

May 3, 2022

**VIA E-FILING**

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Surface Transportation Board  
Office of Proceedings  
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Washington, DC 20423

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***Re: STB Docket No. FD 32760, Union Pacific Corporation—Control & Merger—Southern Pacific Rail Corporation***

Dear Ms. Brown:

We are writing concerning UP's April 25, 2022 Reply to BNSF's Petition for Declaratory Order<sup>1</sup> in the above-captioned matter.<sup>2</sup>

BNSF's Petition raised the narrow procedural issue of whether the Board should declare that it – and not a private arbitrator – should rule on any dispute over access to trackage rights on the KCS/Tex Mex line, if it ever becomes ripe, because of the many important policy issues that would need to be considered in such a dispute.

Instead of limiting its Reply to that issue, UP's Reply focuses on the merits of its claim. More than eight pages of UP's 14-page Reply argue for UP's preferred interpretation of the relevant agreements and advance numerous merits-related arguments as to why BNSF is not entitled to use UP's line to connect to the KCS/Tex Mex line.

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<sup>1</sup> The acronyms and defined terms used in this letter are the same as those used in BNSF's April 5, 2022 Petition for Declaratory Order, unless otherwise defined herein.

<sup>2</sup> While the Board's rules, 49 C.F.R. § 1104.13(c), do not permit a reply to a reply, the Board often accepts such replies in the interest of compiling a more complete record. To the extent that the Board deems it necessary, we hereby seek leave to file this letter in order to provide a limited response to new issues raised in the UP reply.

May 3, 2022

Page 2

In its Petition, BNSF did not ask the Board to address the merits of UP's claims at this time.<sup>3</sup> BNSF will also not address those issues here, except to explain why the merits arguments that UP inappropriately presented actually support the narrow procedural relief requested by BNSF.<sup>4</sup>

First, UP relies heavily on language from the Board's 1996 decision approving the UP/SP merger that the Board intended BNSF to essentially stand in the "shoes of SP" in providing replacement competitive rail service to and from Mexico via the Laredo gateway. The fact that SP did not have trackage rights over Tex Mex lines to Laredo in 1996 has no bearing on whether BNSF might need direct access to Laredo *in the future* to fill the Board-intended role of replacing the competition to and from Mexico lost by SP's merger into UP.<sup>5</sup>

Indeed, any dispute over the language in the relevant UP/SP-related agreements will only become fit for resolution if the Board concludes that such BNSF direct access is, in fact, needed to ensure competition for traffic to and from Mexico. Any dispute over the ability of BNSF to access Laredo directly using trackage rights over UP and KCS/Tex Mex will require the Board "to determine whether the conditions it has imposed in merger proceedings are being properly implemented in a manner consistent with the public policy underlying those conditions." UP/SP Dec. No. 108 at 3. As BNSF explained in the Petition, this is clearly not an issue that an arbitration panel should address.

Second, UP also cites the Board's decision in the 1998 *Houston/Gulf Oversight* proceeding as support for its merits argument on the meaning of the relevant UP/SP-related agreements. This decision demonstrates the vital importance of policy considerations in addressing UP's claim if it ripens. In the *Houston/Gulf Oversight* decision, the Board addressed BNSF's request for trackage rights to Laredo over a different UP line during the Houston/Gulf Coast service crisis. The Board considered several issues that an arbitration panel would clearly not be in a position to address, including whether the requested trackage rights would jeopardize essential services provided by Tex Mex, whether the trackage rights would produce harmful levels of traffic on other lines, whether the trackage rights would produce a significant increase in traffic on the BNSF-Tex Mex route, and whether interactions between KCS and Tex-Mex had caused any diminution of competition relative to the pre-merger period. The Board would need to grapple with similar policy issues in any BNSF request for trackage rights over the KCS/Tex Mex line to Laredo.

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<sup>3</sup> It would not be appropriate for the Board to address the merits of UP's claim until it is ripe and until the record is fully developed. As BNSF indicated in the Petition, BNSF would welcome the opportunity to address the ripeness issue and the substantive merits issues if the Board would prefer to open a proceeding to consider these in further depth.

<sup>4</sup> BNSF reserves all rights to reply in full to merits issues in due course.

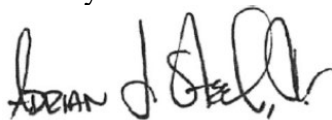
<sup>5</sup> For example, the Board might determine that an independent SP would have required trackage rights over Tex Mex in order to preclude the risk of competitive foreclosure presented by the 2005 acquisition of Tex Mex by KCS. If BNSF later were to seek such trackage rights in order to preserve its customers' competitive access to and from Mexico, BNSF would be fulfilling its Board-mandated role of replacing the competition lost by UP's acquisition of SP.

May 3, 2022

Page 3

Finally, UP's merits arguments make it clear that any dispute over BNSF's direct access to Laredo will eventually end up before the Board, with or without an intervening arbitration. If either party is dissatisfied with the narrow contractually-based arbitral decision, it may seek review by the Board for consideration of the broad public interest issues that would be at the base of any dispute over the language of the UP/SP-related agreements.

Thank you.

A handwritten signature in black ink, appearing to read "Adrian L. Steel, Jr.", with a stylized flourish at the end.

Adrian L. Steel, Jr.

*Attorney for BNSF Railway Company*

Cc: Peter W. Denton  
Anthony J. LaRocca  
Adam C. Sloane  
All Parties of Record

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of May, 2022, I have caused the foregoing BNSF Railway Company's Letter to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams

*Attorney for BNSF Railway Company*