

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket FD 35068

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SOO LINE RAILROAD COMPANY D/B/A CANADIAN PACIFIC RAILWAY
– ACQUISITION AND OPERATION EXEMPTION –
BNSF RAILWAY COMPANY

SOO LINE RAILROAD COMPANY’S
OPPOSITION TO NEW CENTURY AG’S PETITION TO FILE REBUTTAL

Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) opposes the Petition of New Century Ag to File Rebuttal to the Reply of CP and Proposed Rebuttal (“Rebuttal”). The Surface Transportation Board (“STB” or “Board”) rules prohibit a reply to a reply and an exception is not justified here under Board precedent. New Century Ag’s (“NCA”) Rebuttal rehashes arguments from NCA’s December 21, 2018 Petition to Reopen (“Petition to Reopen”) and presents no evidence or argument that was not already made, or could not have been made, in NCA’s opening submission. NCA’s Rebuttal is nothing more than a transparent effort to circumvent Board rules to have the last word. NCA’s Rebuttal is without good cause and should be rejected.

ARGUMENT

The Board’s procedural rules applicable to the Petition to Reopen provide only for the filing of an opening and a reply: “A reply to a reply is not permitted.” 49 C.F.R. § 1104.13(c). These rules give the respondent the last word and require that the petitioner put in its opening pleading all its arguments and evidence supporting the request for action. *Beaufort R.R. Co., Inc. - Modified Rail Certificate*, FD 34943, slip op. at 5 (STB served July 21, 2009) (“*Beaufort*”). Thus, the Board routinely rejects surreplies that merely repeat arguments from the initial pleading or

simply rebut arguments in the reply. *See, e.g., Adrian & Blissfield R.R. Co.-Petition for Declaratory Order*, FD 36148, slip op. at 3 (STB served Jan. 31, 2018) (rejecting reply to reply that consisted of rebuttals to the arguments made in opposition to petition for declaratory order); *Petition of the W. Coal Traffic League to Inst. a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model in Determining the R.R. Industry's Cost of Equity Capital*, EP-664 (Sub-No.2), slip op. at 1-2 (STB served Aug. 14, 2017) (rejecting reply to reply, which merely repeated previously submitted arguments). Likewise, the Board rejects surreplies that contain no “new evidence”, *i.e.*, evidence that could have been brought before the Board previously. *See CSX Transp. Inc.—Abandonment Exemption—In Franklin Cty. PA*, AB-55 (Sub-No. 568X), slip op. at 4 (STB served July 27, 2005) (rejecting reply to a reply that contained no newly discovered evidence and contained nothing that had not already been entered in the proceeding). *Cf. Entergy Ark., Inc. & Entergy Serv., Inc. v. Union Pac. R.R. Co., Mo. & N. Ark. R.R. Co., Inc. & BNSF Ry. Co.*, NOR 42104, slip op. at 3 (STB served Nov. 26, 2012) (rejecting supplemental evidence that contained data that was previously available to complainants).

The Board has granted leave from its prohibition on replies to replies for good cause only when “necessary” or in complex disputes that, for example, include the presentation of new evidence. *See Petition of Union Pac. R.R. Co. for Declaratory Order*, FD 35960, slip op. at 5 (STB served Sept. 30, 2016). This dispute is not complex and the information contained in NCA’s Rebuttal is not “new evidence.” Good cause does not exist here.

A. NCA’s Argument that Rebuttal is Necessary to Correct Factual Inaccuracies is False and a Mere Pretext for Rehashing Arguments it Made in its Petition to Reopen.

NCA argues that rebuttal is needed to address alleged inaccuracies in CP’s evidence that it could not have anticipated. Obviously, CP disagrees that any of its evidence is inaccurate. More to the point, the issues that NCA raises as a basis for its Rebuttal are issues on which NCA already

took a position in its Petition to Reopen. For example, NCA argues that it needs to rebut CP's assertion that, prior to construction of the Noonan loop track, CP placed NCA on notice that NCA would not receive BNSF unit train service. However, NCA already asserted in its Petition to Reopen that CP provided no such notice. Petition to Reopen at 7-9. NCA is not entitled to rebuttal evidence merely to insist on the truthfulness of its opening evidence or the correctness of its arguments. Nor is it proper rebuttal for NCA to present new evidence and argument that it could have presented in its opening brief. *Beaufort*, slip op. at 5. NCA's rebuttal evidence also falls far short of actually rebutting CP's reply evidence.¹

NCA's claim that it needs to rebut evidence regarding its awareness of BNSF's and CP's rights to terminate their Haulage Agreement is similarly flawed. NCA already argued in its Petition to Reopen that it was not aware that the agreement could be terminated at the expiration of the initial term and without Board approval. Petition to Reopen at 18-20. NCA might not like CP's reply evidence, but that does not entitle it to submit additional argument or evidence regarding NCA's purported ignorance of the contents of the Haulage Agreement and applicable law.

Likewise, NCA's argument that it needs rebuttal to correct the record with respect to the nature of the rail service that NCA's predecessor received prior to 2007 does not survive scrutiny. NCA contends that there should be no change in the nature of rail service BNSF can provide as a result of the 2007 transaction. Accordingly, it included in its Petition to Reopen, evidence and argument regarding rail service that NCA (or its predecessors) received prior to 2007 and how that

¹ According to CP's evidence, David Wood had conversations with both Lynn Michelson and Richard Larsen regarding the fact that NCA would not have access to BNSF unit trains at Noonan. However, NCA's Rebuttal includes only the verified statement of Mr. Michelson. Moreover, he claims not to recall such conversations and does not deny that they occurred. Michelson Rebuttal V.S. at ¶¶ 10-12. Lastly, he acknowledges that CP told NCA in writing that NCA could not receive unit train service from BNSF at Noonan (*id.*), a representation that is repeated in Michelson's March 12, 2014 letter to the STB's Tom Brugman: "CP has sent NCA a letter denying delivery of BNSF Shuttle moves from Minot to Flaxton." *Id.*, Exhibit 3.

service has changed after the 2007 transaction (Michelson V.S. at ¶¶ 31-33). Yet it presented no evidence that NCA received “unit” train service on the Joint Line prior to NCA’s construction of its loop track at Noonan in 2014. This omission is because NCA received no unit train service at the Joint Line facilities prior to 2014. In fact, while NCA excoriates CP’s evidence on this issue as “grossly inaccurate,” it admits that CP is, in fact, correct. Rebuttal at 7.

Notwithstanding NCA’s claim that rebuttal is necessary to address these specific issues, NCA did not limit its Rebuttal to “correcting” the record on these limited points. Rather, NCA’s 26-page Rebuttal is a comprehensive attempt to refute CP’s reply evidence. Nor does NCA’s Rebuttal actually correct the record. Rather, it contains several inaccuracies and repeatedly distorts CP’s evidence and arguments. Permitting NCA to circumvent the Board’s rules as it seeks to do here would open the door to endless filings, needlessly increasing the burden on the parties and the STB. The Board should reject NCA’s Rebuttal as improper.

B. NCA’s Rebuttal Does Not Support Granting the Extraordinary Relief that NCA Requests.

NCA’s Rebuttal does not support the extraordinary relief that NCA seeks in its Petition to Reopen. NCA presents no new evidence that was not reasonably available to it when the record was developed in the 2007 proceeding and in every year since. NCA’s Rebuttal does not even attempt to establish that its evidence would have mandated a different result. Rather, NCA’s Rebuttal, like its Petition to Reopen, seeks to excuse NCA’s inaction over the past 11 years, a period in which NCA enjoyed the substantial benefits of the 2007 transaction including enhanced service and competition. Indeed, NCA continues to enjoy enhanced intramodal competition despite the fact that the initial term of the Haulage Agreement expired January 1, 2017. NCA’s Rebuttal contributes nothing to the record and should be rejected.

CONCLUSION

NCA's recycled arguments are not "new evidence" and they are most certainly not "necessary" to explain the type of complex issues that the Board has deemed worthy of a surreply in the past. Good cause does not exist to grant leave from the Board's express prohibition on filing a reply to a reply. Accordingly, the Board should reject the Petition of New Century Ag to File Rebuttal to The Reply of CP and Proposed Rebuttal.

Dated: March __, 2019

William M. Tuttle
General Counsel – US
Marie van Uiter
Legal Counsel – US
Soo Line Railroad Company
d/b/a Canadian Pacific
120 South Sixth Street, Suite 800
Minneapolis, MN 55402

Respectfully submitted,

/s/ David F. Rifkind
David F. Rifkind
Tristan H. Brown
Stinson Leonard Street LLP
1775 Pennsylvania Avenue, NW,
Suite 800
Washington, D.C. 20006
202-969-4218
202-572-9994 Fax
david.rifkind@stinson.com

W. Karl Hansen
Stinson Leonard Street LLP
50 South Sixth Street
Suite 2600
Minneapolis, MN 55402

Counsel for Soo Line Railroad Company
d/b/a Canadian Pacific

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2019 I served the foregoing Opposition to New Century AG's Petition to File Rebuttal by electronic mail and first class mail, postage-prepaid, on the following:

Edward Greenberg, Esq.
Thomas Wilcox, Esq.
Kristine Little, Esq.
GKG Law, P.C.
The Foundry Building
1055 Thomas Jefferson Street, NW
Washington, DC 20007
EGreenberg@gkglaw.com
TWilcox@gkglaw.com
KLittle@gkglaw.com

Adrian Steel, Esq.
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
ASteel@mayerbrown.com

Peter Denton, Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
pdenton@steptoe.com

/s/ David F. Rifkind
David F. Rifkind