

BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. FD 36500

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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

Final Brief of LyondellBasell

Lyondell Chemical Company; Equistar Chemicals, LP; LyondellBasell
Acetyls, LLC; and LyondellBasell Advanced Polymers Inc. (collectively,
LyondellBasell) submits this Final Brief on the Application in this proceeding.

In its opening comments, LyondellBasell raised concerns that increased
traffic levels under Applicants' proposed operating plan would disrupt rail service
for traffic moving from LyondellBasell-owned or -operated facilities near Lake
Charles, LA and Corpus Christi, TX.¹ LyondellBasell also expressed concern that
reliable merger conditions are necessary to hold Applicants accountable to their
assurances that this Transaction is in the public interest.² Several commenters
have raised similar concerns, explaining that Applicants' predicted traffic levels will
almost certainly overwhelm existing infrastructure along the Gulf Coast, among

¹ (LyondellBasell Comments (LYB-3) at 4 (Feb. 28, 2022).)

² (*Id.* at 10.)

other locations, leading to severe congestion in Houston and on a line that Union Pacific Railroad shares with BNSF Railway and Kansas City Southern Railway Company (KCS)³ between Victoria and Robstown, TX.⁴ Commenters also have observed that Applicants' assurances to safeguard the public interest lack objective measures and substance.

To address these concerns, LyondellBasell requested three merger conditions that provide Lake Charles area shippers and Corpus Christi shippers with alternative routings on BNSF or UP that reduce exposure to Transaction-related congestion and service disruption along the Gulf Coast.⁵ Two of the requested conditions establish direct BNSF access to Lake Charles area⁶ shippers consistent with the Lake Charles Merger Conditions that the Board imposed as a condition of the Union Pacific/Southern Pacific (UP/SP) merger. A third condition grants Union Pacific with reciprocal-switch access to KCS-served facilities in Corpus Christi.

Applicants contend that these conditions are unnecessary or merely address pre-existing issues involving the UP/SP merger.⁷ These contentions are incorrect for

³ All references to KCS include the Kansas City Southern Railway Company and its affiliates.

⁴ (*E.g.*, BNSF Ry. Comments (BNSF-9) at 57-64 (Feb. 28, 2022); Union Pacific Comments (UP-10) at 50-59 (Feb. 28, 2022).)

⁵ (LyondellBasell Comments (LYB-3) at 3-4.)

⁶ The Lake Charles area encompasses Lake Charles, West Lake Charles, and Westlake, Louisiana. *BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry.* (BNSF Decision No. 8), FD 32760 (Sub-No. 46), slip op. at 2 n.3 (STB served Feb. 21, 2020). It also includes certain portions of an area known as Mossville, which Applicants describe as Lake Charles in the Application. (Application 1-72, 2-293.)

⁷ (Applicants' Response (CP-53/KCS-39) at I-320 to -323, July 12, 2022.)

several reasons. First, Applicants' operating plan increases operations in areas along the Gulf Coast that have little-to-no additional capacity, like Houston and the shared UP trackage rights line between Robstown and Victoria. Applicants provide little, if any, detail on how they plan to invest in infrastructure to support these operations. Second, to the extent the conditions do not enable LyondellBasell traffic to avoid **completely** the same lines that Applicants would use to handle that traffic, the conditions nevertheless allow traffic moving to or from the Texas Gulf Coast and Mexico alternative routing to avoid areas with a high-risk of Transaction-related service disruptions, such as Houston and portions of the trackage-rights line between Robstown and Victoria. Third, while LyondellBasell seeks conditions that reinforce the direct BNSF access granted by the Lake Charles Merger Conditions, the risk of service disruptions from **this Transaction** provides a new basis for this access. Fourth, to the extent Applicants suggest that their service-assurance process addresses LyondellBasell's service concerns, that process lacks clear service standards that can be readily enforced.

I. The Board should establish objective, readily enforceable merger conditions that hold CPKC to its assurances.

In its opening comments, LyondellBasell emphasized that merger conditions adopted in this proceeding must be reliable otherwise they may fail to protect the public interest.⁸ Applicants, however, have broadly resisted merger conditions in favor of several unenforceable, vague assurances intended to assuage concerns

⁸ (LyondellBasell Comments (LYB-3) at 10.)

about whether the Transaction is in the public interest. Applicants' failure to reinforce their assurances with objective merger conditions is alarming given the serious service and competition problems that stakeholders have identified with this Transaction. The Board thus should establish objective, readily enforceable merger conditions that hold Applicants accountable to their the assurances and protect the public interest.

Several commenters predict that the Transaction will harm the public interest absent objective, readily enforceable merger conditions pertaining to rail service and competitive access. BNSF, Canadian National Railway, and Union Pacific each have submitted extensive analyses demonstrating that the Transaction will overload rail capacity along the Gulf Coast between Houston and Laredo, among other areas.⁹ Also, BNSF, Union Pacific, and the Joint Associations provide analysis explaining how the Transaction increases the risk of extended bottlenecks and competition foreclosure.¹⁰ While Applicants dispute these concerns, shippers and their customers face significant consequences if these service and competition concerns hold true.

To address Transaction-related service and competition concerns, Applicants have made a number of vague assurances and commitments, which lack objective criteria. For example, Applicants have made a service promise with five "pillars,"

⁹ (*E.g.*, BNSF Ry. Comments (BNSF-9) at 57-64, Feb. 28, 2022; Canadian Nat'l Ry. Comments (CN-13), V.S. Randall (pdf pages 215-216, 243-244), Feb. 28, 2022; Union Pacific Comments (UP-10) at 50-59, Feb. 28, 2022.)

¹⁰ (*E.g.*, BNSF Ry. Comments (BNSF-9) at 32-44; Joint Ass'ns Comments (ACC-6/TFI-5/NITL-3) at 7-9, Feb. 28, 2022; Union Pacific Comments (UP-10) at 12-32.)

none of which identifies any objective performance standard or enforcement remedy.¹¹ Further, while Applicants have agreed to a merger condition imposing a five-year STB oversight period¹²—ostensibly for the Board to address service issues—that condition provides no guidance about the service levels that Applicants must achieve or the remedies that will be available to address service problems that may arise from the Transaction. Moreover, at the Board’s hearing in this proceeding, Applicants identified five of its “commitments,” including a commitment to “keep affected gateways open on commercially reasonable terms and create no new bottlenecks.”¹³ At the same time, however, Applicants resisted merger conditions that would hold them accountable to these commitments and refused to define “commercially reasonable” in any capacity other than an ability for a shipper to bring a rate case if it felt that it did not receive a reasonable bottleneck rate. Ultimately, Applicants have not offered or accepted any objective, readily enforceable commitment that addresses the potential harm that the Transaction may cause to shippers and their customers.

Absent objective, readily enforceable merger conditions to hold Applicants accountable to their assurances, stakeholders will lack certainty regarding the assurances being made and have difficulty availing themselves of any intended protections. As LyondellBasell explained in its opening comments,¹⁴ the Rosebluff

¹¹ (Applicant’s Response (CP-53/KCS-39) at 138-39.)

¹² (*Id.* at 140.)

¹³ (Applicants’ Hearing Presentation 4 (Oct. 5, 2022).)

¹⁴ (LyondellBasell Comments (LYB-3) at 10.)

Lead proceeding before the Board under docket FD 32760 (Sub-No. 46) provides an example of how disagreements between railroads over the scope and implementation of a merger condition, and years of litigation to enforce the condition, can frustrate the public interest that merger conditions are intended to protect.¹⁵

In sum, Applicants' specious assurances will not protect the public interest unless they are backed by objective, readily enforceable merger conditions. LyondellBasell, thus, urges the Board to adopt objective, readily enforceable merger conditions that hold Applicants accountable to their assurances and protect the public interest. These conditions should include the conditions that LyondellBasell has proposed.

II. Merger conditions are necessary to protect Lake Charles Area and Corpus Christi shippers from the high risk that this Transaction will degrade their rail service.

A. Lake Charles Protective Conditions.

LyondellBasell has proposed the following conditions to protect Lake Charles area traffic from Transaction-related service disruptions on the Gulf Coast:¹⁶

¹⁵ Today, after seven years of litigation during which the Board twice confirmed that the Lake Charles Merger Conditions provided BNSF direct access to rail customers accessible via a line called the Rosebluff Lead, BNSF's access via the Rosebluff Lead, including to a LyondellBasell facility, remains tied up in litigation between railroads to determine the compensation for the access. *See BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (BNSF Decision No. 8)*, FD 32760 (Sub-No. 46), slip op. at 3-4 (STB served Feb. 21, 2020) (explaining the history of this dispute). All this time, shippers on the Rosebluff Lead have not had the benefit of direct BNSF access pursuant to the Lake Charles Merger Conditions.

¹⁶ (LyondellBasell Comments (LYB-3) at 3.)

- Applicants shall grant BNSF immediate access via reciprocal switch or direct access to all facilities connected to any line over which BNSF has access under Lake Charles Merger Conditions, particularly with respect to Mossville, LA, which Applicants describe as being part of Lake Charles.¹⁷
- The Board will 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.

All of Applicants' reasoning in opposition contain flaws. First, Applicants dismiss these conditions as unnecessary, contending that LyondellBasell's service-related concerns have no basis and that the Applicants' proposed service-assurance process and Board oversight would address any service issues that arise.¹⁸ But the record in this proceeding contains extensive analysis by several railroads demonstrating that the Transaction poses significant service risks to Lake Charles area traffic and other traffic moving along the Gulf Coast.¹⁹ Further, the proposed service-assurance process and Board oversight provides no clear standard under which LyondellBasell can seek a remedy for Transaction-related service issues.

Second, Applicants argue that these conditions are unnecessary to address LyondellBasell's service concerns because the LyondellBasell-owned or -operated

¹⁷ (Application at 1-72, 2-293.)

¹⁸ (Applicants' Response (CP-53/KCS-39) at I-322 to -323.)

¹⁹ (*E.g.*, BNSF Ry. Comments (BNSF-9) at 57-64; Union Pacific Comments (UP-10) at 50-59.)

facilities in the Lake Charles area are already served by Union Pacific.²⁰ This argument ignores that the Lake Charles Merger Conditions provide these facilities with direct access to BNSF because Union Pacific does not provide Lake Charles area shippers competitive service options vis-à-vis KCS.²¹

Third, Applicants claim that these conditions would not resolve LyondellBasell's service concerns because BNSF would need to use the same lines as Applicants to serve the traffic, and LyondellBasell anticipates service disruptions over those lines.²² This claim ignores that Applicants' routing through Houston is a major source of service disruption for the traffic, whereas BNSF has options to route this traffic around the Houston terminal,²³ which would mitigate Transaction-related service disruptions for this traffic. Further, to the extent that Lake Charles area traffic moves to Mexico, BNSF has routing options to Eagle Pass that avoid the trackage rights lines between Houston and the Mexico gateway of Laredo, which Applicants anticipate using to route this traffic and which are vulnerable to Transaction-related service disruptions.

Fourth, Applicants contend that these merger conditions are an attempt to address pre-Transaction conditions.²⁴ This contention ignores that these merger

²⁰ (Applicants' Response (CP-53/KCS-39) at I-323.)

²¹ *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 66)*, FD 32760, slip op. at 8 (STB served Dec. 4, 1996).

²² (Applicants' Response (CP-53/KCS-39) at I-323.)

²³ BNSF Ry. Comments (BNSF-9) at 5, Feb. 28, 2022.

²⁴ (Applicants' Response (CP-53/KCS-39) at I-320.)

conditions are necessary to address service disruptions that **this Transaction** poses for Lake Charles area traffic moving on KCS, especially between the Lake Charles area and the Gulf Coast and Laredo. This risk of Transaction-related service disruptions provides a new basis for BNSF access to Lake Charles area shippers consistent with the Lake Charles Merger Conditions. Specifically, Transaction-related service disruptions would reduce the service that Applicants can provide, further eliminating Applicants as an effective competitor to Union Pacific, which also has access to Lake Charles area shippers. Paralleling the current situation, the Board implemented the Lake Charles Merger Conditions because direct BNSF access to Lake Charles area shippers was necessary to protect the public interest since KCS did not provide those shippers with service options that effectively compete with Union Pacific.²⁵ Thus, because Transaction-related service disruptions would reduce the service levels that Applicants would offer Lake Charles area traffic below those currently offered by KCS, the Transaction increases Lake Charles area shippers' need for direct BNSF access and is inconsistent with the public interest. These conditions would mitigate this public-interest harm by clarifying the terms of BNSF's access to Lake Charles area shippers so that it is more readily available.

In sum, this Transaction creates a high risk of service disruptions for traffic moving between the Lake Charles area and the Gulf Coast and Mexico. This

²⁵ *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 44)*, 1 S.T.B. 233, 427-28 (1996).

increases the importance of direct BNSF access under the Lake Charles Merger Conditions, which would provide LyondellBasell and other Lake Charles area shippers with routings that could avoid some or all of the Gulf Coast lines that face the greatest risk of Transaction-related disruption. The Board should thus establish merger conditions that protect this access to BNSF, consistent with the Lake Charles Merger Conditions.

B. Corpus Christi Protective Condition.

To reduce service disruptions arising from the Transaction to traffic that may move to or from LyondellBasell's Corpus Christi facility, LyondellBasell has proposed the following merger condition:

Applicants shall provide Union Pacific Railroad with access via reciprocal switch at Robstown, TX, to Corpus Christi shippers located on the short KCS branch line that connects to KCS's north-south corridor at Robstown, TX, and runs east into Corpus Christi.²⁶

Applicants claim that this condition would not avoid service disruptions because Union Pacific would handle the traffic on the same lines as Applicants.²⁷ This overlooks that Union Pacific could move this traffic on its line between Corpus Christi and San Antonio, which appears to avoid moving the traffic along any portion of the trackage rights lines that Applicants would use on the Gulf Coast.²⁸

²⁶ (LyondellBasell Comments (LYB-3) at 3-4.)

²⁷ (Applicants' Response (CP-53/KCS-39) at I-323.)

²⁸ Some Corpus Christi shippers on the same KCS line as the LyondellBasell facility have access to Union Pacific via a reciprocal switch that appears to occur in Corpus Christi. KCS Tariff 8100-E, Item 250 (Mar. 1, 2022). If extended to LyondellBasell, this reciprocal switch access appears to allow Union Pacific to move

Applicants also contend that the Transaction does not present any service-related concerns warranting this condition. But, as explained above concerning the Lake Charles conditions, the Transaction would add traffic to an already congested Houston terminal and strain the capacity of the trackage-rights lines running between Robstown and Houston. Further, Applicants' service assurances and service-related conditions provide no clear standard to which Applicants will be accountable.

Ultimately, the proposed Corpus Christi condition is a sensible approach to mitigate the risk of Transaction-related service disruptions affecting traffic originating on the KCS line connecting Robstown and Corpus Christi.

LyondellBasell's traffic to San Antonio on Union Pacific's Corpus Christi subdivision, without the traffic moving on the trackage rights line between Robstown and Victoria.

III. Conclusion.

For the foregoing reasons, LyondellBasell respectfully requests that the Board establish conditions on the Transaction as described in its comments.

Respectfully submitted,

/s/ Jason D. Tutrone
Jason D. Tutrone
Jeffrey O. Moreno
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, DC 20036
(202) 263-4143

Jason.Tutrone@ThompsonHine.com
Jeff.Moreno@ThompsonHine.com

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

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Certificate of Service

I certify that I have this day served copies of this 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

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