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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

APPLICATION FOR TERMINAL TRACKAGE RIGHTS

**BNSF's Reply to
Kansas City Southern Railway Company's New Evidence and
Union Pacific Railroad Company's Comments**

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Before the
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On February 1, 2018, KCS¹ filed a Motion to Dismiss BNSF's Petition to Establish Conditions of Use and Compensation (the "KCS Motion"). On February 21, 2018, BNSF filed both an errata to the BNSF Petition (the "BNSF Petition Errata"), and a Reply to the KCS Motion (BNSF-134, the "BNSF Reply").² On March 5, 2018, KCS submitted a reply to the BNSF Petition Errata and the BNSF Reply (the "KCS Surreply"), containing new evidence with respect to two issues initially raised in the KCS Motion: (1) whether BNSF has the right to operate over a certain track segment used to serve the LyondellBasell facility at issue in the BNSF Petition, and (2) the history of that LyondellBasell facility. On March 9, 2018, UP submitted "comments" regarding the KCS Surreply, providing "factual statements" regarding the

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

² BNSF also concurrently filed a Reply to Union Pacific Railroad Company's Motion to Establish Procedural Schedule (BNSF-133).

two issues discussed in the KCS Surreply and raising a third issue regarding an industry track agreement that purportedly governs the Montell Lead (UP/SP-425, the “UP Comments”). UP did not otherwise comment on the merits of KCS’s arguments and did not provide the Board or the parties with a copy of the industry track agreement.

The three issues raised by KCS and UP are red herrings. They should neither confuse the Board nor delay the implementation of the terminal trackage rights granted by the Board to BNSF in *Decision No. 3*. Moreover, the new evidence submitted in the KCS Surreply and the UP Comments only bolsters BNSF’s position. Because BNSF has established that the KCS Motion is wholly without merit, the Board should reject the KCS Motion and expeditiously establish a procedural schedule to govern consideration of the BNSF Petition.

1. The Board’s Rules Did Not Permit the KCS Surreply, and BNSF Has the Right to Reply to New Evidence Presented in the KCS Surreply and the UP Comments

The KCS Surreply purports to “repl[y] to BNSF’s amended factual assertions” purportedly made in the BNSF Petition Errata and the BNSF Reply. KCS Surreply at 2. Contrary to KCS’s claim, neither BNSF filing contains “amended factual assertions” or “new factual evidence.” The BNSF Petition Errata simply corrected inadvertent errors made in a map submitted initially as page 4 of Exhibit 1 to BNSF’s Petition. The BNSF Reply included as Exhibit 1 an excerpt from BNSF-PR-4, a public filing submitted by BNSF to the Board on July 1, 1997, in connection with the UP/SP merger proceeding. Neither of these BNSF filings “amend[s]” the Petition or constitutes “new evidence.” *See, e.g., N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, Docket No. NOR-42119, slip op. at 4-5 (STB served Mar. 12, 2015) (a publicly available document offered for the first time on final brief was not “new evidence”).

BNSF agrees with KCS that the Board generally permits parties to respond to new evidence submitted in reply briefs, in the interest of compiling a full record.³ However, instead of replying to any purported “new evidence” introduced by BNSF, the KCS Surreply, through a Verified Statement of Mark Nolte, Manager of Real Estate Field Services for the Real Estate and Industrial Development Department of KCS (the “Nolte VS”), simply furthers arguments and itself introduces new evidence that KCS could have presented in the KCS Motion.⁴ Therefore, the KCS Surreply plainly functions as a reply to the BNSF Reply, rather than a “Reply to BNSF’s Amended Petition.” The Board’s rules do not permit KCS to submit such a surreply. *See* 49 C.F.R. § 1104.13(c).

In contrast to the KCS Surreply, this BNSF Reply is limited to responding to the new evidence presented in the KCS Surreply and the UP Comments. Therefore, under KCS’s own reasoning, BNSF has the right to file this reply to the new evidence presented in the KCS Surreply and the UP Comments. To the extent leave from the Board is deemed necessary for the filing of this Reply, BNSF requests such leave in order to have an opportunity to respond to the new evidence presented by KCS and UP.

2. BNSF’s Legal Authority to Operate Over Track Necessary to Serve LyondellBasell Directly Is Irrelevant to Conditions of Use

The KCS Surreply and the Nolte VS devote many pages of argument, testimony, and evidence to the contention that BNSF “will need to obtain contractual authority or some other legal authority to operate over” a certain 0.40-mile segment of track necessary to serve the

³ See KCS Surreply at 2 n.2; *see also City of Alexandria, Va.—Petition for Dec. Order*, Docket No. FD-35157, slip op. at 2 (STB served Nov. 6, 2008) (accepting two otherwise-prohibited replies to replies where such pleadings responded to new evidence submitted in a reply).

⁴ The UP Comments also introduce new evidence through two factual statements verified by Chris Sanford, Union Pacific’s Manager, Interline Marketing.

LyondellBasell facility. KCS Surreply at 7; *see id.* at 3-7; Nolte VS at 6-8, 21-31. KCS then argues that, until BNSF “has obtained legal authority over the Montell Lead and the connecting track, the Petition should be dismissed.” *Id.* at 7. The KCS contentions about requisite contractual authority are beside the point. KCS’s proposed remedy—dismissal of BNSF’s Petition—is fundamentally misguided and would introduce still more inappropriate delay.

As established in the BNSF Petition and the BNSF Reply, the terminal trackage rights granted by the Board in *Decision No. 3* allow BNSF to serve directly all customers accessible via the Rosebluff Lead, including LyondellBasell. The LyondellBasell facility is accessed via the Montell Lead, which connects directly to track that forms part of the Rosebluff Lead, over which BNSF now has terminal trackage rights. Citing its current Zone Track Spot book, UP claims that the “track connecting the Montell Lead to the Rosebluff Lead is distinct from the Rosebluff Lead.” UP Comments at 2. However, for the purposes of the BNSF Petition to establish conditions of use and compensation, it is irrelevant whether or not any connecting track is “distinct” from the Rosebluff Lead or the Montell Lead on any track chart. If any such connecting track forms part of the Rosebluff Lead for purposes of BNSF’s terminal trackage rights, then BNSF has access to such track. If it does not, then BNSF will acquire access to the track.

UP also claims that a provision in an industry track agreement governing the Montell Lead “appears to preclude a unilateral grant of operating rights by the Port, or even a joint grant of operating rights by the Port and Union Pacific.” UP Comments at 3. Mysteriously, UP neglects to describe this provision or attach the agreement. In any event, if some provision of the unprovided agreement requires the Port to obtain the consent of KCS and/or UP in order to grant BNSF access to the Montell Lead, and KCS or UP refuses to grant such consent, then the self-

executing provisions of 49 U.S.C. § 11321(a) would nullify the provision, because it would otherwise deny BNSF direct access to a shipper covered by the Lake Charles Condition.⁵

Regardless, BNSF does not need to have acquired any additional rights before the Board establishes conditions of use and compensation for the parties' joint use of the Rosebluff Lead. The legal and factual predicates that KCS alleges the BNSF Petition must satisfy simply do not exist. All that the Board required in *Decision No. 3*, slip op. at 19, is that BNSF establish that the parties "cannot collectively reach an agreement" with respect to conditions of use and compensation for the parties' joint use of the Rosebluff Lead, "including BNSF's access (if it so elects) to directly serve shippers other than CITGO." The BNSF Petition easily meets that standard. The Board did not require that, before requesting the Board's assistance in establishing conditions of use and compensation, BNSF acquire all contractual rights required to use any additional track (other than the Rosebluff Lead) that may be necessary for direct BNSF service.

3. The New Evidence Presented By KCS Regarding the Historical Ownership of the LyondellBasell Facility Proves that the Facility Is Subject to the Lake Charles Condition

KCS also presents new evidence in the KCS Surreply and the Nolte VS that the LyondellBasell facility was owned by Montell USA at the time of the UP/SP merger. See KCS Surreply at 9-10, Exhibit 2; Nolte VS at 4-6, 11-31. UP "agrees with KCS" on this point, and claims that Montell USA owned the facility from 1995 until 2017. See UP Comments at 2-3. If the LyondellBasell facility was owned by Montell USA at the time of the UP/SP Merger (which

⁵ See *Consolidation Coal Sales Co. v. Consol. Rail Corp.*, Docket No. FD-34169, slip op. at 4 (STB served May 24, 2002) (applying U.S. Supreme Court precedent that contracts, including consent provisions, may be overridden under Section 11321(a)); see also BNSF Rebuttal at 34-42 (Oct. 23, 2015) (noting that the Section 11321(a) override provisions apply to a joint facility agreement governing the Rosebluff Lead).

BNSF has no reason to doubt), then that fact definitively confirms that the LyondellBasell facility is subject to the Lake Charles Condition.

Any facility located at the West Lake Charles station and “open to SP and KCS” before the UP/SP merger is subject to the Lake Charles Condition. *UP/SP Decision No. 44*, 1 S.T.B. 233, 428; *see also Decision No. 3*, slip op. at 2-3, 9-10; BNSF Reply at 2 n.2.⁶ The LyondellBasell facility is located at the West Lake Charles rail station, as KCS has now conceded. KCS Surreply at 9. As confirmed by the UP/SP merger proceeding, the Montell facility at West Lake Charles (now the LyondellBasell facility at issue here) was open to SP and KCS and clearly subject to the Lake Charles Condition. *See, e.g., UP/SP Decision No. 44*, 1 S.T.B. 233, 318 (the Montell facility was “served by an SP single-line routing . . . and a KCS-UP joint-line routing”); *id.* at 427-29 (expanding the Lake Charles Condition to grant BNSF further rights, in response to Montell comments); UP/SP 260 at 23 n.9 (June 3, 1996) (expansion of the Lake Charles Condition to cover “shippers at West Lake Charles served by SP and KCS” “moots the arguments of Montell USA”). Therefore, Montell’s ownership of the LyondellBasell facility at the time of the UP/SP merger proves that the LyondellBasell facility is subject to the Lake Charles Condition.

Moreover, BNSF currently serves the LyondellBasell facility via UP reciprocal switch pursuant to the Lake Charles Condition, and BNSF would not have its current reciprocal switch access to the LyondellBasell facility if the Lake Charles Condition were not applicable to the facility. *See* BNSF Petition at 9; Reilly V.S. at 5-6; BNSF Reply at 6-7. KCS admits that “BNSF already has competitive access to the Lyondell facility via a reciprocal switch from UP.” KCS

⁶ The KCS Surreply misstates the scope of the Lake Charles Condition as applied to the LyondellBasell facility. *See* KCS Surreply at 10 (“Was this facility ‘open’ to ‘all of KCS, SP, and UP’? Was this a captive facility in 1996?”).

Surreply at 11 n.11. However, KCS ignores the implication of its concession: BNSF's access to the LyondellBasell facility via UP reciprocal switch is based on the Lake Charles Condition, which also affords BNSF the right to serve the facility directly.⁷

In the 22 years since *UP/SP Decision No. 44*, KCS and UP have had notice that the Montell facility (now the LyondellBasell facility) is subject to the Lake Charles Condition. In addition to the Board's explicit findings in *Decision No. 44* regarding the Montell facility, BNSF has served the facility by UP reciprocal switch for a number of years. On November 7, 2016, BNSF delivered to UP and KCS a notice of its intent to change BNSF's method of service to LyondellBasell to direct service. Since that time, in the Board-directed negotiations between the three parties, BNSF has focused its efforts on establishing operating conditions and compensation terms for BNSF direct service to LyondellBasell. Until the KCS Motion was filed almost 16 months later, at no point did UP or KCS dispute whether the LyondellBasell facility is subject to the Lake Charles Condition. The parties' filings in response to the BNSF Petition are indicative of the reasons why the parties have been unable to reach an agreement on these issues.

CONCLUSION

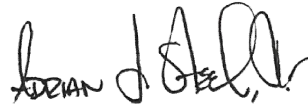
BNSF has established that the KCS Motion is wholly without merit. The LyondellBasell facility is accessed via the Rosebluff Lead and is subject to the Lake Charles Condition. The

⁷ KCS also musingly asks, "[i]f the facility was either captive or served only by SP and KCS prior to the merger, why is it now in the public interest for it to have three carrier access . . . when other shippers are only entitled to two carrier access?" KCS Surreply at 10. The answer is simple: The Board so decided, both in *Decision No. 3* and in 1996 when KCS opposed the Lake Charles Condition in the first place and sought to reopen *UP/SP Decision No. 44*. See *UP/SP Merger Decision No. 63*, slip op. at 7-9. KCS may disagree with the Lake Charles Condition entirely, and the Board's reliance on the Lake Charles Condition for the public interest standard in *Decision No. 3*, but such concerns are appropriately addressed in KCS's petition for reopening and reconsideration of *UP/SP Decision No. 44* (which it lost) and its pending appeal of *Decision No. 3*. KCS cannot narrow the scope of the terminal trackage rights already granted by the Board through this proceeding, which is limited to setting conditions of use and compensation for the parties' joint use of the Rosebluff Lead.

parties cannot agree to conditions of use and compensation for the parties' joint use of the Rosebluff Lead. Nothing further is required for the Board to consider the BNSF Petition and set such conditions of use and compensation.

The new evidence introduced in the KCS Surreply and the UP Comments adds nothing to the arguments advanced in the KCS Motion, and further affirms the sufficiency of the BNSF Petition. Because this BNSF Reply introduces no further new evidence and seeks no further affirmative relief, the Board should not permit KCS or UP to delay this proceeding further by filing yet another improper reply. Instead, the Board should summarily reject the KCS Motion and stop KCS from continuing to stymie the implementation of the terminal trackage rights granted by the Board to BNSF in *Decision No. 3*. As requested in BNSF-133, the Board should expeditiously establish a procedural schedule to govern consideration of the BNSF Petition.

Respectfully submitted,



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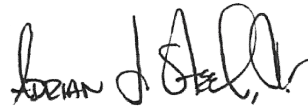
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Dated: March 21, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2018, copies of the foregoing BNSF's Reply to Kansas City Southern Railway Company's New Evidence and Union Pacific Railroad Company's Comments have been served by e-mail on Counsel for UP, KCSR and CITGO.

A handwritten signature in black ink, appearing to read "Adrian L. Steel, Jr.", is positioned above a horizontal line.

Adrian L. Steel, Jr.