

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

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

September 23, 2013

BY HAND-DELIVERY

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

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Public Record

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:

We have reviewed the letters filed on September 16, 2013, by The Kansas City Southern Railway Company ("KCS") and Union Pacific Railroad Company ("UP") concerning the recent dismissal of KCS's suit against BNSF Railway Company ("BNSF") in the United States District Court for the Western District of Louisiana for lack of subject matter jurisdiction and wish to clarify a few especially significant matters.

First, contrary to KCS's suggestion, BNSF never conceded in the District Court that, under the four joint facility agreements, KCS's consent is required in order for UP to grant trackage rights to BNSF so that BNSF can implement direct service under the UP/SP merger conditions. BNSF did not dispute the meaning of the provisions at issue in connection with its motion to dismiss, because that substantive issue was not before the court with regard to BNSF's motion to dismiss, and so it would not have been appropriate for BNSF to make substantive contractual arguments at that point in the case. BNSF's motion focused solely on the court's lack of subject matter jurisdiction, and in such a motion the factual allegations in KCS's amended complaint (including allegations about the meaning of the relevant provisions) are to be taken as true. Thus, BNSF's silence on matters not properly in dispute before the court hardly constitutes any agreement with KCS's view of the terms of its agreements. Moreover, the footnote from the court's decision that KCS cites in its letter is *dicta* that merely discussed another possible jurisdictional ground for dismissing the lawsuit. The court's *holding* was that, because of the STB's exclusive jurisdiction, the court did not have subject matter jurisdiction over KCS's claims. Once the court determined that it did not have subject matter jurisdiction, it did not have jurisdiction to make a substantive finding that "upheld KCS's view" (KCS Letter at 3) on the interpretation of the four joint facility agreements. KCS's characterization of the court as having "found" in favor of KCS's interpretation of the agreements is wrong.

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Second, KCS criticizes BNSF for failing to negotiate or arbitrate the matters in dispute in this proceeding. In previous submissions in this proceeding, BNSF has detailed its discussions with both KCS and UP about the matters at issue here. BNSF also has explained that, because BNSF is not a party to the joint facility agreements that KCS has invoked, BNSF is not in a position to invoke the arbitration provisions of those agreements. KCS ignores that fact.

Third, KCS asks the Board to dismiss BNSF's application on the basis of KCS's bald assertion that BNSF is "not blocked from accessing Westlake/West Lake Charles shippers." (KCS Letter at 2.) KCS, however, *has* blocked BNSF from direct access to such shippers, and KCS's statements about BNSF service via reciprocal switch do not support KCS's request for summary dismissal of BNSF's application.

Fourth, on the heels of KCS's remarkable argument that there is simply no problem here to address because BNSF is not blocked from access, both KCS and UP in their letters suggest that the next step in the process should be negotiations between KCS, UP, and BNSF concerning BNSF's right to directly serve shippers in the Lake Charles area pursuant to the Board's conditions imposed in the UP/SP merger proceeding. There is nothing of substance to negotiate with respect to BNSF's right to provide direct service to shippers located in the Lake Charles area. The Board resolved that issue, over KCS's objections, with clarity in Decision Nos. 44 and 63 when it modified the settlement agreement between UP and BNSF to provide for such service in order to fully protect Lake Charles shippers' pre-merger competitive options.

With regard to any operational issues, BNSF understands that the principal operational concerns previously raised by UP have been resolved, and there is thus no need for extensive three-party negotiations to resolve operational issues. Nonetheless, BNSF is more than willing to join in three-carrier discussions, as necessary, to clarify and resolve any operational issues or concerns that may remain. In fact, BNSF was receptive to UP's invitation in February of this year for such discussions, but unaccountably those discussions never occurred. BNSF notes, however, that it expects any such negotiations to proceed expeditiously. These three carriers have a demonstrated ability to effectively coordinate joint operations 24-7 in other joint operating situations, consistent with industry custom and practice and without the need to resort to protracted contractual negotiations or interpretations. It has, however, been almost a year and a half since CITGO first requested direct train service by BNSF to its facility on the Rose Bluff Lead (and over 17 years since the Board imposed its merger condition entitling BNSF to provide and CITGO to receive such service). BNSF believes that any such negotiations should proceed promptly and run in parallel fashion with this proceeding before this Board so BNSF can provide the competitive replacement service at Lake Charles that the Board ordered. To ensure that such discussions do take place and that they are undertaken in good faith, BNSF proposes that the parties meet as soon as reasonably feasible and that they be required to report to the Board on their status and progress within the next thirty (30) days.

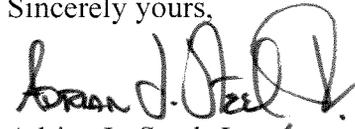
As for compensation issues, KCS's suggestion that BNSF is not willing to pay adequate compensation is wrong. BNSF will pay UP for use of the trackage at issue here in accordance with the trackage rights compensation provisions that are already in place under the Restated and

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Amended Settlement Agreement (“RASA”) and related agreements. UP, in turn, can resolve any additional compensation issues it may have with KCS under the joint facility agreements in bilateral discussions with KCS or in arbitration under those agreements. But the resolution of any disputes between KCS and UP relating to obligations and rights under the joint facility agreements (to which, as noted, BNSF is not a party) should *not* be allowed to further delay or block procedural due process before this agency to determine BNSF’s rights to implement direct service.

There is no reason for delay in issuance of a procedural schedule, which process may run in tandem with any ongoing discussions between BNSF and the incumbent carriers to address any continuing operating issues and any discussions between KCS and UP over any compensation issues.

Sincerely yours,



Adrian L. Steel, Jr.

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