

# BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS  
2401 PENNSYLVANIA AVENUE, NW  
SUITE 300  
WASHINGTON, DC 20037  
  
TELEPHONE: (202) 663-7820  
FACSIMILE: (202) 663-7849

234909

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William A. Mullins

Direct Dial: (202) 663-7823

September 27, 2013

## 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:

On September 23, 2013, BNSF Railway Company (“BNSF”) filed an unlawful reply to a reply (see 49 C.F.R. §1104.13(c)) responding to The Kansas City Southern Railway Company’s (“KCS’s”) reply letter of September 16, 2013. BNSF’s most recent reply to KCS’s reply contained several misstatements of fact that KCS seeks to correct.

BNSF tries to leave the impression that it has had several discussions with both KCS and Union Pacific Railroad Company (“UP”) to resolve this matter. That is misleading. It is true that when BNSF announced its intent to send a unit train directly onto the joint facility property without KCS’s consent and without adequate operational and safety protocols in place, there were several discussions regarding that particular instance. However, unlike the impression that BNSF would like the Board to have, once that unlawful trespass was prevented, BNSF has made no further efforts to discuss the matter with KCS, notwithstanding KCS’s publicly-stated willingness to negotiate.

BNSF has never sought to actually negotiate its future access to the joint facility properties as required by Decision No. 63. BNSF continues to claim that KCS’s consent is somehow not required for BNSF to access property either jointly owned, or solely owned, by KCS. BNSF acts as if the joint facility agreements don’t even exist, or, if they do, it is only UP that has a duty to negotiate, not BNSF. BNSF takes this position even though the Board

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specifically told BNSF to negotiate with both UP and KCS over the “terms of those agreements.”<sup>1</sup>

Even now, while for the first time expressing some willingness to negotiate with KCS, BNSF wants to limit those negotiations to “operational issues” associated with its access. BNSF still refuses to negotiate over (1) the terms of the agreements; (2) the scope and type of BNSF access; and (3) the compensation due for BNSF’s use of KCS’s property.<sup>2</sup> Incredibly, BNSF even goes so far as to say that “[t]here is nothing of substance to negotiate with respect to BNSF’s right to provide direct access.” Of course this flies directly in the face of what the Board told BNSF to do in Decision No. 63 – negotiate “as to the terms of the ... joint facility agreements.” KCS remains willing to negotiate with BNSF, but all issues must be addressed, not just “operational issues.”<sup>3</sup>

BNSF also urges the Board to act immediately – as if there is some harm to shipper service that is occurring that must be quickly remedied; leaving little time for negotiations (after BNSF waited 17 years to make even its current, limited offer to negotiate with KCS). To the contrary, there is no emergency. Shippers, including CITGO, continue to receive service from BNSF as a result of the arrangement between UP and BNSF, as they have for many years. The only shipper who has yet claimed any interest in this proceeding is CITGO. But CITGO currently has service from all three carriers, and quite effectively uses those competitive pressures to its advantage. Indeed, even though its service is via reciprocal switching, BNSF is a current provider of rail service to CITGO’s facility notwithstanding that UP and KCS have rights

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<sup>1</sup> “As to the terms of the four KCS-T&NO joint facility agreements, if the parties (KCS, BNSF, and UP/SP) are not able to come to an agreement, any differences in interpretation of the four joint facility agreements may be submitted to arbitration under the terms of those agreements.” Decision No. 63, slip. op., at 9-10 (emphasis supplied); “[I]f the parties (KCS, BNSF, and UP/SP) are not able to come to an agreement,” Decision No. 63, slip. op., at 9; and “[i]f the parties (KCS, BNSF, and UP/SP) are unable to agree,” Decision No. 63, slip. op., at 10.

<sup>2</sup> Remarkably, BNSF claims it doesn’t owe any compensation to KCS for the use of KCS owned property; claiming that UP owes KCS compensation for BNSF’s use of KCS’s property. Yet, even Section 11102 requires a carrier granted terminal trackage rights, which is the remedy BNSF seeks, to provide compensation to the owning carriers.

<sup>3</sup> To be clear, the initial access by UP’s predecessors to joint facility property in this area was the result of KCS granting access to tracks that KCS alone owned. Having granted that access via a series of contracts, UP’s ability to grant another railroad access to that same property is limited by the scope of UP’s contract rights, as the Board recognized in Decision No. 63. Although BNSF claims that it has authority from UP and the Board to use the joint facility tracks, the Board has no authority, as a condition to a merger, to grant access to property that UP does not own and has no contractual right to grant access to, especially when the other owner of that property (KCS) was not a merger applicant.

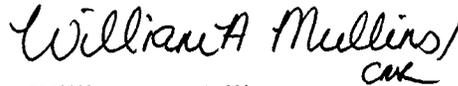
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to serve CITGO directly. Even if BNSF had the "direct" access it seeks, CITGO doesn't have the infrastructure currently in place to handle the 60 car unit trains that BNSF wants to deliver. There is adequate time for negotiations to occur, as required by the Board in its Decision No. 63, without any alleged competitive harm to any shipper that could theoretically be caused by BNSF's inability to provide direct access.

Finally, as KCS has previously noted, if BNSF undertakes negotiations and those negotiations fail to resolve the issues, BNSF can seek to have the parties arbitrate the dispute and failing that can pursue its terminal trackage rights option.

Sincerely,

Handwritten signature of William A. Mullins in cursive script.

William A. Mullins

cc: All Parties of Record