

MAYER • BROWN

Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel +1 202 263 3000
Main Fax +1 202 263 3300
www.mayerbrown.com

December 2, 2015

239659

BY E-FILING

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

ENTERED
Office of Proceedings
December 2, 2015
Part of
Public Record

Adrian L. Steel, Jr.
Direct Tel +1 202 263 3237
Direct Fax +1 202 263 5237
asteel@mayerbrown.com

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:

Enclosed for electronic filing in the above-captioned proceeding is BNSF's Reply to Kansas City Southern Railway Company's Motion to Strike the Verified Statements of Richard Weicher and Footnotes 7 and 15 to BNSF's Rebuttal Argument.

Please contact me if you have any questions. Thank you.

Sincerely yours,



Adrian L. Steel, Jr.

Enclosures

cc: Edward D. Greenberg, Esq.
William A. Mullins, Esq.
Michael L. Rosenthal, Esq.
All parties of record

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 Strike the Verified
Statements of Richard Weicher and Footnotes 7 and 15 to BNSF's Rebuttal Argument**

Roger P. Nober
Richard E. Weicher
David T. Rankin
Courtney Biery Estes
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Adrian L. Steel, Jr.
Adam C. Sloane
Peter W. Denton
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3237

Roy T. Englert, Jr.
Robbins, Russell, Englert, Orseck,
Untereiner & Sauber LLP
1801 K Street, NW, Suite 411L
Washington, DC 20006
(202) 775-4500

COUNSEL FOR BNSF RAILWAY COMPANY

December 2, 2015

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 Railway Company hereby replies to Kansas City Southern Railway Company's Motion to Strike the Verified Statements of Richard Weicher and Footnotes 7 and 15 to BNSF's Rebuttal Argument, which KCS filed in the above-referenced proceeding on November 12, 2015 (the "Motion").¹ As explained below, the Board should deny KCS's Motion because the Motion is untimely with respect to Mr. Weicher's first Verified Statement, and because the Motion offers no legally authoritative basis for striking either of Mr. Weicher's Verified Statements. As a direct participant in the negotiation of the two key settlement agreements at issue, Mr. Weicher is a "well-informed witness" with an enhanced competence to provide reliable and probative testimony as to the parties' intent in those agreements. Similarly, KCS provides no valid grounds for striking footnotes 7 and 15 to the BNSF Rebuttal concerning the 50/50 Line Agreement, particularly given that the challenged statements are factually correct and that BNSF does not rely on the 50/50 Line Agreement as the basis for the terminal trackage rights that it requests in its Application.

¹ The acronyms and defined terms used herein are the same as those used in BNSF's Rebuttal in Support of Application for Terminal Trackage Rights, filed in this proceeding on October 23, 2015 ("BNSF Rebuttal").

I. The Weicher Verified Statements Are Permissible

A. The Motion to Strike Is Untimely And Granting the Motion Would Be Fundamentally Unfair

As an initial matter, the Motion is untimely with respect to the first Verified Statement of Mr. Weicher, filed on December 31, 2014 (accompanying the BNSF Opening Statement and Evidence filed that same day). Any motion to strike this first Verified Statement should have been filed by January 20, 2015. *See* 49 C.F.R. § 1104.13(a) (“A party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board . . .”). KCS cannot be permitted to file a motion to strike Mr. Weicher’s Verified Statement 316 days after it was filed. Moreover, to permit KCS to challenge Mr. Weicher’s Verified Statements at this late date would be fundamentally unfair. If KCS had timely filed its Motion, BNSF would have had ample opportunity to take the Board’s ruling on the Motion into account in preparing subsequent pleadings and evidence. At this stage of the proceeding, however, BNSF is deprived of such an opportunity. For these reasons, the Board should summarily deny the Motion with respect to the Verified Statements of Mr. Weicher.

B. No Rule Prohibits Mr. Weicher From Submitting a Verified Statement and Appearing As Counsel in the Same Proceeding

More generally, KCS’s Motion must be denied because KCS fails to support its arguments with any citations to controlling statutes, Board rules, or Board precedent. Faced with this lack of support, KCS baldly alleges that “Mr. Weicher seeks to serve an *impermissible* dual role as both counsel . . . and as a fact witness.” Motion at 2 (emphasis added). In fact, the Board has no rule or standard prohibiting practitioners from participating in proceedings as both advocates and witnesses. Grasping at straws, KCS alludes to a “general rule” allegedly applicable in other forums, and cites to two cases decided by the Board’s predecessor agency, the

Interstate Commerce Commission (the “ICC”), which interpret rules or standards that are now not applicable to practice before the Board.

In particular, KCS cites a “general rule” contained in the *ABA Model Code of Professional Conduct* that “attorneys are prohibited from acting as both witness and advocate in an adjudicatory proceeding.” Motion at 3-4. However, KCS has already acknowledged in this proceeding that this “general rule” does not apply here. *See* KCS August 24, 2015 Reply at 21, note 25 (“The [ABA Model Code] prohibition against a lawyer testifying applies ‘at trial,’ and this matter, while an adjudicatory proceeding, is not ‘a trial.’”). As the Board has noted recently, the Board does not necessarily follow “general rules” of evidence applicable in other contexts: “[t]he Board’s rules of practice are more informal than the Federal Rules of Evidence; they permit the Board to accept any evidence that is reliable and probative (49 C.F.R. § 1114.1) and are to be construed liberally (49 C.F.R. § 1100.3).” *Denver & Rio Grande Ry. Historical Found.—Petition for Declaratory Order*, STB Finance Docket No. 35496, slip op. at 3 (STB served Aug. 18, 2014) (hereinafter *Denver & Rio Grande*). In this instance, the Verified Statements of Mr. Weicher are certainly both “reliable” and “probative,” in compliance with 49 C.F.R. § 1114.1. Mr. Weicher directly participated on behalf of BNSF in the negotiations of the BNSF Settlement Agreement and the CMA Agreement that underlie many of the issues in this proceeding, and his Verified Statements attest to the background of and the intent of the parties to those agreements.

In further support of its disingenuous challenge to Mr. Weicher’s testimony, KCS cites a 1977 ICC motor carrier case for its claim that “the Board’s predecessor agency specifically prohibited lawyers from being witnesses (except in very limited circumstances).” Motion at 4.

KCS then buries in a footnote an ICC order revising the ICC rules of practice, released two months *after* that decision, where the ICC stated:

Many of the practitioners before the Commission are intimately involved in a daily basis with the inner workings and problems of the clients they represent. This involvement results in an expertise which enhances the practitioner's competence as an advocate and makes him a well-informed witness. We conclude that the Code of Ethics for Practitioners before the Interstate Commerce Commission *does not bar any practitioner before the Commission from appearing in a dual capacity.*

Revised Rules of Practice, Ex Parte No. 55 (Sub-No. 24), 358 I.C.C. 189, 200-201 (1977)

(emphasis added). The ICC allowed practitioners such as Mr. Weicher to participate in proceedings as both advocates and witnesses for precisely the same reason that Mr. Weicher's testimony is appropriate and valuable here, and the Board has no rule prohibiting such dual capacity. Indeed, Mr. Weicher's involvement in the negotiation of both the BNSF Settlement Agreement and the CMA Agreement has afforded him "an expertise which enhances [his] competence" to address the parties' intent in those two agreements and makes him a "well-informed witness" in that regard. *Id.*²

Furthermore, Mr. Weicher has acted as both witness and advocate previously in the UP/SP merger proceeding. In connection with a pleading filed in 2002 (for which he also served

² In footnote 3 to its Motion, KCS suggests a further purported basis for striking Mr. Weicher's testimony – that "BNSF prevented discovery about certain statements and issues set forth in Mr. Weicher's statements (and others) by asserting attorney-client privilege in response to discovery requests." KCS cites no Board authority for the proposition that a verified statement may be struck on this ground, and BNSF is aware of no Board rule or precedent supporting KCS's request. More importantly, KCS reported in a March 16, 2015 letter to the Board, at footnote 3, that "none of the remaining documents [which KCS sought to have produced] are subject to the Attorney-Client Privilege." KCS's letter to the Board was submitted months after the first Weicher Verified Statement was filed. If KCS believed that BNSF improperly asserted the privilege while proffering a Verified Statement by Mr. Weicher, KCS should have pursued any such complaint during the discovery dispute resolution process in this proceeding. As the Board knows, the parties resolved all of their discovery disputes without the need for a decision from the Board or an Administrative Law Judge.

as counsel for BNSF), Mr. Weicher submitted a verified statement testifying to similar facts regarding the intent of the parties to the BNSF Settlement Agreement and the CMA Agreement. *See* UP/SP Merger Proceeding, BNSF’s Response to Order to Show Cause Why BNSF-98 Petition for Clarification Should Not Be Dismissed, BNSF-102 (filed May 22, 2002). Mr. Weicher’s competency to submit such testimony while appearing as counsel was not challenged by any party or by the Board.

C. Mr. Weicher’s Verified Statements Properly Set Forth Both Facts and Opinion

In its Motion, KCS clings to the misguided notion that verified statements must only contain “facts.” *See* Motion at 4-6. In fact, as acknowledged by the Board’s rules, verified statements can properly provide opinion and argument on subjects relevant to the proceeding. *See* 49 C.F.R. § 1112.6 (“A verified statement should contain all the facts upon which the witness relies, and to the extent that it contains arguments, they should be based only on those facts.”). In his Verified Statements, Mr. Weicher properly set forth the facts surrounding the relevant agreements and his opinions and arguments based on those facts.

KCS nevertheless challenges Mr. Weicher’s testimony by alleging that “it certainly cannot be said that his testimony is objective and factual,” but rather is “biased and self-serving.” Motion at 3. Of course, the Board does not require that verified statements be “objective,” and few verified statements would survive a motion to strike under the standard suggested by KCS. Furthermore, a motion to strike is not the proper vehicle for disputing the veracity of Mr. Weicher’s Verified Statements. *See Union Pac. R.R. Co.—Abandonment Exemption—In Rio Grande and Mineral Counties, CO*, STB Docket No. AB-33 (Sub-No. 132X), slip op. at 3 (STB served June 22, 2004) (“The Board’s role in this proceeding is to evaluate the entire record and accord weight to witness testimony as warranted. It is not appropriate to strike evidence from the

record because of disputes as to witness veracity.”). KCS had an opportunity through its Reply to challenge Mr. Weicher’s Verified Statement, and KCS futilely attempted to do so at great length. *See* KCS August 24, 2015 Reply at 21-24.³

Mr. Weicher’s statement indeed sets forth clear facts, in contrast to KCS’s confusion with respect to basic details of the CMA Agreement, including the identity of the parties to the Agreement. At page 6 of its unauthorized October 23, 2015 Rebuttal, KCS asserts incorrectly that “BNSF was not a party to the CMA Agreement,” and thus that UP’s statements as to the intent of the CMA Agreement should govern. The CMA Agreement, however, was executed in counterparts, and Mr. Weicher executed the BNSF counterpart. Moreover, BNSF is expressly identified as BN/Santa Fe in the preamble to the CMA Agreement as a party to the Agreement.

D. The Parol Evidence Rule Provides No Support for the Motion to Strike

In a final attempt to invalidate Mr. Weicher’s Verified Statements, KCS alleges that the statements should be stricken because they are “really no more than an effort to get around the basic parol evidence rule that a court or agency should not look beyond the wording of the document or contract that is complete on its face.” Motion at 6. KCS has, however, seriously misstated the common law “parol evidence” rule. That rule “provides that if the parties to a written agreement assent to a writing as the final and complete expression of the terms of their agreement, evidence of prior or contemporaneous agreements may not be admitted to contradict, vary, or add to the terms of the writing.” *Introduction of Evidence Over Parol Evidence Rule*

³ KCS also alleges that Mr. Weicher incorrectly “claims that the right to provide direct service to CITGO using trackage rights over the Rose Bluff Lead was ‘granted to BNSF by UP in the CMA Agreement.’” Motion at 5. KCS is wrong. BNSF’s right to serve West Lake Charles (and thus CITGO), while not included in the CMA Agreement at the time it was signed, was later added to the Agreement. *See* UP/SP Merger Decision No. 44, 1 S.T.B. 233, 254 n. 24. Section 4(b) of the Second Supplemental Agreement (UP Counsel’s Exhibit 5) and Section 5(b) of the RASA (UP Counsel’s Exhibit 2) confirm the expanded scope of the CMA Agreement.

Objection, 36 Am. Jur. 3d 331 *Proof of Facts*, § 2. The rule “does not operate to exclude extrinsic evidence which tends to aid, confirm, or explain a writing rather than alter it, or which assists the court in understanding and interpreting the language of the writing.” *Id.* Furthermore, as noted above, “the Board’s rules of practice . . . permit the Board to accept any evidence that is reliable and probative (49 C.F.R. § 1114.1) and are to be construed liberally (49 C.F.R. § 1100.3).” *Denver & Rio Grande*, slip op. at 3. Likely due to this broad evidentiary standard, the Board has no rule or practice of excluding evidence based on the “basic rule” proffered by KCS, and KCS cites no support for its Motion to Strike on this ground.⁴

Moreover, the rule provides no support for KCS’s Motion to Strike. Through his Verified Statements, Mr. Weicher does not seek to alter or vary the BNSF Settlement Agreement or the CMA Agreement, but rather explains and provides important context and background to the agreements, all of which comports with the (correctly stated) parol evidence rule. Indeed, parties to Board proceedings frequently submit verified statements from witnesses providing opinion on the contents and background of documents. For example, in its unauthorized October 23, 2015 Rebuttal at 5-12, KCS itself relies extensively on UP’s statements as to the intent of the BNSF Settlement Agreement and the CMA Agreement, as set forth in the Reply Verified Statement of John H. Rebensdorf submitted by UP on August 24, 2015. Should the Board determine that Mr. Weicher’s Verified Statements should be stricken, UP’s verified statements covering the same ground as Mr. Weicher would suffer the same infirmity.

⁴ An exhaustive search of the Board’s precedent did not uncover any instance in which the Board has applied the parol evidence rule, and the ICC only rarely considered the rule. In 1993, ICC Commissioner Philbin wrote in a separate concurring expression that the parol evidence rule would permit extrinsic evidence of the intent of the parties where the evidence clarifies the meaning of an agreement but does not vary its terms. *Del. & Hudson Ry. Co. v. Consol. Rail Corp.*, 9 I.C.C.2d 989, 1004 (1993). This interpretation of the rule, while dicta, generally comports with the modern interpretation of the rule by other jurisdictions.

II. Footnotes 7 and 15 to the BNSF Rebuttal Are Permissible

In addition to its untimely and misguided arguments about the permissibility of Mr. Weicher's Verified Statements, KCS improperly requests that the Board strike footnotes 7 and 15 of the BNSF Rebuttal filed in this proceeding on October 23, 2015. KCS yet again cites no authority for its request, instead claiming falsely that the footnotes "assert the opposite of what BNSF previously said." Motion at 8. There is no basis for KCS's Motion to Strike the footnotes, and the Board should reject this further thinly-veiled attempt by KCS to provide improper sur-reply argument.

KCS asserts that BNSF stated in footnotes 7 and 15 of its Rebuttal that "the 50/50 Line Agreement granted BNSF the trackage rights that it seeks in this proceeding." Motion at 7. KCS claims that these statements are inconsistent with prior statements by BNSF that KCS characterizes as disavowing that Agreement as the basis for BNSF's Application here, and that BNSF should not be able to rely on the 50/50 Line Agreement here to support its Application. In fact, BNSF does not rely on the 50/50 Line Agreement for that purpose, and KCS's arguments reflect its continuing inability to understand the nature of BNSF's request for terminal trackage rights.

As an initial matter, the statements about the 50/50 Line Agreement which KCS alleges should be stricken are both indisputably factually correct. They are repeated here for completeness:

7 Additionally, the 50/50 Line Agreement between UP and BNSF contains a provision granting BNSF trackage rights on former SP spurs and branches connecting to the 50/50 Line, including the Rose Bluff Lead. *See* Opening Statement at 7-8. This independent grant of trackage rights in the 50/50 Line Agreement stands alone as "sufficient legal authority" for implementation of trackage rights on the Rose Bluff Lead and precludes the application of Section 8(n).

15 As discussed above in note [7], the 50/50 Line Agreement contains a provision granting BNSF trackage rights on former SP spurs and branches connecting to the 50/50 Line, including the Rose Bluff Lead. *See* Opening Statement at 7-8. The 50/50 Line Agreement represents an independent commitment (outside of the BNSF Settlement Agreement, the CMA Agreement, and the UP/SP merger conditions) for UP to accommodate BNSF direct service on the Rose Bluff Lead.

BNSF Rebuttal at 11 n. 7 and 28 n. 15. The September 1, 2000 50/50 Line Operating Agreement (UP Counsel's Exhibit 7) provides in Section 2.1(a) that both joint owners (i.e., UP and BNSF) have the right to serve "all present and future industries or facilities originating or terminating traffic on the Joint Trackage." The Joint Trackage is defined as including former SP branches and spurs off the 50/50 Line. The Rose Bluff Lead is such a former SP branch or spur. *See* Definition of "Customer Access Trackage." Section II.2 of the February 12, 1998 Term Sheet Agreement (UP Counsel's Exhibit 6) confirms that each party may serve industries and facilities on the former SP spurs and branches direct, by reciprocal switch and via haulage.

As noted, KCS asserts that BNSF should not be allowed to rely on the 50/50 Line Agreement as the source of trackage rights over the Rose Bluff Lead. BNSF does not seek to rely on the 50/50 Line Agreement in such a manner. In this proceeding (as BNSF has explained on numerous occasions to KCS and its counsel), BNSF relies on the CMA Agreement and the Board's imposition of the Lake Charles Condition on the UP/SP merger to support the *terminal* trackage rights that it seeks. BNSF has not disavowed the 50/50 Line Agreement as being a separate and distinct basis for trackage rights over the Rose Bluff Lead.

If BNSF's Application here is denied, then any provision in the 1948 Joint Facility Agreement between KCS and UP that might require KCS's consent for the grant to BNSF by UP of trackage rights to serve the CITGO and other facilities on the Rose Bluff Lead is, as explained in BNSF's Rebuttal at pages 34 to 42, overridden pursuant to the self-executing provisions of 49 U.S.C. § 11321(a) under clear U.S. Supreme Court and Board precedent, including Decision No.

66 in the UP/SP merger proceeding. BNSF's right to provide such service is established by Section 8 of the CMA Agreement as imposed by the Board as a merger condition.

As the challenged footnotes 7 and 15 state, the 50/50 Line Agreement provides a third basis for BNSF trackage rights over the Rose Bluff Lead independent of the BNSF Settlement Agreement, the CMA Agreement and the Board's merger conditions. BNSF does not rely on that right in establishing the basis for its Application.

There is thus no basis or need for the Board to grant KCS's Motion to Strike footnotes 7 and 15. KCS's complaint arises simply from its failure to comprehend the straightforward fact that there are three different paths by which BNSF can secure the trackage rights recognized by the Board as critical to the preservation of fully effective competition at Lake Charles.

III. Conclusion

BNSF respectfully requests that the Board deny KCS's Motion to Strike. In addition to lacking any merit as explained above, KCS's Motion is just one more effort in its campaign to postpone the day when the Board's Lake Charles Condition is fully implemented. It has now been nearly three years since BNSF filed its Application in this proceeding seeking to implement the right afforded to it by Section 8 of the CMA Agreement, as incorporated into the Lake Charles Condition, to provide direct train service to shippers on the Rose Bluff Lead. Those shippers' corresponding right to receive such service has been similarly delayed. If the Board's merger conditions are to be effective, they must be implemented in a timely and effective manner in order to vindicate shippers' rights to fully competitive replacement service by BNSF. The full implementation of the Lake Charles Condition should not be delayed further.

Respectfully submitted,



Adrian L. Steel, Jr.
Adam C. Sloane
Peter W. Denton
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3237

Roy T. Englert, Jr.
Robbins, Russell, Englert, Orseck,
Untereiner & Sauber LLP
1801 K Street, NW, Suite 411L
Washington, D.C. 20006
(202) 775-4500

Roger P. Nober
Richard E. Weicher
David T. Rankin
Courtney Biery Estes
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Counsel for BNSF Railway Company

Dated: December 2, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2015, copies of the foregoing BNSF's Reply to Kansas City Southern Railway Company's Motion to Strike the Verified Statements of Richard Weicher and Footnotes 7 and 15 to BNSF's Rebuttal Argument have been served by e-mail on Counsel for UP, KCSR and CITGO.



Adrian L. Steel, Jr.