

BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. FD 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC.

—CONTROL—

KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY COMPANY

**Opening Comments and Request for Conditions
of LyondellBasell**

Pursuant to Decision No. 11, Lyondell Chemical Company; Equistar Chemicals, LP; LyondellBasell Acetyls, LLC; and LyondellBasell Advanced Polymers Inc. (collectively, LyondellBasell) submit these comments and request for conditions.

Interest of LyondellBasell

LyondellBasell has four owned and operated facilities located on the lines of Kansas City Southern Railway (KCS) and Canadian Pacific Railway (CP). One facility is located in each of Westlake, LA, and West Lake Charles, LA; one in Corpus Christi, TX; and one in Clinton, IA. From these facilities, LyondellBasell originates rail shipments of polyolefins and liquid chemicals.

LYB-3
304035
ENTERED
Office of Proceedings
February 28, 2022
Part of
Public Record

Comments

Applicants claim that the proposed transaction will provide stronger competition and improve rail service, “without any adverse impacts on any stakeholders.”¹ But LyondellBasell has serious concerns that the proposed transaction will actually reduce competition and/or service in the Lake Charles, LA, area (i.e., Lake Charles, West Lake Charles, Westlake, and Mossville, LA²; collectively, the Lake Charles Area) and for facilities in Corpus Christi, TX, served by KCS.

LyondellBasell’s concerns arise because the application that Applicants filed in this proceeding (Application) indicates that traffic levels will increase substantially along the Gulf Coast, but infrastructure investment to support this traffic will be few and far between.

This has significant consequences for Lake Charles Area facilities. KCS has resisted competitive access in this area, which the Surface Transportation Board granted under the 1996 merger between Union Pacific Corp. and Southern Pacific Rail Corp. (UP/SP Merger). Without this access and if KCS’s service levels drop for Lake Charles Area traffic, LyondellBasell and others face rail options that are even less competitive than they are today, and far less competitive than the Board envisioned when it granted the UP/SP Merger. The Board should not approve

¹ (Application 1-15 to -16.)

² Applicants describe Mossville as Lake Charles in the Application. (*Id.* at 1-72 (referring to “Mossville (Lake Charles)” in map legend), 2-293 (“ . . . south and southwest to Port Arthur and Mossville (Lake Charles, LA)”)).

Applicants' proposed transaction without imposing conditions that protect service levels for Lake Charles Area shippers and the competitive access that the Board sought for the Lake Charles Area when it approved the UP/SP Merger.

Increased traffic without commensurate investment also has significant consequences for Corpus Christi area facilities that are captive to KCS. These facilities' rail traffic faces a high risk of service issues because Applicants have failed to plan any investment along the KCS route from the Mexico border through Corpus Christi and up the Gulf Coast to Beaumont, TX.

To resolve these issues, LyondellBasell proposes three merger conditions, detailed in Part I:

- Grant BNSF immediate access via reciprocal switch or direct access to all facilities connected to any line over which BNSF has access under the merger conditions that the UP/SP Merger imposed for the Lake Charles Area ("Lake Charles Merger Conditions"), particularly with respect to Mossville, LA, which Applicants describe as being Lake Charles.³
- Establish access conditions and compensation for BNSF's access to all shippers on the Rosebluff Lead, a track that UP and KCS jointly own in the Lake Charles Area and to which the Lake Charles Merger Conditions provide BNSF with access.
- Provide Union Pacific Railroad with access via reciprocal switch at Robstown, TX, to Corpus Christi shippers located on the short KCS branch line that

³ *Id.* at 1-72, 2-293.

connects to KCS's north-south corridor at Robstown, TX, and runs east into Corpus Christi.

I. The Board should impose conditions to ensure competitive rail service and protect service levels.

Applicants' operating plan shows that the proposed transaction will cause significant volume increases between Laredo, TX, and Shreveport, LA, which is a critical segment of Applicants' north-south corridor. LyondellBasell is concerned that this increased traffic will negatively impact rail competition and service for LyondellBasell's owned and operated facilities along the Gulf Coast, especially those in the Lake Charles Area and at Corpus Christi, TX. LyondellBasell thus seeks conditions to protect service and competition at these facilities.

Additionally, the Board's authority to condition its approval of the proposed transaction is extraordinarily broad.⁴ And exercising this authority is appropriate to remedy pre-existing issues that will be exacerbated by the proposed transaction.⁵

A. The proposed transaction will reduce existing KCS service levels along the Gulf Coast.

The proposed transaction will significantly increase traffic moving on KCS's main artery between the US/Mexico border at Laredo, TX, through Texas and ending at Shreveport, LA (the Tex Mex line). It will also triple tonnage moving between the Tex Mex line and the Lake Charles Area. But Applicants have little

⁴ *Bessemer & Lake Erie R.R.—Acquisition & Operation—Certain Rail Lines of CSX Transp., Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, and Franklin Counties, N.Y.*, FD 36347, slip op. at 6 (STB served Apr. 6, 2020).

⁵ *Id.*

infrastructure investment planned along the Tex Mex route, and none on the branch that serves the Lake Charles Area, to support the traffic increase.

LyondellBasell is concerned that this will reduce existing service levels for traffic involving two Lake Charles Area facilities owned or operated by LyondellBasell and LyondellBasell's Corpus Christi facility. It will also reduce rail competition in the Lake Charles Area.

For the Lake Charles Area facilities, all KCS traffic connects to the Tex Mex line's Beaumont subdivision, in DeQuincy, LA. Applicants state the traffic moving between Lake Charles and DeQuincy will nearly triple within three years.⁶ They also state that the number of trains operating on the Beaumont subdivision will double within three years.⁷ For the Corpus Christi facility, which is captive to KCS, traffic would connect to the Tex Mex line's Laredo subdivision at Robstown, TX. Applicants' operating plan indicates that daily trains will double on the Tex Mex line between Robstown and Beaumont, TX within three years.⁸

Despite this substantial increase in traffic, KCS has planned little infrastructure investment. For example, it has not planned any investment on the line connecting Lake Charles to DeQuincy or the Tex Mex line between Robstown

⁶ Applicants state 2020 tonnage was 3,430,000 and estimate that tonnage will be 10,006,000 three years after the transaction. (Application 2-495, -500.)

⁷ Average trains per day will increase from 8.86 to 20.26. (*Id.* at 2-452 to -454.)

⁸ Average trains per day on the Rosenberg subdivision will increase from 8.47 to 17.73. (*Id.*)

and Beaumont, TX.⁹ And it has planned few projects between Beaumont and Shreveport.¹⁰

LyondellBasell has significant concerns that Applicants' anticipated traffic increases coupled with their lack of investment in the Tex Mex line and the line between Lake Charles and DeQuincy will have serious consequences for rail service along the Gulf Coast.

B. Merger conditions for Lake Charles Area shippers are necessary to protect existing competition and service.

The Board should impose merger conditions to protect Lake Charles Area shippers from a loss of service and competition due to the increased congestion on the KCS line between Lake Charles and DeQuincy and on the Beaumont subdivision of the Tex Mex line.

As explained, all Lake Charles Area traffic moving on KCS connects to the KCS network along the Tex Mex line at DeQuincy. The traffic moving between Lake Charles and DeQuincy will increase substantially. In addition, all of this traffic will be impacted by the increased train traffic on the Beaumont subdivision. To the extent this traffic moves south along the Gulf Coast, it will also be impacted by increased trains between Robstown and Beaumont.

These increased traffic volumes coupled with the meager infrastructure investment proposed by Applicants, none of which is between Lake Charles and DeQuincy or between Robstown and Beaumont, threatens to decrease service levels

⁹ (*Id.* at 2-337.)

¹⁰ (*Id.*)

for Lake Charles Area traffic. This could reduce KCS's competitiveness in the Lake Charles Area and disrupt the competitive landscape that the Board sought to preserve under the UP/SP Merger conditions. When the Board approved the UP/SP Merger, it imposed conditions allowing BNSF to directly access shippers in the Lake Charles Area even though those shippers would otherwise have had access to KCS and UP post merger.¹¹ The Board reasoned that these conditions were necessary to protect competition in the Lake Charles Area because, among other things, KCS did not offer efficient routings for Lake Charles traffic moving to Houston or north through Shreveport.¹² But, as explained in Part II, KCS has resisted BNSF access under these conditions, effectively forcing LyondellBasell and other Lake Charles Area shippers to choose between KCS and UP, which the Board found did not compete effectively in the Lake Charles Area. Because the proposed transaction increases traffic on KCS routings involving the Lake Charles Area with little to no investment, as explained, it threatens to reduce service levels for KCS's Lake Charles traffic, which will further reduce the already limited competition that KCS has provided to UP in the Lake Charles Area and will leave shippers in the area without effective competition for their traffic.

To address these concerns, LyondellBasell requests two merger conditions, as follows.

¹¹ *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 44)*, 1 S.T.B. 233, 427-29 (1996).

¹² *Id.* at 427.

First, the Board should grant BNSF access to all facilities connected to any line over which BNSF has access under the Lake Charles Merger Conditions. LyondellBasell operates a facility located in Westlake off an industrial track over which BNSF has access under the Lake Charles Merger Conditions.¹³ KCS provides switching at the facility and along the track, and it recognizes that the facility is open to Union Pacific. But KCS refuses to recognize BNSF's access at this facility despite recognizing that all other facilities off the same industrial track have BNSF access.¹⁴ This limits the LyondellBasell-operated facility's traffic to service by KCS or UP. At the same time, the proposed transaction will nearly triple the tonnage on the KCS line connecting the Lake Charles Area to its network,¹⁵ above 2020 levels, without any investment on the line. The proposed transaction will also double the daily trains on the Tex Mex line where it branches to serve the Lake Charles Area. Accordingly, the proposed transaction places this facility's traffic in jeopardy of degraded service on the merged CP/KCS. And any degraded service will further reduce CP/KCS's rail competition with UP, which the Board determined is in the public interest under the UP/SP Merger decision. Thus, clarifying that BNSF has

¹³ The Lake Charles Area Merger Conditions provided BNSF with direct and reciprocal switch access to handle traffic of shippers open to all of UP, SP, and KCS at Lake Charles and Westlake and open to SP and KCS at West Lake Charles. *BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (BNSF Decision No. 8)*, FD 32760 (Sub-No. 46), slip op. at 2 (STB served Feb. 21, 2020).

¹⁴ *See, e.g.*, Serving Carrier/Reciprocal Switch Record for Sasol Chemicals (USA) LLC, 2201 Old Spanish Trail, Westlake, LA 70669, <https://www.railinc.com/railservicefinder> (last visited Feb. 28, 2022).

¹⁵ Applicants state 2020 tonnage was 3,430,000 and estimate that tonnage will be 10,006,000 three years after the transaction. (Application 2-495, -500.)

access to all facilities located off lines over which BNSF has access under the Lake Charles Merger Conditions would not only help preserve adequate service for these facilities, but also ensure they have access to competition that KCS has denied.

Second, the Board should establish “default” access conditions and compensation for BNSF’s access to all shippers on the Rosebluff Lead, a track that UP and KCS jointly own in the Lake Charles Area. Despite the Board allowing BNSF to access these shippers under the Lake Charles Merger Conditions, KCS and UP have tied up this access in endless litigation with BNSF, as explained in Part II. The proposed transaction will exacerbate this problem by reducing KCS service levels for Rosebluff Lead traffic, essentially eliminating the effectiveness of any competition KCS provided UP for this traffic. Accordingly, the Board must establish conditions to prevent loss of competition and a reduction of service levels for this traffic.

C. A merger condition for Corpus Christi shippers is necessary to preserve adequate service levels for their traffic.

The Board should also impose a merger condition that provides Union Pacific with access via reciprocal switch at Robstown, TX, to Corpus Christi shippers located on the KCS branch line that connects to the Tex Mex line at Robstown and runs east into Corpus Christi.

This condition is necessary to protect shippers on the branch line from inadequate service levels due to Applicants’ plans to double trains on the Tex Mex line between Robstown and Beaumont, TX, without making any infrastructure investments. LyondellBasell currently has a facility that is off the branch line and

captive to KCS. Although the facility does not actively ship by rail today, LyondellBasell envisions rail shipments in the future to the northeast along the Gulf Coast. But Applicants' plans to double traffic on the Tex Mex line between Robstown and Beaumont without making any infrastructure investments on the line places traffic that would move from the LyondellBasell facility in jeopardy of serious service issues. A reciprocal switch with Union Pacific would protect against these issues because Union Pacific can route the facility's traffic north to San Antonio and then east to Houston and Beaumont on routings that involve minimal travel on the Tex Mex line.

II. The merger conditions that the Board imposes must be reliable.

When the Board approved the UP/SP Merger, it imposed the Lake Charles Merger Conditions, which allowed BNSF to access shippers in the Lake Charles Area directly or via reciprocal switch.¹⁶ Despite these conditions, railroads have used lengthy litigation to thwart BNSF's access to LyondellBasell in the Lake Charles Area, depriving BNSF and LyondellBasell of the competition that the Board intended to preserve under the conditions.¹⁷ This experience underscores that merger conditions are not effective unless they can be quickly and efficiently enforced. Thus, any merger conditions that the Board imposes should be clear and sufficiently detailed to prevent railroads from miring their enforcement with disputes and lengthy litigation.

¹⁶ *UP/SP Decision No. 44*, 1 S.T.B. at 427-29.

¹⁷ *See BNSF Decision No. 8*, slip op. at 1-4 (describing procedural history of trackage rights dispute related to UP/SP Merger).

BNSF's attempts to access shippers on the Rosebluff Lead, a track that UP and KCS jointly own in the Lake Charles Area, have been tied up in a decade of litigation after which BNSF still does not have access to a LyondellBasell facility off the lead. In 2012, BNSF sought to exercise its rights under the Lake Charles Merger Conditions by requesting access to serve directly a shipper on the Rosebluff Lead.¹⁸ But KCS refused.¹⁹ In February 2013, BNSF filed a terminal trackage rights application to enforce the condition and gain direct access to the shipper.²⁰ But KCS and UP opposed the access.²¹ In June 2016—four years after BNSF filed its trackage rights application to enforce the condition—the Board granted BNSF terminal trackage rights for the Rosebluff Lead consistent with the Lake Charles Merger Conditions.²² But this did not resolve access because the Board directed UP, KCS, and BNSF to develop conditions governing BNSF's access to directly serve shippers on the lead.²³

After the 2016 decision, the Rosebluff Lead saga continued as BNSF sought access to a LyondellBasell facility off the lead. BNSF was unable to reach an agreement with KCS and UP on conditions and compensation for BNSF to directly

¹⁸ *BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (BNSF Decision No. 4)*, FD 32760 (Sub-No. 46), slip op. at 4 (STB served July 5, 2016).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 5.

²² *Id.* at 1.

²³ *Id.* at 20.

serve the LyondellBasell facility.²⁴ So, in January 2018, BNSF asked the Board to establish conditions of use and compensation for BNSF to directly serve the facility.²⁵ KCS opposed this, arguing that BNSF's trackage rights on the Rosebluff Lead did not apply to the LyondellBasell facility and the Lake Charles Merger Conditions did not cover the facility.²⁶ In May 2018, the Board rejected KCS's position, finding that the facility was covered by the Lake Charles Merger Conditions and that the terminal trackage rights granted in 2016 over the Rosebluff Lead apply to all customers off the lead.²⁷ In 2020—two years later—the Board established conditions for BNSF to directly serve the LyondellBasell facility.²⁸ But it did not establish compensation for that access.²⁹ Today—four years after BNSF sought access to the LyondellBasell facility off the Rosebluff Lead and ten years after BNSF first requested direct access to a Rosebluff Lead shipper under the Lake Charles Merger Conditions—BNSF still does not have access to LyondellBasell's facility.

The delayed BNSF access to the LyondellBasell facility has had a significant negative impact on rail competition experienced by LyondellBasell. In the six years since BNSF began seeking access to the LyondellBasell facility, LyondellBasell has

²⁴ *BNSF Decision No. 8* at 3.

²⁵ *Id.*

²⁶ *BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry.*, FD 32760 (Sub-No. 46), slip op. at 3 (STB served May 4, 2018).

²⁷ *Id.* at 5-6.

²⁸ *BNSF Decision No. 8* at 1.

²⁹ *Id.*

gone through two contracting cycles for rail freight out of the facility.

LyondellBasell did not have access to rail competition from BNSF, as contemplated by the Lake Charles Merger Conditions, for these contract cycles. And because KCS continues to resist BNSF access under the condition, it is unclear when or whether LyondellBasell will ever have BNSF access at the facility.

The Board should not allow the merger conditions it establishes in this proceeding to be undermined by lengthy litigation, like that BNSF has experienced regarding the Lake Charles Merger Conditions. And the Board should be especially wary of this here, given KCS's track record of resisting the Lake Charles Merger Conditions. Thus, the Board should establish clear conditions that are operative without lengthy Board proceedings.

III. Conclusion.

For the foregoing reasons, LyondellBasell respectfully requests that the Board establish conditions on the proposed transaction as described in these comments.

Respectfully submitted,

/s/ Jason D. Tutrone

Jeffrey O. Moreno

Jason D. Tutrone

Thompson Hine LLP

1919 M Street, N.W., Suite 700

Washington, DC 20036

(202) 263-4143

Jeff.Moreno@ThompsonHine.com

Jason.Tutrone@ThompsonHine.com

*Counsel for the Lyondell Chemical
Company; Equistar Chemicals, LP;
LyondellBasell Acetyls, LLC; and
LyondellBasell Advanced Polymers Inc.*

February 28, 2022

Certificate of Service

I certify that I have this day served copies of document upon all parties of record in this proceeding and the parties listed below, by first-class mail, postage pre-paid, or email:

The Honorable Peter Buttigieg
Secretary of the U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590

Attorney General of the United States
c/o Assistant Attorney General, Antitrust Division
Room 3109
Department of Justice
Washington, DC 20530

David L. Meyer
Law Office of David L. Meyer
1105 S Street, N.W.
Washington, DC 20009

William A. Mullins
Baker & Miller PLLC
Suite 300
2401 Pennsylvania Ave., N.W.
Washington, DC 20037

Hon. Thomas McCarthy
1331 Pennsylvania Ave., N.W.
Washington, DC 20004-1710

ctolbert@fmshrc.gov
zbyers@fmshrc.gov

Respectfully submitted,

/s/ Jason D. Tutrone
Jason D. Tutrone

Dated: February 28, 2022