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SERVICE DATE – DECEMBER 1, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY—TERMINAL TRACKAGE RIGHTS—KANSAS CITY  
SOUTHERN RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY

Decision No. 2

Digest:<sup>1</sup> BNSF Railway Company has requested terminal trackage rights over a single track jointly owned by Kansas City Southern Railway Company and Union Pacific Railroad Company. This decision issues a procedural schedule to govern the proceeding.

Decided: November 25, 2014

BACKGROUND

On February 27, 2013, BNSF Railway Company (BNSF) filed an application under 49 U.S.C. § 11102(a) for terminal trackage rights over the Rosebluff Industrial Lead (the RIL), track that is jointly owned by Kansas City Southern Railway Company (KCS) and Union Pacific Railroad Company (UP). The RIL connects to the former Southern Pacific Transportation Company Lafayette Subdivision that is now jointly and equally owned by BNSF and UP. The RIL connects at milepost 223.3 and extends approximately nine miles to the south.<sup>2</sup>

KCS and UP filed separate replies on March 19, 2013, in opposition to BNSF's application for terminal trackage rights. On April 24, 2013, CITGO Petroleum Corporation (CITGO) filed a petition to intervene in support of BNSF's petition.

By decision served on April 14, 2014, the Board directed the parties to engage in mandatory mediation pursuant to 49 C.F.R. § 1109.2(a)(2) to resolve the underlying issue of BNSF access to the greater Lake Charles, La. area.<sup>3</sup> By letter dated July 17, 2014, the Director

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> BNSF Application at 2 (filed Feb. 27, 2013).

<sup>3</sup> The Board granted CITGO's petition to intervene in the same decision.

of the Board's Office of Public Assistance, Governmental Affairs, and Compliance informed the Board that formal mediation was not successful in resolving the disputed issues.

On August 26, 2014, BNSF filed a request that the Board issue a procedural schedule consistent with the one proposed in its February 27, 2013 application. On August 29, 2014, KCS filed a response in opposition to BNSF's request, arguing that BNSF had neither attempted to negotiate with KCS nor asked UP to initiate arbitration.<sup>4</sup> Also on August 29, 2014, UP similarly asked the Board to determine whether BNSF's efforts to obtain trackage rights are consistent with Decision No. 63 and reiterated that BNSF's proposed schedule would not allow sufficient time for other interested parties to file reply evidence, if the Board allows this proceeding to go forward. CITGO and BNSF responded to these filings on September 4 and 5, 2014, respectively.

In Decision No. 63, the Board denied KCS's petition to reconsider the trackage rights granted to BNSF in Decision No. 44.<sup>5</sup> In its petition, KCS argued that neither UP/SP nor the Board could authorize BNSF to conduct trackage rights operations on certain lines that KCS owned jointly with a UP predecessor unless BNSF first filed a terminal trackage rights application. KCS based this argument on four joint facility agreements entered into by KCS and the UP predecessor between 1934 and 1954. In Decision No. 63, the Board declined to rule on the necessity of a terminal trackage rights application and encouraged the parties to negotiate privately with respect to the four joint facility agreements.

In the event a private agreement could not be reached, the Board suggested that the next step might be to invoke arbitration as provided by the four agreements.<sup>6</sup> Recognizing, however, that BNSF was not a party to those agreements, the Board stated its expectation that BNSF would accept arbitration and that UP would invoke arbitration on behalf of BNSF, to the extent BNSF so requested.<sup>7</sup>

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<sup>4</sup> KCS argues that this process is required by the Board's decision in Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp. (Decision No. 63), FD 32760 (Sub-No. 46) (STB served Dec. 4, 1996).

<sup>5</sup> Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Decision No. 44), FD 32760 (STB served Aug. 12, 1996).

<sup>6</sup> The Board stated, "if the parties (KCS, BNSF, and UP/SP) are not able to come to an agreement, any differences in interpretation of the four joint facility agreements may be submitted to arbitration under the terms of those agreements." Decision No. 63, slip op. at 10.

<sup>7</sup> "We realize, of course, that BNSF is not a party to the four agreements. We expect, however: (i) that BNSF, which claims rights derivative to the rights conferred by the four agreements on T&NO, will accept the arbitration remedy provided by the four agreements; and (ii) that, if and to the extent BNSF so requests, SPT will invoke that arbitration remedy on behalf of BNSF." Id. at 10 n.29.

KCS and UP have both opposed the issuance of a procedural schedule for BNSF's application for terminal trackage rights on the grounds that BNSF has not complied with the procedures described above.

### DISCUSSIONS AND CONCLUSIONS

The Board's hope in Decision No. 63 was that the parties would privately resolve any disputes over BNSF's access to the Lake Charles area. The record—including various letters and emails and the unsuccessful Board-ordered mediation—demonstrates that the parties have been unable to do so. As the parties have complied with the intent of Decision No. 63 by attempting to reach a private resolution of this dispute, any further delay of a terminal trackage rights proceeding would be unproductive. We will proceed with issuance of an evidentiary schedule.

KCS and UP suggest that, under Decision No. 63, BNSF must ask UP to invoke the arbitration mechanism contained in the joint facilities agreements before filing a terminal trackage rights application. We disagree. The Board's proposed step of arbitration is permissive, rather than mandatory.<sup>8</sup> Decision No. 63 assumes that (i) BNSF "will accept" arbitration, and that (ii) UP will invoke arbitration "if and to the extent BNSF so requests."<sup>9</sup> However, BNSF is unwilling to request that UP pursue arbitration because it believes that neither party to the joint facility agreements would adequately represent BNSF's interests.<sup>10</sup> Neither KCS nor UP has disputed this claim. In short, Decision No. 63 did not require that BNSF, as a precondition to filing a terminal trackage rights application, seek an arbitration in which it could not participate, and BNSF has reasonably explained its decision not to pursue that course.<sup>11</sup>

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<sup>8</sup> In Decision No. 63, the Board stated that "any differences in interpretation of the four joint facility agreements *may* be submitted to arbitration under the terms of those agreements." Decision No. 63, slip op. at 10 (emphasis added). The Board further suggested that, in the event that the parties did resort to arbitration and "the arbitral interpretation produced a situation where BNSF access to the Lake Charles area is blocked," the next step would be for BNSF to seek approval of a terminal trackage rights application. Id. The Board, however, did not make arbitration a precondition to filing a terminal trackage rights application. Furthermore, any rail carrier may file a terminal trackage rights application under 49 U.S.C. § 11102 without permission from the Board.

<sup>9</sup> Id. at 10 n.29.

<sup>10</sup> According to BNSF, "[p]ursuit of a KCS-UP arbitration proceeding, in which two competitors of BNSF would arbitrate between themselves the scope of BNSF's rights of competitive direct access for years to come, is not only impractical, but also untenable in light of the standstill in progressing such efforts since BNSF first gave notice of its intent to initiate direct service in May of 2012." BNSF Application at 8.

<sup>11</sup> KCS and UP suggest other reasons why the Board should not allow BNSF to pursue its terminal trackage rights application at this time. See KCS Reply 3 n.4, 4-7, 15-18 (filed Mar. 19, 2013); UP Reply 7-8 (filed Mar. 19, 2013). The reasons given, however, either go to the merits of BNSF's application or are moot.

The Board has considered BNSF’s proposed procedural schedule, under which interested parties would have 30 days to file reply comments and evidence. The Board is adopting a modified procedural schedule agreed upon by the parties.<sup>12</sup> Therefore, the following procedural schedule will govern this proceeding:

December 31, 2014	BNSF Opening Statement and Evidence Due
March 2, 2015	Replies and Reply Evidence Due
March 31, 2015	BNSF Rebuttal Argument and Evidence Due

It is ordered:

1. The parties shall comply with the procedural schedule set forth in this decision.
2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Commissioner Begeman concurred with a separate expression.

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COMMISSIONER BEGEMAN, concurring:

Although I do not agree that the steps the Board expected to occur before BNSF pursues terminal trackage rights to serve the Lake Charles area are *permissive*, I do agree that it is appropriate to set a procedural schedule on BNSF’s terminal trackage rights application. That is because I believe the Board erred in Decision No. 63 when it imposed those steps. The Board should remedy that mistake.

I do not dispute that portions of the pertinent language in Decision No. 63 include the word “may,” but a full reading of the language is necessary to determine the intent, and it does not support the majority’s conclusion that the language set a “permissive” course. While awkwardly constructed, Decision No. 63 specifically acknowledges that unsettled controversies under the four joint facility agreements “shall be referred to arbitration,” and that while BNSF is not a party to those agreements, the Board “expect[s]” not only that “BNSF... will accept the arbitration remedy” but that UP “will invoke arbitration on behalf of BNSF,” if requested. The decision goes on to state that “[i]f the parties (KCS, BNSF, and UP/SP) are unable to agree” and the arbitral decision denies BNSF access to the Lake Charles area, “BNSF may return to the Board to seek approval of a terminal trackage rights application. Decision No. 63 imposed a series of steps, albeit questionable ones, before BNSF can pursue its terminal trackage rights application.

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<sup>12</sup> KCS and UP requested 60 days to file reply comments and evidence; BNSF has stated that it does not object to this request. (BNSF Reply at 3 n.3).

Unfortunately, the steps outlined in Decision No. 63 pose more questions than they answer. It is unreasonable to expect one carrier to fairly represent the interests of another, especially where the carriers' interests are not necessarily aligned. That is why I supported the Board's decision directing the parties to try to mediate their differences earlier this year. Now, the Board should reopen and correct the material error in Decision No. 63, relieving both BNSF and UP of the ill-advised obligations imposed there.<sup>1</sup> Such a correction would allow the Board to reach the same reasonable procedural outcome and put the parties on a proper footing for resolving their dispute.

I concur.

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<sup>1</sup> E.g., CSX Corp.—Control and Operating Leases/Agreements—Conrail Inc., 3 S.T.B. 764, 770 (1998) (49 U.S.C. § 722(c) allows the Board to reopen a final proceeding because of material error, new evidence, or substantially changed circumstances); Montezuma Grain Co. v. STB, 339 F.3d 535, 542 (7th Cir. 2003) (Grounds for reopening must be sufficiently material that they would convince the Board to alter its decision).