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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

ENTERED
Office of Proceedings
February 8, 2016
Part of
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:

The Kansas City Southern Railway Company (“KCS”) hereby files, via e-filing, KCS’s Reply to BNSF’s Motion to Strike New Argument and New Evidence in Union Pacific’s and KCS’s Final Briefs, which BNSF filed on January 19, 2016. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS APPLICATION --
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

**THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S REPLY TO BNSF'S MOTION
TO STRIKE NEW ARGUMENT AND NEW EVIDENCE IN UNION PACIFIC'S AND
KCS'S FINAL BRIEFS**

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February 8, 2016

**Attorneys for The Kansas City Southern
Railway Company**

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The Kansas City Southern Railway Company ("KCS") hereby replies to BNSF's Motion to Strike New Argument and New Evidence in Union Pacific's and KCS's Final Briefs ("Motion"), which was filed on January 19, 2016. As explained herein, the Motion to strike portions of KCS's brief should be denied in its entirety. The language BNSF seeks to strike from KCS's brief is not new evidence or new material. Rather, KCS's contrast of the arguments in the record is fully consistent with prior precedent. BNSF has also failed to meet the standard for relief under 49 C.F.R. §§ 1104.8 and 1117.1.

BACKGROUND

On October 30, 2015, Union Pacific ("UP") petitioned the Board for an order directing UP, KCS, CITGO Petroleum Corporation ("CITGO"), and BNSF to file simultaneous final briefs to set forth their positions on key issues and to address the proper application of Board precedent in light of the full record ("Petition"). The Board granted the Petition and noted that "a concise summary of the parties' positions could help focus the Board's analysis of the evidence and arguments, and

facilitate a more efficient resolution of outstanding issues.”¹ On December 30, 2015, UP, KCS, CITGO, and BNSF filed their respective briefs, outlining their positions on key issues. After reviewing KCS’s and UP’s Briefs, BNSF filed its Motion seeking to strike certain portions of both briefs.

ARGUMENT

BNSF asserts that KCS submitted new argument in its final brief, and that such new argument was improper and should therefore be stricken. BNSF seeks to strike KCS’s analysis of BNSF’s rebuttal evidence on competition and KCS’s analysis of the proper statutory scope of 49 U.S.C. §11321(a)’s preemptive effects. BNSF’s request should be denied. There was nothing improper about KCS’s use of the brief to summarize, compare, and contrast BNSF’s arguments with those of KCS, the prior decisions, and the statute. The alleged improper language also cannot be stricken as being redundant, irrelevant, immaterial, impertinent, scandalous, untimely, or procedurally deficient.²

With respect to KCS’s summary analysis of BNSF’s competitive evidence, BNSF takes issue with KCS’s argument that the proper market share comparison is not between BNSF’s share and SP’s historic share, but rather between BNSF/KCS and UP (KCS Final Brief at 7-8). Motion at 3. Because, according to BNSF, this is new argument and not merely a summary of KCS’s position, it should be stricken. BNSF’s request is unsupported, inconsistent with precedent, and should be denied.

¹ BNSF Ry. Co. – Terminal Trackage Rights – Kansas City S. Ry. Co. & Union Pac. R.R. Co., STB Finance Docket No. 32760 (Sub-No. 46), slip op. at 2 (STB served Nov. 30, 2015).

² See 49 C.F.R. § 1104.8; Union Pacific R.R. Co. – Aban. Exemption – in Lafayette County, MO, AB No. 33 (Sub-No. 297X), 2011 STB LEXIS 353, at *7 (STB served July 22, 2011) (noting that under the “Board’s regulations, ‘redundant, irrelevant, immaterial, impertinent, or scandalous matter’ may be stricken from any document.”)

KCS's argument that an examination of BNSF, UP's and KCS's market shares is necessary in order to determine whether BNSF is an effective competitor in the Lake Charles Area is not new argument at all, and it is certainly not new material or new evidence. Throughout this proceeding, KCS has taken the position that BNSF is an effective competitor in the Lake Charles Area. The entire premise of KCS's competitive analysis has been that BNSF and KCS, through reciprocal switching, provide CITGO and other shippers with competitive alternatives to UP so that terminal trackage rights by BNSF are not needed to fulfill the Lake Charles Condition. This is not a new issue or a new argument. The competitive position of UP, KCS, and BNSF (including comparing and contrasting market shares) was an issue in Decision No. 44, discussed again in decision No. 63, and has been raised throughout this proceeding.

After consistently refusing to provide any evidence on the competitive issues, BNSF withheld its competitive analysis until rebuttal when KCS had no opportunity to respond with evidentiary rebuttal evidence. Then, when KCS used its brief to compare and contrast BNSF's position with respect to how the Board should analyze and view the market share evidence put into the record, BNSF cries foul. There was nothing inappropriate about KCS's approach. BNSF may not like KCS's statements in the brief summarizing BNSF's evidence and pointing out how that evidence actually supports KCS's fundamental competitive point, but a dislike for the effectiveness of an argument is not grounds for striking the material.³ Indeed, the precise purpose of a brief is to focus the Board's analysis of the evidence and arguments, to point out the fallacies of the arguments

³ BNSF has not provided a single citation to a case striking argument from a party's brief on the basis that such argument was "new" argument, as opposed to new evidence or new material. The cases cited by BNSF stand for the proposition that parties should not use briefs to introduce new materials, new evidence, or new exhibits not otherwise in the record. KCS's brief did none of those things. Therefore, there is no legal basis for striking the language to which BNSF objects.

raised by others, and to use the record, cases, and evidence to put into perspective arguments of the parties. That's exactly what KCS did, and its arguments should be accepted as such.⁴

It is BNSF's rebuttal evidence on competition, not KCS's summary and analysis of that evidence, which is actually the new evidence or new material.⁵ Throughout this proceeding, BNSF took the position that the parties' competitive positions in Lake Charles was not relevant to BNSF's Application. BNSF presented no evidence to address KCS's and UP's competitive arguments until rebuttal. On rebuttal, BNSF submitted extensive evidence on competition for the first time. Thus, it was not KCS who introduced new evidence or new material, but BNSF.

With BNSF having submitted new evidence for the first time on rebuttal, KCS was fully justified in analyzing that evidence on brief and in showing how that evidence was actually consistent with KCS's fundamental competitive analysis. KCS's argument was not the introduction of new material or new evidence, but rather was an explanation of KCS's argument in light of

⁴ See N. Am. Freight Car Ass'n v. Union Pacific R.R., NOR 42119, slip op. at 4-5 (STB served March 12, 2015) (“NAFCA”)(denying complainant's motion to strike alleged new materials and evidence submitted in the defendant's brief because such materials were previously discussed in prior submissions by the parties and were not outside the scope of the arguments). Accord, Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, NOR 42071, slip op. at 2 (STB served January 19, 2005)(the purpose of briefs is to allow each party to set forth its position on key issues in light of the full record); and Arizona Electric Cooperative, Inc. v. BNSF and UP, NOR 42058, slip op. at 2 (STB served Aug, 2, 2004)(briefs are meant to put into perspective the principal issues and to allow parties to summarize the key evidence to assist the Board).

⁵ See, e.g., Sunbelt Chlor Alkali Partnership v. Norfolk S. Ry. Co., NOR 42130, slip op. at 9-10 (STB served July 20, 2014)(“Sunbelt”). In Sunbelt, the complainant held back certain arguments and evidence until after it reviewed the defendant's reply and then proceeded to file such evidence on rebuttal. The defendant moved to strike, which the Board granted in part and denied in part. The Board noted that it was inappropriate to use rebuttal to present new evidence and argument when a party knew such issues were in dispute and such issues should have been addressed in opening evidence. Here, BNSF knew from the very beginning that BNSF's competitive position vis-à-vis UP and KCS was at issue. Yet, it held back any competitive evidence until rebuttal. KCS's first opportunity to even address that evidence was in its brief. Therefore, either BNSF's evidence should be stricken consistent with Sunbelt, or, alternatively, KCS's arguments and analysis in brief should be accepted.

BNSF's new evidence. KCS's argument on this issue was fully consistent with the fundamental purpose of submitting briefs.⁶

BNSF also seeks to strike a paragraph in KCS's brief that discusses the inability of BNSF to invoke the Section 11321(a) override provision. BNSF's request to strike KCS's Section 11321(a) argument should likewise be denied. As an initial matter, Section 11321(a) cannot even be invoked if a party has the ability to pursue a terminal trackage rights remedy.⁷ Even if that statute can be invoked, it cannot be invoked by BNSF, who was not the applicant, which KCS pointed out on page 19 on its brief ("Page 19 Analysis").

The Page 19 Analysis was not new evidence or new material, but simply legal analysis of the statute. KCS simply explained that BNSF's legal argument, which is based upon the notion that BNSF, as opposed to UP, can invoke the override authority of Section 11321(a), is inconsistent with the statute and the explicit language of Decision No. 63. BNSF was not the applicant in the UP/SP merger, and therefore is not the party who can invoke that section to "exercise control" of the property "acquired through the transaction." KCS's argument was simply legal argument contrasting KCS's views on the scope of Section 11321(a) with BNSF's views, not new material or new evidence. Again, that's the precise point of briefs – to allow parties to summarize, contrast, and focus their arguments.

⁶ Even when a party does submit new material on brief, the Board often allows such material in the interest of developing a complete record. For example, in the UP/SP proceeding, UP and BNSF submitted substantial new evidence on brief, including changing the fundamental structure of the CMA Agreement itself. See Decision No. 63, n. 24 (noting that UP expanded the CMA Agreement in its brief). Indeed, BNSF's Motion to strike is ironic, as it was not until UP's final brief in the UP/SP merger that UP agreed to allow BNSF access to the Rosebluff Lead. If briefs were strictly limited to what had previously been argued, this proceeding would never have taken place.

⁷ See CSX/NS, 3 S.T.B. 196, 1998 STB LEXIS 1559, *228-229 (1998)(refusing to invoke override authority if a terminal trackage rights application could be filed). Accord, Decision No. 44, slip op. at 170 & n.217.

Finally, the Motion should be denied because it fails to meet the standard for a motion to strike as set forth in the regulations. To support a motion to strike, the regulations require that BNSF establish that the argument introduced in the brief by KCS was redundant, irrelevant, immaterial, impertinent, scandalous, untimely, or procedurally deficient. See 49 C.F.R. § 1104.8 (objectionable matter); E.I. Dupont de Nemours and Co. v. Norfolk Southern Ry. Co., NOR No. 42125, 2014 STB LEXIS 71, at *49 (STB served Mar. 24, 2014); Union Pacific R.R. Co. – Aban. Exemption – in Lafayette County, MO, AB No. 33 (Sub-No. 297X), 2011 STB LEXIS 353, at *7 (STB served July 22, 2011). BNSF made no attempt to establish that KCS’s arguments meet this standard. Neither could such an argument succeed. As such, BNSF has not met the standard for granting a motion to strike.⁸

CONCLUSION

The Motion should be denied. KCS’s brief did not contain any new evidence, new materials, or new exhibits. None of the portions sought to be stricken violate 49 C.F.R. § 1104.8. KCS’s brief did not set forth any new issues. It merely summarized, compared, contrasted, and distinguished BNSF’s arguments from those of KCS. Since that is the purpose of final briefs, there is no basis to grant BNSF’s Motion.

⁸ Should the Board determine that KCS has submitted new argument that may violate some standard not fully articulated by BNSF, the Board should still deny the Motion because the Board routinely accepts supplemental comments in the interest of developing a complete record. Norfolk and Western Railway Company – Abandonment Exemption – In Cincinnati, Hamilton County, OH, AB-290 (Sub-No. 184X) (STB served May 13, 1998). See also Chicago Rail Link, L.L.C. – Lease and Operation Exemption – Union Pacific Railroad Co., FD 33323 (STB served Sept. 2, 1997).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing KCS's Reply to BNSF's Motion to Strike Argument and Evidence in Union Pacific's and KCS's Final Briefs was served by first-class mail, postage prepaid, or by a more expeditious manner, this 8th day of February, 2016, on counsel for BNSF Railway Company, Union Pacific Railroad Company, and any other party of record.



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Railway Company