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EVERGY, INC.,)	
EVERGY METRO, INC. and)	ENTERED
EVERGY KANSAS CENTRAL, INC.)	Office of Proceedings
)	October 25, 2024
Complainants,)	Part of
)	Public Record
v.)	Docket No. NOR 42180
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	
)	

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Dated: October 25, 2024

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EVERGY, INC.,)	
EVERGY METRO, INC. and)	
EVERGY KANSAS CENTRAL, INC.)	
)	
Complainants,)	
)	
v.)	Docket No. NOR 42180
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	
)	

**REPLY TO BNSF’S SUPPLEMENT
TO MOTION TO DISMISS**

Complainants Evergy, Inc., Evergy Metro, Inc. and Evergy Kansas Central, Inc. (collectively for purposes of this Reply, “Evergy”), pursuant to 49 C.F.R. § 1104.13(a), hereby reply to the “Supplement to Its Motion to Dismiss” (“Supplement”) filed by Defendant BNSF Railway Company (“BNSF”) on October 15, 2024. The Board should reject the Supplement summarily as a prohibited “reply to a reply,” in accordance with Board rules and precedents. If the Board determines to allow the Supplement to be accepted into the record in this proceeding, Evergy submits that it offers nothing to counter Evergy’s previous arguments demonstrating that BNSF’s pending Motion to Dismiss Count IV of Evergy’s Complaint should be denied.

ARGUMENT

A. The Supplement is a Prohibited Reply to a Reply

BNSF filed its Motion to Dismiss Count IV of the Complaint on May 17, 2024. In accordance with 49 C.F.R. § 1104.13(a), Evergy submitted a Reply on June 5, 2024. The Board’s Rules of Practice governing motions such as BNSF’s do not contemplate any further filings, and 49 C.F.R. § 1104.13(c) specifically provides that “[a] reply to a reply is not permitted.” BNSF’s October 15, 2024 Supplement reiterates arguments made in its Motion and purports to offer additional “facts” related to *current* rail service *after* Evergy replied in opposition to the Motion. Properly characterized, the pleading plainly is a reply to Evergy’s Reply and an effort by BNSF to have the last word on its Motion, and as such should be rejected by the Board. *See FMC Wyoming Crop., Et Al. v. Union Pac. R.R. Co.*, STB Docket No. NOR 42002 (STB served Jan. 8, 1999) at 2 n.2 (railroad not entitled to “have the last word”); *see also Ken Way Transp., Inc. – Pet. For Decl. Order – Certain Rates and Practices of F.P. Corp.*, Docket No. NOR 40840 (ICC served Feb. 18, 1993) at 1; *Rio Grande Indus., Inc., Et Al. – Purchase and Related Trackage Rights – Soo Line R.R. Co. Line Between Kansas City, MO and Chicago, IL*, Docket No. FD 31505 (ICC served Mar. 30, 1990) at 3 n.3.

No doubt aware of the rule against replies to replies, BNSF styles its pleading as a “Supplement.” However, the name given to a filing does not define its substance, and the Board previously has rejected filings with titles other than “Reply” when they were challenged under 49 C.F.R. § 1104.13(c). *See, e.g., GLI Acquisition Co. – Purchase – Trailway Lines, Inc.*, Docket No. MC-F-18505 (ICC served Mar. 4, 1993) at 1 n.4

(“supplemental statement” was “nothing more than a reply to Greyhound’s reply” and rejected); *U.S. Dept. of Energy, Et Al. v. Balt. & Ohio R.R. Co., Et Al.*, Docket No. NOR 38302S (ICC served Feb. 5, 1992) at 2. BNSF did not seek Board leave to file its Supplement, and did not offer any explanation within the document as to why it should be accepted. Consistent with precedent, therefore, it should be rejected. *See AEP Tex. North Co. v. BNSF Ry. Co.*, STB Docket No. NOR 41191 (Sub-No. 1) (STB served Nov. 22, 2006 at 3 n.3 (“As the complainant did not seek leave to file a supplemental pleading, the letter will not be considered.”); *Winona Bridge Ry. Co. – Trackage Rights – Burlington No. R.R. Co.*, Docket No. FD 31163 (ICC served Mar. 17, 1989) at 1 (“WB neither requested leave to reply nor explained why its reply should be entertained. Accordingly, WB’s reply will not be considered.”).¹

B. The Supplement Does Not Provide Merit to the Motion

If the Board accepts BNSF’s Supplement into the record, it nonetheless should deny the Motion to Dismiss. In its Supplement, BNSF continues to focus exclusively on whether there is a *current dispute* over its transportation performance with respect to the Iatan Generating Station and Lawrence Energy Center, which is a misapplication of the governing legal standard. *See* Supplement at 2. As Evergy demonstrated in the Reply to BNSF’s Motion to Dismiss, declaratory relief also is appropriate where necessary to

¹ The Board on occasion has permitted replies to replies where good cause is shown. *See, e.g., Amstar Corp. v. A.T.S.F. Ry. Co.*, Docket No. NOR 37478 (ICC served Aug. 23, 1993) at 1 n.2. Here, however, BNSF provided no reason why it should be permitted to pad the record after Evergy had filed its Reply to the Motion to Dismiss. *See CSX Corp. – Control – Chessie System, Inc., Et Al.*, 2 S.T.B. 554, 556 (1997) (no “good cause” shown to allow additional responsive pleadings).

remove uncertainty, even in the absence of a pending controversy. *See* Reply to Motion to Dismiss at 5-8, and *Union Pac. R.R. – Pet. For Decl. Order*, STB Docket FD 35504 (STB served Dec. 12, 2011) at 3-4. Nothing in the Supplement suggests that BNSF has altered its position that the unilateral imposition of service restrictions on Evergy – both in 2022 and potentially in the future – is a matter of right belonging to the carrier. *See Answer of BNSF Railway Co.*, filed May 20, 2024 at 5-6. As Evergy previously showed, the uncertainty raised by BNSF’s position – which is directly contrary to 49 U.S.C. § 11101(a) and decisions thereunder – provides more than sufficient grounds for the Board to consider the relief sought in Count IV of the Complaint. *See* Reply to Motion to Dismiss at 12-13.

BNSF’s Supplement also continues to misrepresent the nature of Evergy’s declaratory order request. Evergy has not asked the Board to “guarantee[] rail volumes” or “order contract-like service” from BNSF. *See* Supplement at 3-4. In light of BNSF’s clearly stated view that it should have “sole discretion” to determine whether, when and how to provide service to Evergy, Count IV of the Complaint only asks the Board to clarify the *standard* that should be used in the future to measure BNSF’s compliance with governing law, based on the facts in existence at the time of the requests for service. *See* Reply to Motion to Dismiss at 12.² A declaratory order is well-suited to that purpose.

² Evergy also explained that the procedural posture of the instant case supported denial of BNSF’s Motion, as the Board would retain jurisdiction to determine whether to grant declaratory relief after a full airing of the relevant evidence. Reply to Motion to Dismiss at 14.

Finally, BNSF includes in its Supplement a complaint about Evergy's resistance to a new BNSF tariff rule that would compel electric utility shippers to disclose the level of coal inventory at each of their generating stations. *See* Supplement at 3. Attaching as Exhibits what had been intended as a candid exchange of correspondence between BNSF and Evergy executives, BNSF states that Evergy "continues to refuse to provide BNSF with basic information about inventory levels ... that BNSF needs to provide efficient service to Evergy." *Id.*³ This refers to a relatively new item in BNSF's general rules tariff applicable to coal transportation that purports to require that each shipper "provide to BNSF information regarding Shipper's current coal stockpile level in tons and full burn days for each of Shipper's plants on a monthly basis."⁴

Utility coal stockpile information is highly confidential and commercially sensitive, as coal-fired generators compete daily with other sources of electrical power, and target inventories vary from station to station and from month to month depending on myriad factors, including seasonality, weather, fluctuations in power demand and the availability of other resources. BNSF's tariff item contains a statement that "BNSF will treat the stockpile information as confidential," but provides no details or assurances

³ BNSF follows this complaint with patently false statements that Evergy had refused to accept coal at the Iatan Station because of a full stockpile, had "shut down" the Iatan Station, and was unexpectedly removing a trainset from service. Supplement at 3. In fact, as the letter from Evergy that BNSF attached as Exhibit B to its Supplement clearly explained, Iatan's stockpile was not full (BNSF had drawn an erroneous conclusion based on a comment from an underinformed plant employee), the Iatan units were merely offline at the time (not "shut down"), and the removal of a trainset in the Fall was consistent with established practice well-known to BNSF. *Id.* at 1-2.

⁴ *See* BNSF Rules Tariff 6041-B, Item 265.

regarding, for example, how access to the information would be controlled within BNSF and what measures the carrier will take to resist disclosure in response to litigation discovery requests or other efforts to compel release of the information. These and other unaddressed issues led numerous coal shippers and shipper organizations (not merely Evergy) to question the need for and propriety of BNSF's reporting "rule."

BNSF's desire for information regarding Evergy's coal inventories has no relevance to the legal standard for Board issuance of a declaratory order,⁵ but it *is* telling on the question of uncertainty regarding BNSF's future service intentions. Knowledge of Evergy's and other utility coal shippers' inventory levels would put BNSF in a position to allocate its transportation capacity among its customers based on BNSF's own operational goals, as opposed to the shippers' reasonable requests for service, arrogating to itself the discretion to decide whether a shipper really "needs" that service. Rather than expanding capacity to meet its shippers' needs, BNSF could attempt to ration limited capacity to serve its own ends; in effect picking "winners and losers" among its utility coal customers. Its invocation in this case of the new reporting "rule" is further evidence of its continuing view that it should have "sole discretion" to determine whether and how it will provide service to Evergy, contrary to the governing statutes.

⁵ See *Union Pac. R.R.*, *supra*, at 3; *Agrium, Inc. and Agrium U.S. Inc. v. Canadian Pac. Ry.*, STB Docket NOR 42145 (STB served Sept. 15, 2015) at 2.

CONCLUSION

BNSF's Supplement to its Motion to Dismiss should be rejected as a prohibited reply to a reply, and its Motion should be denied.

Respectfully submitted,

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Dated: October 25, 2024

*Attorneys for Evergy, Inc.,
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Evergy Kansas Central, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that this 25th day of October, 2024, I have caused copies of the foregoing to be served electronically upon counsel for Defendant BNSF Railway Company.

/s/ Andrew B. Kolesar III

Andrew B. Kolesar III