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Before the
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY
—TERMINAL TRACKAGE RIGHTS—
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

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APPLICATION FOR TERMINAL TRACKAGE RIGHTS

**BNSF's Rebuttal to the Replies of
The Kansas City Southern Railway Company and Union Pacific Railroad Company to
BNSF's Petition to Establish Conditions of Use and Compensation**

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I. INTRODUCTION AND SUMMARY

On June 25, 2018, KCS and UP¹ each filed a Reply to the BNSF Petition in the above-captioned proceeding (respectively, the “KCS Reply” and the “UP Reply”). This BNSF Rebuttal responds to each Reply.

First, Section III.A of this Rebuttal responds to the attempts by KCS and UP to re-litigate the Board's prior decisions in this proceeding. In that section, BNSF establishes that the Board's prior findings apply to BNSF direct service to Lyondell and are not at issue in this stage of the proceeding. The KCS Reply, however, reflects KCS's intransigent refusal to accept the Board's findings and decision granting BNSF terminal trackage rights as set forth in *Decision No. 3* and affirmed and clarified in *Decision No. 4*. Those decisions affirmed that the Board required BNSF to have the option of direct access to Lake Charles area customers as a condition to the UP/SP

¹ The acronyms and defined terms used herein are the same as those used in BNSF's Petition to Establish Conditions of Use and Compensation (BNSF-132, the “Petition”) filed in this proceeding on January 12, 2018.

merger and in order to replace the loss of competition that would otherwise result from the merger. The Board imposed that condition and granted BNSF terminal trackage rights to implement the condition in *Decision No. 3* with full knowledge of the multi-carrier complexity of the Rosebluff Lead terminal area.

Similarly, the UP Reply consists largely of an attempt to re-litigate the Board's express findings in *Decision No. 3* that BNSF terminal trackage rights operations would be practicable and would not substantially impair the ability of UP and KCS to serve their own customers. UP continues to try to evade its contractual and regulatory obligations to provide BNSF with direct service trackage rights in order to provide an effective competitive alternative to replace competition lost by the UP/SP merger.

Next, in Section III.B, BNSF explains why the Board should establish BNSF's proposal as the condition of use for BNSF's terminal trackage rights. BNSF's proposal provides flexibility and commitment to coordination that would allow BNSF to utilize the "natural windows" that create running tracks through the Rosebluff Yard and clear the 50/50 Line every day. The factual information presented in Section III.B has been verified by Lance R. Brewer, General Director – Transportation for the BNSF Red River Division. Mr. Brewer has responsibility for BNSF operations over the 50/50 Line and in the Rosebluff Lead terminal area.

Despite the fact that UP was fully prepared in 2012 to make operational adjustments to open a two-hour window for BNSF direct service on the Rosebluff Lead to CITGO—that is, UP was prepared to do so until KCS asserted that KCS's consent as joint owner was required—UP now criticizes BNSF's proposal by cherry-picking two historic sample days to identify purported conflicts with the BNSF plan. UP, however, does not offer to make any adjustments to historic or existing operations on the Rosebluff Lead. Consequently, UP's inflexible critique of the BNSF

plan proves nothing. Furthermore, the commencement of BNSF direct service to Lyondell will cure many of the alleged conflicts UP cites.

In Section III.C, BNSF explains that the Board should establish compensation terms for BNSF's terminal trackage rights under condemnation principles and require BNSF to pay the "Prescribed Fee." To be clear, BNSF agrees that KCS, as the joint one-half owner of the Rosebluff Lead, is entitled to one-half of the compensation set by the Board for BNSF's use of the Rosebluff Lead.

Additionally, attached to this Rebuttal is the Verified Statement of Michael R. Baranowski, Senior Managing Director at FTI Consulting ("Baranowski Rebuttal V.S."). Mr. Baranowski analyzes relevant data detailing train operations on the Rosebluff Lead and concludes that operational capacity exists to accommodate BNSF's proposed direct service to Lyondell. Mr. Baranowski testifies that the data show that the operating conflicts alleged by UP are not indicative of capacity constraints that would obstruct BNSF's plan, which is based on mutual flexibility and coordination. Mr. Baranowski also testifies that the data show consistent and predictable sequences of operation supporting the "natural windows" identified by BNSF for its direct service to and from Lyondell.

This controversy has remained at an impasse since for six years. In May 2012, BNSF notified UP of its intent to use the direct trackage rights that UP contractually agreed to provide to BNSF in 1996 and that UP accepted as a condition to the UP/SP merger in order to provide a competitive alternative to the pre-merger competition between UP and SP lost by that merger. Following months of fruitless negotiations, BNSF filed its application for terminal trackage rights with the Board in February 2013. In July 2016, the Board granted BNSF's application and found that the preservation of BNSF's option of direct access is necessary to effectuate the

UP/SP merger conditions. More than six years after its initial notification, BNSF still cannot provide direct service to Lake Charles area customers.

The delay in implementing BNSF's direct access rights has caused BNSF to miss the original market opportunity to provide direct service to CITGO. The Board should resolve the pending dispute in a way that does not encourage more years-long delay tactics every time BNSF elects to directly serve other Lake Charles area customers. Indeed, the KCS and UP Replies reflect the same intransigency that KCS and UP displayed to BNSF in the negotiations mandated by the Board in *Decision No. 3* concerning conditions of use and compensation for the parties' joint use of the Rosebluff Lead—an attitude that doomed those negotiations.

The Board should end this campaign now and hold UP to the commitments that it voluntarily made in connection with the UP/SP merger to BNSF, shippers, and the Board. In light of the Board's unambiguous findings in *Decision No. 3* and *Decision No. 4*, the Board should now grant the BNSF Petition and establish conditions of use and compensation to permit BNSF to finally implement the trackage rights that UP promised to provide in 1996.

II. BACKGROUND

A. The Board granted terminal trackage rights to BNSF and made related findings in *Decision No. 3*.

Over 20 years ago, UP committed no fewer than four times – through the BNSF Settlement Agreement, the CMA Agreement, the 50/50 Line Agreement, and the Board's conditions to the UP/SP merger – to allow BNSF direct access to the Rosebluff Lead. *See* BNSF Opening Statement (Dec. 31, 2014) at 4-9; BNSF's Rebuttal (Oct. 23, 2015) at 28. In *Decision No. 3*, served more than two years ago on July 5, 2016, the Board granted BNSF, over the vigorous objections of UP and KCS, terminal trackage rights on the Rosebluff Lead “to facilitate BNSF's direct access to Lake Charles area shippers.” *Decision No. 4*, slip op. at 2.

The Board found that such terminal trackage rights are in the public interest because they are “necessary to effectuate the Lake Charles Merger Conditions” imposed by the Board in the UP/SP merger proceeding, “specifically BNSF’s option of directly accessing Lake Charles area shippers, including those on the Rosebluff Lead, via trackage rights.” *Decision No. 4*, slip op. at 2 (citing *Decision No. 3*, slip op. at 9-13). Furthermore, the Board found that “BNSF’s use of the terminal facilities would be practicable and would not substantially impair the ability of the rail carriers owning the facility (UP and KCS) to handle their own business.” *Id.* at 3 (citing *Decision No. 3*, slip op. at 13-18).

In *Decision No. 3*, the Board directed BNSF, KCS, and UP to “collectively develop conditions governing their use of the Rosebluff Lead, including BNSF’s access (if it so elects) to directly serve shippers other than CITGO.” *Decision No. 3*, slip op. at 19. The Board also directed the parties to “attempt to agree upon the terms of compensation for BNSF’s use of the Rosebluff Lead.” *Id.* at 20. Pursuant to 49 U.S.C. § 11102(a), the Board stated that the parties may request that the Board establish conditions of use and compensation if the parties cannot reach an agreement on these issues. *Id.* at 19-20.

B. BNSF requested that the Board establish conditions of use and compensation.

As established in the BNSF Petition and further evidenced by the KCS and UP Replies, after extensive negotiations conducted through multiple meetings and exchanges of correspondence, BNSF has reluctantly concluded that the parties cannot reach agreement regarding conditions of use or compensation for BNSF’s use of its terminal trackage rights over the Rosebluff Lead to serve a Lyondell facility accessed via the Lead.² *See* Pet. at 4-7. Neither

² UP alleges that “BNSF’s sporadic, on-again-off-again communications regarding direct service to [Lyondell] show BNSF had little interest in negotiations to establish conditions of use and compensation for that access.” UP Reply at 13. To the contrary, KCS and UP made it clear

KCS nor UP disputes this fact. Therefore, pursuant 49 U.S.C. § 11102(a) and the Board's direction in *Decision No. 3*, BNSF has requested through the Petition that the Board establish such conditions of use and compensation.

In particular, BNSF presented a proposal for BNSF direct service to the Lyondell facility predicated on flexibility and coordination with UP and KCS. BNSF requested that the Board establish that flexible plan and its principles as the condition of use. *See* Pet. at 8.³ BNSF demonstrated through the analyses contained in the Verified Statements of Rob Reilly ("Reilly V.S.") and Michael R. Baranowski ("Baranowski Petition V.S.") that the BNSF proposed condition of use is consistent with the Board's findings of practicability and lack of substantial impairment in *Decision No. 3*. At the Board's direction, BNSF submitted supplemental information regarding its proposal on May 11, 2018, including workpapers containing the data and assumptions underlying the Reilly V.S. and the Baranowski Petition V.S.

With respect to compensation, BNSF requested that the Board: (1) consistent with 49 U.S.C. § 11102(a), "establish compensation terms under the principle controlling compensation in condemnation proceedings," (2) require BNSF to pay UP the Prescribed Fee,⁴ and (3) require

to BNSF in the initial meeting on August 26, 2016, that KCS and UP would not engage in good faith discussions about the conditions of use and compensation. *See* Pet. at 5-7. This is confirmed by the KCS and UP Replies, which seek to repudiate the Board's prior decisions. *See infra* at Section III.A.

³ BNSF also requested that the Board affirm that its findings in *Decision No. 3* "with respect to practicability and lack of substantial impairment apply to the tracks and facilities as they currently exist, as described in the record before the Board." Pet. at 8.

⁴ As defined in the Petition at 15, the Prescribed Fee is the level of compensation that BNSF must pay for trackage rights under the UP/SP merger conditions – namely the rate set by Section 9 of the BNSF Settlement Agreement (the GTM rate), as escalated by Section 7 of the CMA Agreement (and as modified by BNSF and UP in the 50/50 Line Agreement).

UP to pay KCS any amount due to KCS under the compensation terms established by the Board that is greater than the Prescribed Fee. Pet. at 15-16.⁵

C. In *Decision No. 4*, the Board affirmed and clarified its prior findings and found that BNSF's terminal trackage rights apply to the Lyondell facility.

KCS filed a Motion to Dismiss the BNSF Petition, arguing primarily that the Board's findings in *Decision No. 3* were limited solely to BNSF direct service to the CITGO facility at West Lake Charles, and that the findings did not permit BNSF to access other Lake Charles area shippers (such as Lyondell) via the terminal trackage rights granted by the Board to BNSF over the Rosebluff Lead. See *Decision No. 4*, slip op. at 3-4.

In *Decision No. 4*, the Board conclusively rejected KCS's misreading of and refusal to accept the Board's findings in *Decision No. 3*. Contrary to KCS's claims, the Board explained, the terminal trackage rights granted in *Decision No. 3* "encompass BNSF's direct access to all Lake Charles area shipper facilities accessible via the Rosebluff Lead and covered by the Lake Charles Merger Conditions." *Decision No. 4*, slip op. at 5-6.

The Board stated that it "did not limit its public interest analysis to BNSF's service to the CITGO facility," and that the Board "need not individually assess the public interest implications as to each shipper facility." *Decision No. 4*, slip op. at 6. The Board also clarified that its findings in *Decision No. 3* regarding the practicability and the lack of substantial impairment resulting from BNSF's use of the terminal facilities encompassed "BNSF's direct service over the entire

⁵ BNSF also requested that the Board "establish that the compensation terms determined through this proceeding will apply to any BNSF operations using the terminal trackage rights granted by the Board in *Decision No. 3*." Pet. at 16. BNSF further requested that BNSF be "permitted to commence trackage rights operations immediately upon the Board's imposition of operating terms through this proceeding," and that BNSF would pay or otherwise "adequately secure" interim compensation for such operations. *Id.* at 16-17.

Rosebluff Lead (including through the Rosebluff Yard), not solely its direct service to the CITGO facility.” *Id.*

Furthermore, the Board found that the Lyondell facility at issue here is located in West Lake Charles and was subject to the Lake Charles Merger Conditions. *See id.* at 6-7. The Board also rejected KCS’s attempt to dismiss this proceeding because BNSF must use certain track connecting to the Rosebluff Lead in order to serve Lyondell directly, clarifying that *Decision No. 3* “contemplated BNSF securing the rights necessary to access [connecting] facilities.” *Id.* at 7.

In sum, the Board affirmed through *Decision No. 4* that its public interest, practicability, and lack of substantial impairment findings in *Decision No. 3* apply to BNSF direct access to all shipper facilities in the Lake Charles area covered by the Lake Charles Merger Conditions (including the Lyondell facility at issue here), and that the Board would consider BNSF’s request for the Board to set conditions of use and compensation for such direct access through this proceeding, all in accordance with the requirements of 49 U.S.C. § 11102 and the direction of the Board in *Decision No. 3*.

III. ARGUMENT

A. The Board’s prior findings are not at issue in this stage of the proceeding.

Large portions of the KCS Reply and the UP Reply are devoted to improper collateral attacks on the Board’s findings in *Decision No. 3*, as affirmed by *Decision No. 4*, that BNSF direct access to Lyondell using the terminal trackage rights granted by the Board is in the public interest, is practicable, and would not substantially impair the ability of KCS and UP to handle their own business. *See* Section II, *supra*. Those decisions also affirmed the importance of BNSF direct trackage rights to replace the competition lost by the UP/SP merger, which UP accepted as a condition to the UP/SP merger.

The Board has spoken on these matters. They are not at issue here. Any dispute by KCS or UP with respect to these findings would be properly addressed in KCS's appeal of *Decision No. 3* pending in the D.C. Circuit,⁶ in a petition to reopen or reconsider *Decision No. 4* (which neither party has filed), or in a petition to reopen or reconsider *Decision No. 3*.⁷ Because the Board should reject these improper attempts by KCS and UP to re-litigate the Board's prior decisions, what remains is for the Board to set conditions of use and compensation to allow BNSF to finally use the terminal trackage rights granted more than two years ago by the Board.

1. The Board's prior public interest findings apply to BNSF direct service to Lyondell.

KCS argues that the Board "should dismiss or deny BNSF's Petition because BNSF has failed to carry its burden of proof under 49 USC §11102(a) to show that it is in the public interest for BNSF to be granted directed [sic] access to Lyondell." KCS Reply at 5. KCS made just such an argument in its Motion to Dismiss. The Board rejected it squarely in *Decision No. 4*. See Section II.C, *supra*.

KCS now claims that the Board "misses KCS's points" and proceeds to devote the next eight pages of its Reply to a nearly word-for-word recitation of the same public interest

⁶ See BNSF Pet. at 2 n.2 (describing the status of the KCS appeal).

⁷ The Board acknowledged the possibility of "future adjustments" to its finding of lack of substantial impairment by stating that "any party may petition the Board to reopen [*Decision No. 3*] on the basis of new evidence or materially changed circumstances." *Decision No. 3*, slip op. at 18. Importantly, the Board indicated that any such petition to reopen could be filed "[i]f three-carrier operations on the Rosebluff Lead cause substantial impairment in the future." *Id.* To date, nothing has happened with regard to operations on the Rosebluff Lead that could possibly be the subject of new evidence or that could have materially changed the circumstances that the Board considered in *Decision No. 3* or *Decision No. 4*. Therefore, any attempt by KCS or UP to reopen or reconsider the Board's findings would be premature. In any event, neither KCS nor UP has sought to reopen or reconsider the Board's findings.

arguments made in its Motion to Dismiss.⁸ The Board did not “miss” these points. It considered each and denied them all. The Board should summarily reject these redundant arguments.

2. BNSF need not have secured the rights necessary to access any required connecting facilities before the Board establishes conditions of use and compensation.

In KCS’s next attempt to maneuver around the Board’s denial of its Motion to Dismiss, KCS claims that “[u]nless and until BNSF obtains the legal or contractual right to operate over [certain connecting tracks to serve Lyondell], BNSF’s Petition must be denied.” KCS Reply at 15. The Board considered and rejected this argument in *Decision No. 4*, and KCS did not seek reconsideration of that decision.

The Board held unambiguously that “[t]he fact that BNSF is still in the process of acquiring the rights to traverse the tracks connecting the Lyondell facility to the Rosebluff Lead does not prevent the Board from establishing conditions and compensation for use of the Rosebluff Lead in this proceeding.” *Decision No. 4*, slip op. at 7-8. Undeterred by the Board’s plain language, KCS now argues that the Board’s finding is “[t]echnically” right, “but only with respect to CITGO,” and that “the Board cannot make a similar determination with respect to Lyondell.” KCS Reply at 14, 15. The Board should not allow KCS to ignore the Board’s clear holdings that BNSF need not secure the rights to access any necessary connecting facilities before the Board establishes conditions of use and compensation for BNSF direct access to Lyondell.

⁸ Compare, e.g., KCS Mot. to Dismiss at 5 (“BNSF has not made any arguments or provided any evidence as required by 49 USC §11102(a) to establish that service to Lyondell is in the ‘public interest’ or was covered by its prior Application. BNSF skips those steps.”) with KCS Reply at 6 (“BNSF has not presented any evidence to establish that service to Lyondell is in the ‘public interest.’ BNSF simply skipped that step. . .”).

3. The Board's prior findings of practicability and lack of substantial impairment apply to BNSF direct service to Lyondell.

KCS and UP each improperly attack or misunderstand the Board's prior findings that BNSF direct service to Lyondell and other Lake Charles area shippers "would be practicable and would not substantially impair the ability of [UP and KCS] to handle their own business." *Decision No. 4*, slip op. at 3 (citing *Decision No. 3*, slip op. at 13-18).

a. KCS improperly seeks to reverse prior Board decisions and to require BNSF to re-establish the Board's settled findings.

KCS demands that the Board "reverse" its determination in *Decision No. 4* that the Board's practicability finding in *Decision No. 3* is not limited to BNSF service to CITGO. KCS Reply at 16. KCS also claims that the Board should "reverse" its grant of terminal trackage rights in *Decision No. 3* to all shippers on the Rosebluff Lead, "because a service plan for CITGO does not show a practicable service plan for other Rosebluff Lead customers." KCS Reply at 18. Because KCS has not properly presented these requests for "reversal" through a petition for reopening, the Board should summarily reject them. *See* 9 n.7, *supra*.

Furthermore, KCS states repeatedly throughout its Reply that BNSF has failed to establish practicability or lack of substantial impairment (which are statutory elements of a terminal trackage rights application), or that the Board must now make some additional findings with respect to BNSF direct service to Lyondell.⁹ The Board's findings are settled and need not

⁹ *See, e.g.*, KCS Reply at 15 ("The Board needs [certain] pieces of information to make the required Section 11102 finding."); *id.* at 15 ("BNSF wants the Board to find [its proposal] practicable and not interfering with KCS and UP."); *id.* at 15 ("The Board cannot find that BNSF's service to Lyondell would not substantially interfere with KCS's or UP's service . . ."); *id.* at 16 ("The Board Cannot Rely on Operational Findings Related To CITGO To Mean That Service to Lyondell And Other Rosebluff Lead Shippers Is Practicable And Will Not Substantially Interfere With KCS And UP Service.") (emphasis omitted); *id.* at 19 ("BNSF must show that it will not substantially impair the operations of *either* KCS or UP . . ."); *id.* at 23 ("If BNSF does not adhere to that commitment, then the Board has no evidentiary foundation to conclude that BNSF's operations will not substantially impair KCS's.").

be re-established here. KCS fundamentally misunderstands (or willfully ignores) these basic facts.

b. UP improperly seeks to re-litigate the Board's findings of practicability and lack of substantial impairment.

UP declares at the outset that it is “not challenging the Board’s conclusions in Decision No. 3.” UP Reply at 3. UP then spends 46 pages re-litigating *Decision No. 3* by arguing that adding a third carrier (BNSF) to the Rosebluff Lead would “substantially impair service to other shippers” without “construction of additional track capacity.” *Id.* at 13-59. UP’s conclusion expressly set forth in the animation contained in UP Counsel’s Exhibit 11 at 1:18 that “this complex, constrained environment cannot accommodate operations by a third railroad” confirms that UP seeks to improperly challenge the Board’s practicability finding.

UP argued repeatedly in response to the BNSF Application for terminal trackage rights that BNSF direct service on the facilities as they exist now was not practicable and would “substantially impair” UP’s ability to handle its own business.¹⁰ The Board afforded UP’s arguments due consideration and then rejected them. *See Decision No. 3*, slip op. at 15-18. The Board should not disturb those findings here.

Furthermore, UP fails to provide to the Board any details about the additional capacity that UP asserts is needed. UP cannot, especially at this late date in the terminal trackage rights proceeding, assert to the Board that a remedy (*i.e.*, additional capacity) is needed, but not specify the remedy itself. The Board and BNSF are left with no way to evaluate the scope or effectiveness of the proposed remedial capacity improvements. BNSF is also concerned that UP

¹⁰ See UP Reply (Aug. 24, 2015) at 32-46; UP Rebuttal (Oct. 23, 2015) at 5-7; UP Final Brief (Dec. 30, 2015) at 8-17.

may assert that additional capacity is required each time BNSF elects to directly serve a new customer via the Rosebluff Lead. *See* Pet. at 6.

The Board's findings in *Decision No. 3* regarding practicability and lack of substantial impairment applied to the tracks and facilities in the terminal area as they existed under the record presented to the Board, not as such facilities could be expanded by some future construction.¹¹ Indeed, the Board's findings in *Decision No. 3* would be rendered entirely meaningless if the Board later conditioned them on the construction of additional capacity on the terminal facilities.

In any event, BNSF assumes that UP is alluding to multi-million-dollar infrastructure investments as a condition of BNSF's use of the Rosebluff Lead to transport the limited daily volumes currently planned for Lyondell. BNSF and UP have ample history of coordination of investment in capacity improvements for joint operations where those investments are mutually beneficial and economically and operationally justified. In the spirit of good faith cooperation, BNSF would certainly consider UP's suggestion concerning additional capacity, but only after BNSF direct service has begun and the parties have had a chance to work with each other in good faith to accommodate service by all three carriers. BNSF cannot agree that the Board should now reopen its lack of substantial impairment finding to address this new purported capacity issue prior to the start of three-carrier service (*see* 9 n.7, *supra*) or condition its grant of terminal trackage rights on the implementation of any such capacity improvements.

¹¹ *See, e.g., Decision No. 3*, slip op. at 18 ("Our findings here are based on the record currently before us, including the possibility that BNSF may elect to directly serve additional shippers on the Lead.").

- c. **UP committed to provide BNSF direct access to customers on the Rosebluff Lead, and UP must modify its operations as necessary to honor that commitment.**

As noted above, UP obligated itself on four separate occasions to allow BNSF direct access to the Rosebluff Lead in order to effectuate the UP/SP merger conditions imposed by the Board. *See* Section II.A, *supra*. The Board acknowledged these UP commitments more than two years ago in granting BNSF terminal trackage rights to enable BNSF to implement those direct access rights. *See Decision No. 3*, slip op. at 2-3. The Board stated that “[a]llowing UP to deny BNSF that choice [of direct service] . . . would severely undermine the purpose of the merger conditions and the integrity of the Board’s processes.” *Id.* at 12.

Indeed, UP was entirely willing to make operational adjustments and to open a two-hour window for BNSF to operate a direct train through the Rosebluff Yard and down the Rosebluff Lead to serve CITGO every other day in 2012. *See* BNSF Opening Statement (Dec. 31, 2014) at 10-11 & Ex. F. In particular, in May 2012, BNSF notified UP of its intent to provide direct service to CITGO via the Rosebluff Lead, and UP and BNSF personnel corresponded and met over the course of several months to address UP’s operational concerns. *See id.* at 10. In December 2012, Roger Lambeth, Superintendent of the UP Livonia Service Unit, confirmed that UP and BNSF had resolved the operational issues. Mr. Lambeth provided BNSF with a “BNSF Citgo Crude Operating Plan” that opened a two-hour window for BNSF to provide every-other-day direct service to CITGO. *See id.* & Ex. F.¹²

The Board noted these UP efforts in making its practicability finding, stating that “local UP personnel were willing and able to develop a plan for BNSF to serve CITGO directly in

¹² UP reversed its decision to permit BNSF to use the Rosebluff Yard window only after KCS claimed to UP that UP lacked authority to grant BNSF trackage rights over the Rosebluff Lead without KCS’s approval under the consent provisions of the relevant joint facility agreement. *See* BNSF Opening Statement (Dec. 31, 2014) at 10-11.

December 2012” and that “[t]his demonstrates that at least UP and BNSF had agreed that BNSF operations on the Rosebluff Lead would be feasible.” *Decision No. 3*, slip op. at 16 & n.14.

Now, UP continues to seek to repudiate its UP/SP merger commitments and reject the Board’s orders by alleging that adding BNSF as a third carrier to the Rosebluff Lead terminal facilities is impossible without capacity improvements and complaining that “BNSF’s entirely unnecessary request for direct service . . . puts [UP’s] network and our customers needlessly at risk.” UP Reply at 54. The Board, however, recognizing that UP long ago committed to do what it now wishes not to do, granted such access through *Decision No. 3* and ordered the parties to accommodate the operations.

Since the issuance of *Decision No. 3*, UP’s failed attempts at accommodation have irrationally assumed that UP is powerless to alter its own operations to coordinate with a BNSF service plan. If modifications to UP operations are required to enable BNSF to provide direct service, then UP is duty-bound to make them. *See UP/SP Decision No. 95*, slip op. at 4 (STB served Feb. 28, 2002) (“UP agreed to [] potential interference when it accepted the conditions, including the terms of the BNSF Agreement, that we imposed when we approved the UP/SP merger.”). UP has evaded its UP/SP merger obligations for too long, and the Board should not allow UP to continue to do so.

B. The Board should establish BNSF’s proposal as the condition of use for BNSF’s terminal trackage rights.

1. BNSF’s proposed plan is viable and provides the flexibility and commitment to coordination that the Board noted would be required.

The plan that BNSF has proposed for the condition of use provides the flexibility and commitment to “coordination of operations among all the parties” that the Board recognized would be necessary. *Decision No. 3*, slip op. at 16 (internal quotation marks omitted). While BNSF’s plan provides specific times in order to illustrate the expected time for each move and

provide a framework for the events, BNSF never intended to limit its operations to those specific times. Indeed, as emphasized by Mr. Reilly throughout his Verified Statement, BNSF plans to cooperate and coordinate with KCS and UP and to be flexible based on operating circumstances. BNSF's proposal also presents alternative approaches intended to coordinate smoothly with the other carriers.¹³ This willingness to be flexible is a virtue, not a flaw.

Yet KCS and UP each attack the BNSF proposal for its commitment to coordination among the three carriers. For example, UP claims that "the Board cannot reasonably conclude that railroad field personnel could magically resolve [operating conflict] issues on the fly." UP Reply at 14. UP further alleges that coordination amongst the three carriers cannot solve "the substantial and deleterious operational consequences of dropping a third railroad into this already congested area." *Id.* at 54 n.35. Indeed, UP mocks BNSF's proposal and the Board's findings by stating that "BNSF will claim that with just a little more coordination, all would be well." UP Reply at 54. KCS characterizes BNSF's commitment to coordination as "'the parties just have to work it out, like everywhere else,'" and alleges that the Board should not establish conditions of use that maximize flexibility and coordination. KCS Reply at 21 (internal quotation marks omitted).

Again, these KCS and UP arguments fly in the face of the Board's findings in *Decision No. 3*. In finding that operations by BNSF on the Rosebluff Lead would be practicable, the Board indicated that "the addition of a third carrier could entail many operational adjustments, some of which may be complicated." *Decision No. 3*, slip op. at 16. The Board stated that the fact that

¹³ See, e.g., Reilly V.S. at 7 n.6 ("BNSF plans to be flexible on the departure time, depending on the operating circumstances on any given day."); Reilly V.S. at 9 ("If BNSF is unexpectedly delayed, BNSF will coordinate directly with KCS for operation through the Rosebluff Yard during KCS's operating window."); Reilly V.S. at 12 (describing alternative options for BNSF service that are available depending on the particular circumstances on any given day).

BNSF operations “would require coordination of operations among all parties does not warrant a finding that such operations are not practicable.” *Id.* (internal quotation marks omitted).

Furthermore, the Board specifically stated that it based its lack of substantial impairment finding on “appropriate coordination” amongst the carriers. *Id.* at 16. The Board noted that:

We believe that the three carriers can, in the interest of efficiency and operating economies, coordinate operations to minimize their interference with one another. Indeed, a certain level of interference and delay is common and expected in the railroad industry.

Id. at 17-18 n.17.

In short, the Board already considered and rejected the KCS and UP arguments that coordination and operational adjustments cannot solve the capacity issues alleged by the two carriers. Since the Board granted BNSF terminal trackage rights more than two years ago through *Decision No. 3*, neither KCS nor UP has proposed any adjustments to their current operations to accommodate BNSF direct service on the Rosebluff Lead.

Rather than suggest such adjustments or other ways that the three carriers can work together to accommodate BNSF’s implementation of the terminal trackage rights ordered by the Board, KCS and UP instead now argue that the Board was incorrect in finding that sufficient capacity exists at the terminal facilities so long as “appropriate coordination” between the three carriers occurs. The Board should reject these disingenuous attempts to stymie BNSF’s rights and re-litigate the Board’s prior decisions.

2. BNSF can utilize the “natural windows” that create running tracks through the Rosebluff Yard and clear the 50/50 Line every day.

The flexibility and commitment to coordination afforded by BNSF’s proposal would allow BNSF’s trains to utilize the “natural windows” created by KCS and UP movements through the Rosebluff Yard and on the 50/50 Line. These movements occur every day, and they create both (1) a clear track in the Rosebluff Yard that BNSF can use to run through the Yard

during BNSF direct service both to and from the Lyondell facility, and (2) an opportunity for BNSF to run on the 50/50 Line. This approach is fully consistent with the commitment to flexibility and coordination set forth in BNSF's proposal, and it avoids the numerous purported "conflicts" that UP has artificially manufactured by analyzing two historic days without considering operational adjustments.¹⁴

a. A "natural window" exists to accommodate BNSF's inbound service to Lyondell.

Every morning, KCS concludes its 12-hour operating window in the Rosebluff Yard by running east through the Yard and across the 50/50 Line to KCS Mossville Yard. This will typically (1) create an open track in the Rosebluff Yard upon KCS's departure¹⁵ and (2) pause traffic on the 50/50 Line at the junction for Rosebluff Lead. As KCS starts this movement, BNSF's train would depart from Lacassine Yard, travel west on the 50/50 Line, and use the same track that KCS used in departing the Rosebluff Yard (typically Track 1 or Track 4 from BNSF's observations) to enter the Yard on the east end and run west through the Yard.

By coordinating the departure of BNSF's train with KCS's departure from the Rosebluff Yard, KCS's concerns about BNSF interference with its Rosebluff Yard operations disappear. After leaving the west end of the Yard, the BNSF train can proceed south down the Rosebluff

¹⁴ UP's conflict analysis is akin to arguing that a pedestrian cannot cross a busy city street between 9:00 a.m. and 9:05 a.m. each day on the pedestrian's way to work by using historic traffic camera data from that street to identify multiple conflicts with cars and buses in each lane of the street during that period on just two particular days. The pedestrian could clearly cross the street unscathed at some point during that five-minute period each day by coordinating with otherwise conflicting traffic by using a crosswalk and waiting for the traffic light to change. Similarly, notwithstanding UP's purported conflicts identified using historical data, BNSF could operate direct service on the Rosebluff Lead by all three carriers working together to accommodate BNSF's train – just as the Board intended.

¹⁵ See KCS Reply at 25 ("Track 4 is used to assemble outbound trains and land inbound trains, but is cleared out at the end of each carrier's window to make room for the other owner's train.").

Lead and enter the Montell Lead. In so doing, the BNSF train can coordinate its operations with UP's YRB66 as YRB66 serves customers on the east end of the Montell Lead. If necessary to enable YRB66 to enter the Montell Lead from Firestone Yard, BNSF's train could hold on the Rosebluff Lead south of the Rosebluff Yard.

b. A “natural window” exists to accommodate BNSF’s outbound service from Lyondell.

Similarly, UP's YRB86 (the “reverse spreader”)¹⁶ originates each day in the early morning at the southern end of the Rosebluff Lead and gradually moves north to the Rosebluff Yard, collecting outbound cars to be switched to KCS or moved to UP's North Yard for further line-haul movement. *See* UP Reply at 8. Upon reaching Rosebluff Yard, YRB86 switches cars to KCS and picks up cars that need to go to North Yard. This typically occurs between 11 a.m. and 3 p.m. *See id.* at 10.

As YRB86 performs its yard work, BNSF can exit Lyondell onto the Montell Lead, pull onto the Rosebluff Lead, and wait just south of the Rosebluff Yard for YRB86 to complete its work. BNSF can again coordinate as needed with YRB66 as YRB66 returns to Firestone Yard. When YRB86 completes its yard work and departs the east end of Rosebluff Yard headed to North Yard via the 50/50 Line, two things will happen: (1) a clear track will open up in the Rosebluff Yard, and (2) a clear route will open on the 50/50 Line. BNSF can use that clear Yard track to enter the Yard on the west end, run east through the Yard, depart the Yard on the east end, follow YRB86 east on the 50/50 Line, and continue on to Lacassine Yard.

¹⁶ To avoid confusion, BNSF is adopting UP's convention of referring to YRB86 and YRB46 collectively as YRB86. *See* UP Reply at 9 n.2.

c. Mr. Baranowski confirms that the “natural windows” occur consistently.

Mr. Baranowski confirms that data provided by KCS and UP in discovery show that the KCS and UP operational sequences that open these “natural windows” occur consistently. *See* Baranowski Rebuttal V.S. at 2-7. The below figure excerpted from the Baranowski Rebuttal V.S. shows that the sequence and relative timing of events comprising Rosebluff Lead terminal operations consistently holds regardless of whether KCS overstays its window:

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Baranowski Rebuttal V.S. at 4, Fig. 1. Specifically:

1. The top red bar starts on a given day at 12 a.m. and the red bar ends when KCS’s last train exits the east end of the Rosebluff Yard to the north. The white portion immediately following indicates time before YRB86 enters the Yard.
2. Next, the yellow bar starts when YRB86 enters from the west end of the Rosebluff Yard and the yellow bar ends when this train exits to the east end of the Yard.
3. Next, the green bar starts immediately after the yellow bar ends to show that YRB65 is likely on duty in the Rosebluff Yard. The green bar ends when YRB65

exits the west end of the Yard and departs south down the Rosebluff Lead. The white portion immediately following indicates time when no trains are in the Yard.

4. Next, the blue bar starts when YAK63 enters the east end of the Rosebluff Yard before being reclassified as YRB74, and the blue bar ends when YRB74 exits the west end of the Yard and departs south down the Rosebluff Lead. The white portion immediately following indicates time when no trains are in the Yard.
5. Lastly, the bottom red bar starts when KCS enters the Rosebluff Yard and ends at 11:59pm. The next bar to the right depicts operations on the following day.

Baranowski Rebuttal V.S. at 3-4.

Mr. Baranowski uses data provided by KCS in discovery to identify average periods of time that each “natural window” would occur within the sequence of events depicted in the above figure. Baranowski Rebuttal V.S. at 5-6. Mr. Baranowski also testifies that, in practice, UP is routinely able to move cars, blocks, and trains all the way through Rosebluff Yard. *Id.* at 9-10. Additionally, Mr. Baranowski testifies that the volumes of cars inbound or outbound to Zone 2 of the Rosebluff Lead that dwelled in the Rosebluff Yard for more than one week between November 2017 and February 2018 indicate that, to the extent that there are blockages in the Rosebluff Yard, efficiency improvements controlling excess dwell times could reduce instances in which all tracks in the Yard are blocked. *Id.*

In sum, BNSF’s proposal for a condition of use provides the necessary flexibility and coordination to take advantage of certain “natural windows” created by daily KCS and UP movements through the terminal facilities. To be sure, this will require the good faith cooperation of UP to avoid or minimize service disruptions, but UP is duty bound by reason of its contractual commitments and the Lake Charles Merger Conditions to provide that cooperation.

3. UP's criticism of the BNSF proposal by using two historic sample days to identify conflicts in the Rosebluff Yard and on the Montell Lead proves nothing.

UP exhaustively describes the existing KCS and UP operations in the Lake Charles terminal area, painting a picture of two carriers making continual real-time adjustments to maximize limited capacity. *See* UP Reply at 3-12. UP concludes that “careful coordination and close cooperation” are required amid “complexities, capacity constraints, uncertainties, and deviations from plan.” *See id.* at 3, 8. UP indicates that “plans are often disrupted,” and that KCS and UP each often “overstay” their respective 12-hour operating windows in Rosebluff Yard in order to accommodate each carrier’s needs. *Id.* at 7.

However, in response to BNSF’s proposal, UP’s and KCS’s touted real-time coordination and cooperation evaporate, and UP claims that adding a third carrier to the mix is impossible. Rather than offer collaborative solutions to implement the Board’s order of terminal trackage rights and live up to its commitments from the UP/SP merger, UP instead provides an unrealistic critique that assumes static UP and KCS operations from two historic sample days.¹⁷

UP overlays actual events of two prior dates with BNSF’s proposal to create a hypothetical scenario of an inevitable – and assumedly irreconcilable – conflict in train movements. But UP’s theatrics unrealistically assume a scenario in which no one turns on the lights and deigns to coordinate the dynamic operation of a railroad on any given day to work around exceptions from a plan.

¹⁷ UP also claims that BNSF’s assertion that BNSF direct service “would free up capacity and reduce congestion” is “entirely erroneous.” UP Reply at 57 (internal quotation marks omitted). UP neglects to note, however, that this “entirely erroneous” assertion actually came directly from the Board’s prior findings. *See Decision No. 3*, slip op. at 17 (“BNSF’s direct service will free up capacity and eliminate some of the congestion in Rosebluff Yard, as numerous BNSF cars will no longer be switched or stored there.”).

This effort proves nothing. UP identifies numerous purported conflicts between the BNSF proposal and existing KCS and UP operations on October 3, 2017, and February 21, 2018, but UP entirely fails to consider the “operational adjustments” that the Board recognized in *Decision No. 3*, slip op. at 16, would be required by UP and KCS to accommodate BNSF service. Indeed, Mr. Baranowski testifies that Wednesday, February 21, 2018, is not representative of typical Rosebluff Lead terminal operations, because that day follows a period of unusually high inbound volumes and unusually low switching activity, likely due to the Presidents’ Day holiday on Monday, February 19. See Baranowski Rebuttal V.S. at 12-13.¹⁸

While the remainder of this Section III.B.3 addresses certain purported UP conflicts, it is not necessary to address each UP criticism of the BNSF observational study and BNSF’s proposed condition of use, because UP’s inflexible approach is not consistent with the Board’s findings and direction in *Decision No. 3*. The Board fully acknowledged the “challenges” associated with adding BNSF direct service on the Rosebluff Lead and determined that the public interest outweighed these concerns. *Decision No. 3*, slip op. at 16-17. The Board should reject these attempts by UP to evade the Board’s order by identifying hypothetical operational conflicts on two historic sample days without even paying lip service to the Board’s directive in *Decision No. 3* that the parties should coordinate their operations to minimize interference.

a. The data show available capacity on the 50/50 Line between Lacassine Yard and the Rosebluff Lead.

UP identifies a number of purported conflicts between the portion of the BNSF plan that calls for a BNSF train to run on the 50/50 Line to and from Lacassine Yard, and operations on the 50/50 Line on two historic days. See UP Reply at 34-35, 42 n.22, 50-53. UP identifies a

¹⁸ Mr. Baranowski also testifies that it is not clear whether the limited data provided by UP in support of its February 21 study consistently identifies track occupancy correctly. See Baranowski Rebuttal V.S. at 14.

series of historical train movements, work permits, and bridge openings on this portion of the 50/50 Line for those two historic days.

In order to put these two days in perspective, Mr. Baranowski analyzed bridge opening and train event data from the 50/50 Line provided in discovery by UP to determine how frequently the 50/50 Line achieved its maximum hourly operational capacity during the entirety of 2017. *See* Baranowski Rebuttal V.S. at 7-9. Mr. Baranowski testifies that, based on the average number of trains that pass along the 50/50 Line at a control point between UP's North Yard and the connection to the Rosebluff Lead and the capacity of the 50/50 Line, only between {{ }}% and {{ }}% of the time during 2017 is the relevant portion of the 50/50 Line potentially unable to accommodate an additional train during a given hour without otherwise adjusting existing operations. *See id.* at 8.

b. Any purported conflicts with YRB65 could be resolved with minor operational adjustments.

UP refers multiple times to a purported conflict between UP's YRB65 and BNSF's plan. *See, e.g.,* UP Reply at 45-46, 56. BNSF fully acknowledges that UP's YRB65 could be classifying cars at the west end of Rosebluff Yard at the times when BNSF's train would pass through the Yard. UP can readily pause its YRB65 activities for 10-15 minutes to allow the BNSF train to pass. Such a pause would have only a minor impact, if any, on the ongoing classification and would be consistent with UP's obligation, as recognized by the Board in *Decision No. 3*, to make operational adjustments to accommodate BNSF direct service trains. *See* Section III.A.3.c, *supra*. In fact, UP acknowledged that "YRB65 interrupts its work to allow

YRB86's entry into [Rosebluff] Yard at approximately 8:30 am." UP Reply at 10. BNSF's train could move through the Yard during that same or a similar interruption.¹⁹

c. The data show that no conflicts should exist with YRB86 operations south of Rosebluff Yard.

UP refers to a purported conflict between YRB86 and BNSF's proposed morning movement through the Rosebluff Yard to Lyondell. *See, e.g.*, UP Reply at 48-49, 55 ("depending on when BNSF could find a window to move over the 50/50 Line to Rose Bluff Yard, its exit also might be blocked by YRB86, which would be picking up cars on the Lead on its way to the Yard").²⁰

However, Mr. Baranowski testifies that YRB86 does not enter Rosebluff Yard until on average {{ }} hours after KCS departs from Rosebluff Yard, at which point the natural window begins where BNSF's train would travel through the Yard on its way to Lyondell. *See* Baranowski Rebuttal V.S. at 6, Table 1. This suggests that it is likely that YRB86, on its gradual trip north up the Rosebluff Lead to the Rosebluff Yard, may not have even reached the Montell Lead by the time the BNSF arrives to serve Lyondell.²¹ In this case, no conflict would exist.

¹⁹ The inbound "natural window" provides a place for BNSF to enter the east end of the Rosebluff Yard on the track used by KCS in its departure. *See* Baranowski Rebuttal V.S. at 5 n. 5. Therefore, there is no need for YRB65 to prepare for BNSF's arrival until BNSF is already in this track and waiting to pass through the west end of the Yard. Furthermore, Mr. Baranowski observed that historically a significant period of time has existed between when YRB65 departs the west end of the Yard and YAK63 enters the east end of the Yard. *See* Baranowski Rebuttal V.S. at 5 n.6. This buffer time could absorb the impact of any operational delays caused by BNSF's train.

²⁰ UP also alleges that YRB86 may obstruct BNSF's path to Lyondell because YRB86 has historically picked up cars set out by YRB74 on the previous day on the Montell Lead. *See, e.g.*, UP Reply at 12, 51-52. As discussed below, BNSF direct service to Lyondell should eliminate any of these purported conflicts with cars set out on the Montell Lead. *See* Section III.B.3.d, *infra*.

²¹ Even if YRB86 is holding south of the Rosebluff Yard to wait for a clear track in the Yard when BNSF arrives, UP has not identified any reason why YRB86 could not wait on the

d. BNSF direct service to Lyondell should eliminate any purported “conflicts” between the BNSF plan and UP operations on the Montell Lead.

UP also identifies a number of purported conflicts between the BNSF plan and historic UP operations on the Montell Lead, none of which would typically occur once BNSF begins direct service to Lyondell. UP asserts that there is often not enough capacity in the Firestone Yard to accommodate the cars picked up by UP from Montell Lead customers, causing YRB74 to use the Montell Lead to set out cars for pick up later by YRB86. *See* UP Reply at 30, 36-40.

What UP fails to mention, however, is that the majority of the cars currently set out on the Montell Lead by YRB74 are BNSF cars that UP is handling via reciprocal switch to or from Lyondell. BNSF direct service to Lyondell would free up sufficient capacity at Firestone Yard for UP to store non-Lyondell cars from YRB74 and YRB66. This should eliminate the need for UP to set out cars on the Montell Lead.²² In his Rebuttal V.S., Mr. Baranowski confirms that industry event data provided by UP in discovery show that, once BNSF starts direct service to Lyondell, on average {{ }} of the three tracks in Firestone Yard would be full even if every single car potentially using Firestone Yard were placed there for the entire day. *See* Baranowski Rebuttal V.S. at 10-11.

Furthermore, UP argues that BNSF’s plan would conflict with YRB66 moving between Firestone Yard and shippers on the east end of the Montell Lead. *See, e.g.,* UP Reply at 30-31, 33, 36-40. As explained above in Section III.B.2, the BNSF train inbound to Lyondell can coordinate its operations with YRB66. If necessary to enable YRB66 to enter the Montell Lead

Rosebluff Lead south of the Montell Lead, thus allowing BNSF to enter the Montell Lead from the Rosebluff Lead.

²² To the extent that YRB74 also delivers and picks up cars from the Westlake Polymers 1 & 2 facilities on a given day, BNSF can readily coordinate its activities with YRB74 to avoid material impact.

from Firestone Yard, BNSF's train could hold on the Rosebluff Lead south of the Rosebluff Yard. Similarly, the BNSF train outbound from Lyondell can again coordinate as needed with YRB66 as YRB66 returns to Firestone Yard.

Therefore, none of the purported "conflicts" identified by UP between the BNSF plan and UP operations on the Montell Lead would typically occur once BNSF direct service to Lyondell begins and with sufficient coordination between the two carriers.

4. The Board should not impose the UP proposal for BNSF to swap responsibility for direct service with UP as a condition of use.

After presenting an inflexible critique of the BNSF proposed condition of use and refusing to exhibit any willingness to modify its operations to accommodate BNSF direct service (in spite of its contractual promises to BNSF and the Board's direction in *Decision No. 3*), UP now requests at this late stage in the proceeding that the Board impose a single remarkable condition on BNSF's use of its terminal trackage rights: "BNSF's agreement to swap responsibility with [UP] for [Rosebluff] Yard, the [Rosebluff] Lead, and the Montell Lead." UP Reply at 59.

Under this proposal, BNSF would provide direct service to Zone 2 customers (including switching cars for KCS and UP) and switch UP traffic moving to shippers in Zone 1. UP offers BNSF its 12-hour operating window in the Rosebluff Yard to facilitate this transfer. *Id.* at 59-60. UP's three-paragraph proposal lacks many important details, including whether UP contemplates any transfer to BNSF of UP's ownership interest in the terminal facilities. The Board should not countenance further delays in the proceeding with UP's latest diversionary tactic.

As discussed above, the Board made it abundantly clear in *Decision No. 3* that it fully contemplated three-carrier service on the terminal facilities when making its practicability and lack of substantial impairment findings. The Board should not now repudiate such findings by

requiring BNSF, as a condition of use, to fully step into UP's shoes. That said, BNSF will consider this UP proposal further and would be willing to discuss this issue during the Board-sponsored mediation scheduled to take place later this month or potentially thereafter once BNSF commences direct service.

5. The Board should not impose the KCS requested conditions of use.

KCS apparently requests that the Board impose three conditions on BNSF's use of the Rosebluff Lead:

- (1) "BNSF must operate through Rosebluff Yard only during UP's 'window,' and must be penalized if it fails to do so;"
- (2) "BNSF must not stop, pick up or set out cars in Rosebluff Yard; and"
- (3) "BNSF must not substantially impair UP's operations on the Rosebluff Lead."

KCS Reply at 16.²³

As an initial matter, the third KCS request for no "substantial impairment" is meaningless. As established above, the Board has already granted BNSF's application and found that "BNSF will be able to use the Rosebluff Lead without substantially impairing the operations of UP or KCS." *Decision No. 3*, slip op. at 16. As noted above, KCS has not filed a petition to reopen the lack of substantial impairment finding, and there would be no basis for such a petition at the present time. Thus, there is no reason for the Board to impose KCS's substantial impairment condition.

If the third KCS requested condition instead simply means that BNSF must "avoid interfering with or delaying UP's operations," KCS Reply at 25, then the Board should reject this request as well. In finding lack of substantial impairment, the Board specifically contemplated

²³ It appears to BNSF that these are the KCS proposed conditions of use. However, KCS does not formally request that the Board impose these terms as "conditions of use," and these requests are worded differently throughout the KCS Reply (*compare, e.g.,* KCS Reply at 16 *with id.* at 25).

that “a certain level of interference and delay is common and expected in the railroad industry.” *Decision No. 3*, slip op. at 17-18 n.17. A condition of use that prohibited any and every level of interference or delay, no matter how manageable, would directly contradict the Board’s findings in *Decision No. 3*.

The first KCS requested condition would require BNSF to operate in the Rosebluff Yard only during the actual times that UP operates in the Yard and to “be penalized if [BNSF] fails to do so.” KCS Reply at 25. The second KCS condition would require BNSF to “pass through the Rosebluff Yard without stopping or setting out or picking up traffic.” *Id.* The Board should also reject each of these requests.

While BNSF certainly proposes to operate trains directly through Rosebluff Yard without stopping during UP’s assigned 6 a.m. to 6 p.m. window, BNSF also proposes alternative approaches and the ability to modify its plan to account for changed operating circumstances. *See* Section III.B.1, *supra*. UP’s and KCS’s descriptions of their operations in the terminal area illustrate why the hard-and-fast rules requested by KCS do not work well in complex and constrained operating environments. For the benefit of all three carriers and their customers, the Board should not impose rules that limit BNSF’s flexibility and ability to coordinate with the two existing carriers to optimize BNSF direct service using its terminal trackage rights.

C. The Board should establish compensation terms for BNSF’s terminal trackage rights under condemnation principles, and require BNSF to pay the “Prescribed Fee.”

1. KCS is entitled to half of the compensation set by the Board, and UP should be responsible for any difference between the “Prescribed Fee” and the compensation terms set by the Board.

As an initial matter, BNSF agrees that KCS, as one-half owner of the relevant Rosebluff Lead terminal facilities, is entitled to one-half of the compensation set for BNSF’s use of its Board-ordered terminal trackage rights. That compensation level should be set either by the

mutual agreement of BNSF, KCS, and UP (using any method the three parties choose) or by the Board “under the principle controlling compensation in condemnation proceedings.” 49 U.S.C. § 11102(a). As discussed in the BNSF Petition at 7 and 15-17, the parties have been unable to reach agreement with respect to compensation terms for BNSF’s Rosebluff Lead terminal trackage rights operations. Therefore, BNSF has requested that the Board establish such terms.

Although KCS should be compensated fairly for BNSF’s operations, the level of compensation that BNSF must pay for trackage rights implemented under the UP/SP merger conditions, such as the terminal trackage rights at issue here, has already been set as the “Prescribed Fee.” *See* Pet. at 15. As the Board noted, the Prescribed Fee would have clearly been the proper compensation to UP for BNSF’s trackage rights if KCS was not a one-half owner with UP of the Rosebluff Lead terminal facilities. *See Decision No. 3*, slip op. at 20.

In the Petition, BNSF proposed that BNSF pay UP the Prescribed Fee, and that UP then pay KCS the amount due to KCS under the compensation terms set by the Board. BNSF would also be willing to (1) pay KCS directly under the compensation terms set by the Board, and (2) pay UP the Prescribed Fee, less the amount paid to KCS by BNSF. In each formulation, KCS would receive appropriate compensation, BNSF would be responsible for the Prescribed Fee, and UP would be responsible for any difference between the Prescribed Fee and the compensation that UP or KCS is owed for BNSF’s terminal trackage rights operations.

An example demonstrates the point. Assume for illustration purposes that the compensation figure as set by the Board is \$100 per car that BNSF moves on the terminal facilities, as calculated pursuant to condemnation principles. KCS would be entitled, as one-half owner of the terminal facilities, to receive \$50 per car. If BNSF were to pay UP the Prescribed Fee for such a direct service train, then UP would pay to KCS \$50 per car from the amount

received by UP from BNSF. UP's compensation would be the balance of the Prescribed Fee paid by BNSF. Alternatively, BNSF would be willing to directly pay KCS \$50 per car and to pay UP the Prescribed Fee minus the \$50 per car figure already paid to KCS by BNSF.

This is entirely appropriate, because UP has the affirmative obligation under the BNSF Settlement Agreement, the CMA Agreement, the 50/50 Line Agreement, and the Lake Charles Merger Conditions to provide BNSF with direct service trackage rights at the Prescribed Fee. UP should be required to accept any shortfall between the terminal trackage rights compensation and the Prescribed Fee because UP voluntarily chose to proceed with the UP/SP merger and to thereby provide BNSF with direct service trackage rights over the Rosebluff Lead at the Prescribed Fee. If UP failed to secure KCS's consent to the grant of trackage rights to BNSF on the Rosebluff Lead, then UP bears responsibility for whatever compensation to KCS is now appropriate.²⁴ Any shortfall should not rest on BNSF or on Lake Charles area shippers.

²⁴ UP and KCS make variations on the same argument that under today's economic conditions the Prescribed Fee gives owners of the Rosebluff Lead terminal facilities no incentive to add capacity to support BNSF direct service if BNSF's compensation proposal were to be adopted. See UP Reply at 2, 62; KCS Reply at 2 n.2. Both parties, however, fail to recognize that the BNSF Settlement Agreement and the CMA Agreement established a series of protocols for implementing necessary capital improvements on the trackage rights lines. First, BNSF Settlement Agreement § 9(c)(ii) provides for the parties to share the costs of capital improvements based on usage. See UP Reply (Aug. 24, 2015), Counsel's Ex. 2. Second, BNSF Settlement Agreement § 9(c)(iv) provides for the establishment by UP and BNSF out of the purchase price of a capital reserve fund of \$25 million to pay for "capital projects on the Trackage Rights Lines that are required to accommodate the operations of both UP/SP and BNSF." *Id.* Finally, CMA Agreement § 6(a) requires UP to "place 100% of the total trackage rights fees received from BN/Santa Fe with respect to the lines in Texas, Louisiana, Arkansas, Missouri and Illinois over which BN/Santa Fe will receive trackage rights in a segregated fund to be spent on (a) maintenance of those lines, (b) offsetting depreciation of those lines, and (c) capital improvements on those lines." *Id.*, Counsel's Ex. 3. CMA negotiated for the establishment of such a fund to ensure that, *inter alia*, necessary capital improvements would be adequately funded. The additional (undefined) capacity which UP seeks would be within the scope of this provision, and thus UP's and KCS's concerns as to future capacity investment are misplaced given the merger parties' carefully crafted protocols.

Furthermore, any amount paid by BNSF in excess of the Prescribed Fee for the Rosebluff Lead terminal trackage rights would improperly reopen the carefully calculated and bargained-for UP/SP merger conditions. Lake Charles area shippers (including Lyondell and CITGO) have an independent right under the CMA Agreement and the Lake Charles Merger Conditions to receive direct BNSF service subject to the Prescribed Fee. *See* BNSF Opening Statement (Dec. 31, 2014) at 21-22; CITGO Reply (Aug. 24, 2015) at 15-17.

UP cannot make Lake Charles area shippers' service cost more than service using the Prescribed Fee would cost just because UP forced BNSF to file a terminal trackage rights application by not otherwise securing BNSF's direct access to the Rosebluff Lead through agreement with KCS. The Prescribed Fee applies to all other BNSF trackage rights over UP lines resulting from the UP/SP merger conditions, and BNSF should not be required to pay more than the Prescribed Fee for its access to the Rosebluff Lead.

2. The Board should reject the KCS compensation arguments.

KCS claims that "BNSF's Petition should be denied because BNSF's compensation and operating proposals together seek to create insurmountable competitive advantage for BNSF vis-à-vis KCS and UP," and that the Board "should not" establish the compensation terms. KCS Reply at 26. The KCS compensation argument consists largely of a further effort to reopen the Board's public interest findings by re-litigating the competitive analysis undertaken by the Board in the UP/SP merger.

The Board affirmed in *Decision No. 3* that the Board's public interest determination in UP/SP merger "is controlling in this trackage rights proceeding," and that "the preservation of BNSF's option of direct access is necessary to preserve these shippers' access to multiple competitive carriers and routing options." Slip op. at 10. The competition issues raised by KCS in its compensation argument are simply not relevant to setting the compensation terms "under

the principle controlling compensation in condemnation proceedings,” 49 U.S.C. § 11102(a), and the Board should disregard them or reject them summarily.

Additionally, KCS’s argument that the Board should dismiss the BNSF Petition on the ground that BNSF has failed to set forth a compensation figure based on the statutory standard is wrong and disingenuous. Section 11102(a) provides that the parties are to seek to agree on compensation, and that, if they cannot do so, the Board will then set the compensation. Nothing in Section 11102 or Board precedent requires BNSF to initially propose a compensation figure.

After nine pages of irrelevant and misleading arguments about competition issues and *prima facie* cases (see KCS Reply at 26-34), KCS finally sets forth its preferred compensation approach: the “ECP methodology.” See *id.* at 35. Confusingly, KCS immediately discards the ECP approach and instead provides a cursory formulation of a “market based approach,” apparently determined by starting from “a comparable switching rate that UP charges KCS for access to Lake Charles” and subtracting “the portion of that fee that approximates the costs associated with that switch.” *Id.* at 36. KCS then argues that BNSF should pay: (1) “a per car fee,” calculated using KCS’s opaque approach; (2) “[BNSF’s] fair share of maintenance on a usage basis;” and (3) “a delay charge for any operational delays caused by the presence of BNSF’s trains.” *Id.*

KCS’s proposal fails entirely to identify any figure based on “the principle controlling compensation in condemnation proceedings.” 49 U.S.C. § 11102(a). KCS does not propose a per-car rate based on SSW calculations, on ECP methodology, or on any other recognized methodology. The “market based fee” proffered by KCS has no relationship to condemnation

principles and no support beyond the basic figures that KCS provides as the inputs. Indeed, KCS has told BNSF that there are no workpapers underlying KCS's compensation proposal.²⁵

Moreover, the KCS-proposed fee is, in KCS's view, intended to compensate KCS and UP for BNSF's access to the Rosebluff Lead terminal facilities *and the customers* accessed via those facilities. See KCS Reply at 34 ("KCS must be compensated in a manner that . . . contribute[s] to profits so that KCS and UP can obtain revenue adequacy."). The Board granted BNSF access to Lake Charles area shippers through the Board's imposition of the Lake Charles Merger Conditions, and compensation for access to such customers is not relevant here.

KCS also proposes that BNSF pay its "fair share of maintenance on a usage basis." KCS Reply at 36. Because the Prescribed Fee includes BNSF payments for ordinary and programmed maintenance, BNSF should not be charged for any additional maintenance fees for its usage of

²⁵ KCS's Fifth Amendment argument (KCS Reply at 34-35) reflects the same confusing refusal to commit to any particular compensation formula and lack of evidence to support its arguments. For example, KCS has failed to provide any basis for calculating the lost profits that it argues should be included as a component in any compensation formula. In fact, KCS has not presented evidence that it will suffer *any* lost profits.

In addition, KCS's Reply assumes, without meaningful analysis, that a "taking" in the constitutional sense will occur the moment BNSF's access to shippers on the Rosebluff Lead becomes direct, rather than being accomplished via reciprocal switching. There is no basis for that assumption. Presumably, it is the fact that BNSF trains (as well as KCS and UP trains) will now run over a line that KCS partly owns that prompts KCS to rely on the concept of a physical "taking." But "[n]ot every physical *invasion* is a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982). "[T]emporary limitations are subject to a . . . complex balancing process to determine whether they are a taking . . . [because] they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property." *Id.* KCS does not acknowledge the balancing test applicable in such cases and makes no effort to apply it. And, given that this proceeding is merely about substituting one form of access to shippers for another and that UP trains (sometimes operating under a reciprocal switching arrangement with BNSF) already run over the same tracks, it is inconceivable that any KCS property has been "taken" in the constitutional sense merely because of a grant of terminal trackage rights to allow BNSF direct access.

the Board-ordered terminal trackage rights.²⁶ UP is obligated to cover such maintenance expenses under the terms of the BNSF Settlement Agreement, the CMA Agreement, and the 50/50 Agreement, and pursuant to UP's acceptance of the Lake Charles Merger Conditions.²⁷

KCS further proposes that BNSF pay "a delay charge for any operational delays caused by the presence of BNSF's trains." KCS Reply at 36. Any such "delay charge" would not be compensation for BNSF's access to the Rosebluff Lead. KCS cites no precedent for inclusion of such a fee (in terminal trackage rights compensation or otherwise), and BNSF knows of no such precedent. At most, any such discriminatory "delay charge" would constitute an operational-based penalty, and any such charge would simply lead to continuing disputes as to the cause of any particular delay.²⁸

3. The Board should reject the UP compensation arguments.

Rejecting its contractual promises and its responsibilities under the UP/SP merger conditions by arguing that BNSF should pay more than the Prescribed Fee here, UP analogizes to the terminal trackage rights granted by the Board over the KCS Shreveport and Beaumont lines

²⁶ Furthermore, KCS should not expect to receive full trackage rights compensation from BNSF when KCS refuses to make the Rosebluff Yard available to BNSF during KCS's operating window. If KCS prevails in its misguided effort to restrict BNSF access to UP's operating window only, then KCS is not really providing any track capacity to BNSF, and KCS should not be compensated separately for any capacity that it refuses to provide.

²⁷ See, e.g., UP Reply (Aug. 24, 2015), Counsel's Ex. 2 (BNSF Settlement Agreement) § 9(a) ("The owning line shall be responsible for maintenance of its line in the ordinary course The compensation for such maintenance shall be included in the mills per ton mile rates received by such owning line under this Agreement."); *Id.*, Counsel's Ex. 3 (CMA Agreement) § 7 ("[The BNSF Settlement Agreement] shall be amended to provide that [BNSF's] trackage rights fees shall be adjusted upward or downward each year . . . for the categories of maintenance and operating costs covered by the fee."); *Id.*, Counsel's Ex. 7 (50/50 Line Agreement) § 3.2 (UP is responsible for maintenance of the relevant portion of the 50/50 Line).

²⁸ If the Board were to set any "delay charge," then it should apply equally to delays caused by BNSF, KCS, or UP. Once BNSF begins using its terminal trackage rights to operate direct service, BNSF will be on equal footing with the other two carriers with operating rights on the Rosebluff Lead terminal facilities.

in connection with the UP/SP merger proceeding. *See* UP Reply at 61. However, the fact that KCS and BNSF mutually agreed that BNSF would pay KCS a trackage rights fee other than the Prescribed Fee is not relevant here. In that scenario, UP was not a joint owner with KCS of the relevant trackage, and BNSF agreed separately to pay a different fee. Here, BNSF has not agreed to be responsible for payment of a fee that differs from the Prescribed Fee, and any effort by UP to substitute any other fee would relieve UP of its voluntarily undertaken and Board-approved commitment in connection with the UP/SP merger.

UP also argues that BNSF should be required to pay compensation in excess of the Prescribed Fee because BNSF is already an “extremely effective competitor.” UP Reply at 61. Just like the KCS arguments regarding competition, *see* Section III.C.2, *supra*, this UP argument is entirely irrelevant. The Prescribed Fee was set in the BNSF Settlement Agreement, and the CMA Agreement revised the annual GTM rate adjustment mechanism in order to more closely align annual adjustments with changes in UP’s operating costs. *See* BNSF Opening Statement (Dec. 31, 2014) at 21. UP should not be permitted to reopen the Prescribed Rate now.

UP further claims that “BNSF’s decision to use terminal trackage rights instead of the current reciprocal switching arrangement is entirely voluntary, and BNSF alone should bear the costs of its unilateral decision.” UP Reply at 61.²⁹ The more relevant voluntary decision, however, is UP’s voluntary decision when seeking approval of the UP/SP merger to agree to the Lake Charles Merger Conditions, to adopt the Prescribed Fee, and to give BNSF the right to make that very election of direct service. Furthermore, it was the request of two Lake Charles

²⁹ As set forth in note 25, *supra*, the BNSF Settlement Agreement and the CMA Agreement established protocols for the costs of necessary capital improvements, including the establishment of two funds for the payment of such costs and the sharing on the basis of usage for improvements not covered by the funds. To the extent that UP contends that BNSF alone should be responsible for the costs of the additional capacity improvements UP claims are needed, it is wrong. The protocols would govern.

area shippers – CITGO and Lyondell – that led to BNSF’s election to provide direct BNSF service.

As the Board is well aware, in granting BNSF trackage rights as a condition of the UP/SP merger, the Board imposed a common carrier obligation on BNSF to serve the shippers to which BNSF gained access. *See UP/SP Merger Decision No. 44*, 1 S.T.B. 233, 373 (1996). BNSF’s decision to provide direct service in response to shipper requests does not somehow excuse UP from its voluntarily accepted obligations to offset the loss of competition from the UP/SP merger by making alternative service available to Lake Charles area shippers. These Lake Charles Merger Conditions continue to benefit shippers as their need for direct BNSF service arises, and UP cannot simply ignore and disregard the Lake Charles Merger Conditions at will.

IV. CONCLUSION

For the reasons stated herein, BNSF respectfully requests that the Board grant the BNSF Petition and establish conditions of use and compensation requested by BNSF in order to finally allow BNSF to implement the direct trackage rights promised 22 years ago in connection with the UP/SP merger.

BNSF has shown that its proposed plan, as confirmed by Mr. Baranowski, would provide the flexibility and commitment to coordination that would allow BNSF to utilize the “natural windows” that create running tracks through the Rosebluff Yard and clear the 50/50 Line every day to provide direct service to the Lyondell facility. BNSF has also shown, again as confirmed by Mr. Baranowski, that the commencement of BNSF direct service to Lyondell will eliminate the risk of conflicts on the Montell Lead.

The time has finally come for Lake Charles area shippers to begin enjoying the benefits of the competitive alternative of BNSF direct service promised by UP and imposed by the Board

as the Lake Charles Merger Conditions. UP freely accepted these conditions as a commitment to honor on an ongoing basis, as and when customer demand arose.

Respectfully submitted,



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Dated: July 16, 2018

VERIFICATION

I, Lance R. Brewer, General Director – Transportation for the Red River Division for BNSF Railway Company, declare under the penalty of perjury that I have reviewed the description of the BNSF proposal in Section III.B of the foregoing document and that the factual information presented therein is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on July 16, 2018.

/s/ Lance R. Brewer

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 46)

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

REBUTTAL VERIFIED STATEMENT OF

MICHAEL R. BARANOWSKI

JULY 16, 2018

I. Introduction

I am Michael R. Baranowski, a Senior Managing Director at FTI Consulting and the head of FTI's Network Industries Strategies group within the Economic Consulting division. I have over thirty years of experience in analyzing railroad traffic and revenue patterns, evaluating railroad operations, analyzing railroad data, calculating and projecting the costs of providing railroad service, analyzing contribution and profitability, analyzing damage claims, and determining the reasonableness of railroad rates and charges. I have testified numerous times before the Surface Transportation Board, arbitration panels, and other federal and state regulatory agencies regarding economic issues related to transportation. I submitted a Rebuttal Verified Statement in this proceeding on October 23, 2015 (Application Rebuttal V.S.) and a Verified Statement in support of BNSF's petition in this proceeding on January 12, 2018 (Petition V.S.). A copy of my Curriculum Vitae is included as Exhibit MRB-1.

In my Application Rebuttal V.S., I demonstrated based on data provided by UP and KCS that operating windows during which neither UP nor KCS trains occupy the Rosebluff Yard at West Lake Charles, Louisiana, occur daily and that much of the industry switching activity conducted by UP south of the Rosebluff Yard on the Rosebluff Lead occurred from {{
}}. In my Petition V.S., I evaluated BNSF's proposed plan to provide direct service to the LyondellBasell (Lyondell) facility. My analyses of available data detailing train operations on the Rosebluff Lead and cars moving into and out of the Rosebluff Yard showed that operational capacity exists to accommodate BNSF's proposed plan for serving Lyondell.

I have been asked by counsel for BNSF to evaluate BNSF's proposed plan in light of updated data provided by UP and KCS and to address UP's objections to this plan and criticisms

of my previous analysis. As will be discussed below, the updated data show that operational capacity and natural operating windows exist to accommodate BNSF's proposed direct service, and that UP's asserted conflicts are not indicative of unavoidable capacity constraints.¹

II. The Data Shows That Rosebluff Operations Comprise a Consistent Sequence of Events That Provide Natural Windows For BNSF To Perform Direct Service

In its Reply, UP details a sequence of events that comprise Rosebluff Lead terminal operations and speculates that individual elements of these operations may pose conflicts with BNSF's proposed operations. My previous analyses focused on identifying static windows with no reported train occupancy in the Rosebluff Yard. I now also consider BNSF's plan in light of UP's emphasis on operational flows along the 50/50 Line, through the Rosebluff Yard, and on the Rosebluff Lead and Montell Lead. This distinction is important because, although UP's analysis focuses on operational flows, it has raised certain criticisms that are meaningful only in terms of evaluating the static windows developed in my prior analyses. These concerns are not related directly to the flexible plan BNSF has proposed.

In particular, UP uses Figure 2 of my Application Rebuttal V.S. (showing certain times when no trains were active in Rosebluff Yard between 5/1/2014 and 6/15/2014) to argue that BNSF would not be able to pass through the Yard because these windows do not always match with BNSF's proposed operating times through the Yard. *See* UP Reply at 43. This UP criticism misses the point of my earlier analysis, which is to demonstrate that, based on the data, intervals of time with no trains working in Rosebluff Yard occurred frequently over the historical six week period.

¹ My analyses address those topics for which UP and KCS have provided sufficient data to analyze relevant operations. I understand that UP's Reply considers additional data not provided to BNSF (*see* UP Reply at 50), and, as such, I am unable to consider these data in forming my opinions. While UP has provided select data in support of its operational review for 10/3/2017 and 2/21/2018, it also appears that UP has not included other data it has relied on, including train telemetry data.

As an initial matter, in the context of analyzing the operational flows described by UP, the data show that the sequence of events that comprises Rosebluff Lead terminal operations typically occurs in a sequential and consistent fashion. Within these operational flows, there are natural windows between some events that would allow for BNSF to perform direct services. This supports BNSF's willingness to exercise flexibility and perform its operations in relation to when other specific Rosebluff Lead operations occur, as opposed to demanding a fixed time each day, as UP's analyses assume.

The below figure is an updated version of Figure 1 in my Application Rebuttal V.S. that summarizes daily Rosebluff Lead terminal operations based on when certain trains passed through the yard between 11/1/2017 to 5/30/2018.² This shows a sequence and relative timing of events that consistently holds regardless of whether KCS overstay its window:

1. The top red bar starts on a given day at 12am and the red bar ends when KCS's last train exits the east end of the Rosebluff Yard to the north. The white portion immediately following indicates time before the YRB86 enters the yard.
2. Next the yellow bar starts when YRB86³ enters from the west end of the Rosebluff Yard and the yellow bar ends when this train exits to the east end of the Yard.
3. Next the green bar starts immediately after the yellow bar ends to show that YRB65 is likely on duty in the Rosebluff Yard. The green bar ends when YRB65 exits the west end of the Yard and departs south down the Rosebluff Lead. The white portion immediately following indicates time when no trains are in the Yard.
4. Next the blue bar starts when YAK63 enters the east end of the Rosebluff Yard before being reclassified as YRB74, and the blue bar ends when YRB74 exits the west end of the Yard and departs south down the Rosebluff Lead. The white portion immediately following indicates time when no trains are in the Yard.

² This is the period covered in the yard AEI data provided by KCS. Details of my calculations are shown in my workpapers.

³ I adopt UP's convention of referring to the reverse spreader train as YRB86, although I understand it is sometimes classified as YRB46.

5. Lastly, the bottom red bar starts when KCS enters the Rosebluff Yard and ends at 11:59pm. The next bar to the right depicts operations on the following day.

Figure 1⁴

}}

See Baranowski Workpaper “Rosebluff Operations Analysis.xlsx”, at tab “Tables.”

An inbound natural window occurs for BNSF’s trip to Lyondell after KCS’s morning train departs the east end of the Rosebluff Yard (depicted in the above chart when the top red bar ends). BNSF could move its train from the 50/50 Line just east of the Rosebluff Lead turnoff onto the Rosebluff Lead after KCS’s train clears the Rosebluff Lead en route to Mossville Yard. The data show that there is a clear Rosebluff Yard track left behind the departing KCS train⁵ and as confirmed below the 50/50 Line is clear while the KCS train crosses. There is also an outbound natural window for BNSF’s train to return to Lacassine Yard from Lyondell by trailing

⁴ A larger version of this figure is included as Exhibit MRB-2.

⁵ KCS data shows the departing train is on average {{ }}, indicating that at least this portion of the departing track must be clear. Since BNSF explains its train would typically handle between {{ }} Lyondell cars per day, the slot left behind KCS’s departing train in the yard will be sufficient length to accommodate BNSF immediately upon entrance to the yard. See Baranowski Workpaper “Rosebluff Operations Analysis”, at tab “Cites” and Reilly Petition V.S. at 6.

UP's YRB86 when it departs the east end of Rosebluff Yard (depicted in the above chart when the yellow bar ends), and travels east on the 50/50 Line. In this case, there is already a clear track through the Rosebluff Yard and east on the 50/50 Line to accommodate the departing YRB86, and BNSF's trailing train would only slightly increase the amount of time these portions of the route are already being occupied by YRB86.⁶

To further define these natural windows, I use KCS's yard AEI data and UP's train event data for the November 1, 2017 to March 31, 2018 time period⁷ to identify when certain operating events occur relative to when KCS's last yard train departs the east end of Rosebluff Yard to Mossville⁸. Specifically, I identify the amount of time from when KCS exits the Yard to the following events:

- 1) When a train is next on the 50/50 Line, which identifies the amount of time available for BNSF to move west on the 50/50 Line to the Rosebluff Lead;
- 2) When UP's YRB86 enters the west end of the Rosebluff Yard from the south, which identifies the amount of time available for BNSF to enter the Montell Lead before UP's reverse spreader moves north up the Rosebluff Lead into Rosebluff Yard; and
- 3) When UP's YRB86 exits the east end of the Yard to the north, which identifies the amount of time available to BNSF to reach Lyondell and complete its switching before being ready to trail YRB86 out through the east end of the Rosebluff Yard and east on the 50/50 Line.⁹

⁶ I understand that YRB65 may potentially be switching the west end of the Rosebluff Yard during some portion of these natural windows. See Reilly Petition V.S. at 12. As context, there is on average a {{ }} window of time with no train activity in the yard between when YRB65 departs the west end of the Yard and YAK63 enters the east end of the Yard. This time is identified in the above chart in the white space between where the green bar ends and the blue bar begins. See Baranowski Workpaper "Rosebluff Operations Analysis," at tab "Cites."

⁷ This is the period covered by the yard AEI data produced by KCS that coincides with the 50/50 Line CP218 train event data provided by UP. See UP-HC-0000996 and KCS-HC-3733.

⁸ There is no morning KCS train departing Rosebluff Yard on the weekends since KCS's only job terminates in the middle of the night before (See KCS Reply at 19). Accordingly, my analysis does not consider a window relative to when KCS departs on weekends.

⁹ Based on BNSF's proposal, this portion of the operation would take approximately 3 hours, assuming 30 minutes from the Rosebluff Lead turnoff to Lyondell, 2 hours to complete

The below table identifies the timing between events in the existing sequence of operations that form the natural windows that BNSF could utilize.¹⁰

Table 1

KCS Departure Hour	Percent of Time KCS Departs to Mossville Yard By Hour	Average Hours After KCS Departure Until:		
		1) - Next Train Passes CP218 on 50/50 Line	2) – YRB86 Enters Rosebluff Yard From South	3) – YRB86 Exits Rosebluff Yard to North
4am	{{			
5am				
6am				
7am				
8am				
9am				
10am				
11am				
Average				}}

See Baranowski Workpaper “Rosebluff Operations Analysis.xlsx”, at tab “Tables”

For example, during the {{ }} of time KCS departs the east end of the Rosebluff Yard during the 7 a.m. hour:

- 1) BNSF would have on average {{ }} hours to move from the 50/50 Line onto the Rosebluff Lead to avoid other trains on the 50/50 Line;
- 2) BNSF would have on average {{ }} hours to move from the 50/50 Line onto the Montell Lead to also avoid UP’s YRB86 coming north up the Rosebluff Lead into the Rosebluff Yard; and
- 3) BNSF would have on average {{ }} hours between when BNSF first moves onto the Rosebluff Lead to when BNSF must be ready to trail YRB86 north out of Rosebluff Yard.¹¹

switching at Lyondell, and 30 minutes to get in position to trail the reverse spreader out of Rosebluff Yard. See Reilly V.S. at 7.

¹⁰ Specific conflicts that UP asserts may exist along this route are discussed in the next section.

III. The Data Do Not Indicate That All Operational Capacity Has Been Used Or That UP's Asserted Conflicts Are Unavoidable

Based on its analysis, UP asserts there are operational conflicts at certain locations along BNSF's route and claims that virtually all operational capacity has been consumed.¹² Using the data provided by UP and KCS, I evaluate operational capacity at locations where UP asserts there are conflicts and assess whether remedies are readily available.

a. Data Provided by UP Show Available Capacity On The 50/50 Line Between Lacassine Yard and the Rosebluff Lead

According to UP, BNSF's train would encounter conflicts on the 50/50 Line between Iowa Junction (west of BNSF's Lacassine Yard) and the turnoff to the Rosebluff Lead.¹³ In support, UP identifies historical train movements, work permits, and bridge openings on this portion of the 50/50 Line for the two days it analyzes (October 3, 2017 and February 21, 2018). To put these asserted conflicts into perspective, using bridge opening data and train event data provided by UP, I analyzed how frequently the 50/50 Line achieved its maximum hourly operational capacity during the entirety of 2017.¹⁴ The below table summarizes the number of trains that passed along the 50/50 Line during each hourly increment in 2017 and whether or not the swing bridge was open at any point during that hour.

¹¹ I recognize these average windows must include an allowance of time for KCS's departing train to clear the Rosebluff Lead turnoff and BNSF's train to begin moving down the Rosebluff Lead from the turnoff on the 50/50 Line.

¹² See UP Reply at 53-54.

¹³ See UP Reply at 4, 34, 50, and 52-53.

¹⁴ My analysis is unable to identify times when the 50/50 Line is unavailable due to work permits because UP did not provide those data.

Table 2

Number Trains That Moved on 50/50 Line Between North Yard and Rosebluff Lead Connection	Percent of Hours During FY2017	
	No Bridge Openings During Hour	Bridge Openings During Some Portion of Hour
No Trains During Hour	{{	
1-Train During Hour		
2-Trains During Hour		
3-Trains During Hour		
4-Trains During Hour		
Total		}}

See Baranowski Workpaper “Rosebluff Operations Analysis.xlsx”, at tab “Tables”

The above results show that, during a given hour, at most {{ }} trains pass along the 50/50 Line at control point 218 between UP’s North Yard and the connection to the Rosebluff Lead.¹⁵ When the swing bridge is open at some point during the hour, it is rare that more than {{ }} trains pass.

Taking this information together provides a general view of available capacity on this portion of the 50/50 Line. When, during a given hour, there are at most {{ }} trains on the 50/50 Line and the bridge is not open at any point, it is reasonable to expect that there would be capacity for an additional train. When there are already {{ }} trains on the 50/50 Line during an hour, or at least {{ }} trains and the bridge is open at some point during that hour, it is reasonable to expect that there would be no capacity for an additional train. When, during a given hour, there are {{ }} trains and the bridge is not open, or fewer than {{ }} trains and the bridge is open, at some point capacity to accommodate an additional train is potentially available.

¹⁵ See UP-WLC-000831.

The below table summarizes capacity based on these categories and shows that only between {{ }} and {{ }} of the time during 2017 is this portion of the 50/50 Line potentially unable to accommodate an additional train during a given hour without otherwise adjusting existing operations.

Table 3

Percent of Time With Capacity for Additional Train on 50/50 Line During Hour For FY2017	
Likely Available	{{ }}
Potentially Available	
Likely Unavailable	
Total	}}

See Baranowski Workpaper “Rosebluff Operations Analysis.xlsx”, at tab “Tables”

b. Data Provided by KCS Show That Effective and Efficient Operations Would Provide Operational Capacity Through the Rosebluff Yard

UP asserts that all the tracks in the Rosebluff Yard may be blocked when BNSF proposes to run through the Yard.¹⁶ In my Petition V.S., I identified the total cars in the Yard relative to overall capacity to demonstrate that there is sufficient capacity to clear tracks and effectively avoid these blockages. See Petition V.S. at 9-11. Using more recent data produced by KCS, I refined the analysis from my Petition V.S. to determine the dwell times for those cars that occupy tracks in the Yard.

The below table summarizes my analysis of cars inbound or outbound to Zone 2 that dwelled in Rosebluff Yard for more than one week at a time between November 2017 and February 2018. This suggests that, to the extent there are blockages in the Yard, efficiency improvements controlling excess dwell could reduce instances in which all tracks in the yard are blocked.

¹⁶ See UP Reply at 45-46 and 51.

Table 4

Month	Zone 2 Cars Dwelling In Rosebluff Yard Longer Than:	
	1-Week	2-Weeks
November 2017	{{	
December 2017		
January 2018		
February 2018		}}

See Baranowski Workpaper “Rosebluff Operations Analysis.xlsx”, at tab “Tables”

Also, the table below identifies times during the day when a UP job moves any car or locomotive out one end of the Rosebluff Yard within 24 hours of when the car entered from the other end—either from the west end to the east end or vice versa. This shows that in practice a clear path exists to move cars, blocks, and trains all the way through the Yard.

Table 5

Average Daily Moves Through Rosebluff Yard Made by UP Between February and April 2018	
Average Daily <u>Blocks</u> UP Moved All the Way Through Rosebluff Yard Within 24 Hours of Entering	{{
Average Daily <u>Cars</u> UP Moved All the Way Through Rosebluff Yard Within 24 Hours	}}

See Baranowski Workpaper “Rosebluff Operations Analysis.xlsx”, at tab “Tables”

c. The Data Shows That the Instances of Cars Set Out on the Montell Lead for Switching Would be Reduced if BNSF Switches Lyondell Instead of UP

UP asserts that BNSF would sometimes be blocked from entering the Montell Lead under current operations because the YRB74 may have placed outbound cars on the Montell Lead during the previous night for YRB86 to pick up the next morning.¹⁷ However, based on UP’s description of operations, there would be no need to place these cars on Montell Lead once

¹⁷ UP Reply 11-12, 29-30, 33.

BNSF takes over switching the majority of Lyondell volumes, because BNSF’s direct service would free up capacity for those cars in Firestone Yard.

UP explains that YRB74 often places outbound Westlake Polymers 1 & 2 and Lyondell cars on the Montell Lead when Firestone Yard is full.¹⁸ Additionally, I understand that UP may also use the Firestone Yard to place cars inbound and outbound to Halliburton, Kronos, and the Port of Lake Charles. Using UP’s industry event data, I calculated the daily volumes of all switched cars potentially using the Firestone Yard and considered the effect of removing {{ }}% of Lyondell cars. The below table shows that, in the event that BNSF takes over switching the majority of Lyondell volumes, on average not even {{ }} of the three tracks in Firestone Yard would be full even if every single car potentially using Firestone Yard were placed there for the entire day.

Table 6

	Average Cars Potentially Placed in Firestone Yard During UP's Daily Switching Operation
Current Operations	{{
Revised Operations Less {{ }}Lyondell Volumes	
Estimated Per Track Car Capacity At Firestone Yard (3-Tracks Total)	}}

See Baranowski Workpaper “Rosebluff Operations Analysis.xlsx”, at tab “Tables”

This aspect of operations also affects UP’s claim that YRB86 may block the Rosebluff Lead south of the Rosebluff Yard during BNSF’s inbound trip and UP’s criticism of my Rosebluff Lead occupancy analysis for not assessing whether such blockage occurs.¹⁹ As a threshold matter, UP’s concerns may be moot because the natural window for BNSF to come down Rosebluff Lead toward Lyondell begins on average {{ }} hours before YRB86 comes

¹⁸ UP Reply at 12.

¹⁹ UP Reply at 47-48.

north up the Rosebluff Lead into the Rosebluff Yard.²⁰ However, in the event YRB86 is active on the Rosebluff or Montell Leads picking up cars set out the night before, this activity may no longer be performed on the Montell Lead but instead at Firestone Yard, which is located on the Rosebluff Lead south of the turnoff to the Montell Lead. In the event that YRB86 is otherwise holding the Rosebluff Lead south of the Rosebluff Yard, UP has not explained why it would need to block BNSF's route to Lyondell by holding north of the Montell Lead turnoff.²¹

IV. UP's Study of February 21, 2018 Operations Does Not Indicate That All Operational Capacity Has Been Used Or That UP's Asserted Conflicts Are Unavoidable

UP performed a study of operations intended to identify when certain portions of track along BNSF's route were occupied on Wednesday, February 21, 2018. UP highlighted hypothetical conflicts between UP and KCS operations that did occur and BNSF operations that did not occur on this day.²² The data appear to show that the day selected by UP is not representative of typical Rosebluff Lead terminal operations, because February 21 followed a period of unusually high inbound volumes and unusually low switching activity, likely due to the Presidents' Day holiday on Monday, February 19, 2018.

In particular, {{ }} inbound volumes came into the Rosebluff Yard on February 20 and February 21 combined than during any other {{ }} during the first quarter of 2018. Furthermore, KCS had unusually low activity in the Rosebluff Yard during the {{ }} days prior. Specifically, before beginning the switching operations observed on

²⁰ See Table 1 above.

²¹ Additionally, I understand UP asserts that BNSF's switching at Lyondell may occur at times YRB66 has historically traveled on the Montell Lead to switch customers located further east. As context, data provided by UP show that the YRB66 is on duty on average {{ }} each day, a portion for which it is at the at the east end of the Montell Lead, and BNSF estimates it will be switching at Lyondell for approximately {{ }}. See Reilly V.S. at 6 and Baranowski Workpaper "Rosebluff Operations Analysis.xlsx", at tab "Cites."

²² See UP Reply at 50.

Wednesday February 21, KCS had last been in the Yard for only about {{
}}. The last time KCS had been in the Yard for a substantial portion of its
12-hour window was on {{
}} night, {{
}} full days prior.²³ In this context, the facts
that the Yard appears crowded on UP's video footage and that KCS's more than 5-hour overstay
disrupted operations are neither surprising nor seemingly representative of typical operations.
See Baranowski Workpaper "Rosebluff Operations Analysis", at tab "Cites."

Additionally, in reviewing the data UP provided in support of its February 21 study, it is
not clear whether UP consistently identified correct track occupancy. For example, UP's Exhibit
13 indicates that between 12:00 am and 9:45 am there were cars blocking the Montell Lead east
of Lyondell, which UP later clarified was documented based on data identifying cars placed by
YRB74 at {{
}} and picked up by YRB86 at {{
}}. However, the referenced
data identifies these cars as set out and picked up on the Rosebluff Lead (Track 105) and not on
Montell Lead.²⁴

In fact, none of the data provided by UP in support of its February 21 study show any
cars set out or picked up on the Montell Lead (Tracks 800 and 810).²⁵ In another case, UP's
Exhibit 13 indicates that between 9 am and 10 am the Rosebluff Lead south of the Rosebluff
Yard was occupied, which UP later clarified was documented based on the YRB86 picking up

²³ In corroboration, KCS's crew data shows that both of KCS's Rosebluff Yard jobs had taken
off their regularly scheduled shifts spanning from {{
}}
immediately prior to UP's observations of KCS's shifts spanning from Tuesday night to
Wednesday morning. For reference, each of these jobs had taken off only {{
}} regularly
scheduled shifts the entire first quarter of 2018. See Baranowski Workpaper "Rosebluff
Operations Analysis.xlsx", at tab "Cites."

²⁴ See UP Reply Workpaper "UP WP Rosebluff WO Data - Highly Confidential 062518.xls", at
tab "YRB86-20," at rows 104 to 148 and at tab "YRB86-20," at rows 117 to 148. See also UP-
WLC-000829. See also UP-WLC-000829.

²⁵ See UP Reply Workpaper "UP WP Rosebluff WO Data - Highly Confidential 062518.xls," at
tabs "YRB74-20," "YRB86-20," "YRB66-21," "YRB74-21," and "YRB76-21," at columns M.

cars at this time on the Montell Lead, which would have fouled the Rosebluff Lead. However, the referenced data actually show YRB86 picking up cars directly from the Rosebluff Lead and from Firestone Yard, which is located on the Rosebluff Lead 0.7 miles south of the turnoff to the Montell Lead.²⁶

Finally, since UP's study of operations on October 3, 2017, and February 21, 2018, contain no systematic measures of volumes, capacity, occupancy, timing, or utilization, and the study results and provided supporting data cover only these two days, it is not possible to discern from that study any materials relevant to reviewing the results of my analysis showing that operational capacity exists.

²⁶ See UP Reply Workpaper "UP WP Rosebluff WO Data - Highly Confidential 062518.xls," at tab "YRB86-20," at rows 104 to 148. See also UP-WLC-000829.

VERIFICATION

I, Michael R. Baranowski, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.


Michael R. Baranowski

Executed: July 16, 2018

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EDUCATION

B.S. in Accounting, Fairfield University
Supplemental Finance Studies, Kean College

Mike Baranowski heads FTI's Network Industries Strategies practice and provides strategic, financial and economic consulting services to the telecommunications and railroad and pipeline transportation industries. He has special expertise in analyzing and developing complex costing and cash flow models, conducting detailed operations analysis, and transportation engineering. Much of his work involves providing oral and written expert testimony before courts, arbitration panels and regulatory bodies.

He is a recognized expert in railroad regulatory economics and has assisted FTI's railroad clients in a broad range of litigation and regulatory engagements involving pricing of services, contract disputes, damage calculations and analyses of the specific effects of pending or proposed changes in policy or regulation.

Some of Mr. Baranowski's representative experience includes:

- Development of strategic litigation approach for large railroad rate proceedings based on the theory of Constrained Market Pricing and the Stand-Alone cost test. Theory assumes the existence of a hypothetical, efficient competitor and involves detailed analysis of railroad operations, expenses, capital expenditures and revenues.
- Development of a suite of modeling tools to assess the regulatory risk of railroad rates for a mix of commodities based on key cost drivers and forecasts.
- Design and development of modeling tools designed to simulate the cost of competitive entry into local telecommunications markets and directing the efforts of a nationwide team of testifying experts presenting the cost model results in multiple proceedings across the country.
- Detailed analysis, critique and restatement of complex cost models developed for the railroad, telecommunications, pipeline and trucking industries.
- Designing modeling tools for use in calculating the costs of competitive entry into railroad, telecommunications and pipeline markets.
- Conducting detailed analyses of railroad operations and developing the associated capital requirements and operating expenses attributable to specific movements and the incremental capital and operating expense requirements attributable to major changes in anticipated traffic levels.

Mr. Baranowski holds a B.S. in Accounting from Fairfield University in Fairfield, Connecticut and has pursued supplemental finance studies at Kean College in Union, New Jersey.

SELECT RAILROAD TESTIMONY

Surface Transportation Board

February 4, 2008	Docket No. 42099 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSX Transportation, Inc.
February 4, 2008	Docket No. 42100 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSX Transportation, Inc.
February 4, 2008	Docket No. 42101 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSX Transportation, Inc.
May 1, 2008	Docket No. Ex Parte 679 Petition of the AAR to Institute a Rulemaking Proceeding to Adopt a Replacement Cost Methodology to Determine Railroad Revenue Adequacy, Verified Statement of Michael R. Baranowski
July 14, 2008	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Third Supplemental Reply Evidence of BNSF Railway Company
July 14, 2008	Docket No. AB-515 (Sub-No. 2) Central Oregon & Pacific Railroad, Inc. -- Abandonment and Discontinuance of Service -- in Coos, Douglas, and Lane Counties, Oregon (Coos Bay Rail Line)
August 8, 2008	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Fourth Supplemental Evidence of BNSF Railway Company
August 11, 2008	Docket No. 42104 Entergy Arkansas, Inc. and Entergy Services, Inc. v Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc.; Finance Docket No. 32187 Missouri & Northern Arkansas Railroad Company, Inc. -- Lease, Acquisition and Operations Exemption -- Missouri Pacific Railroad Company and Burlington Northern Railroad Company, Reply Evidence and Argument of Union Pacific
September 5, 2008	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Fourth Supplemental Reply Evidence of BNSF Railway Company
September 12, 2008	Docket No. AB-515 (Sub-No. 2) Central Oregon & Pacific Railroad, Inc. -- Abandonment and Discontinuance of Service -- in Coos, Douglas, and Lane Counties, Oregon (Coos Bay Rail Line); Rebuttal to Protests
August 24, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Opening Evidence of Union Pacific Railroad Company
October 22, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Rebuttal Evidence of Union Pacific Railroad Company
January 19, 2010	Docket No. 42110 Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
May 7, 2010	Docket No. 42113 Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company, Joint Reply Evidence of BNSF Railway Company and Union Pacific Railroad Company
November 22, 2010	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, BNSF Comments on Remand, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher

Michael Baranowski

January 6, 2011	Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition for Enforcement of Decision, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
October 28, 2011	Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Opening Evidence of BNSF Railway Company, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
November 10, 2011	Docket No. 42127 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
November 28, 2011	Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Reply Evidence of BNSF Railway Company, Joint Reply Verified Statement of Michael R. Baranowski and Benton V. Fisher
May 10, 2012	Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition to Reopen and Modify Rate Prescription, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
November 30, 2012	Docket No. 42125 E.I. DuPont De Nemours & Company v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
December 7, 2012	Docket No. Ex Parte 715, Rate Regulation Reforms, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski
January 7, 2013	Docket No. 42130 SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
March 1, 2013	Ex Parte No. 711 Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Opening Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Richard W. Brown
April 12, 2013	Docket No. 42136 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
April 30, 2013	Ex Parte No. 711 Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Richard W. Brown
June 20, 2013	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
September 5, 2013	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Reply Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
July 21, 2014	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
September 5, 2014	Ex Parte No. 722 Railroad Revenue Adequacy, Opening Comments of Norfolk Southern Railway Company, Verified Statement of Michael R. Baranowski
November 4, 2014	Ex Parte No. 722 Railroad Revenue Adequacy, Reply Comments of Norfolk Southern Railway Company, Verified Statement of Michael R. Baranowski

Michael Baranowski

September 4, 2015	Docket No. FD 35743 Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) - Canadian National Railway Company, Opening Evidence of Illinois Central Railroad Company and Grand Trunk Western Railroad, Joint Verified Statement of Michael Baranowski and Benton Fisher
October 7, 2015	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Supplemental and Compliance Evidence of CSX Transportation, Inc.
October 23, 2015	Docket No. FD 33760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Rebuttal Statement, Verified Statement of Michael R. Baranowski
November 20, 2015	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Reply to Supplemental and Compliance Evidence
March 7, 2016	Docket No. 42142 Consumers Energy Company v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
July 18, 2016	Docket No. FD 35842 New England Central Railroad, Inc. -- Trackage Rights Order -- Pan Am Southern LLC, Pan Am Southern Reply Evidence, Verified Statement of Michael R. Baranowski
July 26, 2016	Ex Parte No. 704 (Sub-No. 1) Review of Commodity, Boxcar, and TOFC/COFC Exemptions, Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
August 26, 2016	Ex Parte No. 704 (Sub-No. 1) Review of Commodity, Boxcar, and TOFC/COFC Exemptions, Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
October 11, 2016	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Comment of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
October 26, 2016	Ex Parte No. 711 (Sub-No. 1) Reciprocal Switching, Opening Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski
November 7, 2016	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
March 6, 2017	Docket No. 42142 Consumers Energy Company v. CSX Transportation, Inc., Supplemental Reply Evidence of CSX Transportation, Inc.
January 12, 2018	Docket No. FD 32760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, Verified Statement of Michael R. Baranowski

U.S. District Court for the Northern District of Texas, Fort Worth Division

November 7, 2017	Civil Action No. 4:16-cv-1061-O, BNSF Railway Company v. Panhandle Northern Railroad LLC, Expert Report of Michael R. Baranowski
November 22, 2017	Civil Action No. 4:16-cv-1061-O, BNSF Railway Company v. Panhandle Northern Railroad LLC, Reply Expert Report of Michael R. Baranowski

Arbitrations and Mediations

February 12, 2009	In the Matter of the Arbitration between Wisconsin Public Service Corporation and Union Pacific Railroad Company, Rebuttal Expert Report of Michael R. Baranowski on behalf of Union Pacific Railroad Company
October 16, 2009	In the Matter of Arbitration Between Norfolk Southern Railway Company and Drummond Coal Sales, Inc., Expert Report of Michael R. Baranowski on behalf of Norfolk Southern Railway Company
July 25, 2011	American Arbitration Association Case No. 58 147 Y 0031809, BNSF Railway Company and Kansas City Southern Railway Company, Expert Report of Michael R. Baranowski on behalf of BNSF Railway Company
April 25, 2013	JAMS REF #1340009009, Union Pacific Railroad vs. Canadian Pacific and Dakota, Minnesota & Eastern Railroad Arbitration, Expert Report of Michael R. Baranowski on behalf of Union Pacific Railroad Company
September 6, 2013	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, Expert Report of Michael R. Baranowski
October 25, 2013	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, Expert Reply Report of Michael R. Baranowski
January 1, 2014	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, BNSF Post-Argument Submission, Affidavit of Michael R. Baranowski
April 14, 2017	American Arbitration Association Case No. 01-15-0004-4830 and 01-15-0004-4931, Arbitration Between FirstEnergy Generation LLC and CSX Transportation, Inc. & BNSF Railway Company, Expert Report of Michael R. Baranowski
November 22, 2017	American Arbitration Association Case No. No. 01-16-0003-6208, CSXT Transportation, Inc. v. JEA and Florida Power & Light Co., Expert Report of Michael R. Baranowski
January 26, 2018	American Arbitration Association Case No. No. 01-16-0005-5615, BNSF Railway Company & Norfolk Southern Railway Company v. FirstEnergy Generation, LLC, Expert Report of Michael R. Baranowski
February 16, 2018	American Arbitration Association Case No. 01-16-0005-5615, BNSF Railway Company & Norfolk Southern Railway Company v. FirstEnergy Generation, LLC, Rebuttal Expert Report of Michael R. Baranowski
February 23, 2018	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Expert Report of Michael R. Baranowski
April 17, 2018	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Reply Expert Report of Michael R. Baranowski
June 22, 2018	JAMS REF #1100088262, BNSF Railway Company and Union Pacific Railroad Company, Expert Report of Michael R. Baranowski

Exhibit MRB-2

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2018, copies of the foregoing BNSF's Rebuttal to the Replies of Union Pacific Railroad Company and The Kansas City Southern Railway Company to BNSF's Petition to Establish Conditions of Use and Compensation have been served by e-mail on Counsel for UP and KCSR.

A handwritten signature in black ink, appearing to read "Adrian L. Steel, Jr.", written over a horizontal line.

Adrian L. Steel, Jr.