the Verified Statement of Jon Gabriel and Travis Thowe, concerning capacity improvements along the Texas Gulf Route.

30. Produce all Documents concerning recommendations regarding any action to increase capacity to handle additional trains moving to, from, through, or within Houston.

31. Produce all Documents from the period of 2004 to present analyzing, discussing, or evaluating BNSF's efforts to work with FXE to invest in or otherwise improve service or capacity on lines owned by FXE and/or BNSF lines that connect to FXE.

32. Produce all Documents from the period 2004 to present discussing, analyzing, studying, or reviewing business opportunities with FXE, including transit times, capacity, competitiveness, and alternatives.

33. Produce all Documents analyzing, discussing, or evaluating decisions made as a result of the Proposed CP-KCS Transaction concerning BNSF's current or future operations, including on decisions related to capacity investments.

34. Produce all Documents concerning Your local trackage rights on the CP Davenport Subdivision serving customers between Davenport and Clinton, Iowa.

35. Produce all Documents analyzing whether to exercise Your trackage rights to Brownsville over UP.

36. Produce all agreements relating to BNSF rights to reach Robstown or Brownsville/Matamoros over UP routes.
37. Produce a copy of the I-5 Prop Rate Agreement, including all of its amendments, as well as all of its matrixes.
38. Produce all Documents generated by BNSF management (directors and officers, and their direct reports) from the period of 1996 to present concerning the I-5 Prop Rate Agreement.
39. Produce all Documents concerning BNSF complaints made to UP concerning the I-5 Prop Rate Agreement, rates provided pursuant to the I-5 Prop Rate Agreement, and the effects on rail freight movements from the implementation of or rates provided under the I-5 Prop Rate Agreement.
40. Produce all Documents concerning BNSF complaints made to UP concerning UP operation of UP lines in Texas on which KCS operates via the KCS Trackage Rights.
41. Produce all Documents concerning rail employee counts and rail crew shortages affecting the Houston Terminal area.
42. Produce all Documents forecasting employee needs in Houston.
43. Produce all Documents since January 1, 1994, analyzing the effect of past Class 1 rail mergers – including transactions in which BNSF participated, on any aspect of competition in the market for transportation services.
44. Identify all locations where BNSF was granted trackage rights in the Restated and Amended Settlement Agreement filed jointly by UP and BNSF in STB Finance

Docket No. 32760 and STB Finance Docket No. 32760 (Sub-No. 21) on March 1, 2002 where BNSF does not operate or utilizes UP haulage instead of exercising trackage rights.

45. Produce all Communications between BNSF and Lyondell Chemical Company; Equistar Chemicals, LP; LyondellBasell Acetyls, LLC; and LyondellBasell Advanced Polymers Inc. (collectively, LyondellBasell), concerning service to facilities in LyondellBasell owns or operates in the Lake Charles, LA area (including Westlake, West Lake Charles and Mossville, LA).

46. Produce Your five-year volume-growth forecasts.

47. To the extent not already produced, provide Your cross-border grain volumes since January 1, 2018 and projections of cross-border grain volumes at least through December 31, 2025.

48. Produce all analyses of rail market share, including by commodity, geographic location, Mexico gateway, and railroad.

49. Produce all analyses related to commercial opportunities lost and/or gained since January 1, 2020 for cross-border intermodal business and cross-border grain business.

50. Produce documents discussing or relating to any complaints relating to service provided by BNSF.

51. Produce minutes of Board of Directors meetings and any materials provided to the Board of Directors, relating to:

- (a) CP-KCS Transaction;
- (b) CN-KCS Transaction;
- (c) Rail service operating in Texas, Louisiana, and Arkansas;

- (d) Rail infrastructure investments in Texas, Louisiana, and Arkansas;
Mexican Concessions;
- (f) Service complaints against UP or BNSF and rail service
improvement efforts by UP or BNSF.

Dated: March 16, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Third Set of Requests for Production to BNSF to be served electronically or by first-class mail, postage pre-paid, on all parties of record in these proceedings.

/s/ Sonia Gupta

Sonia Gupta

March 16, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *BNSF's Reply to KCS's Motion to Redesignate the Confidentiality Designation of Certain Documents Produced by BNSF in Discovery* to be served electronically or by first-class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams

Attorney for BNSF Railway Company

June 21, 2022