

BNSF-140

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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

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APPLICATION FOR TERMINAL TRACKAGE RIGHTS

BNSF's Reply to UP and KCS Responses to Decision No. 6

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In *Decision No. 6* in this proceeding, served on December 7, 2018, the Surface Transportation Board (the “Board”) directed BNSF, KCS, and UP to provide certain information, as specified in the appendix to that decision, that would assist the Board in establishing compensation for BNSF’s use of the Rosebluff Lead.¹ On February 4, 2019, the parties each filed simultaneous responses to *Decision No. 6* (BNSF-139, UP/SP-430, and the “KCS Response”). Consistent with the Board’s direction in *Decision No. 6* and the Board’s scheduling order issued January 29, 2019, BNSF hereby replies to the responses of UP and KCS.

In this Reply, BNSF first addresses the responses of the parties to each of the Board’s questions in *Decision No. 6*. Next, BNSF addresses the largely repetitive arguments presented by KCS, many of which the Board has already rejected in *Decision No. 44* and *Decision No. 63* in the *UP/SP Merger* proceeding, and in

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, as modified to reflect the Board’s usage in *Decision No. 4* in this proceeding, served on May 4, 2018.

Decision No. 3 and *Decision No. 4* in this proceeding. Finally, BNSF renews its request that the Board establish the conditions of use for BNSF's terminal trackage rights now and permit BNSF to commence operations under an interim compensation scheme.

A. Compensation information requested by the Board.

1. *Provide documents sufficient to demonstrate the current fee that BNSF pays to UP for reciprocal switching on the Rosebluff Lead, including governing agreements, terms, and clauses (e.g., escalation clauses).*

BNSF and UP agree that the reciprocal switch fee BNSF pays UP is governed by the June 1, 1996 Haulage Agreement and the BNSF Settlement Agreement, as restated and amended in 2002 ("RASA"). BNSF-139 at 5-6; UP/SP-430 at 1-2. The small discrepancies in the amounts provided by BNSF and UP apparently result from BNSF providing amounts escalated for 2019 and UP providing amounts from 2018.

2. *Provide documents sufficient to demonstrate the current Prescribed Fee (i.e., the trackage rights fee that BNSF pays to UP under the UP/SP merger agreements/conditions), including governing agreements, terms, and clauses (e.g., escalation clauses).*

The small difference between the Prescribed Fee amount provided by BNSF (\$0.0033045 per gross ton mile) and that provided by UP (\$0.00331 per gross ton mile) apparently results from UP rounding up each of the final two digits in the amount provided by BNSF. BNSF-139 at 6; UP/SP-430 at 2.

BNSF and UP agree that the Prescribed Fee is established by the BNSF Settlement Agreement. UP did not acknowledge, however, that the Prescribed Fee for BNSF movements on the relevant portion of the 50/50 Line results from a modification by BNSF and UP through the 50/50 Line Agreement (as amended) of the figure established by the BNSF Settlement Agreement.

3. *If the Board determines that its SSW Compensation methodology should be used to calculate the trackage rights fee owed to one or more owners of the Rosebluff Lead/Yard,*
 - a. *What adjustments or modifications to the SSW Compensation methodology would be needed if BNSF is allocated one daily, exclusive window of time for direct operations on the Rosebluff Lead and BNSF's window occurs:*
 - i. *during UP's 12-hour window in Rosebluff Yard;*
 - ii. *during KCS's 12-hour window in Rosebluff Yard;*
 - iii. *during both UP's and KCS's 12-hour windows in Rosebluff Yard?*

In response to these questions, KCS renewed its argument that BNSF's trackage rights operations must occur exclusively in UP's operating window. KCS Response at 16-19, 39. KCS contends that granting BNSF a daily, exclusive window could cause KCS disruptions and additional costs. *Id.* at 39. BNSF already addressed this argument in its Rebuttal filed July 16, 2018 (BNSF-138) at 15-16. BNSF's proposed operating plan allows BNSF to cooperate and coordinate with KCS and UP and to be flexible based on the operating circumstances. See BNSF-139 at 7. Even KCS acknowledges that the KCS and UP operating windows are fluid and "not fixed." KCS Response at 17. The Board should set the BNSF proposed operating plan as the conditions of use for BNSF's terminal trackage rights, and the Board should not place artificial constraints on BNSF's terminal trackage rights operations.²

² KCS's broader compensation arguments raise issues that will need to be addressed in the compensation proceeding. UP agrees with BNSF's position that UP is only due the Prescribed Fee, and KCS has stated that BNSF should not be allowed to operate during KCS's window. Under this construct, the Board must determine whether KCS is entitled to *any* interest rental compensation under the *SSW Compensation* methodology. If BNSF only accesses the Rosebluff Lead during UP's operating window, KCS would not lose any productive value of its asset. Therefore, if the Board accommodates KCS and restricts BNSF's access to UP's window, the Board should also limit the compensation paid by BNSF to the Prescribed Fee. Additionally, the Board should consider the facts that, in connection with BNSF's current access to Rosebluff Lead shippers via reciprocal switch, BNSF has not compensated KCS directly for KCS's ownership share of the Rosebluff Lead, and KCS has never sought such compensation despite its repeated complaints related to BNSF's access.

According to KCS, the *SSW Compensation* methodology alone does not account for additional costs incurred due to disruptions such as overtime and additional locomotive hours. KCS Response at 39-40. KCS claims that it cannot calculate the additional costs without knowing the parameters of BNSF's operations, but that BNSF should be required to pay KCS for them. *Id.* at 40. BNSF addresses this KCS argument below.

UP did not answer the Board's questions directly, but instead stated that its "basic position" is that BNSF should pay UP the Prescribed Fee. UP/SP-430 at 3. Also, "to the extent that KCS is entitled to compensation established under the *SSW Compensation* methodology or any other methodology, BNSF is obligated to pay KCS under 49 U.S.C. § 11102(a)." *Id.*

UP is right that BNSF should pay UP the Prescribed Fee as compensation for its use of the terminal trackage rights ordered by the Board. However, UP should be responsible for any compensation due to KCS for BNSF access beyond the Prescribed Fee. *See* BNSF-121 (Dec. 31, 2014) at 21-22; BNSF-124 (Oct. 23, 2015) at 33-34; BNSF-132 (Jan. 12, 2018) at 15. UP has an 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 over the Rosebluff Lead at the Prescribed Fee. *See* BNSF-121 (Dec. 31, 2014) at 21; BNSF-124 (Oct. 23, 2015) at 34; BNSF-132 (Jan. 12, 2018) at 15-17; BNSF-138 at 31-32; BNSF-139 at 3. To the extent that the Board orders BNSF to pay any amount greater than the Prescribed Fee, BNSF reserves the right to seek reimbursement from UP for such amount. *See* BNSF-139 at 4.³

³ KCS also recognized UP's ultimate responsibility. *See* KCS Response at 7 ("KCS is the innocent bystander of a *promise that UP had no legal right to make.*") (emphasis added); *see also id.* at 4 n.7 ("It is KCS's position that an agreement by UP to allow BNSF to operate on the Rosebluff Lead transfers a part of UP's interest in the track, without KCS's agreement."). Moreover, any argument that BNSF must pay more than the Prescribed Fee because BNSF applied for terminal

- b. *Would the SSW Compensation methodology need to be modified to properly account for operations in Rosebluff Yard if BNSF's proposed direct train service traverses Rosebluff Yard without stopping or switching?*

In response to this question, UP argued “the track owner should be compensated for any spill-over effects of the terminal trackage rights – i.e., impacts on the owner’s other operations.” UP/SP-430 at 4. UP suggested that “such impacts could be addressed through the variable cost component and the interest rental component (by including other affected tracks and traffic in the interest rental calculations).” *Id.* KCS responded that “to the extent that BNSF’s train delays KCS’s use of its window and delays add costs to KCS, BNSF should pay for those costs.” KCS Response at 40.

First, the Board should reject the attempts by UP and KCS to force BNSF to pay for any ill-defined indirect effects associated with the introduction of a third carrier on the Rosebluff Lead. Any such compensation has no connection with the “principle controlling compensation in condemnation proceedings.” 49 U.S.C. § 11102(a). Furthermore, the Board addressed UP’s and KCS’s concerns in *Decision No. 3*. In finding that BNSF’s trackage rights operations would be practicable and would not substantially impair the operations of UP and KCS, the Board acknowledged 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 further stated that “. . . a certain level of interference and delay is common and expected in the railroad industry . . .” *Id.*, slip op. at 17-18 n.17.

Second, if the Board applies the *SSW Compensation* methodology, the “spill-over” impacts identified by UP and the “delay costs” identified by KCS should not be addressed through the variable cost component. This category of expense “is

trackage rights in this proceeding is specious, given that UP created the need for BNSF to seek terminal trackage rights by not obtaining KCS’s prior consent under the joint facility agreements.

designed to reflect the incremental cost that the tenant carrier imposes on the owning carrier as a result of operation over the owning carrier's track." *Ark. & Mo. R.R. Co. v. Mo. Pac. R.R. Co.*, 6 I.C.C.2d 619, 623 (1990). The category "represents the expenses that are most directly and causally related to the operations by the tenant carrier." *Id.* Typical items under this category include the variable costs "of train operations, switching, and mechanical services" incurred by the landlord as a result of the tenant's operations. *St. Louis S.W. Ry.—Trackage Rights Over Mo. Pac. R.R.—Kan. City to St. Louis*, 1 I.C.C.2d 776, 791 (1984).

The Board has not previously included in the "variable cost" category of expenses the "spill-over effects" and "delay costs" that UP and KCS allege that BNSF must cover. This is likely due to the difficulty in determining causation and properly assigning blame for such purported indirect effects in a fluid multi-carrier operating environment such as the Rosebluff Lead.

Third, addressing any such secondary indirect impacts "by including other affected tracks and traffic in the interest rental calculations," as UP suggests, would skew the essential nature and intent of the interest rental component of the *SSW Compensation* methodology. The interest rental component "is determined by multiplying: (i) the value of the assets by (ii) a rate of return equal to the current pre-tax nominal cost of capital. The resulting product is then apportioned to the tenant carrier according to its percentage of cars traversing the line." *New England Cent. R.R., Inc.—Trackage Rights Order—Pan Am S. LLC*, FD 35842, slip op. at 3 (STB served Feb. 12, 2016) (citation omitted).

This component values only **the assets used by the tenant** in the trackage rights service. "[I]ncluding other affected tracks and traffic" in this valuation base in an effort to address some purported indirect impacts of BNSF's service is simply

not appropriate.⁴ As BNSF noted, only the Rosebluff Yard running track (and any additional Rosebluff Lead track) that BNSF will use in its trackage rights operations should be included in any valuation base, not unrelated yard track that BNSF will not use. *See* BNSF-139 at 8.

Fourth, imposing on BNSF (and not KCS or UP) separate and discriminatory delay penalties, as KCS has suggested, would be inconsistent with the Board's practicability and lack of substantial impairment findings in *Decision No. 3* and would lead to costly and inefficient disputes between the carriers regarding causation.

Finally, UP argued in response to this question that, "where terminal trackage rights are not being imposed to preserve the status quo (e.g., where the tenant would be using terminal trackage rights to gain access to new customers), the owner should be entitled to recover for its lost contribution to fixed costs from traffic the tenant handles using the terminal trackage rights." UP/SP-430 at 4.

UP's discussion here of the "status quo" and "new customers" is unclear but ultimately irrelevant. The Board granted BNSF terminal trackage rights in this proceeding in order to "preserve competition for Lake Charles area shippers." *Decision No. 3*, slip op. at 9 (quoting *UP/SP Decision No. 44*, 1 S.T.B. at 428). BNSF will use its terminal trackage rights to provide customers covered by the Lake Charles Merger Conditions with a direct BNSF service option, while BNSF currently serves those customers via reciprocal switch. Furthermore, as discussed in further detail in Section B.3 below, long-standing court and ICC/STB precedent

⁴ This is supported by the Final Report of the Railroad Accounting Principles Board ("RAPB Final Report") which was released on September 1, 1987, and which "govern[s] the determination of costs for specific regulatory purposes." *St. Louis S.W. Ry.—Trackage Rights Over Mo. Pac. R.R.—Kan. City to St. Louis*, 5 I.C.C.2d 525, 528 (1989). The RAPB Final Report, Vol. 2 at 73, indicates that "[a]sset valuations should reflect current market values, preferably for the specific incremental assets required or consumed as a result of access."

shows that UP and KCS cannot claim “lost profits” when seeking compensation under condemnation principles or under the *SSW Compensation* methodology.

- c. *What method should be used to calculate the interest rental component? Provide all information and data needed to support the suitability of your preferred method and to calculate the interest rental component under that method.*

BNSF does not have the information or data necessary to determine which method should be used to calculate the valuation base to be used in the interest rental component. BNSF-139 at 8-9. If the Board decides to apply the *SSW Compensation* methodology, BNSF (the tenant) will need to obtain significant amounts of information about the line (specified in BNSF-139, Ex. E) from KCS and UP (the landlords) before BNSF can identify the appropriate method. *See id.* at 8-9.

- d. *Should the below-the-wheel variable costs and maintenance-of-way costs be calculated based on actual costs or system-average costs under the Uniform Railroad Costing System (URCS)?*

The Prescribed Fee includes BNSF payments for ordinary and programmed maintenance, so BNSF should not be charged for any additional maintenance fees for its usage of the terminal trackage rights. *See* BNSF-138 at 34-35. However, should the Board apply the *SSW Compensation* methodology, BNSF and UP agreed that the Board should calculate below-the-wheel variable costs and maintenance-of-way costs based on actual costs. BNSF-139 at 9; UP/SP-430 at 5. KCS argues, without basis, that “URCS would be the most suitable method.” KCS Response at 42.

BNSF continues to believe that, if the Board uses the *SSW Compensation* methodology, the Board should use actual expenditures associated with the track to calculate variable costs and BNSF’s usage-proportionate share of the track’s maintenance and operation expenses. This is consistent with Board precedent and the most accurate measure of the relevant cost categories. Applying URCS to

develop costs for jointly-owned track would require making arbitrary assumptions regarding the proper weighting of UP's and KCS's system average URCS. Such assumptions would potentially introduce additional distortions that the Board could avoid by using actual costs.

- e. *Should the SSW Compensation methodology take into account how costs and fees are currently allocated between the two owners of the Rosebluff Lead/Yard? If so, explain how certain SSW Compensation cost categories (e.g., maintenance-of-way) should be allocated between the owners of the property? What other adjustments or modifications to the SSW Compensation methodology would be needed to account for the fact that the Rosebluff Lead/Yard has two owners?*

In response to these questions, BNSF and UP agreed that, if the Board were to use the *SSW Compensation* methodology, the Board would not need to take into account how costs and fees are currently allocated between UP and KCS. BNSF-139 at 10; UP/SP-430 at 6. KCS used its response to these questions as yet another platform for its broader compensation arguments, which BNSF addresses fully elsewhere in this Reply. KCS Response at 42-43.

- f. *Should the trackage rights fee set by the Board be calculated on a carload, per car-mile, or per ton-mile basis?*

In response to this question, BNSF proposed that any trackage rights fee set by the Board be calculated on a per ton-mile basis, consistent with the Prescribed Fee. BNSF-139 at 10. UP stated that the Board should address below-the-wheel variable costs and maintenance-of-way costs on an actual cost basis, calculated annually, and allocated on a usage basis among the parties. UP/SP-430 at 5. UP argued that “the other *SSW Compensation* components should be calculated on a per carload basis.” KCS argued that the “market-based fee paid to KCS for KCS's lost opportunity profits should be on a carload basis.” KCS Response at 43. Any

SSW Compensation fee, KCS argued, “should be a per-car mile basis for both loads and empties.” *Id.*

BNSF addresses KCS’s “lost opportunity profits” argument below in Section B.3. BNSF continues to believe that any trackage rights fee set by the Board separate from the Prescribed Fee should be calculated on a per ton-mile basis, in part to better enable the parties to reconcile that fee with the Prescribed Fee.

- g. Identify additional costs, if any, specific to the Rosebluff Lead/Yard that would not be accounted for under the Board’s SSW Compensation methodology.*

In response to this question, BNSF stated that it believes that there are no additional costs specific to the track covered by the Board’s grant of terminal trackage rights that would not be accounted for under the *SSW Compensation* methodology. BNSF-139 at 10. UP repeated its argument regarding compensation for “spill-over effects of the terminal trackage rights,” which BNSF addresses above in Section A.3.a.

KCS responded to this question by identifying a number of additional costs that BNSF should pay. First, KCS argued that “BNSF should contribute its usage-based share of extraordinary costs.” KCS Response at 43. BNSF believes that any such costs should be accounted for under the *SSW Compensation* expense category for the tenant’s proportionate share of maintenance and operation expenses.

Next, KCS argued that “BNSF should pay for all additional capital improvement costs that are required to accommodate BNSF’s initial access.” *Id.* By granting BNSF’s terminal trackage rights application in *Decision No. 3* and finding that BNSF’s operations would be practicable and would not substantially interfere with the operations of KCS or UP, the Board has already determined that no additional capital improvements are necessary to accommodate BNSF’s access. As BNSF has explained, the Board’s findings in *Decision No. 3* “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.” BNSF-138 at 13. BNSF has offered to consider UP’s suggestion concerning additional capacity, “but only after BNSF direct service has begun.” *Id.* The costs for any such capacity improvements must be shared between the parties, not borne solely by BNSF.

Finally, KCS argued again that BNSF should pay a “per hour train delay charge.” KCS Response at 43. BNSF responds to that argument above in Section A.3.b.

B. The Board should reject KCS’s additional arguments.

1. KCS continues to re-litigate settled issues.

Before responding to the Board’s targeted questions set forth in *Decision No. 6*, KCS first presents a series of rehashed arguments, most of which KCS initially presented in the KCS Reply (June 25, 2018) or earlier in this proceeding. At a fundamental level, KCS continues to refuse to acknowledge:

- the impact of the Board’s imposition of the Lake Charles Merger Conditions through *UP/SP Decision No. 44*;
- the Board’s rejection of KCS’s petition for reconsideration in *UP/SP Decision No. 63*;
- the Board’s grant to BNSF of terminal trackage rights over the Rosebluff Lead in *Decision No. 3*; and
- the Board’s affirmation in *Decision No. 4*, slip op. at 5-6, that the Board’s public interest, practicability, and lack of substantial impairment findings in *Decision No. 3* apply to BNSF direct access to “all Lake Charles area shipper facilities accessible via the Rosebluff Lead and covered by the Lake Charles Merger Conditions.”

The Board is **not** “on the precipice of granting BNSF direct terminal trackage rights,” KCS Response at 3. The Board granted BNSF these rights more than two-and-a-half years ago in *Decision No. 3*. All that remains is for the Board to set conditions of use and compensation to allow BNSF to implement these rights. BNSF

addressed similar KCS attempts to re-litigate settled issues comprehensively in BNSF-138 (July 16, 2018). BNSF declines now to engage with KCS's continued collateral attacks on the Board's prior findings.

2. BNSF's position in this proceeding has no bearing on the Board's reciprocal switching rulemaking.

KCS argues that any compensation terms that the Board imposes through this proceeding may have "potentially significant implications" with respect to the Board's open rulemaking proceeding in Docket No. EP 711 (Sub-No. 1) regarding reciprocal switching prescriptions under 49 U.S.C. § 11102(c)(1). KCS Response at 14-16. KCS alleges that "BNSF appears to avoid wanting to be on the record proposing something that could come back to bite it, and the industry, in EP 711." KCS Response at 15.

BNSF's position, stated consistently throughout this proceeding, is that 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. If the Board ultimately sets compensation levels at an amount higher than the Prescribed Fee, UP has an affirmative obligation to pay that difference. *See* BNSF-139 at 2-4. Contrary to KCS's allegations, BNSF's position simply has no bearing on the access pricing principles that the Board may develop for the prescription of reciprocal switching arrangements through EP 711 (Sub-No.1).

3. KCS's arguments for a "market-based fee" to recoup its lost profits ignores the statutory requirement that the Board set compensation terms based on condemnation principles.

As discussed above in Section A.3, KCS contends that the Board should order BNSF to pay KCS a "market-based per car rate representing the lost contribution that KCS otherwise could have achieved" to support its local and interstate

network. KCS Response at 6. KCS also refers to this as its “lost opportunity profits.” *Id.* at 30.

KCS apparently justifies its efforts to obtain additional compensation for “lost profits” on the basis that “imposing BNSF access is a taking of KCS property requiring KCS to be given compensation to put it in the same economic condition it would have been absent the taking.” KCS Response at 3. However, KCS neglects to acknowledge that decisions of the federal courts, the ICC, and the STB have repeatedly shown that KCS **cannot** claim “lost profits” when seeking compensation under the *SSW Compensation* methodology or under condemnation principles, even if KCS establishes that a constitutional “taking” has occurred.⁵

The requirement that the Board set compensation terms in this proceeding based on “the principle controlling compensation in condemnation proceedings,” 49 U.S.C. § 11102(a), was originally enacted in 1920. *See* Transportation Act, 1920, ch. 91, 41 Stat. 456, 479-80 (1920). Despite moving over the years from Section 3(4) of the Interstate Commerce Act to its current location in Section 11102(a), the language has not changed since 1920.

The ICC first applied this “condemnation” provision in 1933, finding that terminal trackage rights cannot be directly analogized to condemnation rights, because:

what is acquired is not a permanent right, maintainable as long as petitioner continues to operate its railroad, as in a condemnation proceeding, but a right to be exercised only so long as it may be exercised ‘without substantially impairing the ability of a carrier

⁵ KCS alleges that “BNSF apparently acknowledges that an uncompensated taking has already occurred.” KCS Response at 15 n.12 (citing BNSF-138 at 34 n.25). Just the opposite is true. BNSF pointed out that there is no basis for KCS’s assumption “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.” BNSF-138 at 34 n.25. KCS has the burden to demonstrate a taking but still neglects to apply the balancing test identified by BNSF and the case law. Unless and until KCS meets its burden of proof, the proper conclusion is that the Takings Clause has no relevance in this proceeding.

owning or entitled to the enjoyment of terminal facilities to handle its own business.’

Missouri—K.T.R. Co. v. Kansas City Term. Ry. Co., 198 I.C.C. 4, 7 (1933). The terminal trackage rights user, the ICC reasoned, “has become a tenant of respondent, and the just and reasonable compensation which it is required to pay is in effect a rental.” *Id.* at 8. The calculation used by the ICC in 1933 for terminal trackage rights compensation has been refined and modernized over the years into the three-pronged approach that the Board refers to now as the *SSW Compensation* methodology, based on a series of seminal ICC cases from the 1980s. *See Decision No. 6*, slip op. at 2 n.4.

The ICC and the Board have repeatedly used the *SSW Compensation* methodology to set trackage rights compensation terms. *See, e.g., Ark. & Mo. R.R. v. Mo. Pac. R.R.*, 6 I.C.C.2d 619 (1990). In 2008, the Board affirmed that it would also use this method to determine “the principle controlling compensation in condemnation proceedings” under section 11102(a), just as the ICC first did in 1933. *S. Plains Switching, Ltd. Co.—Compensation for Use of Facilities in Alternative Rail Service—W. Tex. & Lubbock Ry. Co., et al.*, FD 35111, *et al.*, slip op. at 8 (STB served Jan. 11, 2008) (referring to *SSW Compensation*).

When the Board applied the three-pronged approach for determining compensation owed under Section 11102(a) in 2008, the Board determined that “[t]he rail-line owner is entitled to fair compensation for the facilities it provides **but not for lost profits.**” *S. Plains Switching, Ltd. Co.—Compensation for Use of Facilities in Alternative Rail Service—W. Tex. & Lubbock Ry. Co.*, FD 35111, slip op. at 4 (STB served Dec. 15, 2008) (emphasis added). The RAPB Final Report similarly found that asset valuations “should not include monopoly rents resulting from an owner’s prior control of access.” RAPB Final Report, Vol. 2 at 73.

Earlier, the ICC rejected the attempt of a track owner to claim “loss of future earnings” as compensation for the use of its tracks under the predecessor to Section 11102(a). *Use by Erie of Niagara Junction Ry. Co. Terminals*, 278 I.C.C. 425, 431-32 (1950). The ICC relied on the black-letter law, still applicable today, that “[l]oss of an anticipated business profit is not generally regarded as an element of damage or compensation in condemnation proceedings.” *Id.* at 431 (citing *United States ex rel T.V.A. v. Powelson*, 319 U.S. 266 (1943), and *Mitchell v. United States*, 267 U.S. 341 (1925)). Indeed, “[t]here are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment.” *United States ex rel T.V.A.*, 319 U.S. at 281. The “lost profits” claimed by KCS are one of these non-compensable losses.

As the ICC and the Board has repeatedly recognized, the methodology now known as *SSW Compensation* comprehensively addresses the Section 11102(a) requirement that the Board apply “the principle controlling compensation in condemnation proceedings.” The “market-based fee” proposed by KCS to recoup its lost profits is completely untethered to this statutory requirement and the *SSW Compensation* methodology. The Board should reject KCS’s proposal.

C. The Board should grant BNSF’s petition and permit BNSF to commence direct train service now under an interim compensation scheme.

As BNSF explained, BNSF-139 at 10-12, before the Board begins a lengthy process of setting compensation terms and while the operational evidence remains fresh, BNSF respectfully requests that the Board proceed to establish the conditions of use and permit BNSF to commence trackage rights operations on the Rosebluff Lead immediately under an interim compensation scheme.

BNSF and UP agree that BNSF should pay UP the Prescribed Fee as compensation for use of BNSF’s terminal trackage rights. *See* BNSF-139 at 4;

UP/SP-430 at 3. The remaining issues are whether BNSF must pay penalties for indirect effects of BNSF service, whether KCS is entitled to any interest rental compensation, how any KCS compensation should be calculated, and who should pay that compensation to KCS. None of these issues would prohibit the Board from allowing BNSF to begin service now, using the Prescribed Fee as interim compensation, to be reconciled once these issues are resolved.

KCS has proposed a novel compensation scheme that could take the parties and the Board years to fully address. Even relatively straight-forward *SSW Compensation* methodology proceedings are typically measured in years rather than months. The Board should not make Lake Charles area shippers continue to wait during this process to receive the BNSF direct service promised to them by UP and the Board.

Respectfully submitted,



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Dated: February 25, 2019

CERTIFICATE OF SERVICE

I certify that I have, on February 25, 2019, served copies of BNSF's Reply to UP and KCS Responses to Decision No. 6 (BNSF-140) upon all parties of record in this proceeding, by electronic mail.

A handwritten signature in black ink, appearing to read 'Peter W. Denton', written over a horizontal line.

Peter W. Denton
Attorney for BNSF Railway Company