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SERVICE DATE – DECEMBER 31, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35740

BNSF RAILWAY COMPANY AND MUSKET CORPORATION

v.

UNION PACIFIC RAILROAD COMPANY

Decided: December 30, 2013

BNSF Railway Company (BNSF) and Musket Corporation (Musket) (collectively, Petitioners) have filed a petition for a declaratory order (Petition) seeking a determination that certain of Union Pacific Railroad Company's (UP) interchange practices at Texas International Terminals (TXIT) in Galveston, Tex., are unreasonable because they effectively preclude Petitioners from utilizing BNSF for unit train service to TXIT. Petitioners also seek a declaration that the continuation of such practices would constitute: (i) a discriminatory and unreasonable practice in violation of 49 U.S.C. § 10702(2); (ii) failure to provide reasonable, proper, and equal interchange facilities in violation of 49 U.S.C. § 10742; and (iii) failure to provide reasonable service upon reasonable request in violation of 49 U.S.C. § 11101.

Under 49 U.S.C. § 721 and 5 U.S.C. § 554(e), the Board may issue a declaratory order to terminate a controversy or remove uncertainty. As discussed below, because the record indicates that there is no longer an active controversy here, a declaratory order proceeding will not be instituted.

BACKGROUND

BNSF provides unit-train service from Musket's oil-loading facility in Dore, N.D., to the TXIT multi-modal transloading facility located on the Galveston Ship Channel. Only UP, however, has direct rail access to TXIT's loop tracks, which are used to unload railcars and to load barges, ships, and on-site storage tanks and buildings. Because BNSF lacks direct access to the TXIT facility, it relies on a reciprocal switching arrangement with UP to facilitate Musket's shipments to TXIT. Under this voluntary arrangement,¹ when BNSF has cars to deliver, it moves them from its nearby Valley Yard over a UP-owned connecting track, then over a short segment of UP mainline, to the three UP-owned interchange tracks at UP's interchange yard near

¹ TXIT was opened to BNSF through a voluntary reciprocal switching arrangement between BNSF and Southern Pacific Transportation Company (SP) prior to SP's merger with UP. Since 1996, when the merger was consummated, UP has continued to provide reciprocal switching for BNSF traffic moving to and from TXIT.

the entrance to the TXIT facility over which the reciprocal switching occurs. After unloading, UP crews move the empty cars back to Valley Yard upon being notified by BNSF that it is able to accept them.

On May 17, 2013, BNSF and Musket filed the Petition, in which they claim that “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.”² Petitioners further assert that UP historically has required each of the following actions be performed on BNSF trains destined for TXIT: (a) BNSF crews break up each of its trainload lot or unit trains into multiple small blocks of cars at Valley Yard; (b) BNSF crews deliver each block of cars individually to a small interchange track at UP’s interchange yard; (c) each block of cars is separately delivered by a UP crew to TXIT; (d) after unloading, UP retrieves the empty cars in a piecemeal manner mixed with other types of traffic; (e) BNSF crews separately pick up the cars as they are released in a piecemeal manner at UP’s yard; and (f) BNSF crews reassemble the unit train or trainload lot into a single block at Valley Yard for the empty return movement.³ Petitioners state that BNSF has made a number of operational suggestions to help address congestion at TXIT but that UP “thus far has failed to implement them.”⁴

On June 6, 2013, UP filed its Reply to the Petition (UP Reply), in which it claims that the Board lacks authority over the voluntary switching arrangement at issue and that none of the statutory provisions cited by Petitioners provides a basis for relief.⁵ UP generally denies Petitioners’ allegations and characterizations of UP’s performance, and further asserts that Petitioners fail to acknowledge the limitations on physical capacity near and at the TXIT facility, and ignore the fact that BNSF’s own limitations in Galveston frequently cause delay in the movement of cars into and out of the facility.⁶ UP also notes that it recently leased land to TXIT for the construction of four new storage tracks to facilitate the handling of both UP and BNSF cars to and from TXIT’s loop tracks, as well as a staging track for trainload traffic delivered by UP, and that operations utilizing these improvements were implemented on May 1, 2013.⁷ As a result, UP argues that Board intervention at this time would be premature.⁸

² Petition at 3.

³ Id. at 4.

⁴ Id. at 7.

⁵ UP Reply 2-3, 9-15.

⁶ Id. at 4-9.

⁷ Id. at 3.

⁸ Id. at 15-16.

On June 26, 2013, Petitioners filed a reply (BNSF/Musket Reply) to the UP Reply, which Petitioners characterized as a motion to dismiss rather than a reply to the Petition.⁹ Therein, Petitioners dispute UP's contention that the Board lacks regulatory authority over voluntary reciprocal switching arrangements and reiterate their arguments regarding 49 U.S.C. §§ 10702(2), 10742, and 11101.¹⁰ Petitioners also "acknowledge that UP's service has improved since the Petition . . . was filed" as a result of the new storage and staging tracks coming on-line in early May, and that this "improvement is encouraging, and supports BNSF's and Musket's belief that BNSF and UP should ultimately be able to arrive at protocols that ensure satisfactory service."¹¹

UP filed a motion for leave to file a further reply and the accompanying reply on July 16, 2013 (UP Sur-Reply), in which it argues that the BNSF/Musket Reply is an unauthorized reply to the UP Reply under 49 C.F.R. § 1104.13(c) and generally restates its legal arguments.¹²

DISCUSSION AND CONCLUSIONS

The Board has broad discretion in determining whether to issue a declaratory order under 49 U.S.C. § 721 and 5 U.S.C. § 554(e). See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). Petitioners have acknowledged that switching operations at TXIT have improved since the Petition was filed, and that they believe that BNSF and UP ultimately should be able to arrive at a negotiated solution that will ensure satisfactory service. Therefore, there is no longer an active controversy to resolve here. Should an active controversy regarding these issues arise in the future, the parties are reminded that the Board's alternative dispute resolution processes¹³ remain available.¹⁴

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to institute a declaratory order proceeding is denied.

⁹ BNSF/Musket Reply at 1.

¹⁰ Id. at 2-9.

¹¹ Id. at 9.

¹² In the interest of compiling a more complete record, the Board will accept both the BNSF/Musket Reply and the UP Sur-Reply.

¹³ See Assessment of Mediation & Arbitration Procedures, EP 699 (STB served May 13, 2013).

¹⁴ The parties are also reminded that a case involving these types of claims is often more appropriately brought as a complaint rather than a petition for a declaratory order.

2. This decision is effective on the date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings