

LAW OFFICE
THOMAS F. McFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1666
CHICAGO, ILLINOIS 60604-1228
TELEPHONE (312) 236-0204
mcfarland@aol.com

301047

September 8, 2020

By e-filing

Allison C. Davis, Director
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

ENTERED
Office of Proceedings
September 8, 2020
Part of
Public Record

Re: Docket No. NOR 42169, *Bell Oil Terminal, Inc. v. BNSF Railway Company*

Dear Ms. Davis:

Hereby transmitted is a Reply in Opposition to Motion to Dismiss for filing with the Board in the above referenced matter.

Respectfully submitted,

/s/ Thomas F. McFarland

Thomas F. McFarland
Attorney for Bell Oil Terminal, Inc.

TMcF:mg:enc:\1877\efSTB2

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

BELL OIL TERMINAL, INC.,	)	
	)	DOCKET NO.
<u>Complainant,</u>	)	NOR 42169
v.	)	
	)	
BNSF RAILWAY COMPANY,	)	
	)	
<u>Defendant.</u>	)	
	)	

REPLY IN OPPOSITION TO MOTION TO DISMISS

BELL OIL TERMINAL, INC.
3741 South Pulaski Road
Chicago, IL 60632

Replicant

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228
(312) 236-0204
mcfarland@aol.com

Attorney for Replicant

DUE DATE: September 8, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

BELL OIL TERMINAL, INC.,	)	
	)	DOCKET NO.
<u>Complainant,</u>	)	NOR 42169
v.	)	
	)	
BNSF RAILWAY COMPANY,	)	
	)	
<u>Defendant.</u>	)	
	)	

REPLY IN OPPOSITION TO MOTION TO DISMISS

Pursuant to 49 C.F.R. § 1104.13(a), BELL OIL TERMINAL, INC. (Bell) hereby replies in opposition to a Motion to Dismiss (Motion) filed by BNSF RAILWAY COMPANY (BNSF) on August 17, 2020.

DECISIONAL STANDARDS

The Board may dismiss a complaint if it does not state reasonable grounds for investigation and action. 49 U.S.C. § 11701(b). However, motions to dismiss are generally disfavored and are rarely granted. *State of Montana v. BNSF Railway Co.*, 2011 WL 531860 at *2 (Docket No. NOR 42124, served February 16, 2011) (concern whether requests to ship 52-car movements would be honored by BNSF under its common carrier obligation, among other issues, provided reasonable grounds for an investigation into the allegations of the complaint); *see, also, Dairyland Power Coop. v. Union Pacific R. Co.*, 2008 WL 2901888 at *4 (Docket No. NOR 42105, served July 29, 2008); and *Garden Spot & N. Ltd. & Indiana Hi Rail Corp.* --

Purchase & Operate -- Line between Newtom and Browns, IL, 1992 WL 389440 at *2 (Docket No. F.D. 31593, served January 5, 1993).

In considering a motion to dismiss, the Board views the factual allegations in the complaint in the light most favorable to the complainant. *State of Montana v. BNSF Railway Co.*, *supra*, 2011 WL 531860 at *2; *see, also, North American Freight Car Assn. --Protest and Petition for Investigation -- Tariff Publications of Burlington, N. & S.F. Ry.*, 2004 WL 1803878 at *7 (Docket No. NOR 42060 [Sub-No. 1], served August 13, 2004).

As a party seeking rarely-granted affirmative relief, BNSF faces a heavy burden to prove that the Complaint does not contain reasonable grounds for an investigation. BNSF has fallen far short of sustaining that burden.

ISSUE

The dispositive issue is whether reduced frequency of rail service (lesser number of service days per week) is a change in a “common carrier service term” for which 20 days’ prior notice is required under 49 U.S.C. § 11101(c), as contended by Bell, or instead is no more than an “operating detail” that can be changed at the whim of a rail carrier, on a moment’s notice, free from Board oversight, as argued by BNSF.

BACKGROUND

Reduced frequency of service is a recent occurrence associated with Precision Scheduled Railroading (PSR). PSR is designed to reduce rail carrier costs, cut local services, boost profit, and hike stock prices, all on a short term basis. BNSF has stated publicly that it will implement aspects of PSR that will benefit its bottom line.

Under PSR, shippers having been served the same number of days per week for many years have suddenly seen a reduction of that service. One such instance involved Hasa, Inc. (Hasa), a receiver of water sanitation commodities served solely by Union Pacific Railroad Company (UP) at Saugus, CA. Hasa had been served five days per week for over 50 years when UP abruptly proposed to reduce that service by 40 percent to three days per week. Hasa complained vociferously to the Board.

REPLY

1. The Board's Action In the Hasa Case Undermines The Motion

Hasa sought an emergency service order under 49 U.S.C. § 11123 and a temporary injunction under 49 U.S.C. § 1321(b)(4) to restrain UP from placing the reduced frequency of service into effect. In response, the Board ordered UP to restore and maintain five-days-per-week service until the Board resolved the pleadings filed by Hasa. *See, Hasa, Inc. v. Union Pacific Railroad Company*, 2019 WL 3957844 at *2 (Docket No. NOR 42165, served August 21, 2019).^{1/}

The Board's assertion of jurisdiction to resolve the dispute over frequency of service in the *Hasa* case is flatly inconsistent with BNSF's position that frequency of service is an operating matter not subject to Board oversight. The emergency relief provided to Hasa made it unnecessary for the Board to require 20 days' prior notice for UP's proposed reduction of service frequency. It is crystal clear, however, that the Board treated frequency of service as a common

^{1/} The parties in *Hasa* subsequently resolved their dispute. *Hasa, Inc. v. Union Pacific R. Co.*, 2019 WL 5658810, served October 31, 2019.

carrier service term within the Board's jurisdiction, not an operating detail that could be changed willy-nilly by a rail carrier.

2. A Shipper Whose Service Frequency Is Reduced Is Entitled To The Protections Of 49 U.S.C. § 11101(c)

It is axiomatic that a shipper can be harmed by a reduction of its rail service as well as by an increase in its rate. Reduced frequency of service leads inevitably to increased demurrage charges. A receiver whose service days are curtailed is harmed by the inability to receive an adequate supply of raw material to operate its business as efficiently as when it had a steadier stream of rail service. There are many additional instances in which reduced frequency of service seriously harms rail shippers and receivers.

The statute under consideration is designed specifically to cushion that harm by providing a 20-day notice period during which an affected shipper or receiver can adjust its business to better absorb the adverse effect of the upcoming reduction of service or increase in rate, or, if necessary, to seek Board redress before the harmful change in service or rate is to take effect (*see, e.g., Hasa, supra*).

There is no rational basis for a determination that Bell is not entitled to the protections of 49 U.S.C. § 11101(c) in order to lessen or to avoid the harm that it would experience as a result of BNSF's reduction of service frequency. Certainly, the Motion does not provide a reasonable ground for such a finding.

3. There Is A Common Carrier Obligation To Provide Reasonably Frequent Rail Service

Reduced frequency of rail service is a change in a common carrier service term under 49 U.S.C. § 11101(c) because there is a common carrier obligation to provide reasonable frequency of service under 49 U.S.C. § 11101(a). Thus, in *Louisiana Grocers Cooperative v. Illinois*

Central Gulf R. Co., 353 ICC 606 (1977), delivery of railcars from the rail carrier's yard to the receiver's sidetrack increased from an average of one day after the cars were received in the yard to an average of four days after such receipt. (353 ICC at 609). Referring to that reduction of service frequency, the Interstate Commerce Commission (ICC) said (*id*):

...Repeated delays in delivery of this nature over a substantial period of time is a violation of a carrier's duty to furnish reasonably prompt transportation.
..

Inasmuch as there is a common carrier obligation to provide reasonably frequent rail service, it follows that a reduction in frequency of service is a change of a common carrier service term within the meaning of 49 U.S.C. § 11101(c).

See, also, Savannah Port Terminal R.R. -- Pet. for Declaratory Order -- Certain Rates and Practices as Applied to Capital Cargo, Inc., 2008 WL 2224904 at *6 (Docket No, F.D. 34920, served May 30, 2008) (record did not support an obligation to provide three switches per day at receiver's facility compared to rail industry standard of one switch per day).

4. Nothing In The Motion Supports Dismissal Of The Complaint

BNSF's Motion is the latest unwarranted carrier attempt to dilute statutory notice protections when rail carriers increase rates or reduce service. Thus, in the rulemaking proceeding that implemented § 11101(c) when the notice requirement was carried forward in ICCTA, the rail carriers argued for the use of "electronic billboards" or other "passive" means of notification. The Board found that such passive means would not meet the notification requirements of the statute. *Disclosure, Pub. & Not. of Change of Rates -- Rail Carriage*, 1 STB 153 (1996), at 159.

In the present case, too, BNSF seeks to exclude changes in frequency of service from the protection of the statute, even though frequency of service relates directly to the common carrier obligation of rail carriers. The Board should act to preserve the integrity of the service protections of the statute.

A common carrier service term protected by 49 U.S.C. § 11101(c) need not be contained in a rail carrier's tariff. (Motion 1-2). The service term may be part of a rail industry custom and practice, such as one switch per day in the *Savannah Port Terminal* case, or it may evolve from case law interpreting a statute, or in any number of other ways.

A rail carrier does not guarantee a particular level of service if the frequency of its service is treated as a common carrier service term protected by § 11101(c). (Motion at 2, 9-10). A carrier can reduce the frequency of its service at any time subject to the provision for 20 days' notice and the requirement to provide service on reasonable request. The law does not require a particular level of service, only that which is reasonable.

The services described at page 6 of the Motion may be common carrier service terms, but if they are, that does not support a contention that service frequency is not.

CONCLUSION AND REQUESTED RELIEF

Each of the foregoing Sections of this Reply, considered independently, contains reasonable grounds for investigation and action on Bell's Complaint. Collectively, those grounds warrant summary denial of BNSF's Motion. *See, State of Montana v. BNSF Railway Co., supra*, 2011 WL 531860 at *2.

WHEREFORE, the Board should deny the Motion and direct parties to confer to adopt a reasonable procedural schedule for processing the Complaint. *See* 49 C.F.R. § 1111.11(a).

Respectfully submitted,

BELL OIL TERMINAL, INC.
3741 South Pulaski Road
Chicago, IL 60632

Replicant

/s/ Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228
(312) 236-0204
mcfarland@aol.com

Attorney for Replicant

DUE DATE: September 8, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I served a copy of this Reply In Opposition
To Motion To Dismiss, by e-mail on the following:

Adam Weiskittel, Esq.
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
adam.weiskittel@bnsf.com

Anthony J. LaRocca, Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000
ALaRocca@steptoe.com

Suzanne C. Wellen, Esq.
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
suzanne.wellen@bnsf.com

Sarah B. Nural, Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000
SNural@steptoe.com

/s/ Thomas F. McFarland

Thomas F. McFarland