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Before the Public Record
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

APPLICATION FOR TERMINAL TRACKAGE RIGHTS

**BNSF's Response to
KCS's Request to Dismiss or Hold Proceeding in Abeyance**

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Dated: February 8, 2021

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On December 18, 2020, BNSF¹ filed a petition in this proceeding (the “Petition”) asking the Board to: (1) establish that any future conditions of BNSF’s use of the Rosebluff Lead terminal trackage rights will be based on the principles of operation that the STB set out in *Decision No. 8*, and (2) establish an expedited process for resolving any disputes over conditions of use for shippers other than Lyondell that BNSF may later elect to serve using its terminal trackage rights. As BNSF explained in the Petition, these actions are necessary in order to end the KCS and UP efforts to block BNSF from implementing the terminal trackage rights granted more than four years ago by the Board in this proceeding.

On January 19, 2021, KCS and UP each filed a reply to the Petition, each requesting that the Board deny the Petition. KCS went one step further in its reply, asking the Board to hold “this entire proceeding” in abeyance or to dismiss this

¹ The acronyms and defined terms used herein are the same as those used in *BNSF Railway—Terminal Trackage Rights—Kansas City Southern Railway (Decision No. 8)*, FD 32760 (Sub-No. 46) (STB served Feb. 21, 2020).

proceeding. KCS Reply 4, Jan. 19, 2021. KCS stated that the Board “need not move forward with either [the] Petition or the compensation stage of this proceeding,” because this “entire proceeding . . . is basically moot.” *Id.* at 4, 12. KCS contends that “the issue of service to Lyondell under Decision No. 8 is no longer ripe for consideration” because of Lyondell’s decision to move its rail transportation business from BNSF to UP for some period of time. *Id.* at 12. KCS further argues that “[u]ntil such time as there is a shipper requesting direct service and BNSF has all contractual rights to serve that shipper, there is no need for the Board to move forward on the Petition, or on the compensation stage of the proceeding.” *Id.*

BNSF responds herein to this new request for relief requested by KCS, but does not otherwise reply to the KCS or UP replies.² The Board should reject KCS’s request to dismiss or hold this proceeding in abeyance.

Contrary to KCS’s assertions, BNSF need not file an additional terminal trackage rights application each time a new customer accessible via the Rosebluff Lead and subject to the Lake Charles Merger Conditions requests direct BNSF train service. As the Board explained when it rejected a similar dismissal request from KCS in this proceeding almost three years ago, the Board’s “grant of trackage rights applied to all shipper facilities accessible via the Rosebluff Lead and subject to the Lake Charles Merger Conditions.” *BNSF Ry.—Terminal Trackage Rights—*

² The Board’s rules, 49 C.F.R. § 1104.13(c), prohibit a reply to a reply. However, parties may respond to new requests for relief set forth in a reply filing. *See, e.g., Pet. of Tex. Ry. Exch. LLC for Issuance of a Crossing Order Pursuant to 49 U.S.C. § 10901(d)*, FD 36186 (Sub-No. 1), slip op. at 2-3 (STB served Apr. 4, 2019) (denying a motion to strike a filing that responded to a reply filing containing a new proposed procedural schedule). Therefore, BNSF believes that this limited response is not a “reply to a reply” prohibited by § 11014.13(c). However, to the extent that the Board deems it necessary, BNSF hereby seeks leave to respond to the KCS dismissal/abeyance request.

Kan. City S. Ry. (Decision No. 4), FD 32760 (Sub-No. 46), slip op. at 6 (STB served May 4, 2018).

The Board confirmed that it did not limit the required public interest determination to a single shipper on the Rosebluff Lead:

Because *Decision No. 3* granted trackage rights on the Rosebluff Lead for BNSF's direct access to all shipper facilities in the Lake Charles area covered by the Lake Charles Merger Conditions, ***the Board need not individually assess the public interest implications as to each shipper facility***, as KCS argues in its motion.

Id. (emphasis added). Similarly, the Board has confirmed that it did not limit its findings regarding “practicability” and “substantial impairment” to a particular shipper. *Id.* (“[W]hen the Board found BNSF’s use of the terminal facilities to be practicable without substantially impairing the operations of UP or KCS, it considered BNSF’s direct service over the entire Rosebluff Lead (including through the Rosebluff Yard) . . .”).

As BNSF explained in the Petition, BNSF is justifiably concerned that the delay tactics used thus far by KCS and UP in this proceeding (including now this latest KCS request) will continue once BNSF elects to serve another shipper using its terminal trackage rights. The explicit basis of the BNSF Petition is that BNSF and shippers accessible via the Rosebluff Lead and subject to the Lake Charles Merger Conditions need an efficient regulatory process in place so that they can promptly implement direct BNSF service upon request.

BNSF has every right to request this relief pursuant to the Board’s powers under 49 U.S.C. § 11102(a) to establish conditions of use for the terminal facilities. The relief would prevent the occurrence of any future multi-year regulatory proceedings, allowing BNSF and its customers to keep pace in the brisk and competitive real-world Lake Charles transportation market, which moves in a matter of weeks or months, not years. Therefore, KCS’s argument that the Board

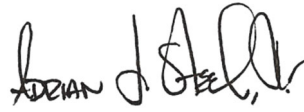
should not entertain the BNSF Petition unless BNSF has first identified a specific customer simply does not hold water.

Likewise, BNSF's temporary loss of the Lyondell business does not require the Board to dismiss or hold in abeyance the separate compensation phase of this proceeding. First, the compensation terms set by the Board will apply to any future BNSF direct movements to Lyondell, which could resume in a few years. Second, the compensation terms should also apply to any other BNSF movements using the terminal trackage rights.³ The parties have already submitted opening statements and evidence in that compensation phase and the parties are currently preparing their reply statements and evidence, to be filed on April 12, 2021. The compensation phase needs to conclude under the established procedural schedule so that the promise made to Lake Charles area shippers by UP, as enforced by the Board's conditions to the UP/SP merger, can finally come to fruition.

The Board should reject the KCS request and move forward both with consideration of the BNSF Petition and with the separate compensation phase of this proceeding.

³ KCS and BNSF apparently disagree about the proper scope of the compensation terms that the Board will set in that separate phase. BNSF believes that the Board should set compensation terms for all potential BNSF movements using the terminal trackage rights, like the Board normally does when it sets trackage rights compensation terms. KCS apparently believes that the Board should require BNSF to institute separate multi-year regulatory proceedings to set compensation terms for each shipper facility that BNSF elects to serve using its terminal trackage rights. The Board can and should resolve this issue in the compensation phase of the proceeding.

Respectfully submitted,



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Dated: February 8, 2021

CERTIFICATE OF SERVICE

I certify that I have, on February 8, 2021, served copies of BNSF's Response to KCS's Request to Dismiss or Hold Proceeding in Abeyance (BNSF-145) 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