

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 UP's Petition for Reconsideration of Procedural Schedule

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On May 4, 2018, UP¹ filed a petition for reconsideration of the Board's *Decision No. 4* in the above-captioned proceeding (UP/SP-426 or the "UP Petition"). BNSF respectfully requests that the Board deny the UP Petition and affirm the procedural schedule set forth in *Decision No. 4*.

ARGUMENT

Pursuant to 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.3(b), the Board will grant a petition for reconsideration only upon a showing that: (1) the prior action will be affected materially because of new evidence or changed circumstances, or (2) the prior action involves material error. *See, e.g., New England Cent. R.R., Inc.—Trackage Rights Order—Pan Am S. LLC*, FD 35842, slip op. at 4 (STB served April 26, 2018) ("*New England Central*"). While UP neglected to mention the Board's rules governing petitions for reconsideration or cite to any

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.

precedent regarding the Board's application of these standards, UP did allege that the Board's scheduling order "involves material error" and that "changed circumstances" have occurred.

1. The Prior Action Did Not Involve "Material Error."

As the Board affirmed in recent weeks, "[i]n a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error." *New England Central*, slip op. at 4 (citing *Can. Pac. Ry.—Control—Dakota, Minn. & E. R.R.*, FD 35081, slip op. at 4 (STB served May 7, 2009)). However, rather than substantiate its material error claims, UP has simply provided citations to three cases setting forth axiomatic administrative law principles with no application to the facts of this case or to the Board's material error standard.

First, UP argued that *Decision No. 4* "involves material error because the agency failed to consider [UP's] arguments in our motion to establish a procedural schedule or explain its reasons for disregarding them." UP Petition at 1. Rather than ignoring UP's motion to establish a procedural schedule, as UP alleges, the Board unambiguously stated that it adopted the schedule "[a]fter considering UP's and BNSF's respective requests concerning a procedural schedule." *Decision No. 4*, slip op. at 8; see also, *id.*, slip. op. at 3-4 (describing the UP motion and BNSF's reply). Indeed, UP and BNSF each presented their respective arguments with respect to the schedule that will govern this proceeding, the Board considered these arguments and then issued its decision. See *City of Ozark, Ark.—Petition for Declaratory Order*, FD 36104, slip op. at 5 (STB served Dec. 8, 2017) ("The Board considered the evidence presented by both parties and found the evidence submitted by UP more persuasive."). Just because UP disagrees with the Board's conclusion does not substantiate UP's claim of material error.

Second, UP argued that the procedural schedule set forth in *Decision No. 4* “fails to provide [UP] sufficient time to prepare and present reply evidence addressing the complex operating issues presented by BNSF’s Petition.” UP Petition at 1. UP did not even attempt to substantiate this material error claim, and instead directed the Board to a Supreme Court homily to due process. The Board has rejected similar due process arguments in a petition for reconsideration where the petitioner was an active participant in the proceeding and did not present any evidence that the petitioner “suffered actual harm as a result of the procedural schedule.” *Norfolk S. Ry.—Acquisition & Operation—Certain Rail Lines of the Del. & Hudson Ry.*, FD 35873, slip op. at 6-7 (STB served May 15, 2015).

UP has known for eighteen months that BNSF is seeking to directly serve the LyondellBasell facility at West Lake Charles using the terminal trackage rights over the Rosebluff Lead ordered by the Board in *Decision No. 3*. See BNSF Petition at 5. UP has had nearly four months to review the BNSF Petition and to prepare its reply. If UP has indeed “made diligent use of its time since BNSF filed its Petition,” UP Petition at 4, then the procedural schedule ordered by the Board should be sufficient. In short, UP has not met its burden in proving that the Board’s procedural schedule decision involved material error.

2. No “Changed Circumstances” Have Occurred That Would Affect The Prior Action Materially

UP also claims that “BNSF’s slow response to discovery constitutes changed circumstances that would justify reconsideration.” UP Petition at 3. To the contrary, BNSF has worked diligently to address UP’s discovery requests.² In each instance where UP has requested

² BNSF believed that it had completed its production nearly two months ago, on March 15, 2018. See UP Petition, Ex. A at 5. UP then requested the production of further materials on April 9, 2018. *Id.* at 3-4. BNSF identified certain documents that were responsive to UP’s request, but that BNSF initially withheld because they were subject to the attorney-client privilege or the attorney work product doctrine. *Id.* at 3. In the spirit of cooperation, BNSF provided a

additional materials, BNSF has reviewed its documents and responded in a timely fashion. UP has not objected to the timeliness of BNSF's responses to discovery prior to the UP Petition, and has not sought the Board's assistance in compelling BNSF to answer the discovery requests.

Moreover, UP's claim of "changed circumstances" is missing an essential element – *change*. In fact, since the Board issued *Decision No. 4*, nothing has changed. In that decision, the Board acknowledged that discovery was ongoing, and that the Board "expects the parties to continue to work to resolve discovery issues efficiently and cooperatively." *Decision No. 4*, slip op. at 9. That is exactly what is happening: BNSF has worked to resolve discovery issues and commits to its continued cooperation with the parties throughout the discovery process.

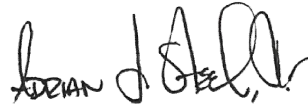
Furthermore, UP does not even address the Board's frequent holding that if a party has demonstrated no changed circumstances that "would mandate a different result, then the Board will not grant reconsideration." *Atlanta Dev. Auth. d/b/a Invest Atlanta & Atlanta Beltline, Inc.—Verified Petition for a Declaratory Order*, FD 35991, slip op. at 4-5 (STB served May 26, 2017) (quotations and citations omitted). UP has adduced no basis for concluding that, if the Board had considered the pace and conduct of the discovery process, it would or should have established a different procedural schedule.

CONCLUSION

Because UP has not met its burden for reconsideration, the Board should deny the UP Petition.

conditional waiver of the attorney-client privilege and of the attorney work product protections in order to produce those further documents. *Id.* at 2.

Respectfully submitted,



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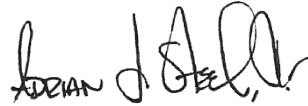
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Dated: May 7, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2018, copies of the foregoing BNSF's Reply to UP's Petition for Reconsideration of Procedural Schedule have been served by e-mail on Counsel for UP and KCSR.

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

Adrian L. Steel, Jr.