

July 28, 2022

305071

VIA E-FILING

Ms. Cynthia Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, S.W.
Washington, DC 20423

ENTERED
Office of Proceedings
July 28, 2022
Part of
Public Record

Re: **STB Docket No. FD 36500, Canadian Pacific Railway Limited, et al.—Control—
Kansas City Southern, et al.**

Dear Ms. Brown:

On July 20, 2022, Applicants¹ submitted a letter motion requesting that the Board strike the verified statements filed on July 12, 2022 by BNSF in response to comments, protests, requests for conditions, and other opposition by non-Applicant parties. BNSF respectfully requests that the Board deny Applicants' request. As explained below, BNSF fully complied with the procedural schedule set by the Board in this proceeding and with the principles that have evolved in merger cases for the creation of a record for Board evaluation of merger effects.

Applicants have overreached in attempting to prevent the Board from considering the probative evidence submitted by BNSF in response to comments and other pleadings. As explained below, Applicants mischaracterized the nature of BNSF's response comments and misconstrued past Board decisions regarding the development of a complete record in merger proceedings. The Board should not allow Applicants to unnecessarily limit the Board's review of the public interest considerations in this proceeding.

The Legal Standard

Applicants' attempt to preclude comments by parties like BNSF is based on a misreading of Board precedent. Applicants rely on a Board decision in the *UP/SP* merger proceeding where the Board stated that "parties filing responses on April 29 are limited to responding to issues and arguments raised in the March 29 filings." *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Decision No. 31)*, FD 32760, 1996 WL 189464, at *3 (STB served Apr. 19, 1996). But as explained below, BNSF did here exactly what the Board directed parties to do in *UP/SP* – BNSF's

¹ Unless otherwise defined in this letter, the acronyms and defined terms used in this letter are the same as those used in Applicants' July 20, 2022 letter and BNSF's July 12, 2022 response comments.

witnesses responded “to issues and arguments raised” in other parties’ opening comments. The Board’s concern in *UP/SP* was that parties not be entitled to present new theories on reply that might catch Applicants off-guard. But Applicants here are not complaining about new theories. To the contrary, their complaint is that BNSF’s response comments support the same theories and arguments that BNSF made on opening.

Applicants also rely on an ICC decision in the *UP/CNW* merger proceeding. But that decision addresses the entirely different issue of the proper scope of rebuttal on a responsive application. See *Union Pac. Corp.—Control—Chi. & N.W. Transp. Co. (Decision No. 20)*, FD 32133, 1994 WL 498541 (ICC served Sept. 16, 1994). In *UP/CNW*, the ICC struck witness statements that responsive applicant SP filed as rebuttal in support of its responsive application. One reason cited by the ICC was that the rebuttal statements related to “the effects of the primary application” rather than support for the responsive application, which was the purported reason for filing the statements. See *id.* at *7. That issue, of course, is irrelevant here because BNSF has not filed a responsive application. The ICC also stated it was concerned that certain statements contained “an entirely new theory.” See *id.* However, as noted above, Applicants’ complaint here is that BNSF’s response comments support theories and arguments that BNSF presented on opening. BNSF did not raise any “new theories” in its response comments.

Applicants’ description of the relevant precedent also ignores altogether the Board’s central objective in establishing public comment on merger applications, which is to ensure that the Board’s decisions are informed by a fully developed record. Indeed, the Board’s regulations explicitly state the Board’s objective: “[t]o assure a fully developed record on the impacts of a proposed railroad consolidation, the Board encourages public participation from . . . affected shippers and carriers, and other interested persons.” 49 C.F.R. § 1180.2(h) (2000). Even where a filing has been late-filed, or has not been called for under a procedural schedule – not the case with BNSF’s response – the Board will accept the filing if it provides a “more complete record” and “clarifies the arguments.” *BNSF Ry.—Aband. Exemption—in Kootenai Cnty., Idaho*, AB-6 (Sub-No. 468X), slip op. at 1-2 (STB served Nov. 27, 2009). BNSF’s response comments clearly address issues that will be central to the Board’s evaluation of the public interest in this proceeding.

The logical conclusion of Applicants’ argument is that no parties other than Applicants could have submitted filings on July 12. In fact, the procedural schedule explicitly permitted parties like BNSF to respond to the comments filed by other parties, and BNSF did just that. Applicants acknowledge that “[u]nder the Board’s procedural schedule, July 12 was the date for two sets of evidentiary submissions: (a) ‘Responses to comments, protests, requests for conditions, and other opposition – including responses to DOJ and USDOT filings,’ and (b) ‘Rebuttal in support of the Application.’” (Motion to Strike at 1-2) (citing Decision No. 11). But Applicants appear to believe that “Responses to comments” should be read by the Board to be limited to “Applicants’ Responses to comments,” not responses by other parties like BNSF. This cannot have been the Board’s intent, because “Rebuttal in support of the Application” would be entirely unnecessary if Applicants were the only parties entitled to respond to other party comments.

As further explained below, the response verified statements that Applicants seek to strike fully comport with Board precedent and the motion should be denied.

BNSF Witnesses Jon Gabriel and Travis Thowe

Applicants seek to strike the Response Verified Statement of BNSF witnesses Jon Gabriel and Travis Thowe that addressed concerns and conditions proposed by other parties on opening – notably UP and CN – relating to capacity and congestion in the Houston area. As Messrs. Gabriel and Thowe explained, portions of their response statement were addressed to opening comments by UP that “[a]dditional capacity would be required on all UP’s lines between Robstown and Beaumont to accommodate Applicants’ planned traffic volumes.” (See UP Comments 56, Feb. 28, 2022.) While UP did not present a capacity study, it requested that the Board impose conditions that would require capacity studies of the important Houston area. For its part, CN criticized Applicants’ inadequate evaluation of capacity and discussed the impact of yard activity on traffic flows, referring in part to the Englewood Yard in Houston as an example of serious consequences of inadequate yard capacity on network fluidity.

In response to these comments, Messrs. Gabriel and Thowe submitted a study from Mark Dinger of HNTB that considered the impacts of the new merger-related CP-KCS traffic using the widely-accepted RTC model. Notwithstanding concerns raised about capacity in the Houston terminal complex, neither Applicants nor any commenters – including UP, which owns and controls many of the rail lines in Houston – conducted any formal or detailed analysis of whether current Houston-area infrastructure can accommodate the increase in traffic projected by Applicants. The purpose of the HNTB study and the additional analysis done by BNSF’s witnesses to test the application of the RTC model was to “illustrate the types and scope of the issues presented by the new traffic and the need for Applicants to study these issues with the input of affected stakeholders.” (Response V.S. Gabriel-Thowe BNSF-12-50 to BNSF-12-51.) The discussion of the RTC model was fully responsive to the UP and CN comments highlighting the need for a formal capacity study of Houston and to the request for conditions that would require Applicants to conduct such a study to avoid harmful congestion in the Houston area.

Indeed, Applicants’ lack of any detailed modeling of capacity in the important Houston area was striking. As the Board is aware, RTC modeling has become a widely used approach to assessing the adequacy of capacity when traffic is proposed to be added to existing lines. Applicants themselves devoted vast attention and resources to RTC modeling of lines in Chicago in response to concerns raised by Metra. And even though Applicants were given the opportunity to supplement their operating plan after opening comments identified serious concerns with Houston capacity, Applicants provided the Board with no evidence or workpapers that sought to model the impact of merger-related traffic increases in the Houston area. Applicants’ empty assurances that everything will be OK in Houston are simply not sufficient.

The RTC evidence submitted by Messrs. Gabriel and Thowe in response to the UP and CN comments was not intended to identify particular capacity projects that will be needed to accommodate merger-related traffic increases. Rather, it was intended to show the Board the type

of study that must be conducted with input from all stakeholders to avoid harmful congestion in Houston. There is no justification for striking the RTC evidence. If Applicants truly believe that a careful and detailed study of Houston area capacity is unnecessary, they can try to convince the Board to rely on Applicants' vague assurances that all will be well.

Applicants took the opportunity in their letter motion to begin to respond substantively to the RTC evidence presented by BNSF's witnesses, and BNSF would not object to Applicants further filing a limited response to that evidence. Indeed, BNSF's objective is to ensure that the important issue of Houston capacity and congestion is given serious and focused attention. The Response Verified Statement of Messrs. Gabriel and Thowe should not be struck, but rather should be the starting point for a formal evaluation of the impact of merger-related traffic increases on capacity and congestion in Houston.

BNSF's Witnesses Dr. Reishus and Professor Wilson

Applicants also request that the STB strike in their entirety the Response Verified Statements of Dr. David Reishus and Professor William Wilson. Applicants assert that these statements are "out of bounds under the Board's principles" because they "seek[] to augment BNSF's case against the Transaction and in favor of the conditions BNSF itself has proposed." (Motion to Strike 4, 6.) But both statements fall squarely into the category of permissible response comments under the two principles that Applicants describe as applicable. First, Applicants claim that response comments must be "limited to responding to issues and arguments raised in the . . . initial round of comments and requests for conditions." (*Id.* at 2.) (citing Decision No. 31, FD 32760, at *3.) Second, response comments must be "directed to the impact of conditions that had *previously been proposed by others.*" (Motion to Strike 2.) The Response Verified Statements of Dr. Reishus and Professor Wilson comport fully with both of these principles.

Dr. Reishus explains in the second paragraph of his Response Verified Statement that he is addressing two issues that were raised by other parties *for the first time in their February 28 opening comments*. (Response V.S. Reishus BNSF-12-78.) The first issue involved the proportional rate conditions that certain parties have asked the Board to adopt as protection against the anticompetitive foreclosure of gateways. Dr. Reishus analyzed those proposed conditions and contrasted them with the condition proposed by BNSF. Dr. Reishus's analysis could not possibly have been submitted by BNSF on February 28, before BNSF and Dr. Reishus even knew what conditions were going to be proposed by other parties. The second issue addressed by Dr. Reishus was the implication for anticompetitive foreclosure of an analysis done by CN *on opening* that addressed a different topic, namely the apparent overstatement of traffic that can be expected to be diverted to the merged CP-KCS for movement to Mexico. Dr. Reishus explains that CN's diversion analysis shows that Applicants assume they will divert substantial traffic without engaging in price competition, which could only realistically be accomplished through anticompetitive foreclosure at the Mexican border. While the data underlying CN's analysis came from the Application, Dr. Reishus could not have analyzed the implications of the CN study until CN submitted it in its opening comments.

Similarly, Professor Wilson's Response Verified Statement is addressed to comments and requests for conditions submitted by other parties for the first time in their opening comments. Professor Wilson first addresses concerns expressed by certain U.S. wheat grower associations *in their opening comments* that the regulatory regime in Canada could unfairly prejudice U.S. grain growers in their competition with Canadian grain growers for access to markets in the United States and Mexico. Professor Wilson, a long-standing expert in the field, was able to explain why those opening comment concerns were valid. Professor Wilson, like Dr. Reishus, also addressed the differences in proportional rate conditions proposed by various other commenting parties on opening from the perspective of U.S. grain interests that value access to growing Mexican markets. The discussion by Professor Wilson of these conditions could not possibly have been presented to the Board before the conditions had even been proposed.

* * * * *

BNSF's Response Verified Statements were a proper response to the opening comments and requests for conditions submitted on February 28 by other parties. They were timely filed, they were well within the scope of permissible response comments under the Board's procedural schedule and precedent, and they will assist the Board in evaluating the public interest issues raised by the proposed merger. The Board should deny Applicants' attempt to exclude valuable and pertinent evidence from the record in this proceeding.

Ms. Cynthia Brown
July 28, 2022
Page 6

Respectfully submitted,

/s/ Anthony J. LaRocca
Anthony J. LaRocca
Peter W. Denton
John J. Kavanagh
Onika K. Williams
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036
(202) 429-3000

Adrian L. Steel, Jr.
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3237

Attorneys for BNSF Railway Company

cc: David L. Meyer
William A. Mullins
All Parties of Record

Ms. Cynthia Brown

July 28, 2022

Page 7

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *BNSF Response to CP Motion to Strike* to be served electronically or by first-class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams

Attorney for BNSF Railway Company

July 28, 2022