

BAKER & MILLER PLLC

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

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

William A. Mullins

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

February 25, 2019

247194

VIA E-FILING

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

ENTERED
Office of Proceedings
February 25, 2019
Part of
Public Record

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

Dear Ms. Brown:

Please find enclosed The Kansas City Southern Railway Company's ("KCS") Reply to the comments filed pursuant to Decision No. 6. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

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

**THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S REPLY
TO DECISION NO. 6**

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

**William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
Telephone: (202) 663-7823
Facsimile: (202) 663-7849**

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

February 25, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

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

**THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S REPLY
TO DECISION NO. 6**

PREFACE

In Decision No. 6, the Board requested that KCS, UP and BNSF (collectively "Parties") respond to certain questions and information requests. On February 4, 2019, the Parties did so. Consistent with Decision No. 6, as modified by a Director's Decision served January 29, 2019, KCS is hereby filing this reply to the comments of UP and BNSF.¹

SUMMARY

BNSF continues to insist that it should pay no more than the Prescribed Fee that it had negotiated with UP in a series of three private agreements (and without KCS participation). It provided no evidence or even legal argument that the Prescribed Fee (or SSW² for that matter) meets the statutory requirement that such a fee be equivalent to a fee set under the "principle controlling compensation in condemnation proceedings." UP did not propose a fee and likewise provided no data or argument that the Prescribed Fee or SSW met the statutory standard. Only

¹ Citations to the Parties' February 4 filings will be referred to as "[Name of Railroad Filer] Compensation" at [page(s)].

² While not endorsing the use of SSW, BNSF does indicate that if the Board decides to apply SSW, it should be modified in certain ways that are favorable to BNSF.

KCS has provided the Board with a compensation approach. KCS provided data and legal argument showing that the suggested KCS approach meets the statutory requirement of 49 U.S.C. §11102(a). As such, if the Board does move forward with establishing compensation to govern BNSF's use of KCS's property - which it should not do because there is no basis in law or fact for providing BNSF with direct terminal trackage rights - at a minimum the Board should (and must, given the lack of evidence from UP and BNSF) adopt KCS's compensation proposal.

KCS also provided market share information establishing that BNSF, since the Lake Charles Condition was first imposed, has been a very effective competitor via its switching and haulage rights for Lyondell traffic. The data shows that BNSF is more than fulfilling the intent of the Lake Charles Condition – which was to ensure that Lyondell (and other shippers) would continue to have competitive options in a post-UP/SP merger environment. In contrast, BNSF has not provided any economic or competitive data establishing that BNSF needs direct terminal trackage rights to preserve Lyondell's pre-UP/SP merger competitive situation. The market share data clearly establishes that BNSF has been a very effective competitor through switching access and has the substantial market share. BNSF has achieved this competitive advantage despite the fact that it is paying UP \$315.92 per car.³ By contrast, KCS receives nothing from BNSF for use of KCS's property.

If the Board moves forward with granting direct access, KCS's market-based compensation approach for BNSF direct access results in a rate that is similar to or even lower than the current rate BNSF pays. Thus, adopting KCS's proposed rate will not prevent BNSF from continuing to compete, and would allow BNSF to provide the direct service they say that Lyondell needs.

³ BNSF Compensation at 5.

All Parties acknowledge that if the Board adopts an SSW-based compensation approach, additional discovery and proceedings must take place. BNSF suggests that those proceedings could take a year or more, and that, therefore, BNSF should be allowed to begin operations before the compensation is set pursuant to such a proceeding.

The Board should reject BNSF's request to begin operating while the compensation is being determined. The statute requires that the "compensation" first be set, and then either be paid or "adequately secured," before BNSF may exercise those rights. And because BNSF already serves Lyondell, there is no reason to allow BNSF to operate before the compensation is set. There is no claim or evidence Lyondell will be harmed during the pendency of any such compensation proceeding.⁴ In addition, it is essential that the Board establish specific conditions of access, such as when BNSF may operate, remedies available to KCS when BNSF disrupts KCS's operations, BNSF's shared responsibility for maintenance costs, and BNSF's liability for property damage and personal injury resulting from its operations before turning BNSF loose to operate in the severely congested environment that is the Rosebluff Lead.

Although BNSF purports to be anxious to begin direct operations and bemoans the delays associated with this proceeding, those delays are largely of BNSF's own making. BNSF delayed roughly nine months before asking the Board to set operating and compensation terms. Compensation and operating issues with KCS potentially could have been resolved if BNSF's approach had been anything other than the inflexible insistence repeated in its pleadings that it be granted unlimited access and that it pay KCS nothing for that access. This case potentially could

⁴ Because BNSF already provides competitive service to Lyondell and others, and very effectively, there will be no harm to shippers during the pendency of any compensation proceeding or any further legal proceedings. Shippers today have the benefit of competitive BNSF service today, and will continue to have that service in the future.

have been resolved long ago through negotiations with KCS if BNSF had shown any flexibility in its position. It did not.

Finally, BNSF should know full well that a Board decision granting BNSF direct terminal trackage rights will not resolve the case. There are several further legal obstacles to BNSF access that are outside of the Board's jurisdiction that need to be resolved through negotiations with KCS and others. If, in the end, BNSF cannot overcome those obstacles, BNSF is not without remedies. If the Restated and Amended Settlement Agreement ("RASA") provides BNSF the right to direct access to Lyondell, as BNSF claims,⁵ the agreement also provides a means of resolving disputes. If BNSF were actually harmed by denial of access, BNSF can make that claim under the RASA's dispute resolution mechanism and seek appropriate damages. That is the proper remedy.

I. ONLY KCS HAS PUT FORTH A COMPENSATION PROPOSAL CONSISTENT WITH STATUTORY AND CONSTITUTIONAL REQUIREMENTS.

A. BNSF Has Presented No Evidence Meeting The Statutory Standard

Pursuant to 49 U.S.C. §11102(a), when the Board grants a carrier use of another carrier's terminal facilities and the involved carriers cannot agree on compensation or conditions of access, the Board may (but is not required to) establish the compensation to be paid and access conditions. The compensation must be set "under the principle controlling compensation in condemnation proceedings." Rather than present evidence on the level of compensation that would qualify under the Statute, BNSF simply reiterates its already rejected argument that "the level of compensation that BNSF must pay for trackage rights implemented under the UP/SP

⁵ BNSF has previously stated that its request for access over the Rosebluff Lead is not based on the 50/50 Line Agreement. See BNSF April 8, 2013 Filing, at FN 9. See also BNSF's Opening Statement and Evidence (December 31, 2014) at FN 5. BNSF should not be allowed at this late date to claim that its rights flow from that agreement.

merger conditions has already been established by the 'Prescribed Fee.'” BNSF Compensation at 3. BNSF’s continued insistence that the Board utilizes the Prescribed Fee to pay both UP and KCS ignores the statutory requirements of Section 11102(a).

First, while it could be argued that UP agreed that the Prescribed Fee is what BNSF would have to pay UP, the Prescribed Fee cannot govern what BNSF is obligated to pay KCS. KCS and BNSF have not agreed to any level of compensation.⁶ The negotiations between UP and BNSF that resulted in the fee that BNSF will pay UP (and no other carrier) for trackage rights did not involve KCS. KCS was not a party to the resulting agreements. As a result such agreements are not binding on and cannot confer rights or impose obligations upon KCS. Instead, as the Board made clear in Decision No. 3, KCS, as an owner of the track BNSF seeks to use, must be compensated separate and apart from what BNSF pays UP.⁷

Second, BNSF made no effort to establish that the Prescribed Fee meets the statutory standard of compensation in condemnation proceedings-- a requirement for the fee required for the terminal trackage rights BNSF seeks. At no time in this proceeding has BNSF demonstrated such a correlation, despite the fact that KCS has presented evidence demonstrating that the

⁶ It is unfortunate that BNSF, in seven years, has not once offered to pay KCS a fee separate from what it pays UP. KCS has always been willing to negotiate this element, which could have been resolved a long time ago except for BNSF’s intransigence.

⁷ The excerpts below are from pages 18-20 of Decision No. 3:

“§ 11102(a) cannot be read, as BNSF implies, to exclude the involvement of KCS, a 50% joint owner of the terminal facilities, when establishing conditions and compensation for use. Although the first sentence of Section 11102(a) uses the singular (‘owned by a rail carrier’), the statute must encompass situations involving multiple rail-carrier owners...”

“[BNSF’s interpretation] would undermine that purpose to preclude the statute’s application where the terminal facilities are owned by more than one rail carrier. See Rio Grande/CMW, 5 I.C.C.2d at 983-84 (making it clear compensation must “be determined by the parties” on a line used by multiple carriers under a trackage rights agreement) (citations omitted)...”

Prescribed Fee does not satisfy the statutory requirements. The Prescribed Fee was not set in accordance with, and has no correlation to, a fee consistent with the principles governing compensation in a condemnation proceeding. The Prescribed Fee was the product of extensive negotiations between BNSF and UP. It was intended to govern a panoply of rights between the two parties. It has no correlation to any sort of methodology or compensation applicable to a Section 11102(a) proceeding where KCS's property could be taken through government mandated access.⁸ Indeed, as the Board has recognized, the Prescribed Fee does not even equate to an SSW rate and is lower than what would apply in an SSW calculation.⁹

Finally, with respect to SSW, BNSF has presented no argument that even SSW complies with the statutory and constitutional requirements applicable to a Section 11102(a) terminal trackage rights takings case. KCS has provided evidence that it does not. See KCS Compensation at 22-31. BNSF doesn't even advocate for SSW, continuing to insist that the Prescribed Fee should apply. At most, BNSF states that should the Board decide to apply SSW, it should also adopt some BNSF friendly-modifications. BNSF Compensation at 8. Even these modifications should be rejected. They fail to satisfy the intended goal of SSW - to place the landlord and the tenant in the same economic position and ensure that both the landlord and tenant carry the same cost

⁸ Both BNSF and UP seem to accept the principle that to the extent BNSF is granted direct terminal trackage rights, BNSF may continue to pay UP the Prescribed Fee pursuant to their contracts. But such contracts do not govern KCS. BNSF filed an application under Section 11102(a) to obtain use of KCS's property. Accordingly, BNSF still has to pay KCS under the principle controlling compensation in condemnation proceedings, consistent with the statute.

⁹ UP/SP Decision No. 44, slip op. at 140 (the Board recognized that the trackage rights rates provided for in the UP-BNSF Settlement Agreement [i.e., the RASA] were lower than the Board would have set using SSW).

burden.¹⁰ Instead, the modifications that BNSF advocates would allow BNSF to avoid paying the full costs associated with the taking of property requested by BNSF, i.e., no compensation for delays associated with BNSF's operations or for extra crew and congestion costs associated with having to accommodate BNSF.

In contrast, KCS explained why SSW compensation should not, standing alone, be applied. KCS showed that the methodology has never been applied in a Section 11102 compelled terminal trackage rights case unless the parties consent to that use. KCS also explained that SSW was designed for use in merger cases for overhead trackage rights, not local terminal trackage rights. KCS explained that applying SSW for BNSF terminal trackage rights to Lyondell would tilt the playing field even further by (1) giving BNSF access at sub-market rates, and further competitively disadvantaging KCS; (2) granting BNSF access to Lyondell for manifest traffic that even KCS as a co-owner of the Rosebluff Lead doesn't have; (3) would force KCS to bear costs caused by BNSF's operation that are not accounted for in SSW; and (4) deprive KCS of income needed to support its entire network, not just the Rosebluff Lead. KCS also noted how application of SSW here could have much broader implications in other matters, like the pending Ex Parte 711 (Sub-No. 1) rulemaking. Clearly, SSW, standing alone, should not apply in the context of this case. BNSF's comments did not establish or prove that the Board should apply SSW, or that SSW was consistent with statutory and constitutional requirements.

¹⁰ See SSW I, 1 I.C.C.2d 776, 786 (1984). The compensation established must "put the tenant on an equal footing with the landlord." See WCTL, 169 F.3d at 781. Absent such a requirement, the landlord would end up subsidizing the tenant, it would not receive an adequate return, and there would be no economic incentive for it to maintain or replace the line as necessary to continue efficient service. See also Missouri Pac. R. Co. v. ICC, 23 F.3d 531, 534 (D.C. Cir. 1994).

B. Only KCS Has Offered A Statutorily and Constitutionally Valid Compensation Proposal

In contrast to UP and BNSF, who did not submit any methodology consistent with the statute, KCS has submitted three potential proposed approaches to determining a fee that would be consistent with Section 11102(a), revenue adequacy requirements, and the Constitution: (1) Efficient Component Pricing (“ECP”); (2) adoption of the existing UP/KCS Lake Charles switching rate; or (3) use of an average of market based rates derived from the switching fees that BNSF currently charges KCS for access to BNSF-served shippers.¹¹ These proposals are the only proposals in the record consistent with the Fifth Amendment and the principle underlying condemnation.¹²

Under the Fifth Amendment and Section 11102(a), if KCS’s property is going to be taken for BNSF’s partial use, KCS must be compensated in a manner that puts it in as good a position economically as it would have been absent access by BNSF. Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923) (citation omitted); see also Olson v. United States, 292 U.S. 246, 254-55 (1934); United States v. Miller, 317 U.S. 369, 373 (1943); United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979); and United States v. Virginia Elec. & Power Co., 365 U.S. 624, 633 (1961). To comply with these mandates, and if the Board moves forward in imposing BNSF access over KCS’s property, “just compensation” requires that the Board compensate KCS for all additional operating costs associated with BNSF’s access, a return on

¹¹ KCS also suggested that depending upon which method the Board would adopt, BNSF should pay a market-based access fee component as a contribution to KCS’s network costs, in addition to an SSW-based component.

¹² The proposals are also consistent with ICCTA’s mandate to adopt policies allowing KCS to earn adequate revenues, i.e., achieve revenue adequacy. See 49 U.S.C. §10101(3). Since the Board began issuing Railroad Revenue Adequacy Determinations in 1996, KCS has never been found by the STB to be revenue adequate and consistently remains near the bottom of the revenue adequacy list.

KCS's invested track infrastructure, and compensation for the lost contribution caused by BNSF's access to Lyondell.

Although ECP is well studied and is legally and economically sound,¹³ KCS understands that ECP has never been applied in an ICC or STB proceeding and is problematic to calculate given BNSF's existing access via reciprocal switching. Accordingly, in addition to SSW, KCS proposed that BNSF be required to pay KCS an access fee based upon comparable market-based rates charged by UP, KCS, and BNSF for access to shippers. Because there is no directly comparable, market-based trackage rights rate to compare, KCS proposed to use the market-based rate that UP charges KCS for switching cars to/from the Lake Charles Harbor and Terminal District. See KCS Rebuttal Comments at KCS's Reply to BNSF Railway Company's Opening Statement as Supplemented on May 11, 2018, Filed June 25, 2018) at 26-35. This approach remains valid as it approximates the market-based rates carriers charge each other for accessing Lake Charles shippers.

The other approach suggested by KCS was to examine the switching rates that BNSF charges KCS for access to shippers of manufactured products on BNSF lines.¹⁴ Such a list was attached as Exhibit B in KCS's Feb. 4 comments. From this list, one can develop an average rate. The resultant switching rate would approximately represent what BNSF would charge KCS for access to Lyondell in an arms-length, market-based transaction if BNSF's and KCS's roles before the Board here were reversed.

¹³ See KCS's Reply to BNSF Railway Company's Opening Statement as Supplemented on May 11, 2018, Filed June 25, 2018) at 26-35.

¹⁴ Because grain, more so than chemicals and plastics, often moves in unit trains, KCS suggested excluding them from consideration.

Once this average market access rate is determined, one would have to remove the portion of that fee that BNSF would pay to KCS for using trackage rights over the Rosebluff Lead. This could be done by removing the SSW amount that is calculated for BNSF's trackage rights over the Rosebluff Lead. The remaining fee would approximate the market rate that KCS would require from BNSF in a market-based approach for KCS to consent to BNSF's access. This market-based rate would be in addition to an SSW-based fee.¹⁵ SSW plus the market access fee is the only compensation method in the record that ensures KCS is compensated in a manner that puts it in as good a position economically as it would have been absent access by BNSF.

KCS's compensation proposals are the only proposals in the record that satisfy the statutory and constitutional requirements. These proposals would ensure that KCS receives an adequate return, would support (rather than undermine) KCS's efforts to achieve revenue adequacy, and would create the incentive to maintain or replace the line as necessary to continue efficient service. If the Board moves forward with granting BNSF direct terminal trackage rights and setting compensation, it must adopt one of KCS's approaches. There is no basis in the record to adopt a different proposal.

II. ALTHOUGH BNSF DIRECT TERMINAL TRACKAGE RIGHTS ARE NOT NECESSARY FOR SHIPPERS TO ACHIEVE THE BENEFITS OF THE LAKE CHARLES CONDITION, ADOPTING KCS'S PROPOSAL WOULD NOT UNDERMINE THAT CONDITION

BNSF direct terminal trackage rights are not necessary to implement the intent of the Lake Charles Condition for Lyondell. The intent of the Lake Charles Condition was to ensure that Lyondell (and others) would not lose competitive options as a result of the UP/SP merger. The entire record of this proceeding is devoid of any evidence showing that Lyondell (or any

¹⁵ SSW would be calculated using RCNLD as discussed in VS Carey, Exhibit A to KCS Compensation.

other Lake Charles shipper) needs BNSF direct terminal trackage rights to prevent a loss of pre-merger competitive conditions. BNSF has produced no such evidence, nor could it.¹⁶ Instead, the evidence in the record shows precisely the opposite. As shown by Professor Carey, direct access to Lyondell by BNSF is unnecessary because for over 20 years BNSF has used reciprocal switching to gain a significant market share of Lyondell traffic vis-à-vis KCS and UP.¹⁷ The Lake Charles Condition, as implemented through BNSF switching and haulage rights, already has allowed BNSF to more than fully replicate the competition that might otherwise have been lost when SP merged into UP.

Lyondell and other Rosebluff Lead shippers actually saw their competitive options increase, not decrease, as a result of the UP/SP merger. Prior to the merger, they were served only by SP and KCS, with SP providing a reciprocal switch to KCS via a negotiated rate.¹⁸ When UP, a much stronger competitor, stepped into the shoes of SP, Lyondell's pre-merger competitive options were improved, without BNSF access. The Lake Charles Condition, and the implementation of that condition via UP providing BNSF with a reciprocal switch provided Lyondell even more competitive options than existed pre-merger. Thus, to the extent competition is to be preserved or even enhanced in a merger situation, such a competitive

¹⁶ At most, there is evidence in the record indicating that BNSF seeks direct access not to benefit shippers, but to lower its costs to further increase its profitability and to improve its transit times (for cars that are destined to storage). KCS Compensation at 12, 27-28. There is no evidence, or even a statement, that BNSF will pass these savings along to its shippers or that competition will be preserved (or even enhanced) through BNSF direct access.

¹⁷ See VS Carey, Exhibit A to KCS Compensation.

¹⁸ The negotiated rates SP and KCS charged each other for switching traffic on the Rosebluff Lead took account of the parties' joint ownership and shared maintenance of the Lead. Like the Prescribed Fee that UP charges BNSF, the fee SP charged KCS pre-UP/SP merger and the fee UP and KCS currently charge each other for Rosebluff Lead switching take account of non-cash consideration between the parties, consideration that BNSF would not provide.

landscape already exists without the need to impose additional competitive access via BNSF direct terminal trackage rights.

If the Board nevertheless remains determined to grant BNSF direct access,¹⁹ it should only do so consistent with KCS's compensation and operation proposals. Adopting KCS's proposals would not prevent Lyondell from obtaining the alleged benefit of direct BNSF access. Indeed, the record reflects that BNSF has achieved its competitive advantage despite the fact that it was paying UP (KCS receives nothing) \$315.92 per car. Under either of KCS's market-based compensation proposals, the rate that BNSF would pay KCS would (based upon rough calculations using URCS and a market access fee) actually be lower than the current rate – even if BNSF also had to pay UP the Prescribed Fee for trackage rights (which equates to approximately \$6.02 per car²⁰). Thus, adopting either of KCS's proposed compensation approaches would allow BNSF to continue to provide competitive service as envisioned by the Lake Charles Condition while ensuring that KCS is compensated in a manner that satisfies Section 11102(a) and the Constitution by putting KCS in as good a position economically as it would have been absent access by BNSF.

III. PER 49 U.S.C. §11102(A), THE BOARD MUST FIRST ESTABLISH BOTH THE ACCESS CONDITIONS AND THE COMPENSATION AMOUNT; THE COMPENSATION MUST BE PAID OR ADEQUATELY SECURED PRIOR TO ALLOWING BNSF'S ACCESS.

All of the Parties recognize that should the Board order SSW be used to determine some part of the compensation for BNSF's trackage rights over the Rosebluff Lead, the Parties would

¹⁹ The Board has taken the position in the Court of Appeals proceeding in the D.C. Circuit that Decision No. 3 granting BNSF access to CITGO (not Lyondell) is not a final decision. Therefore, the Board is free in any subsequent decision to change course and/or make different findings with respect to service to Lyondell.

²⁰ UP Compensation at 2.

need an opportunity to take discovery and a procedural schedule would need to be implemented to produce and develop evidence. See BNSF Compensation at 8. BNSF sets forth in Exhibit E to its filing the information it thinks that it would need to perform an SSW calculation. Id. Likewise, UP states that it would likely need to identify and retain outside consultants to develop the required revenue allocations and does not have access to the BNSF or KCS data required to apply the capitalized earnings method. UP Compensation at 5.

KCS agrees with BNSF and UP that it does not have all the information necessary to perform such calculations. Neither does the Board. KCS also has identified the types of information it would need to perform such calculations. See KCS Compensation 39-41. Clearly, the Parties also agree the process would be complex and time-consuming.

As shown by KCS, the Board need not use SSW. If the Board nevertheless chooses to use SSW as part of the compensation formula, SSW cannot be the only means of compensating KCS. If it chooses to use SSW, the Board should promptly establish a procedural schedule to allow the Parties to exchange the information necessary to perform the required calculations and to present that evidence to the Board.

BNSF argues that a lengthy process to establish the compensation terms would delay BNSF from commencing operations.²¹ While true, the statute requires nothing less. Section 11102(a) makes it clear that if the parties cannot agree on compensation, and KCS and BNSF have not agreed on such compensation, the Board “may” (but is not required to) set the

²¹ Any further delay during the pendency of any compensation methodology proceeding or a proceeding to establish specific terms of a trackage rights agreement between the Parties will not harm shippers because BNSF already provides competitive service to Lyondell and others, and very effectively.

compensation and conditions of access. Once this compensation is established, the rate must “paid or adequately secured” before BNSF can operate.

BNSF says it will pay an interim compensation subject to a true-up when the Board eventually sets the compensation, or alternatively, that it will promise to pay whatever the Board sets and thus this promise constitutes “adequately securing” payment of the compensation rate. This proposal turns the statutory requirement on its head. The statute does not say pay first whatever BNSF wants to pay or the Board sets as interim compensation. The statute requires the Board to set the compensation first. Then, such compensation is to be paid (or secured) before a carrier can begin to operate. BNSF offers no Section 11102 precedent in support of its proposal to pay partial compensation now, and full compensation later.²² As such, the Board cannot legally adopt BNSF’s proposal.²³

BNSF’s proposal also ignores that fact that much of the delay that has occurred in this proceeding is due to BNSF’s own intransigence. BNSF’s continued insistence that it should only pay the Prescribed Rate and that, regardless of its sworn testimony, it should be free to operate at any time, even in KCS’s window, has been a significant contributor to the length of this proceeding. If BNSF truly wanted to commence operations after issuance of Decision No. 3, it

²² BNSF’s reference to the trackage rights user in PAS being allowed to operate during the pendency of a compensation proceeding is irrelevant here. In that proceeding, both parties had previously agreed to compensation terms and were parties to the original trackage rights agreement, which had expired. Under long standing precedent, operations pursuant to previously approved trackage rights continue until either discontinued or the Board sets new compensation. As such, PAS does not support granting BNSF’s request to operate prior to trackage rights compensation being established, particularly given that KCS was not involved in the initial agreements.

²³ This reading is also consistent with Decision No. 3 where the Board rejected BNSF’s request to commence operations right away because BNSF did not negotiate with both UP and KCS concerning both conditions of use and compensation, and noted that both processes “necessarily precede BNSF’s operations on those facilities.” Decision No. 3 at 20.

should have engaged in earnest discussion with KCS for such access. Unfortunately, it did not. KCS has always indicated a willingness to negotiate. BNSF has not.

It is important that the Board establish access conditions, as well as compensation, before BNSF can exercise trackage rights to Lyondell. Matters such as liability terms and timing of access must be established ahead of time, not be left to chance and dispute in a rush to let BNSF move Lyondell's traffic to storage.

IV. SETTING COMPENSATION AND OPERATING TERMS IN THIS STAGE OF THE PROCEEDING IN AND OF ITSELF WILL NOT ALLOW BNSF TO PROVIDE DIRECT SERVICE

Although the record reflects that the Board should not and need not grant BNSF direct terminal access for BNSF to fulfill the Board's commitment under the Lake Charles Condition, if it does and sets the compensation, such a decision will not result in BNSF being able to provide access to Lyondell. There are several further legal obstacles to BNSF access that are outside of the Board's jurisdiction. Thus, a Board decision in BNSF's favor will not result in immediate access for BNSF to serve Lyondell.

As explained previously, Lyondell is neither on the Rosebluff Lead nor do its tracks connect directly to the Rosebluff Lead. To serve Lyondell, BNSF must traverse two separate tracks - the Montell Lead (owned by the Port of Lake Charles) and a 0.40-mile connecting track (collectively the "Additional Tracks"). These Additional Tracks are not subject to the Board's jurisdiction. The Board has no legal authority to impose terminal trackage rights over tracks that are not owned by a rail carrier.²⁴ BNSF will still need to obtain rights to utilize the Additional Tracks necessary for BNSF to provide service.

²⁴ "The Board may require terminal facilities...*owned by a rail carrier*...to be used by another rail carrier..." 49 U.S.C. §11102(a) (emphasis added). While ownership of the 0.40 connecting

Obtaining these rights will require KCS's consent. The Montell Lead is a private track subject to a private agreement. That agreement does not give BNSF the right to use that track. Likewise, while ownership of the 0.40-mile connecting track is unclear, the Board did not, and has not, granted BNSF any rights to operate over that track. BNSF's right of access over this track also must be resolved. KCS is willing to negotiate these issues with BNSF separate and apart from any discussions or contractual arrangements between UP and BNSF; however, BNSF continues to insist that it needs no consent from KCS to use KCS's property and that it need not pay KCS for use of KCS's property.

If BNSF cannot obtain these additional rights, or the Board determines that terminal trackage rights indeed are not justified, BNSF can continue to serve Lyondell (and others) via haulage and reciprocal switching rights. If, as BNSF claims, UP granted BNSF direct terminal trackage rights on the Rosebluff Lead in the RASA, BNSF should seek any remedies it is entitled to under that agreement.

Assuming that BNSF is correct in asserting that UP contracted in the RASA to give BNSF trackage rights on the Rosebluff Lead, BNSF's remedy would be to pursue relief under that agreement, presumably through arbitration. To the extent BNSF can show a breach and can show damages due to its inability to serve Lyondell directly, it would be entitled to contractual remedies. The Board need not involve itself in such proceedings.

CONCLUSION

If the Board chooses to grant BNSF trackage rights to Lyondell and further chooses to set the compensation and operating conditions for that access, KCS's evidence is the only evidence

tracks is unclear, there is no question that the Montell Lead is owned by a non-carrier, the Port of Lake Charles. The Board has no jurisdiction over this track.

on compensation that would allow the Board to satisfy its statutory and Constitutional duties of setting compensation based on principles applicable in condemnation – a principle emulating the terms of a market-based agreement for BNSF's access over KCS's property. Anything less would perpetuate or exacerbate the competitively-advantaged position already given to BNSF vis-à-vis KCS and UP by the Lake Charles Condition.

The statute requires that the Board set the compensation and access conditions before allowing BNSF to operate trains on the Rosebluff Lead. Until compensation is set, it could not be paid or secured, as the statute requires. Similarly, conditions of access such as timing, liability and others, cannot be left for determination after operations begin.

While gathering the information needed to make these determinations will take some time, Lyondell will not be harmed as BNSF already competes successfully for Lyondell traffic through UP reciprocal switching and haulage. If BNSF could establish that it was harmed from delay, it could seek redress under the terms it agreed to in the RASA.

Respectfully submitted,



Adam J. Godderz
W. James Wochner
David C. Reeves
THE KANSAS CITY SOUTHERN RAILWAY
COMPANY
P.O. Box 219335
Kansas City, MO 64121-9335
Tel: (816) 983-1324
Fax: (816) 983-1227

February 25, 2019

William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
Telephone: (202) 663-7823
Facsimile: (202) 663-7849

Attorneys for The Kansas City Southern
Railway Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of The Kansas City Southern Railway Company's Reply to Decision No. 6 was served by first-class mail, postage prepaid, or by a more expeditious manner, this 25th day of February, 2019, on counsel for BNSF Railway Company, Union Pacific Railroad Company, and all other parties of record.



William A. Mullins
Attorney for The Kansas City Southern
Railway Company