

**PETITION OF BELL OIL TERMINAL, INC.
AND BNSF RAILWAY COMPANY
FOR MEDIATION AND A STAY**

Pursuant to 49 C.F.R. § 1117.1, Complainant Bell Oil Terminal, Inc. ("Bell") and Respondent BNSF Railway Company ("BNSF") hereby petition for STB-supervised mediation in this proceeding. The parties propose that 60 days be set aside for the mediation, because of the potential complexity in resolving this dispute, unless the parties agree that the mediation should be extended. Obviously, the parties propose that the disposition of the issues in the proceeding be stayed while the mediation is ongoing.

Background

Bell operates a substantial liquid asphalt terminal ("Bell's Terminal") on the south side of Chicago, IL.¹ Liquid asphalt can be transported in tank cars and stored in tanks at Bell's Terminal until it is shipped for use in roofing or paving operations, among other purposes.

Bell has increased capacity at its Terminal from four large tanks to seven, and sought reinstatement of rail service.

BNSF previously had removed a rail siding by means of which it had provided rail service in the past. That sidetrack was removed in conjunction with reconfiguration of BNSF trackage connecting its Chicago and Chillicothe Subdivisions as part of the federally funded CREATE Project.

¹ Mr. Peter Wittich, President of Bell, owns separate companies operating four separate liquid asphalt terminals in the Midwest. Two of the other terminals are also in Illinois (in Drummond and Peoria), and two are in Michigan (Lansing and Manistee). Mr. Wittich also owns Interstate Asphalt Corporation.

By November 2008, in response to a request by Bell, BNSF and Bell exchanged various proposals to provide a switch connection to Bell's Terminal. Negotiations continued until September 2009. Ultimately, the parties could not agree.

Having reached impasse in negotiations with BNSF, Bell filed the Complaint herein, alleging that by virtue of imposing unreasonable conditions on its willingness to construct a switch connection to Bell's Terminal, BNSF thereby failed and refused to construct, maintain, and operate a switch connection to Bell's Terminal on reasonable terms and conditions. BNSF moved to dismiss Bell's Complaint, arguing that it need not provide a switch connection to Bell unless Bell first constructs a rail siding. Bell disagrees with BNSF's legal argument, but the parties agreed to postpone discovery until the Board resolved the issues raised by BNSF's Motion to Dismiss.

Argument

Bell and BNSF recognize that the STB's procedures do not require STB-supervised mediation in a proceeding such as this, unlike the requirement for such mediation in response to the filing of a rail rate complaint. However, given that STB-sponsored mediations have been successful in various proceedings in recent years,² Bell and BNSF believe that mediation may be the best means of resolving this dispute in a manner that is favorable to both BNSF and Bell.³

² *E.g., E.I. DuPont de Nemours v. CSX Transportation Company*, STB Docket No. 42112 (served May 11, 2009); *Williams Olefins, L.L.C. v. Grand Trunk Corp.*, STB Docket No. 42098 (served Feb. 14, 2007); *BP Amoco Chemical Co. v. Norfolk Southern Railway Co.*, STB Docket No. 42093 (served May 23, 2005).

³ Accordingly, Bell and BNSF seek a "housekeeping stay" to permit STB-supervised mediation to occur for as long as both parties find mediation to be productive. Entry of a "housekeeping" stay would be consistent with the parties' agreement to postpone discovery pending consideration of BNSF's Motion to Dismiss. See letter from Thomas McFarland, Esq., filed herein on November 16, 2009.

A resolution that both parties agree on, and which therefore might result in a different and perhaps better commercial outcome than may be an outcome that the Board could order in a response to the Complaint herein, would certainly be better (at least from a commercial standpoint) than forcing the Board to rule on the legal issues posed by the Complaint and the Motion to Dismiss. Accordingly, the parties would welcome the STB's mediation, in an attempt to find a resolution of this matter that makes good commercial sense and that would avoid the need for the Board to resolve the legal issues presented.

Conclusion

Complainant Bell Oil Terminal, Inc., and Respondent BNSF Railway Company hereby petition the Board for Board-supervised mediation and a housekeeping stay in the interim.

Respectfully submitted,

BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131-2828

BELL OIL TERMINAL, INC.
3741 South Pulaski Road
Chicago, IL 60623

Respondent

Karl Morell by JPM

KARL MORELL
BALL JANIK, LLP
1455 F Street, NW, Suite 225
Washington, DC 20005
(202)638-3307
kmorell@bjllp.com

Attorney for Respondent

Complainant.

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-0204
(312)236-0204 (telephone)
(312)201-9695 (facsimile)
mcfarland@aol.com

Michael F. McBride

MICHAEL F. McBRIDE
VAN NESS FELDMAN, P.C.
1050 THOMAS JEFFERSON STREET, N.W.
SUITE 700
WASHINGTON, D.C. 20007-3877
(202)298-1989 (telephone)
(202)338-2416 (facsimile)
mfm@vnf.com

Attorneys for Complainant

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