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ENTERED
Office of Proceedings
July 16, 2018
Part of
Public Record

July 16, 2018

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

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

Dear Ms. Brown:

The Kansas City Southern Railway Company hereby files, via e-filing, its "Rebuttal" to the June 25, 2018 reply comments filed by Union Pacific in the above-captioned matter. 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**

FINANCE DOCKET NO. 32760 (SUB-NO. 46)

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

**REBUTTAL TO UNION PACIFIC RAILROAD COMPANY'S REPLY TO BNSF'S
PETITION TO ESTABLISH CONDITIONS OF USE AND COMPENSATION**

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

July 16, 2018

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SUMMARY OF ARGUMENT

At this time, KCS objects to and opposes the request of the Union Pacific Railroad Company ("UP") that the Board order BNSF be granted the right to the use of Rosebluff Yard and other related tracks to provide switching service to shippers in Zone 2 of the Lake Charles Area in lieu of UP. UP Reply, June 25, 2018, at 59-60.¹ Specifically, UP argued that "the Board should condition BNSF's use of the Rose Bluff Industrial Lead on BNSF's agreement to swap responsibility with Union Pacific" for the relevant tracks. UP Reply at 59. UP's proposal includes granting one 12-hour operating window to BNSF, which would make BNSF "fully free

¹ The Board's May 15 decision (Decision No. 5) set a deadline of July 16 for BNSF to file its rebuttal comments. The Decision was silent with respect to whether UP and KCS could file rebuttal comments to each other's reply comments. Because UP for the first time in its reply comments has presented its proposal for the Board to order a new type of relief by directing that BNSF undertake UP's Rosebluff Lead switching duties KCS believes it has an automatic right to file rebuttal. If not, KCS hereby requests specific permission to file these rebuttal comments. Montreal, Maine & Atlantic Railway, LTD – Discontinuance Of Service And Abandonment – In Aroostook And Penobscot Counties, ME, AB 1043 (Sub-No. 1), 2010 STB LEXIS 571, *59 (STB served Dec. 27, 2010) (Granting leave to file rebuttal to address arguments raised in reply).

to operate a special BNSF direct train to LYB” and give BNSF “full authority to adjust its other operations to accommodate the new service to LYB.” *Id.* at 60.

UP argued that its proposal is necessary because UP does “not believe [the] Rose Bluff Yard, the Rose Bluff Industrial Lead, and the Montell Lead can accommodate the operations of three carriers directly serving customers.” *Id.* at 59. Furthermore, UP argued that “attempting to accommodate direct service by three railroads in this capacity-constrained area would produce the worst possible outcome for shippers in the Lake Charles area and across [UP’s] network.” *Id.* at 60.

KCS agrees with UP that the “Rose Bluff Yard, the Rose Bluff Industrial Lead, and the Montell Lead” cannot accommodate both UP and BNSF operations. However, KCS objects to UP’s proposal that BNSF take over switching responsibilities for two primary reasons. First, UP’s proposal is well beyond the scope of BNSF’s application and operating plans and is beyond the Board’s authority under Section 11102. Secondly, a series of contracts governing UP’s use of the Rosebluff Lead prohibit UP from leasing or transferring any part of its interest in the Rosebluff Lead without the consent of KCS. Accordingly, KCS’s consent is required for BNSF to undertake UP’s switching responsibilities.

ARGUMENT

I. THE BOARD DOES NOT HAVE THE AUTHORITY TO GRANT BNSF SWITCHING RESPONSIBILITY IN A TERMINAL TRackage RIGHTS PROCEEDING

UP’s proposal should be rejected because the Board does not have authority to order reciprocal switching in the context of this proceeding. BNSF’s original petition was a terminal trackage rights application filed under 49 U.S.C. § 11102(a) (“Section A”). See BNSF Petition, Jan. 10, 2018. BNSF did not file a petition under 49 U.S.C. § 11102(c) (“Section C”) requesting

reciprocal switching rights. Therefore, absent the filing of a Section C application, the Board has no authority to require a switching agreement. In order for the Board to consider a swap in switching responsibilities, at a minimum either UP or BNSF would be required to file an application under Section C for reciprocal switching in the first instance and the Board would have to make the requisite findings.²

Likewise, neither UP nor BNSF can rely upon the findings made in Decision No. 3 to justify a grant of reciprocal switching rights to BNSF. The findings in that decision were based upon BNSF's Section A application and were granted based upon BNSF providing direct terminal trackage rights, not reciprocal switching. There were no findings that BNSF service in lieu of UP via a reciprocal switching arrangement would be "practicable and in the public interest" or are "necessary to provide competitive rail service." 49 U.S.C. § 11102(c). As such, the Board cannot use the record in this proceeding to justify an order granting BNSF reciprocal switching rights.

II. EXISTING CONTRACTS PROHIBIT UP FROM LEASING OR TRANSFERRING ITS INTEREST IN THE ROSEBLUFF LEAD TO BNSF

Absent a grant of forced switching access via a Section C application and subsequent Board findings, UP does not have the contractual right without KCS's consent to substitute BNSF switching service for UP's existing switching service. The agreements governing UP's use of the Rosebluff Lead and related tracks prohibit UP from transferring its switching responsibilities to BNSF, or any other carrier, without KCS' consent.

² KCS does not concede that a filing under Section 11102(c) would allow the Board to replace one switching carrier with another; rather, KCS merely states at this time that UP's proposal is well beyond the relief sought in BNSF's Section 11102(a) application and the Board lacks sufficient factual, as well as legal, bases for acting on it.

UP's usage of the Rosebluff Lead, Rosebluff Yard, and related connecting tracks are governed by a series of agreements that were adopted by UP as a successor in interest to the Texas and New Orleans Railroad Company ("T&NO"). These agreements were discussed in Decision No. 63 in the UP/SP proceeding. They were included in the record in KCS's March 19, 2013 reply and discussed again in KCS's August 24, 2015 reply.

To summarize, there are four agreements governing ownership and usage of the various tracks in the Lake Charles Area. The first such joint use agreement was entered into between KCS and the T&NO, at the time a subsidiary to SP, on September 19, 1934 ("the 1934 Agreement"). Under the 1934 Agreement, KCS granted T&NO rights over a specific portion of KCS's track. A second joint use agreement was entered into between KCS and T&NO on August 30, 1940 ("the 1940 Agreement"), wherein KCS granted trackage rights to T&NO over another specific portion of KCS's track. Under both the 1934 and the 1940 Agreements, KCS remains the sole owner of its track, and only KCS has the right to grant another carrier the right to operate over KCS's trackage.

On May 21, 1947, the United States and the Reconstruction Finance Corporation deeded more than five (5) miles of additional track to KCS and T&NO, as joint owners. KCS and T&NO then entered into a third joint use agreement on March 29, 1948, to govern the operations of this "new" track ("the 1948 Agreement"). On July 26, 1955, KCS entered into a fourth joint use agreement with T&NO ("the 1955 Agreement"). The purpose of the 1955 Agreement was to govern the use of additional trackage jointly owned by KCS and T&NO. The 1948 and 1955 Agreements specifically cover the tracks to serve Lyondell and CITGO.

Section 19 of the 1948 Agreement expressly provides that neither T&NO nor any of its successors (which include UP) shall have the right to transfer any interest in the joint track

“without advance written approval of the other party.” Similar to the 1948 Agreement, section nine of the 1955 Agreement also prohibited T&NO and its successors from transferring any of its interests in the jointly owned track to another carrier without the express consent of KCS.

KCS has not provided UP with any consent to transfer any interest, including any ownership or operating rights, to BNSF, nor has UP specifically asked. Therefore, UP presently does not have the right to transfer any of its interests or switching responsibilities to BNSF without KCS’ consent, which has not been granted. Without this consent, the Board has no authority at this time to adopt UP’s proposal and provide BNSF with reciprocal switching rights over the various tracks and in lieu of UP.

III. THE PARTIES MAY DISCUSS SWITCHING RESPONSIBILITIES IN THE CONTEXT OF THE UPCOMING MEDIATION

Although KCS currently objects to UP’s proposal and notes the Board cannot legally order adoption of that proposal in the current proceeding, UP has raised a valid point. It is clear that three railroads cannot operate in Rosebluff Yard or the Rosebluff Lead in a manner that is both practicable and does not interfere with KCS’s and UP’s existing service to their customers. Nor can UP and BNSF both operate over the Montell Lead to serve Lyondell without significant operational issues and concerns.

Nonetheless, if the Board grants BNSF’s terminal trackage rights application to serve Lyondell, which the Board should not and cannot legally do, switching Zone 2 customers will have to be addressed differently than is done today. Three railroads cannot operate in the Rosebluff Yard or on the Rosebluff Lead as proposed by BNSF. If that potential solution is for BNSF to switch Zone 2 customers in lieu of UP, such a solution should only be through the consent of KCS and UP, the owners of the joint trackage. As such, KCS believes it would be more practicable for the carriers to discuss possible solutions in the context of mediation with

BNSF and UP. Such a mediation has already been scheduled for July 31, 2018. In the mediation, KCS would be willing to begin a discussion of alternative switching arrangements for Zone 2.

Respectfully submitted,

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Attorneys for The Kansas City Southern
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of The Kansas City Southern Railway Company's Rebuttal to the June 25, 2018 reply comments filed by Union Pacific in the above-captioned matter was served by first-class mail, postage prepaid, or by a more expeditious manner, this 16th day of July, 2018, 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