

BNSF-134

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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 Kansas City Southern Railway Company's
Motion to Dismiss BNSF's Petition**

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February 21, 2018

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SURFACE TRANSPORTATION BOARD

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BNSF Railway Company (“BNSF”)¹ hereby replies to KCS’s Motion to Dismiss BNSF’s Petition to Establish Conditions of Use and Compensation, filed in this sub-docket on February 1, 2018 (the “Motion”). Because none of the arguments that KCS offers in support of its Motion has merit, BNSF respectfully requests that the Board summarily deny the Motion.

SUMMARY

In its Motion, KCS alleges that “BNSF has not presented a prima facie case that it has both the legal and contractual right to serve Lyondell.” KCS Motion at 2. The principal thrust of KCS’s arguments is that the Board’s findings in Decision No. 3 with respect to public interest, practicability, and lack of substantial impairment were all limited solely to BNSF direct service via the Rosebluff Lead to the CITGO facility at West Lake Charles. That is patently not true.

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 “Petition”) filed in this proceeding on January 12, 2018.

In its Application, BNSF sought terminal trackage rights over the Rosebluff Lead to serve all shippers covered by the Lake Charles Condition to the UP/SP merger, not just CITGO.² In Decision No. 3, the Board clearly and unambiguously acknowledged that the terminal trackage rights granted through that decision over the Rosebluff Lead would allow BNSF to serve shippers other than CITGO. As BNSF cited a number of times in the Petition, the Board directed the parties to negotiate to develop conditions of use to serve shippers (including shippers other than CITGO) using the trackage rights, and to request that the Board establish such conditions of the parties cannot agree. BNSF's Petition follows the Board's direction exactly:

Thus, we direct BNSF, UP, and KCS to collectively develop conditions governing their use of the Rosebluff Lead, *including BNSF's access (if it so elects) to directly serve shippers other than CITGO*. If the parties cannot collectively reach an agreement, they may request that the Board establish conditions of use.

Decision No. 3, slip op. at 19 (emphasis added). Therefore, BNSF does not need to file a new terminal trackage rights application each time it elects to directly serve a customer accessed via the Rosebluff Lead using the trackage rights already granted by the Board.

The legal and factual bases for BNSF's Petition are straightforward and are directly based on the Board's direction in Decision No. 3. The terminal trackage rights granted by the Board allow BNSF to use the Rosebluff Lead to directly serve *all* customers accessible via the Rosebluff Lead. LyondellBasell is such a customer. The Board established no further requirements in Decision No. 3 that would govern BNSF's Petition, and KCS's efforts to create them are unavailing.

² As defined in BNSF's Opening Statement at 4-5, and used throughout BNSF's pleadings in this sub-docket, the "Lake Charles Condition" is, collectively, the trackage rights conditions under the BNSF Settlement Agreement and the CMA Agreement imposed on the UP/SP merger by the Board in Decision No. 44 that provide BNSF the right (i) to handle traffic of shippers open to all of UP, SP, and KCS at Lake Charles and Westlake; and (ii) to handle traffic of shippers open to SP and KCS at West Lake Charles, including traffic on the Rosebluff Lead. See Decision No. 3, slip op. at 2-3, 9-10.

ARGUMENT

1. The Scope of BNSF's Terminal Trackage Rights Includes Shippers Other Than CITGO

KCS first alleges that the scope of BNSF's terminal trackage rights granted by the Board in Decision No. 3 is somehow limited only to direct BNSF service via the Rosebluff Lead to the CITGO facility in West Lake Charles. *See* KCS Motion at 3-9. KCS suggests that BNSF must file a new terminal trackage rights application in order to provide direct service over the Rosebluff Lead to any West Lake Charles area customer other than CITGO, and that the Board must make further findings pursuant to 49 U.S.C. § 11102 in order to consider BNSF's Petition and establish operating conditions or compensation governing BNSF service to LyondellBasell. *Id.* at 5.

KCS is wrong. In fact, through its Application and subsequent pleadings in this sub-docket, BNSF sought terminal trackage rights over the *entire* Rosebluff Lead to enable BNSF to fully implement the Lake Charles Condition to the UP/SP merger by providing direct service to *all* customers accessed by the Rosebluff Lead, including CITGO and any other similarly situated shippers such as LyondellBasell.³ The fact that BNSF sought trackage rights to serve all shippers accessible via the Rosebluff Lead could not be any clearer. KCS understood and itself acknowledged that BNSF sought "unlimited rights to pick up, deliver and directly serve CITGO and *multiple other shipper facilities . . .*" KCS Reply at 34 (filed August 24, 2015) (emphasis added).

³ *See, e.g.*, BNSF Application at 3 ("The terminal trackage rights sought in this Application would permit BNSF . . . to directly serve CITGO *and other customers in the West Lake Charles area . . .*") (emphasis added); *id.* at 14 (" . . . BNSF seeks terminal trackage rights to connect the 50/50 Line to the West Lake Charles CITGO facility (*and other West Lake Charles facilities*) to which the Board mandated that BNSF have direct access.") (emphasis added); Decision No. 3 at 2 ("By its application here, BNSF seeks to exercise the option of delivering its cars directly from its recently completed Lacassine Yard . . . *to shippers on the Lead . . .*") (emphasis added).

In Decision No. 3, the Board unambiguously found that its public interest, practicability, and lack of substantial impairment findings extended to shippers other than CITGO, and that BNSF could use its terminal trackage rights to access other shippers accessible via the Rosebluff Lead. *See* Decision No. 3 at 10 (“The Board’s determination in *UP/SP Decision No. 44* (and reaffirmed in *UP/SP Decision No. 63*) that the public interest would be served by giving BNSF the option of direct or reciprocal-switching access *to all Lake Charles area shippers* is controlling in this trackage rights proceeding.”) (emphasis added); *id.* at 18 (“Our [practicability and lack of substantial impairment] findings here are based on the record currently before us, including the possibility that BNSF may elect to directly serve *additional shippers on the Lead.*”) (emphasis added).

Therefore, KCS’s observation that BNSF’s operating plan presented in the Application and related filings (which focuses on direct service to CITGO) differs from BNSF’s operating plan presented in the Petition (which focuses on direct service to LyondellBasell) is irrelevant. *See* KCS Motion at 5-6.⁴ The Board acknowledged in Decision No. 3, slip op. at 13-14, that BNSF provided no specific operating proposals regarding shippers other than CITGO, yet the Board still explicitly found in Decision No. 3, slip op. at 18, that such BNSF direct service to

⁴ In support of its argument that BNSF must file a new terminal trackage rights application in order to directly serve LyondellBasell because BNSF’s operating plan to LyondellBasell differs from BNSF’s operating plan to CITGO, KCS identifies an example in the LyondellBasell operating plan where BNSF would enter the Rosebluff Yard two hours before KCS departs. *See* KCS Motion at 6. In the Reilly V.S. at 11-12, Mr. Reilly identified two alternatives for BNSF service to LyondellBasell based on actual traffic observed on October 7, 2017. *See also* Reilly V.S., Exhibit A at 7. On that day, KCS apparently overstayed its scheduled 6 p.m. to 6 a.m. operating window in the Rosebluff Yard. The BNSF operating plan shows how a clear track through the Rosebluff Yard still existed on that day to accommodate the BNSF movement, despite any otherwise unexpected KCS activity in the Yard. BNSF is clear throughout its Petition and the Reilly V.S. that “BNSF will coordinate directly with KCS for BNSF’s operation through the Rosebluff Yard” if a BNSF train and a KCS train are unexpectedly operating in the Rosebluff Yard at the same time. BNSF Petition at 8, n. 9; Reilly V.S. at 9.

shippers other than CITGO would be practicable and would not substantially impair the ability of UP and KCS to handle their own business.

BNSF is not required to submit a new terminal trackage rights application each time BNSF elects to serve a customer directly using the terminal trackage rights granted by the Board in Decision No. 3. Such a requirement would directly contravene the Board's findings in Decision No. 3 and unnecessarily delay full and timely implementation of the Lake Charles Condition by resulting in needless disputes between the parties and proceedings before the Board. Under KCS's approach, shippers in need of competitive direct BNSF service would be prevented from obtaining such service until the end of a redundant and potentially lengthy administrative process.

KCS may disagree with the Board's findings and brand them as "unfair," KCS Motion at 21 n.26, but such concerns are appropriately addressed in a petition for reconsideration of Decision No. 3 (which KCS did not file) or in KCS's appeal of Decision No. 3 pending in the D.C. Circuit⁵ – not through a motion to dismiss BNSF's Petition.

2. The New Tests Constructed by KCS Are Legally and Factually Baseless

KCS next proceeds to unilaterally announce new legal and evidentiary tests to govern the BNSF Petition – none of which the Board identified in Decision No. 3 as necessary predicates to any request for Board intervention to set conditions of use and compensation, and all of which have no legal or factual basis. KCS claims that BNSF's alleged failure to comply with this KCS-conceived framework means that the Board must dismiss BNSF's Petition. KCS is wrong.

⁵ See BNSF Petition at 2, n.2 (describing the status of the KCS appeal).

A. LyondellBasell is Located in West Lake Charles and the Lake Charles Condition Applies to LyondellBasell.

KCS argues, for instance, that BNSF “has not presented sufficient facts to create a prima facie case” that LyondellBasell is located in West Lake Charles and that the Lake Charles Condition applies to LyondellBasell. KCS Motion at 10-12. While unnecessary to prove any purported “prima facie case,” BNSF’s Petition and the Reilly V.S. establish that the LyondellBasell facility is located at the rail station of West Lake Charles. BNSF Petition at 1, 5; Ex. 1 at 1, Reilly V.S. at 5, 7.⁶

Furthermore, BNSF’s Petition and the Reilly V.S. establish that the Lake Charles Condition applies to the LyondellBasell facility by describing current BNSF service to LyondellBasell via UP reciprocal switch. BNSF Petition at 8-9; Reilly V.S. at 5-6. Just like all other “Zone 2” West Lake Charles customers subject to the Lake Charles Condition and accessed via the Rosebluff Lead (such as CITGO), the LyondellBasell facility is currently open to BNSF, KCS, and UP, but any BNSF and KCS service is performed by UP via reciprocal switch. *See* Decision No. 3 at 2 (describing the division of existing operations on the Rosebluff Lead into two customer zones). BNSF would not have the right to provide such current service to the LyondellBasell facility absent the applicability of the Lake Charles Condition to that facility. Although BNSF currently provides all its service to West Lake Charles customers accessed via the Rosebluff Lead (including LyondellBasell) via reciprocal switching performed by UP pursuant to the Lake Charles Condition, BNSF also has the right under that condition to use the terminal trackage rights granted by the Board to serve these West Lake Charles customers directly. *See* Decision No. 3 at 4, 9-10.

⁶ The city listed in the facility’s postal address is meaningless for the purposes of this analysis. *See* KCS Motion at 11.

The rhetorical questions posed by KCS regarding the history of the LyondellBasell facility are also red herrings. *See* KCS Motion at 10-11. The Lake Charles Condition applies to all shippers at Lake Charles, Westlake, and West Lake Charles. None of the relevant constituent parts of the collective Lake Charles Condition (including the BNSF Settlement Agreement, the CMA Agreement, the Second Supplemental Agreement, or Decision No. 44) restrict coverage of the Lake Charles Condition in the way that KCS suggests. *See* BNSF Opening Statement at 4-5. That said, the LyondellBasell facility has been open to BNSF service via UP reciprocal switch pursuant to the Lake Charles Condition since BNSF first started such service to West Lake Charles customers in 1997. *See UP/SP Merger Proceeding*, BNSF's Fourth Quarterly Progress Report, Att. 12 at 5 (BNSF-PR-4, filed July 1, 1997) (showing Occidental Chemical, a predecessor-in-interest to LyondellBasell, at West Lake Charles as a new customer to which BNSF gained access as a result of the UP/SP merger) (relevant excerpts attached hereto as Exhibit 1).

B. The Montell Lead Connects Directly to the Rosebluff Lead

KCS next argues that the "Montell Lead does not connect to the Rosebluff Lead." KCS Motion at 15. Again, KCS is wrong. As BNSF described in its Petition and the attached Reilly V.S., the LyondellBasell facility is accessed via the Montell Lead, which connects directly with the Rosebluff Lead and extends east for approximately 1.63 miles. Petition at 8; Reilly V.S. at 4.

The Port-owned Montell Lead ends just west of Highway 108 and connects directly to track owned jointly by UP and KCS that forms part of the Rosebluff Lead. The map included at page 4 of Exhibit 1 to BNSF's Petition depicts this connection, but the map fails to properly extend the purple line indicating the Rosebluff Lead south from the switch located just south of the linear body of water identified in blue to the connection with the Montell Lead. The terminal trackage rights granted by the Board in Decision No. 3 include this portion of the Rosebluff

Lead. Concurrently with the filing of this Reply, BNSF has filed an errata to its Petition to correctly identify the Rosebluff Lead on this map.

C. BNSF Has Acquired or Will Acquire the Required Access Rights to Directly Serve LyondellBasell.

In a continued attempt to re-litigate Decision No. 3, KCS next alleges that “[t]here is no indication that” the terminal trackage rights granted by the Board “included the right to get on and off the Rosebluff Lead so as to access other tracks and other shippers not on the Rosebluff Lead” KCS Motion at 13. KCS also contends that BNSF has not established that it has the contractual right to use the tracks required to serve the LyondellBasell facility. KCS Motion at 17-19. In each instance, KCS mischaracterizes the scope of BNSF’s terminal trackage rights and attempts to impose legal and factual predicates on BNSF’s Petition that simply do not exist.

Contrary to KCS’s contention, BNSF does not assert that “BNSF was granted unfettered access to any tracks connecting with any shipper BNSF wished to serve irrespective of the ownership of those tracks or the location of the shipper’s facility.” KCS Motion at 15. As described in the BNSF Petition at 5, BNSF will acquire access rights to the Montell Lead from its owner, the Port of Lake Charles, which has indicated to BNSF that it does not object to BNSF operating on the Montell Lead. BNSF has access rights to the remaining track required to serve LyondellBasell (the Rosebluff Lead) through the terminal trackage rights granted by the Board in Decision No. 3. No further access rights are required for direct BNSF service to LyondellBasell.

In any event, in order to properly fulfill the Lake Charles Condition, the terminal trackage rights granted by the Board in Decision No. 3 over the Rosebluff Lead must permit BNSF to directly serve all customers subject to the Lake Charles Condition, including LyondellBasell. None of the relevant constituent parts of the collective Lake Charles Condition indicate that a

shipper must be immediately adjacent to the relevant trackage rights line (in this case, the Rosebluff Lead) in order to receive direct BNSF service.⁷

KCS also argues that the Board should dismiss the Petition because the scope of the terminal trackage rights granted by the Board is limited to the particular type of commodity identified by CITGO. *See* KCS Motion at 13. The Board placed no such commodity restrictions on its grant of terminal trackage rights in Decision No. 3.

D. LyondellBasell Desires BNSF Direct Service and the Board’s Public Interest Finding in Decision No. 3 Applies Here.

KCS next asserts that a “fundamental predicate” of the BNSF Petition “is that Lyondell desires direct BNSF service and that such service is in the public interest,” but that BNSF has failed to present such evidence. KCS Motion at 20-21. Again, KCS is wrong with regard to both the matters that BNSF must prove and the facts on the ground. The Board already found in Decision No. 3, slip op. at 9-13, that BNSF’s requested terminal trackage rights over the Rosebluff Lead to serve all West Lake Charles shippers are in the public interest. BNSF does not need to re-establish the validity of this public interest finding each time it elects to directly serve a customer using those terminal trackage rights.

The Board also did not require in Decision No. 3 that any of the parties prove that a customer desires BNSF direct service in connection with a request that the Board establish conditions of use and compensation to govern BNSF’s usage of its terminal trackage rights. That

⁷ KCS’s attempt to restrict the Lake Charles Condition to shippers immediately adjacent to the Rosebluff Lead is similar to UP’s argument that the UP/SP merger “new facilities” condition did not apply to a shipper facility that was not directly immediately adjacent to a UP line over which BNSF had been granted trackage rights. *See UP/SP Merger Decision No. 86*, 4 S.T.B. 303, 305-07 (served July 12, 1999). The Board firmly rejected that UP effort, and it should do likewise here. *Id.* Any more narrow interpretation of the scope of BNSF’s terminal trackage rights over the Rosebluff Lead would “eviscerate” the Lake Charles Condition. *Id.* at 307.

said, LyondellBasell has indeed requested direct BNSF service through a letter September 7, 2016, attached hereto as Exhibit 2.

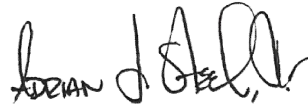
CONCLUSION

BNSF has established in this Reply that KCS's Motion is wholly without merit. BNSF received trackage rights in Decision No. 3 to directly serve all shippers accessed via the Rosebluff Lead, including LyondellBasell. The new legal and evidentiary tests that KCS has constructed in an effort to fend off or delay BNSF's petition are legally baseless. All that the Board required in Decision No. 3 for BNSF's Petition is that BNSF establish that the parties "cannot collectively reach an agreement" with respect to conditions of use and compensation for the parties' joint use of the Rosebluff Lead, "including BNSF's access (if it so elects) to serve shippers other than CITGO." Decision No. 3, slip op. at 19. BNSF's Petition clearly meets that standard.

BNSF thus respectfully requests that the Board summarily reject the Motion.⁸ Pursuant to 49 U.S.C. § 11102(d), the Board must complete this proceeding "within 180 days after the filing of the request for relief." The Board should not allow KCS to further delay the implementation of BNSF's terminal trackage rights by creating from whole cloth a "prima facie case" framework to govern BNSF's Petition that simply does not exist.

⁸ KCS urges the Board to "defer establishing a procedural schedule for BNSF direct service to Lyondell until such time as the Board rules on this Motion." KCS Motion at 22-24. As discussed in BNSF's Reply to UP's Motion to Establish Procedural Schedule (BNSF-133), filed concurrently with this Reply, the Board should expeditiously establish a procedural schedule to govern consideration of BNSF's petition.

Respectfully submitted,



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Counsel for BNSF Railway Company

Dated: February 21, 2018

EXHIBIT 1

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY

-- CONTROL AND MERGER --

SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY'S QUARTERLY PROGRESS REPORT

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July 1, 1997



BNSF

PETER J. RICKERSHAUSER
Vice President, Marketing, UP/SP Lines

Burlington Northern Santa Fe

Attachment 11

2650 Lou Menk Drive
P.O. Box 961065
Fort Worth, TX 76161-0065
817-352-6686
817-352-7154

April 21, 1997

Carrier Officer Name, Title
Company
Mailing Address
City, State ZIP

Dear *First Name*:

One of the major outcomes of the UP/SP merger and the conditions applying to BNSF has been our ability to access new customers at "2-to-1 points", points served prior to the UP/SP merger by only UP and SP, now also served by BNSF. In addition, BNSF gained access to new customers at major locations through reciprocal switching arrangements with carriers at those terminals. Finally, BNSF gained access to 17 additional shortline and regional rail carriers at "2-to-1 points" as a result of the UP/SP merger. As a result, you and your customers can now look to BNSF for competitive rail service to reach over 1,100 new direct customer locations throughout the West.

We have enclosed three lists to help illustrate BNSF's new customer reach as a result of the UP/SP merger. The first list shows the 17 additional shortline and regional rail carriers at "2-to-1 points" which can now interchange directly with BNSF at the junctions shown. The second lists the customers we now reach directly at "2-to-1 points", or through interchange or reciprocal switch, sorted by customer location (state, city, customer name). The third list shows those customers in alphabetical order.

These lists continue to change and grow as BNSF and UP review and add additional specific customer locations to our "2-to-1" customer lists. We will send out periodic updates to these lists. In addition, if you would like this information in a spreadsheet format on a diskette for easier handling by your organization, please let me know, and one will be provided.

If, after reviewing the attachments, you have any further questions, or if the Burlington Northern Santa Fe can provide additional information, please contact either your ongoing BNSF interface in the Shortline/Interline Development Group or one of us. BNSF appreciates our business relationship with your company, and we hope you will take full advantage of our new routes and services over UP/SP lines as a result of the UP/SP merger to extend your customers' competitive rail service reach to the new points we serve - on BNSF!

Sincerely,

042197.conncarr

TWO-TO-ONE CUSTOMERS AS OF JUNE 26, 1997

COMPANY	STATION	ST
Allen Millwork Inc	Shreveport	LA
Atlas Processing Co (UP Pennzoil Products)	Shreveport	LA
Beaird Industries Inc	Shreveport	LA
Custom Bilt Cabinet & Supply	Shreveport	LA
G S Roofing Products Co Inc	Shreveport	LA
Georgia Pacific Corp	Shreveport	LA
Hart Lumber Co Inc	Shreveport	LA
Murphy Bonded Warehouse Inc	Shreveport	LA
National Biscuit Co (Nabisco)	Shreveport	LA
Purina Mills Inc	Shreveport	LA
Rothschild Boiler Tank & Works Inc (UP *Bell Industri	Shreveport	LA
S F Services Inc	Shreveport	LA
Sears Roebuck & Co	Shreveport	LA
Southwestern Electric Power Co	Shreveport	LA
Condea Vista Co	West Lake	LA
Conoco	West Lake	LA
Holnam (UP Ideal Basic Industries)	West Lake	LA
Jupiter Nash (*Jupiter Chemicals Inc ?)	West Lake	LA
Olin Corp	West Lake	LA
PPG Industries	West Lake	LA
Tetra Chemical (*Tetra Technologies Inc?)	West Lake	LA
Alcoa Specialty	West Lake Charles	LA
Baroid	West Lake Charles	LA
Citgo Petroleum Corp	West Lake Charles	LA
Firestone Tire & Rubber	West Lake Charles	LA
Occidental Chemical	West Lake Charles	LA
Port of Lake Charles	West Lake Charles	LA
W R Grace	West Lake Charles	LA
West Lake Polymers	West Lake Charles	LA
Ag Processing	Dexter	MO
Cargill	Dexter	MO
Hudson Foods	Dexter	MO
Monarch Feed Mills	Dexter	MO
Union Electric	Union Electric Coal	MO
Baker Hughes Inteq	Argenta	NV
Battle Mountain Auto Supply	Battle Mountain	NV
M I Drilling Fluids	Battle Mountain	NV
Sierra Chemical NV	Battle Mountain	NV
Anschutz Marketing Transport	Carlin	NV
Kilborn International	Carlin	NV
Baroid Drilling Fluids	Dunphy	NV
Koch Sulfur Products	Dunphy	NV

EXHIBIT 2



Richard Miller
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Fort Worth, TX 76131-2830

Wednesday, September 7, 2016

Richard,

Given the Surface Transportation Board's Decision No. 3 (Docket No. FD 32760, June 29, 2016), Lyondell Chemical Company, Equistar Chemicals, LP, and LyondellBasell Acetyls, LLC (collectively, "Customer") request that BNSF Railway Company provide direct rail service to Customer's Lake Charles, LA facility under the Transportation Master Contract, BNSFC 310890.

Thank you,

A handwritten signature in blue ink that reads "Natalie Nichols".

Natalie Nichols
Rail Logistics Commercial Manager
Lyondell Chemical Company

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2018, copies of the foregoing BNSF's Reply to Kansas City Southern Railway Company's Motion to Dismiss have been served by e-mail on Counsel for UP, KCSR and CITGO.

A handwritten signature in black ink, appearing to read "Adrian L. Steel, Jr.", written over a horizontal line.

Adrian L. Steel, Jr.