

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820

FACSIMILE: (202) 663-7849

William A. Mullins

Direct Dial: (202) 663-7823
E-Mail: wmullins@bakerandmilller.com

March 16, 2015

237957
ENTERED
Office of Proceedings
March 16, 2015
Part of
Public Record

VIA E-FILING

Cynthia T. Brown, Chief
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 – Kansas City Southern Railway Company and Union Pacific Railroad Company

Dear Ms. Brown:

As the Board is aware, The Kansas City Southern Railway Company (“KCSR”) has served two motions to compel against BNSF Railway Company (“BNSF”) and one motion to compel against CITGO Petroleum Corporation (“CITGO”)(collectively, “Motions”). These Motions seek to compel answers to discovery requests which are necessary for KCSR to fully respond to BNSF’s request for terminal trackage rights over the jointly-owned Rosebluff Industrial Lead (“Application”). KCSR has received and reviewed the replies of BNSF and CITGO in response to KCSR’s Motions and has had a series of correspondences with counsel regarding the Motions. After careful consideration and in an effort to try and resolve discovery disputes as much as possible without Board involvement, KCSR is willing to withdraw some of its requests contained in the Motions, while others will require Board involvement or assistance.

BNSF

1. KCSR’s First Motion to Compel (“1st Motion”)

KCSR filed its 1st Motion after BNSF refused to provide its traffic tapes for each year from the period beginning December 31, 1996 and ending with the date of the response as requested in KCSR’s First Set of Discovery Requests to BNSF. Upon objection by BNSF, KCSR expressed its willingness to limit its request to the past three years of traffic tapes and to data relevant to Lake Charles origins and terminations. This is identical to what KCSR and UP have provided each

Cynthia T. Brown, Chief

March 16, 2015

Page 2 of 4

other. BNSF continues to refuse to provide the tapes on the basis of relevancy. KCSR continues to believe the tapes are necessary to examine BNSF claims that the failure to give them direct access would “defeat the Board’s prior efforts to preserve the pre-merger competition that existed between UP and SP,” BNSF Opening at 13, and that “direct BNSF service is a vital and necessary component in resolving the loss of competitive options to Lake Charles are shippers.” *Id.* at 15. It also claims that its Application must be granted “[f]or CITGO to have the competitive option that the Board deemed critical,” BNSF Opening at 17, and that without trackage rights “BNSF cannot play the competition-preserving role that the Board designated for it.” *Id.* Of course the underlying premise of all of those statements is that BNSF service today is not resolving the loss of competitive options. KCSR is entitled to test those claims and to provide evidence to rebut them. As such, KCSR renews its request for the BNSF traffic tapes.

2. KCSR’s Second Motion To Compel (2nd Motion)

On February 6, 2015, KCSR filed its 2nd Motion in response to BNSF’s refusal to fully and adequately respond to KCSR’s Second Set of Discovery Requests to BNSF. At the time of KCSR’s 2nd Motion, BNSF had either refused or only partially responded to the majority of KCSR’s discovery requests. Since KCSR filed its 2nd Motion, BNSF has produced additional documents that are responsive to some, but not all, of KCSR’s requests. Since that time, KCSR and BNSF have been in discussions to resolve KCSR’s concerns and additional documents have been produced. KCSR appreciates BNSF’s efforts to gather and produce additional documents, as well as BNSF’s continued willingness to work with KCSR to attempt to amicably resolve discovery disputes. Based upon the additional documents produced and its discussions, KCSR withdraws certain requests identified in its 2nd Motion. KCSR withdraws its request to compel answers to Interrogatories No. 1 and 2 and Document Requests Nos. 1, 3¹, 4, and 8. However, despite both KCSR’s and BNSF’s good faith efforts to respond to each other’s discovery efforts, KCSR does not agree that all of its discovery requests contained in its 2nd Motion have been addressed,² and as discussed further below, renews its requests to compel answers to Document Requests Nos. 2, 5, 10 and 12 and to order the unredaction of certain documents.³

¹ Counsel for BNSF has assured KCSR that it is looking for any additional documents concerning justification for construction of the Lacassine Yard. KCSR is willing to withdraw this request, subject to BNSF’s agreement to produce any additional documents concerning justifications for the Lacassine Yard once located.

² KCSR notes that the documents that BNSF produced on February 27, 2015 were heavily redacted. KCSR has and continues to be in discussions with BNSF over the grounds for the redactions, and whether any additional documents should be unredacted.

³ KCSR and BNSF have discussed KCSR’s request that the Board order BNSF to unredact certain documents identified in KCSR’s 2nd Motion. On February 20th BNSF provided KCSR with its basis for redacting the documents specified in KCSR’s 2nd Motion. KCSR has reviewed BNSF’s grounds for redaction and is willing to withdraw its request for the following sets of documents: BNSF-HC-000007, BNSF-HC-000155, BNSF-HC-000177, BNSF-HC-000426, BNSF-HC-000485, BNSF-HC-000572, and BNSF-HC-000590. KCSR believes that the remaining documents are indeed

Cynthia T. Brown, Chief
March 16, 2015
Page 3 of 4

CITGO

On January 15, 2015, KCSR served its First Discovery Requests directed to CITGO, containing 18 discovery requests (two requests for admissions, six interrogatories, and 10 document requests). CITGO responded to KCSR's discovery requests on January 30, 2015 by producing 75 documents (including confidential and highly confidential responses), and objecting to five of KCSR's requests (one interrogatory and four document requests). After reviewing CITGO's responses, KCSR filed a Motion to Compel Responses to KCSR's First Set Of Discovery Requests To CITGO ("CITGO Motion"). On March 2, 2015, CITGO served KCSR with CITGO's Reply to Motion to Compel ("CITGO Reply"). KCSR has reviewed the CITGO Reply, and is willing to withdraw Interrogatory No. 4, as CITGO has adequately explained the inconsistency that KCSR noted with respect to CITGO's operational capacity. However, KCSR renews its request to compel full and complete responses to the remainders of its requests.

Unresolved Document Requests

While BNSF and KCSR have made a lot of progress through good faith discussions, not all discovery issues have been resolved. As noted, KCSR believes that its request in KCSR's 1st Motion, KCSR's remaining Document Requests in KCSR's 2nd Motion (Nos. 2, 5, 10 and 12), KCSR's request that the Board order BNSF to unredact certain documents, and KCSR's remaining requests in its CITGO Motion (Interrogatory No. 3 and Document Requests Nos. 1, 2, 4, 5, 6, 8, and 9) all⁴ remain relevant to several of the statutory elements as set forth in 49 U.S.C. §11102(a) and BNSF and CITGO should be compelled to respond.

As detailed in their replies and in their recent letters in response to UP's March 6, 2015 letter, BNSF and CITGO object to many of KCSR's Outstanding Requests on the grounds that the information requested pertains to the public interest component of 49 U.S.C. §11102(a), which BNSF and CITGO purport has already been met in Decision Nos. 44 and 63 in this proceeding. Essentially, BNSF and CITGO assert that documents related to the competitive effectiveness of BNSF's existing service over the Rosebluff Industrial would not "affect the outcome of this proceeding," and are not "relevant to the subject matter involved in this proceeding." *Id.* Because BNSF and CITGO have unilaterally determined the information requested is not relevant and will not affect the outcome of the proceeding, BNSF and CITGO should not be required to provide KCSR with the requested information,

relevant and necessary for KCSR to evaluate and respond to BNSF's Application. Further, none of the remaining documents are subject to the Attorney-Client Privilege. Therefore, KCSR again asks the Board to order BNSF to unredact the following documents that BNSF produced: BNSF-HC-000009-BNSF-HC-000011, BNSF-HC-000052-BNSF-HC-000054, BNSF-HC-000056, BNSF-HC-000058, BNSF-HC-000060-BNSF-HC-000062, BNSF-HC-000400-BNSF-HC-000401, BNSF-HC-000410-BNSF-HC-000411, BNSF-HC-000428-BNSF-HC-000430, BNSF-HC-000432, BNSF-HC-000434, BNSF-HC-000436-BNSF-HC-000438.

⁴ Referred to collectively as "KCSR's Outstanding Requests."

BAKER & MILLER PLLC

Cynthia T. Brown, Chief
March 16, 2015
Page 4 of 4

KCSR disagrees. It is the responsibility of the Board, not the parties to a proceeding, to determine the relevancy of the requested materials. See 49 C.F.R. § 1114.21(a)(1); See Seminole Electric Coop., Inc. v. CSX Transport, Inc., Docket No. NOR 42110, at 2 (STB served Feb. 17, 2009) (“Seminole”). As held in Seminole, a party is entitled to all relevant and potentially admissible information, not only information that the [opposing party] believes is sufficient.”) Id. Accordingly, the Board must decide whether to compel responses to the Outstanding Requests. However, in doing so, the Board need not decide the merits of KCSR’s arguments on the public interest standard, and contrary to what BNSF and CITGO have stated, KCSR is not asking it to do so. Rather, all the Board needs to determine is that the information would be “potentially” admissible and “might” affect the outcome or “might” lead to other admissible evidence. Appl. of the Nat’l R.R. Passenger Corp. Under 49 US C. § 24308(a)-Can. Nat’l Ry., FD 35743, slip op. at 8 (STB served Sept. 23, 2014)(quoting Waterloo Ry.-Adverse Aban.- Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me., AB 124 (Sub-No. 2) et al., slip op. at 2 (STB served Nov. 14, 2003)). Clearly, the Outstanding Requests “might” affect the outcome and “could” lead to other admissible evidence. The Board does not, and should not, have to decide the merits of the public interest arguments to reach those conclusions.

In closing, KCSR plans on continuing to try to resolve KCSR’s Outstanding Requests amicably; however, it stands firm in its position that KCSR’s Outstanding Requests are relevant and necessary for KCSR to fully respond to BNSF’s Application. It renews its Motions with respect to the Outstanding Requests.

Sincerely,



William A. Mullins

cc: Adrian L. Steel, Jr.
Michael Rosenthal
Edward D. Greenberg
Parties of Record