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October 26, 2009

ENTERED
Office of Proceedings

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Part of
Public Record

E-File

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001

Re: <u>STB Finance Docket No. 35302, Bell Oil Terminal, Inc. v. BNSF Railway Company</u>

Dear Acting Secretary Quinlan:

Attached for E-filing is the Motion to Dismiss of BNSF Railway Company.

If you have any questions, please contact me.

Sincerely yours,

Karl Morell

Karl Morell

Enclosure

PORTLAND, OREGON WASHINGTON, D.C. BEND, OREGON

BEFORE THE

SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35302

BELL OIL TERMINAL, INC.
v.
BNSF RAILWAY COMPANY

COMPLAINT UNDER 49 U.S.C. 11103(b) FOR THE INSTALLATION AND OPERATION OF A SWITCH CONNECTION

MOTION TO DISMISS

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Dated: October 26, 2009

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MOTION TO DISMISS

Defendant BNSF Railway Company ("**BNSF**") hereby moves to dismiss the Complaint filed by Complainant Bell Oil Terminal, Inc. ("**Bell Oil**"), on October 6, 2009, in this proceeding. The Complaint is, at best, premature since Bell Oil is missing a fundamental prerequisite to the filing of a complaint under 49 U.S.C. § 11103: there is no private siding to which BNSF can connect.

Upon application of the owner of a lateral, branch line or a private side track, the Surface Transportation Board ("Board") may order a common carrier by railroad to "construct, maintain and operate, on reasonable conditions, a switch connection to connect that branch line or private side track with its railroad" provided certain conditions are met. Section 11103(a). A prerequisite to the filing of a complaint, however, is the existence of the branch line or private side track.

As the Supreme Court noted, Congress, in adopting the provisions that are now codified at Section 11103(a), provided a number of safeguards to unnecessary expenditures by carriers, including the requirement that "the railroad cannot be ordered to build the switch until after the shipper has built the private siding." *Cleveland, C., C. & St. L. Ry. Co. v. United States*, 275 U.S. 404, 413 (1928) ("*Cleveland*"); *see also Winters Metallic Paint Co. v. C., M. & St. P. Ry. Co.*, 16 I.C.C. 587, 589 (1909); *Ralston Townsite Co. v. M. P. Ry. Co.*, 22 I.C.C. 354, 356 (1912) ("it is a condition precedent to the exertion of the power of the [Board] that such lateral railroad or private sidetrack should be actually constructed in such manner that a physical connection is practicable and safe."); *Virginia Coal & Fuel Co. v. N. & W. Ry. Co.*, 55 I.C.C. 61 (1919) (Complaint dismissed because shipper had no private track with which a connection could be made); *Certain-Teed Products Corp. v. C., R. I. & P. Ry. Co.*, 68 I.C.C. 260, 263 (1922) (carrier's duty to provide switch connection "does not arise until the shipper has provided the sidetrack."); *Schlicher v. Director General*, 62 I.C.C. 181, 187 (1921) (Shipper must construct sidetrack before carrier is obligated to act on an application for a switch connection).

Moreover, the Board's authority is limited to ordering a carrier to build "a switch connection" with a private track, but not the construction of the private track itself. *National Industrial Traffic League v. A. & R. R. R. Co.*, 61 I.C.C. 120, 123 (1921) ("*Traffic League*") ("But it is not [a carrier's] duty as a common carrier to enter into a contract to lease a railroad siding to a shipper or to enter into an agreement to operate privately owned sidetracks.").

More recently, the Board has reconfirmed that a sidetrack must be operable before the Board can order a switch connection. *Battaglia Distributing Co., v. Burlington Northern*, 2 S.T.B. 323, 328 (1997). *See also* STB Docket No. 41068, *Valley Feed Company v. Greater Shenandoah Valley Development Company D/B/A Shenandoah Valley Railroad Company* (not printed), served December 11, 1998, slip op. at 15 (Under Section 11103, the shipper "is obligated to restore the track to operable condition before a carrier may be ordered to install a switch connection.").

Requiring Bell Oil to first construct its private sidetrack before BNSF can act on its application and before the Board can decide its Complaint is particularly important for a number of reasons.

First, as explained below, designing a switch connection at Bell Oil's Pulaski Terminal in Chicago is very challenging from an engineering standpoint and serving the Pulaski Terminal will be very challenging from an operational standpoint.

Bell Oil's Pulaski Terminal parallel's BNSF's southern transcontinental mainline just north of BNSF's Corwith Yard. The rail corridor adjacent to the Pulaski Terminal was recently upgraded as part of the Chicago Regional Environmental and Transportation Efficiency ("CREATE") project in Chicago. The reconfiguration of the tracks in the area of the Pulaski Terminal as part of the CREATE project has significantly complicated any potential service to Bell Oil's facility.

The Corwith Yard handles the third highest volume of intermodal rail cars in unit train-size service on the BNSF system: 681,000 trailer/container lifts per year or 1,865 lifts per day. All of this time and service-sensitive traffic moves over BNSF's mainline adjacent to the Pulaski Terminal. Consequently, any switch connection installed on this extremely high-volume mainline must be carefully planned so as not to disrupt the shipments of thousands of BNSF customers.

Service to the Pulaski Terminal will also be very challenging. Since there are no local rail deliveries in the area, BNSF will need to create a new local switch operation from the Corwith Yard. In order to reach the Corwith Yard, Bell Oil's loaded cars will need to be switched into and out at least three yards given the operational constraints in the Chicago area. Service to the Pulaski Terminal will also be impacted by: (1) traffic delays in the Corwith Yard; (2) transit delays on the Corwith Yard's north departure track due to train holdings for BNSF's east/west mainline traffic; and (3) traffic delays in the Corwith Yard due to Amtrak and Canadian National Railway Company ("Canadian National") trains, which operate over a rail line that crosses BNSF's mainline between the Corwith Yard and the Pulaski Terminal. As BNSF, Canadian National and Amtrak traffic increases in the future, service to the Pulaski Terminal will become even more complicated. BNSF has estimated that a reduction in capacity on its mainline adjacent to the Pulaski Terminal due to serving Bell Oil could cost BNSF nearly $4 million per year in lost container traffic.

Second, BNSF and Bell Oil have had a major disagreement as to where Bell Oil's sidetrack will be located. Bell Oil insisted that its sidetrack be located on the BNSF right-of-way.[1] BNSF repeatedly pointed out that the parcel of BNSF right-of-way Bell Oil seeks to occupy is needed for existing plans as well as future capacity expansions. As recently as July 2009, Bell Oil rejected a BNSF proposal because it would have placed the sidetracks on Bell Oil property. The latest plan submitted to Bell Oil appeared to accommodate both parties' interests. That plan, however, involves an expensive track configuration on BNSF's property which BNSF was agreeable to make provided that Bell Oil either contributes to the construction cost or guarantees traffic volumes sufficient to allow BNSF to recoup its expenses. Bell Oil agreed to the plan but not the cost sharing or traffic guarantees.

Third, BNSF is concerned that Bell Oil will not furnish sufficient business to justify the construction and maintenance of the switch connection and that it is seeking the connection for

[1] Bell Oil's application submitted to BNSF in September 2008 is deficient because it is premised on Bell Oil's sidetrack being located on BNSF's right-of-way.

ulterior motives. According to Bell Oil's application, Bell Oil shifted all of its traffic from BNSF to trucks in 2002. According to BNSF records, Bell Oil did not use rail service at its Pulaski Terminal for at least several years in the mid-1990's. The parent of Bell Oil operates another storage facility approximately one mile from the Pulaski Terminal, which is directly served by Canadian National. Consequently, Bell Oil may well be using direct access to BNSF as leverage in negotiating rates with Canadian National and trucking companies. BNSF's concern in this regard is heightened because Bell Oil has steadfastly refused to provide BNSF any volume commitments. Bell Oil is insisting that BNSF expend approximately $1.6 million dollars on a switch connection without Bell Oil first having constructed its sidetrack and without any volume commitments.

The latest plan submitted to Bell Oil made sense from BNSF's perspective only if Bell Oil agreed to share in the construction cost or guarantee traffic volumes. Since Bell Oil has refused to do either, BNSF cannot economically justify the significant expense given Bell Oil's limited traffic volumes and its ability and past inclination to divert its traffic to trucks. In other words, without contributions or volume guarantees by Bell Oil, BNSF's latest plan no longer meets the requirements of Section 11103(a)(3). Any less expensive switch connection will likely not meet the requirements of Section 11103(a)(1) and (2). Consequently, BNSF is withdrawing its latest compromise plan.

While the Board has jurisdiction to order a common carrier to construct a switch connection if the statutory standards are met, the Board is powerless to order the construction of a sidetrack or dictate how that sidetrack is to be constructed. *See Traffic League.* Therefore, without a sidetrack in place, the Board cannot possibly meet its responsibilities under Section

11103, since the shipper can opt not to construct the sidetrack or build it in some other configuration not considered by the Board.

Without an existing sidetrack, it is not possible for BNSF or the Board to determine whether a switch connection is reasonably practicable. As explained above, this is not an ordinary switch connection. The Pulaski Terminal is located on a high-volume mainline handling extremely time-sensitive traffic. The Pulaski Terminal is also located adjacent to BNSF's third largest volume intermodal yard. Unless the connection is practicable, service to thousands of BNSF customers will be disrupted and BNSF stands to lose millions of dollars in revenues.

Without an existing sidetrack, it is also not possible for BNSF or the Board to determine whether a switch connection can be made safely. Given the high-density rail corridor needed to serve Bell Oil, BNSF is concerned over the safety of its employees as a slow-speed local uses the corridor solely to serve Bell Oil.

Without an existing sidetrack, it is also not possible for BNSF to determine the cost of the switch connection. Without a fairly accurate estimate of the costs involved, the Board will not be able to determine whether Bell Oil has sufficient business to justify the switch connection.

In September 2008, Bell Oil estimated that it would ship via BNSF 200 carloads of liquid asphalt in the first year and approximately 500 carloads by the third year. If Bell Oil's traffic were rail-dependent one could reasonable verify those estimates by looking at traffic volumes moving through its Pulaski Terminal. As evidenced by Bell Oil's past conduct, it can readily shift the traffic to trucks thus rendering its estimates meaningless. Bell Oil's steadfast refusal to contribute to the cost of constructing the switch connection or to make any volume commitments confirms the unreliability of Bell Oil's traffic estimates.

The requirement in Section 11103(a) that a shipper first construct its private track before seeking relief under Section 11103(b) is a necessary safeguard to prevent the potential squandering of scarce railroad capital. *See Cleveland*, 275 U.S. at 413. It is also a necessary prerequisite to any determination that the switch connection "is reasonably practicable", "can be made safely" and "will furnish sufficient business to justify its construction and maintenance" as required by Section 11103(a). Bell Oil's past insistence that its private side track be located on BNSF's right-of-way only reinforces the importance of requiring Bell Oil first to construct the side track on its property because BNSF is not legally obligated to accept the side track on its property and the Board cannot compel BNSF to do so. Moreover, the Board has no jurisdiction over the construction, or lack of construction, of Bell Oil's side track. Consequently, this proceeding is not ripe as Bell Oil may decide not to construct a side track, or even worse, construct the side track in a manner that adversely impacts BNSF service in the area.

In conclusion, BNSF respectfully urges the Board to follow the requirements of the statute and the holdings of the Supreme Court, the Board's predecessor and the Board itself and dismiss this proceeding on grounds that there is no side track to which the Board can order a connection.

Respectfully submitted,

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Attorneys for:
BNSF Railway Company

Dated: October 26, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Motion to Dismiss to be served on counsel for Bell Oil Terminal, Inc., by first class mail this 26th day of October, 2009.

Matthew Hoyer