

245809

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

ENTERED
Office of Proceedings
May 25, 2018
Part of
Public Record

William A. Mullins

Direct Dial: (202) 663-7823
wmullins@bakerandmiller.com

May 25, 2018

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: FD 32760 (Sub-No. 46), BNSF Railway Company – Terminal Trackage Rights –
Kansas City Southern Railway Company and Union Pacific Railroad Company

EXPEDITED CONSIDERATION REQUESTED

Dear Ms. Brown:

Enclosed is The Kansas City Southern Railway Company's ("KCS") Motion to Compel Responses to KCS's First Set of Discovery Requests to BNSF ("Motion"). KCS requests expeditious consideration of the issues addressed herein. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS APPLICATION --
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

**THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
MOTION TO COMPEL RESPONSES TO
KCS'S FIRST SET OF DISCOVERY REQUESTS TO BNSF**

EXPEDITED CONSIDERATION REQUESTED

**W. James Wochner
David C. Reeves
THE KANSAS CITY SOUTHERN
RAILWAY COMPANY
P.O. Box 219335
Kansas City, MO 64121-9335
Telephone: (816) 983-1324
Facsimile: (816) 983-1227**

May 25, 2018

**William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

**Attorneys for The Kansas City Southern
Railway Company**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS APPLICATION --
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

**THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
MOTION TO COMPEL RESPONSES TO
KCS'S FIRST SET OF DISCOVERY REQUESTS TO BNSF**

EXPEDITED CONSIDERATION REQUESTED

Pursuant to 49 CFR § 1114.31(a), The Kansas City Southern Railway Company ("KCS") hereby moves for an order compelling BNSF Railway Company ("BNSF") to produce documents related to two discovery requests contained in KCS's First Set of Discovery Requests to BNSF, which were served on BNSF on May 1, 2018 ("KCS's First Requests"). While BNSF has been cooperative in discovery and has worked with KCS to resolve most of KCS's concerns regarding BNSF's initial production of documents and responses to KCS's First Requests, this Motion is necessary because BNSF has, on the basis of a relevancy argument, refused to produce any documents directly related to the compensation issues that are directly related to BNSF's January 12, 2018 petition ("BNSF's Petition"). Specifically, KCS asks the Board to order BNSF to fully respond to Document Request Nos. 7 and 9, which collectively seek information related to compensation that BNSF is required to pay KCS and Union Pacific ("UP") in the event the Board grants BNSF direct operating rights over the jointly-owned facilities in order to serve Lyondell.

The standard of relevancy is a broad one. KCS is entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). “The requirement of relevance means that the information might be able to affect the outcome of a proceeding.” Waterloo Ry.—Adverse Aban.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. in Aroostook County., Me., AB-124 (Sub-No. 2), et al. (STB served Nov. 14, 2003). It “is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(2). See also Ballard Term. R.R. – Acquisition & Operation Exemption – Woodinville Subdivision, FD 35731, slip op. at 3 (STB served Aug. 22, 2013) (“Ballard”) and Seminole Electric Coop., Inc. v. CSX Transport, Inc., NOR 42110, at 2 (STB served Feb. 17, 2009).

The issue of compensation is an issue in this proceeding. BNSF has asked the Board to set conditions of use and compensation for BNSF to provide direct service to Lyondell. The statute requires that BNSF provide compensation to both KCS and UP. BNSF itself acknowledged that it is asking the Board to establish trackage rights terms and compensation “under the principle controlling compensation in condemnation proceedings.”¹ Yet, BNSF has failed to produce any responsive documents to two questions directly related to developing and determining the compensation due under the statute.

For Document Request No. 7, BNSF was asked to “[p]roduce Documents sufficient to show BNSF’s payment per car for reciprocal switching of traffic to and from Lyondell’s Lake Charles Facility.” The information sought in Document Request No. 7 is relevant or consistent

¹ BNSF’s Petition at 15.

with the Ballard standard as it is directly related to compensation and is reasonably calculated to lead to the discovery of admissible evidence.

Yet, BNSF responded to Document Request No. 7 as follows:

Subject to and without waiving the General Responses and General Objections set forth above, BNSF objects to this request because it is overbroad and seeks information or documents that are neither relevant to the subject matter involved in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. BNSF's payments for its current reciprocal switching service are irrelevant to the compensation terms that the Board will establish through this proceeding for BNSF direct service.

BNSF is not the arbiter of what is and what is not relevant to KCS's ability to undertake a compensation analysis nor in determining how the Board will establish compensation in this proceeding. The amount of current compensation BNSF pays UP may or may not be consistent with the "principle controlling compensation in condemnation proceedings." 49 U.S.C. § 11102(a). Yet, KCS cannot know the answer to that question if BNSF refuses to produce any information related to its current compensation payments. Such information will facilitate KCS's analysis of the proper level of compensation that the Board may eventually be required to establish in this proceeding.

Likewise, Document Request No. 9 requested BNSF to "[p]roduce any calculations, reports, or analysis completed relating to the costs of serving Lyondell directly and through reciprocal switching." BNSF responded to Document Request No. 9 as follows:

BNSF objects to this request because it is overbroad and seeks information or documents that are neither relevant to the subject matter involved in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, and without waiving the General Responses and General Objections set forth above, BNSF states that it will produce any responsive documents it may identify regarding the costs of BNSF direct service to Lyondell."

Despite claiming that it will produce responsive documents, BNSF has produced no documents in response to Document Request No. 9. Upon clarification discussions, counsel for BNSF has indicated to KCS that there are no such documents related to the “costs of BNSF direct service to Lyondell.” See Exhibit A. KCS accepts BNSF’s response with respect to documents related to the costs associated with directly serving Lyondell. However, as it did with respect to the documents sought in Document Request No. 7, BNSF is refusing, on relevancy grounds, to produce any “calculations, reports, or analysis completed relating to the costs of serving Lyondell. . . through reciprocal switching.”

KCS requests the Board to compel BNSF to produce the documents requested in Document Request No. 9 to the extent there are any “calculations, reports, or analysis completed relating to the costs of serving Lyondell . . . through reciprocal switching.” In conducting any analysis or studies related to determining the level of compensation due KCS and UP, the current costs associated with serving Lyondell through reciprocal switch is directly relevant to whether or not the existing rate is consistent with the “principle controlling compensation in condemnation proceedings.” Neither KCS nor the Board can make the requisite statutory findings if BNSF is refusing to produce any documents related to its existing compensation levels. BNSF should not be able to withhold responsive information during discovery simply because it deems in its sole opinion that the information is irrelevant.²

EXPEDITED CONSIDERATION REQUESTED

KCS respectfully requests expedited consideration for this Motion in order to provide KCS with sufficient time to incorporate any responses into its June 25 reply comments. As the

² See Iowa Public Service Company v. Burlington Northern Railroad Company and Chicago and Northern Western Transportation Company, No. 37021; No. 37029, 1985 ICC LEXIS 542, at *6-*8 (March 11, 1985).

procedural schedule currently stands, KCS's response is due on June 25, 2018. Under the Board's rules, BNSF has twenty days (until June 14, 2018) to respond to this Motion. Assuming BNSF waits until June 14th to respond, the Board would have very little time to issue a decision, and order the relevant documents produced (if it is inclined to do so); and, KCS would have virtually no time to analyze the documents and incorporate them into its reply. Accordingly, KCS requests that BNSF respond expeditiously and the Board rule on this Motion expeditiously.

CONCLUSION

KCS respectfully requests that the Board consider this motion on an expedited basis and compel BNSF to promptly respond to Document Requests 7 and 9. The Document Requests that are the subject of this Motion are reasonable and relevant and directly related BNSF's Petition to have the Board set the conditions of use and compensation for BNSF to provide direct service to Lyondell.

Respectfully submitted,



William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

Attorneys for Kansas City Southern Railway
Company

May 25, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by mailing copies of The Kansas City Southern Railway Company's Motion to Compel Responses to KCS's First Set of Discovery Requests to BNSF via prepaid first class mail to all parties of record in these proceedings or by more expeditious means of delivery.

Dated at Washington, D.C. this 25th day of May, 2018.



William A. Mullins
Attorney for Kansas City Southern Railway
Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS APPLICATION --
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

**THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S
MOTION TO COMPEL RESPONSES TO
KCS'S FIRST SET OF DISCOVERY REQUESTS TO BNSF**

EXHIBIT A



RE: BNSF's Responses To KCS First Discovery Request

Denton, Peter W.

to:

WMullins@bakerandmiller.com

05/25/2018 03:24 PM

Cc:

"Steel, Jr., Adrian L.", "Long, Clarence D.", "CZorbaugh@bakerandmiller.com",

"mrosenthal@cov.com"

Hide Details

From: "Denton, Peter W." <PDenton@mayerbrown.com>

To: "WMullins@bakerandmiller.com" <WMullins@bakerandmiller.com>

Cc: "Steel, Jr., Adrian L." <AS steel@mayerbrown.com>, "Long, Clarence D."

<CLong@mayerbrown.com>, "CZorbaugh@bakerandmiller.com"

<CZorbaugh@bakerandmiller.com>, "mrosenthal@cov.com" <mrosenthal@cov.com>

History: This message has been replied to.

Bill,

BNSF objected on relevancy grounds to the entirety of Document Request No. 7.

With respect to Document Request No. 9, BNSF objected on relevancy grounds to the portion of the request related to the costs of **reciprocal switching** service, and BNSF stated that it would produce any responsive documents it may identify regarding the costs of BNSF **direct** service to Lyondell. BNSF has located no such documents.

Regards,
Peter

Peter W. Denton

Mayer Brown LLP

D +1-202-263-3329

M +1-202-276-2900

From: WMullins@bakerandmiller.com [<mailto:WMullins@bakerandmiller.com>]

Sent: Friday, May 25, 2018 3:18 PM

To: Denton, Peter W.

Cc: Steel, Jr., Adrian L.; Long, Clarence D.; CZorbaugh@bakerandmiller.com; mrosenthal@cov.com

Subject: RE: BNSF's Responses To KCS First Discovery Request

Peter

For Document Request No. 9, you stated that "BNSF will produce any responsive documents it may identify regarding the costs of BNSF direct service to Lyondell." We have no record of BNSF producing any documents responsive to this request. Is that because you are saying that BNSF has no such documents or are you still looking and will produce any such documents? OR, are you claiming, like you did with respect to No. 7, that such information is not relevant?

William ("Bill") A. Mullins

Partner

Baker and Miller PLLC

Suite 300

2401 Pennsylvania Ave, N.W.

Washington, D.C. 20037

(202) 663-7823 (Direct)

(202) 663-7849 (Fax)

The above message may be privileged, confidential and protected from disclosure by attorney/client, work product or other privileges. If you believe that it has been sent to you in error, do not read it. Please reply to the sender that you have received the message in error. Then delete it. Thank you.

From: "Denton, Peter W." <PDenton@mayerbrown.com>

To: "WMullins@bakerandmiller.com" <WMullins@bakerandmiller.com>

Cc: "CZorbaugh@bakerandmiller.com" <CZorbaugh@bakerandmiller.com>, "mrosenthal@cov.com" <mrosenthal@cov.com>, "Steel, Jr., Adrian L." <ASSteel@mayerbrown.com>, "Long, Clarence D." <CLong@mayerbrown.com>

Date: 05/25/2018 01:53 PM

Subject: RE: BNSF's Responses To KCS First Discovery Request

Bill,

Further to my email yesterday afternoon, BNSF has completed its search for additional documents responsive to the two issues highlighted in yellow below. Attached is an additional document, designated as Highly Confidential, that BNSF is producing in response to KCSR Document Request No. 1. There is nothing further. The password for the attached ZIP file is

Regards,
Peter

Peter W. Denton

Mayer Brown LLP

D +1-202-263-3329

M +1-202-276-2900

From: Denton, Peter W.

Sent: Thursday, May 24, 2018 4:40 PM

To: 'WMullins@bakerandmiller.com'

Cc: CZorbaugh@bakerandmiller.com; mrosenthal@cov.com; Steel, Jr., Adrian L.

Subject: RE: BNSF's Responses To KCS First Discovery Request

Bill,

Please see our responses below to your questions, in blue/bold text. We would be happy to discuss further if you would like.

Regards,
Peter

Peter W. Denton

Mayer Brown LLP

D +1-202-263-3329

M +1-202-276-2900

From: WMullins@bakerandmiller.com [<mailto:WMullins@bakerandmiller.com>]
Sent: Tuesday, May 22, 2018 11:51 AM
To: Steel, Jr., Adrian L.; Denton, Peter W.
Cc: CZorbaugh@bakerandmiller.com; mrosenthal@cov.com
Subject: BNSF's Responses To KCS First Discovery Request

Adrian & Peter,

We have reviewed the Responses and Objections of BNSF to The Kansas City Southern Railway Company's First Set of Discovery Requests to BNSF as served on May 16, 2018 ("Response"). I am writing to make a good faith attempt to resolve some questions that we have concerning the Response. Hopefully, we can resolve these issues expeditiously and limit the scope of any motion to compel that KCSR may find it necessary to file.

Document Request No. 1 requested that "BNSF Produce all Documents, contracts, and Agreements between Lyondell and BNSF related to BNSF service to the Lake Charles Facility, including but not limited to any contracts referencing BNSF Direct Service on the Montell Lead and any drafts, agreements, and negotiations, relating to any BNSF service, past, present, future, or potential service, between Lyondell and BNSF for service to the Lake Charles Facility."

The Response directed KCSR to certain documents previously produced by BNSF including BNSF-HC-0002824, which was an agenda for a meeting between Lyondell Bassell ("Lyondell") and BNSF that included discussing Direct Service at Lake Charles. KCSR requests that BNSF produce any notes from the January 5, 2017 meeting and any related follow-up e-mails related to that meeting.

BNSF is searching for any notes and follow-up emails related to the cited January 5, 2017 meeting and will review any identified documents for production, subject to any applicable objections.

Additionally, on May 16, 2018, BNSF produced several sections of a contract between BNSF and Lyondell that was extensively redacted. Given the protective order is in place, KCSR requests that BNSF provide an unredacted version of the documents produced as BNSF-HC-0003044 through BNSF-HC-0003092.

BNSF did not redact the contractual documents due to confidentiality concerns, but rather because the redacted information consists wholly of commercial information that is not related to operational issues and thus is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Lastly, BNSF stated that: (1) it will produce any additional documents it may identify regarding operational issues; and (2) to the extent that this request seeks commercial information unrelated to operational issues, BNSF objects to this request on the grounds that it seeks information or documents (a) that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and (b) that constitute or disclose information that would result in the violation of any contractual obligation to a third party or in the violation of 49 U.S.C. § 11904.

Please confirm whether BNSF has located any additional Documents related to Document Request No. 1 that it intends to produce or withhold, and if it intends to withhold any Documents provide the basis for BNSF's refusal to produce said Documents.

BNSF has identified no further documents responsive to Document Request No. 1 that it intends to produce or withhold.

Document Request No. 5 requested that BNSF “Produce all Documents regarding BNSF’s ability to use the Connecting Track, including but not limited to any Communications, Agreements, contracts, studies, or reports.”

BNSF objected to Document Request No. 5 on various grounds and further asserted that in Decision No. 4, slip op. at 7-8 (served May 1, 2018), the Board stated that it can rule on BNSF’s petition before BNSF has obtained any necessary operating rights.

KCSR seeks confirmation of whether BNSF has withheld any potentially relevant Documents on the basis of BNSF’s various objections.

Because BNSF objects to this request on the basis of relevancy, BNSF has not conducted a search for documents that would be responsive to Document Request No. 5.

Document Request No. 6 requested that BNSF “Produce all Communications and Agreements, and all Documents relating to any such Communications or Agreements, relating to BNSF’s use of the Montell Lead to serve Lyondell or any other Shipper accessible from the Montell Lead.”

For Document Request No. 6, BNSF produced a number of Documents, including BNSF-C-0002939, which is an e-mail from July 2017. The e-mail indicates that in July 2017, BNSF and Port of Lake Charles (“Port”) were in the process of drafting an agreement to allow BNSF access to the Port’s facilities. KCSR has reviewed the Documents produced by BNSF and no communications were produced after July 2017. KCSR requests that BNSF review its files and produce all correspondence, communications, Documents, observations, and agreements between the Port and BNSF, including the proposed contract that was discussed in the e-mail designated BNSF-C-0002939.

BNSF is searching for any additional documents related to this request and will review any identified documents for production, subject to any applicable objections

Additionally, the Documents produced by BNSF do not appear to include any correspondence, communications, documents, and or agreements, between BNSF and Lyondell, concerning BNSF providing direct service to Lyondell over the Montell Lead. KCSR requests that BNSF review its files and produce all correspondence, communications, documents, observations, and agreements between the Lyondell and BNSF concerning BNSF’s ability to provide direct service over the Montell Lead, including proposed service times, proposed conditions of service, and any service expectations.

Please refer to BNSF-C-0002919 and 2920, and BNSF-HC-0002824 and 2849. BNSF has identified no further documents that are responsive to this request.

In the Response, BNSF states that it will produce any additional documents it may identify that are responsive to Request No. 6. Please confirm whether BNSF has located any additional documents related to Document Request No. 6 that it intends to produce or withhold, and if it intends to withhold any documents provide the basis for BNSF’s refusal to produce said documents.

BNSF has identified no further documents responsive to Document Request No. 6 that it intends to produce or withhold.

Document Request No. 12 – For Document Request No. 12, BNSF states it will produce any additional documents it may identify responsive to the request, which seeks documents “comparing or contrasting BNSF direct service to CITGO and BNSF direct service to Lyondell.”

Please confirm whether BNSF has located any documents related to Document Request No. 12 that it intends to produce or withhold, and if it intends to withhold any documents provide the basis for

BNSF's refusal to produce said documents.

BNSF has identified no further documents responsive to Document Request No. 12 that it intends to produce or withhold.

Document Request No. 13 requests that BNSF "Produce any Documents, including reports, studies, observations, Communications, or analysis, relating to the use of the Montell Lead to service Lyondell."

For Document Request No. 13, BNSF produced a number of Documents, including BNSF-C-0002939, which is an e-mail from July 2017; the e-mail indicates that in July 2017, BNSF and Port were in the process of drafting an agreement to allow BNSF access to the Port's facilities. KCSR has reviewed the Documents produced by BNSF and no communications were produced after July 2017. KCSR requests that BNSF review its files and produce all correspondence, communications, Documents, observations, and agreements between the Port and BNSF, including the proposed contract that was discussed in the e-mail designated BNSF-C-0002939.

See BNSF's response above to the same question in Document Request No. 6.

In the Response, BNSF states that it will produce any additional documents it may identify that are responsive to Request No. 13. Please confirm whether BNSF has located any additional documents related to Document Request No. 13 that it intends to produce or withhold, and if it intends to withhold any documents provide the basis for BNSF's refusal to produce said documents.

BNSF has identified no further documents responsive to Document Request No. 13 that it intends to produce or withhold.

Document Request No. 14 requests that BNSF "Produce all Documents relating to BNSF's decision to provide Direct Service to Lyondell's Lake Charles Facility, including but not limited to any analysis of feasibility or cost, and Communications with Lyondell or third parties."

BNSF produced a handful of documents and further stated that it will produce any additional documents it may identify that are responsive to Request No. 14. Please confirm whether BNSF has located any documents related to Document Request No. 14 that it intends to produce or withhold, and if it intends to withhold any documents provide the basis for BNSF's refusal to produce said documents.

BNSF has identified no further documents responsive to Document Request No. 14 that it intends to produce or withhold.

Please let me know if you have any questions or would like to discuss the above noted concerns. As you know, any motion to compel that KCSR may determine to file with respect to the deficiencies in BNSF's responses is due no later than Monday, May 29, 2018 (because of the upcoming holiday weekend). Thus, I request that you respond promptly. Thank you.

William ("Bill") A. Mullins
Partner
Baker and Miller PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
(202) 663-7823 (Direct)
(202) 663-7849 (Fax)

The above message may be privileged, confidential and protected from disclosure

by attorney/client, work product or other privileges. If you believe that it has been sent to you in error, do not read it. Please reply to the sender that you have received the message in error. Then delete it. Thank you.

This email and any files transmitted with it are intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify the system manager. If you are not the named addressee you should not disseminate, distribute or copy this e-mail.

[attachment "BNSF_HC_012 Highly Confidential May 25 2018 11th Production.zip" deleted by William Mullins/bakermiller]