

234264

MAYER • BROWN

Mayer Brown LLP  
1999 K Street, N.W.  
Washington, D.C. 20006-1101

Main Tel +1 202 263 3000  
Main Fax +1 202 263 3300  
www.mayerbrown.com

**Robert M. Jenkins III**  
Direct Tel +1 202 263 3261  
Direct Fax +1 202 263 5261  
rmjenkins@mayerbrown.com

May 17, 2013

BY MESSENGER

Cynthia T. Brown  
Chief, Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423-0001



ENTERED  
Office of Proceedings

MAY 17 2013

Part of  
Public Record

Re: BNSF Railway Company and Musket Corporation  
v. Union Pacific Railroad Company – Petition for  
Declaratory Order, STB Docket No. FD 35740

Dear Ms. Brown:

Enclosed for filing in the above case are an original and ten copies of a Petition for Declaratory Order and a check for \$1,000 to cover the filing fee. Please date-stamp the extra copy of this pleading and return it to our representative. Thank you.

Sincerely yours,

Robert M. Jenkins III

RMJ/bs

Enclosures

**FEE RECEIVED**  
MAY 17 2013  
SURFACE  
TRANSPORTATION BOARD

**FILED**  
MAY 17 2013  
SURFACE  
TRANSPORTATION BOARD

204264

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

_____		)
BNSF RAILWAY COMPANY and		)
MUSKET CORPORATION,		)
		)
Petitioners,		)
		)
v.		)
		)
UNION PACIFIC RAILROAD COMPANY,		)
		)
Respondent.		)
_____		)

Docket No. FD 35740

ENTERED  
Office of Proceedings  
MAY 17 2013  
Part of  
Public Record

**PETITION FOR DECLARATORY ORDER**

Roger P. Nober  
Richard E. Weicher  
Jill K. Mulligan  
Adam Weiskittel  
BNSF RAILWAY COMPANY  
2500 Lou Menk Drive  
Fort Worth, TX 76131

Robert M. Jenkins III  
Adrian L. Steel, Jr.  
Adam C. Sloane  
MAYER BROWN LLP  
1999 K Street, NW  
Washington, DC 20006  
202-263-3261

Morris W. Collie  
MUSKET CORPORATION  
10601 N. Pennsylvania Ave.  
Oklahoma City, OK 73120

*Attorneys for Petitioners*

DATED: May 17, 2013



2. Petitioner Musket is a commodity supply, trading, and logistics company that is a leader in shipping crude oil by rail. Its headquarters are at 10601 North Pennsylvania Avenue, Oklahoma City, Oklahoma 73120.

3. Respondent Union Pacific Railroad Company (“UP”) is a Class I common carrier railroad operating in 23 states in the western two-thirds of the United States. Its headquarters are at 1400 Douglas Street, Omaha, Nebraska 68179.

4. TXIT is a multi-modal transloading facility located on the Galveston Ship Channel at 4800 Port Industrial Road, Galveston, Texas 77554. TXIT is and has been an “open” facility served both by UP and, through UP reciprocal switching, by BNSF.

5. TXIT receives by rail a variety of bulk commodities, including crude oil, potash and other fertilizers, that are then stored and/or transloaded to oceangoing vessels for transportation to domestic and international destinations. A substantial and growing part of TXIT’s business is transloading crude oil delivered by rail for ongoing shipment by barge to refinery markets in Texas and elsewhere along the Gulf Coast, as well as to international refinery markets. The boom in U.S. oil production, particularly in the Bakken shale region of North Dakota and Montana, has generated a huge demand for tank car unit trains to move crude oil to the Gulf Coast. BNSF has invested hundreds of millions of dollars in facilities in the Bakken shale region and elsewhere to enable it to efficiently load and move unit trains of crude oil to the Gulf Coast for its shippers. BNSF’s shippers have also invested more than \$1 billion in facilities and tank car leases and purchases related to the unit train transportation of crude oil from the Bakken Shale to refinery markets such as those served by TXIT.

6. Musket is a leading shipper of Bakken crude oil to Gulf Coast markets. It has made a major investment in a large oil-loading facility in Dore, North Dakota, and in tank cars

that it leases for unit-train shipments from that facility to TXIT and other distribution facilities and consumers in the Gulf Coast. BNSF serves the Dore facility and can provide direct unit-train service for Musket to TXIT.

7. Over the past couple of years, UP's pattern of unnecessarily inefficient, discriminatory and unreasonable switching operations at the TXIT facility for BNSF trains has severely disadvantaged both BNSF's ability to provide competitive unit train service to TXIT, and Musket's ability to serve distribution facilities and customers in the Gulf Coast by utilizing TXIT. UP has provided direct service of trainload lot and unit trains to the TXIT facility, but only for UP linehaul business. UP has not allowed BNSF's single-line trainload lot or unit trains to be delivered to TXIT on an equivalent or at least non-discriminatory basis, even though there has been ample capacity at the TXIT facility to do so. UP has instead historically required that each of the following actions be performed on BNSF trains destined to TXIT:

- BNSF crews must break up each of its trainload lot or unit trains into multiple small blocks of cars at BNSF's Valley Yard just outside the TXIT facility;
- BNSF crews must then deliver each block of cars individually to a small interchange track at UP's nearby interchange yard;
- UP then chooses to have each block of cars separately delivered by a UP crew to the TXIT facility;
- after the cars have been unloaded, UP does not retrieve the cars as a group but instead retrieves empty cars in a piecemeal manner mixed with other types of traffic;
- BNSF crews separately pick up the cars that are part of the shipment as they are released in a piecemeal manner at UP's yard; and

- BNSF crews must then reassemble the unit train or trainload lot into a single block in its yard for the empty return movement.

As a result of this unnecessarily inefficient process, it has taken 2 to 7 days for BNSF's unit trains to cycle into and out of TXIT, as opposed to 12 to 24 hours for unit trains moving in UP linehaul service.

8. Since the mergers that created BNSF and UP, the two railroads have a well-developed protocol for discussing service disputes over jointly operated facilities and assets that one carrier can operate over the other through trackage rights. The issues at TXIT have been discussed at the operational and policy level between BNSF and UP at length.

9. BNSF, TXIT, and interested shippers, including Musket, have engaged in lengthy discussions with UP over the past year concerning its handling of BNSF's unit train traffic. BNSF and Musket believe that TXIT has had more than enough in-facility track capacity to receive unit trains from BNSF in an efficient manner. This is clearly evidenced by the fact that UP utilizes those same in-facility tracks to efficiently deliver unit trains handled by UP in linehaul service. BNSF also avers that allowing the efficient use of those in-facility tracks for BNSF unit trains would save BNSF the cost and delay of breaking its unit trains into small blocks, separately delivering and picking up the blocks of cars from UP's yard, and reassembling the unit trains in BNSF's yard. TXIT and the shipper involved would save the cost and delay of piecemeal unloading of a unit train that could be unloaded more efficiently, and the shipper would save the cost of its equipment being tied up in a lengthy and unnecessary piecemeal switching process between BNSF's and UP's yards, and between UP's yard and the TXIT facility. UP would also save the cost and delay of separately switching each small block of cars into and out of the TXIT facility. UP's requirement to switch only small cuts of BNSF cars has

significantly and unnecessarily increased the number of switching moves into and out of TXIT, and sub-optimized available capacity, crews, equipment, and fuel. All of these practices substantially reduce BNSF's ability to competitively serve the TXIT facility.

10. UP's provision of discriminatory and inefficient switching for BNSF unit trains at TXIT has had an especially adverse impact on cycle times for those trains and their equipment. For a shipper such as Musket, a significant delay in turning around a unit train adversely affects the utilization it gets from its tank car equipment. Longer cycle times mean more equipment expense and inventory carrying cost per ton of product delivered, and in the case of crude oil shipments, hindered ability to forecast market opportunities on price spreads between origination and final delivery in a dynamic energy market. From BNSF's standpoint, the inefficient dwelling of equipment, added train make-up and break-up, and commingling of equipment for multiple shippers and destinations beyond TXIT has hindered BNSF's ability to plan efficiently for its own crew and locomotive needs and restricted BNSF's ability to provide a competitive unit train service with cycle times on par with UP's unit train service. The delays and costs associated with the artificial operational restrictions placed on BNSF unit train shipments into TXIT have significantly degraded the competitiveness of BNSF's unit train service offering to Musket and its other customers.

11. BNSF and UP compete head-to-head for unit train transportation of crude oil, potash, and other bulk commodities to the Gulf Coast area. If unit trains handled by UP in line-haul service are delivered to the TXIT facility directly and efficiently, while BNSF's trains must undergo multiple lengthy and unnecessary switching processes, then BNSF's service becomes less competitive. By unnecessarily increasing the costs and delays of BNSF's single-line service from the Bakken region, UP has gained an undue competitive advantage unrelated to its own

linehaul capabilities not only in offering its own single-line service from other regions, but also in pressuring shippers to agree to joint-line service for unit trains originated by BNSF in the Bakken region. If, for example, BNSF interchanged unit trains from the Bakken shale with UP in Kansas City or St. Louis, UP would deliver them directly to the TXIT facility. In fact, UP would deliver unit trains originated by BNSF at Musket's Dore facility in North Dakota directly to the TXIT facility if they were interchanged with UP in Kansas City. In contrast, the same unit trains originating on BNSF in the Bakken shale but interchanging with UP at Galveston have been required to go through a lengthy switching process before being inefficiently delivered in multiple small pieces to the TXIT facility. As a result, UP has required shippers to choose between having their equipment and lading moving in BNSF direct service tied up in Galveston for days or weeks or otherwise using a less efficient two-carrier route to avoid delays associated with UP's inefficient switching.

12. It is not only BNSF, Musket and the other BNSF shippers using the TXIT facility that have been disadvantaged by UP's tactics. The TXIT facility itself, a local family owned business, has been significantly disadvantaged. TXIT recently invested approximately \$40,000,000 to expand its loop tracks and support facilities, including the construction of four new support tracks, to enable it to more readily receive and rapidly unload unit train shipments of crude oil and other commodities, such as potash and other fertilizers. TXIT has advertised its capacity to handle unit train business in reliance on competitive and efficient service from both UP and BNSF. Insofar as BNSF's ability to compete for service to the TXIT facility has been harmed by UP's unwillingness to provide BNSF reasonable, nondiscriminatory switching service, that facility has been less attractive to shippers looking for the most competitive options.

13. UP and BNSF have met many times and BNSF has made a number of operational suggestions, including suggestions entailing the investment of BNSF capital, to help address congestion and UP fluidity concerns at TXIT. However, UP has thus far failed to implement BNSF's operational suggestions. BNSF has suggested making available its own lead track where BNSF's locomotives could remain intact with the unit train and UP crews could easily step on the arriving train to deliver it or step off the departing empty train less than one mile from the TXIT facility. BNSF has also offered to perform the unit train switch service for UP, with BNSF's own crews and locomotives at BNSF's expense. Either service would be much more efficient for all concerned. BNSF would save the cost and delay of breaking its unit trains into blocks, separately delivering and picking up the blocks of cars from UP's yard, and reassembling the unit trains in BNSF's yard. UP would save the cost and delay of separately switching each block of cars into and out of the TXIT facility. TXIT and the shipper involved would save the cost and delay of piecemeal unloading of a train that could be unloaded as a unit, and the shipper would save the cost of its equipment being tied up in a lengthy and unnecessary piecemeal switching process between BNSF's and UP's yard and between UP's yard and the TXIT facility. Here again, BNSF would continue to pay UP's applicable per-car switching rate. And here again, UP has rejected these suggestions.

14. To date, UP has responded to BNSF's complaints about its service at TXIT by arguing that it was operationally impossible to more efficiently switch BNSF unit trains, and making vague representations about its intent to make improvements to that service while refusing to actually commit to any operational changes. UP's dilatory approach to responding to BNSF's proposals—for example, by supposedly considering the alternatives cited above over a period of time only to reject them weeks later—has exacerbated BNSF's and Musket's

commercial disadvantage at TXIT. While UP has recently suggested that it may institute improved switching operations for BNSF unit trains, BNSF and its customers, like Musket, have no assurance that UP's discriminatory and unreasonable practices will cease without a firm commitment from UP. Given UP's history of unreasonable switching operations and delayed rejection of BNSF's operational proposals at TXIT, relying upon UP's assertions of possible improvement is simply not an option for BNSF, Musket and other BNSF shippers. Indeed, UP's pattern of conduct has itself affected BNSF competitiveness for traffic to TXIT.

### **CONCLUSION AND REQUESTED RELIEF**

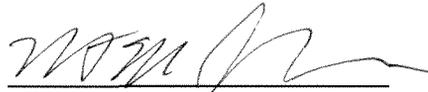
15. UP's refusal to provide or commit to operating protocols that ensure efficient and non-discriminatory switching of BNSF's trains for customers such as Musket has been and continues to be (i) a discriminatory and unreasonable practice in violation of 49 U.S.C. § 10702(2); (ii) a failure to provide reasonable, proper, and equal interchange facilities in violation of 49 U.S.C. § 10742; and (iii) a failure to provide reasonable service on reasonable request in violation of 49 U.S.C. § 11101. If after the filing of this Petition, UP should commit to and implement operations that ensure efficient and non-discriminatory switching of BNSF's trains, it may be appropriate for BNSF's and Musket's claims to be held in abeyance with appropriate Board oversight.

16. The Board has broad discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721(a) to issue a declaratory order to eliminate a controversy or remove uncertainty. Petitioners request that the Board issue an order providing that:

- (a) UP's practices challenged herein have violated and, until corrected, will continue to violate 49 U.S.C. §§ 10702(2), 10742, and 11101;

- (b) UP is required to provide, or permit BNSF to provide, efficient, reasonable and non-discriminatory switching services and interchange facilities for BNSF unit trains at TXIT now and in the future;
- (c) UP's switching services and interchange facilities at TXIT be subject to review and monitoring by the Board's Office of Public Assistance, Governmental Affairs, and Compliance; and
- (d) such other and further relief as the Board may deem proper on the record presented.

Respectfully submitted,



Robert M. Jenkins III  
Adrian L. Steel, Jr.  
Adam C. Sloane  
MAYER BROWN LLP  
1999 K Street, NW  
Washington, DC 20006  
202-263-3261

Richard E. Weicher  
Jill K. Mulligan  
Adam Weiskittel  
BNSF RAILWAY COMPANY  
2500 Lou Menk Drive  
Fort Worth, TX 76131

Morris W. Collie  
MUSKET CORPORATION  
10601 N. Pennsylvania Ave.  
Oklahoma City, OK 73120

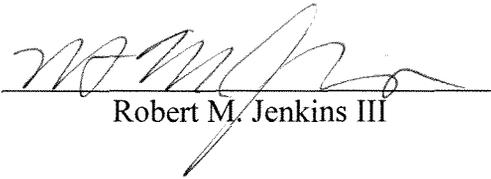
*Attorneys for Petitioners*

DATED: May 17, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May 2013, a copy of the foregoing "Petition for Declaratory Order" was sent by overnight delivery to:

Gayla Tal  
Senior Vice President Law  
And General Counsel  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, Nebraska 68179

  
Robert M. Jenkins III