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March 26, 2024

VIA E-FILING

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

ENTERED
Office of Proceedings
March 27, 2024
Part of
Public Record

Re: STB Docket No. FD 32760 (Sub-No. 49), *BNSF Railway Co.—Petition for Clarification—Service to Colorado Materials*

Dear Ms. Brown:

I write to provide a limited response to two new issues raised by UP¹ in its reply to BNSF's Petition for Clarification, filed in the above-referenced proceeding on March 6, 2024.²

First, UP argues in a footnote that, prior to the UP/SP merger, only SP and not MP/UP could serve customers located on the Cline Mine Industrial Lead. UP Reply at 4, n.5. As BNSF described in its Petition, the plain language of the 1985 SP-MP agreement **excluded** the Lead from the restriction on MP service to customers on SP's lines. A customer locating a new facility on the Lead prior to the UP/SP merger could have reasonably expected to receive service from both MP and SP under the 1985 agreement.

Second, UP argued that, in 2001, the Board rejected "essentially the same proposal" that BNSF has made now in its Petition. UP Reply at 6; *see UP/SP Merger (General Oversight) (Oversight Dec. No. 20)*, 5 S.T.B. 1159 (2001). UP claims that "BNSF's Petition provides no reason for the Board to revisit its conclusions" in order to provide the relief now requested by BNSF. UP Reply at 7. UP misinterprets and overstates the Board's holding in *Oversight Dec. No. 20*. The

¹ The acronyms and defined terms used herein are the same as those used in the BNSF Petition for Clarification filed in this proceeding on February 15, 2024.

² While the Board's rules, 49 C.F.R. § 1104.13(c), do not permit a reply to a reply, the Board often accepts such replies in the interest of compiling a more complete record. To the extent that the Board deems it necessary, BNSF hereby seeks leave to provide this limited response to the UP reply.

Board need not “revisit its conclusions,” UP Reply at 7, because BNSF’s current proposal is fundamentally different from BNSF’s earlier proposals.

In the early stages of the UP/SP merger implementation, the Board rejected previous BNSF proposals to define a “2-to-1” Point as encompassing **an entire geographic area** that could be served by both UP and SP. *See Oversight Dec. No. 20*, 5 S.T.B. at 1161-65 (BNSF proposal would have defined geographic locations using six-digit Standard Point Location Codes); *Merger Dec. No. 44*, 1 S.T.B. at 372-73 (earlier BNSF proposal would have defined geographic locations more broadly using four-digit codes).

Here, BNSF requests that the Board clarify that “all locations on lines that were dual-served by UP and SP prior to the UP/SP merger, including the Cline Mine Industrial Lead, are ‘2-to-1’ Points” open to BNSF service. Pet. at 13. This is a much more targeted proposition than those made more than twenty years ago. In the earlier requests, BNSF would have had access to all shipper facilities within a particular dual-served **geographic location**, regardless of whether any **particular facility** had or would have had access to both UP and SP. Under the current proposal, BNSF would simply have access under the RASA to facilities on lines where any pre-merger shipper would have had the ability to receive service from both UP and SP.³

During the settlement negotiations that led to the RASA, BNSF and UP/SP clearly failed to identify the Cline Mine Industrial Lead as a dual-served line requiring protection. BNSF filed its petition for clarification so that the Board could now fully address the competitive impact resulting from the UP/SP merger. Colorado Materials is a New Shipper Facility on the Lead that is entitled to the preservation of pre-merger competition via BNSF access. The Board need not “revisit its conclusions” in *Oversight Dec. No. 20* in order to grant the relief requested by BNSF.

³ BNSF’s current proposal is not only clearly distinguishable from the one addressed in *Oversight Dec. No. 20*. It also meets the standard for review set by the Board in that decision. The Board rejected BNSF’s earlier proposal because it had “no competitive justification in the context of the UP/SP merger, nor support in the BNSF Agreement itself.” *Oversight Dec. No. 20*, 5 S.T.B. at 1165. BNSF established in its Petition that there is ample competitive justification for BNSF’s current proposal and that the RASA itself supports this concept. *See* Pet. at 7-8 (discussing inclusion in the RASA of points on certain dual-served lines as “2-to-1” Points).

Please contact me with any questions.

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton
Attorney for BNSF Railway Company

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2024, I have caused the foregoing letter to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams
Attorney for BNSF Railway Company