

February 5, 2013

Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20024

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ENTERED
Office of Proceedings
February 5, 2014
Part of
Public Record

Re: Finance Docket No. 35781 – Brazos River Bottom Alliance--Petition for Declaratory Order--In Robertson County, TX

Dear Ms. Brown:

Union Pacific Railroad Company (“UP”) respectfully requests permission to submit this reply to the letter filed by Brazos River Bottom Alliance (“BRBA”) on January 16, 2014 (the “BRBA Letter”). The BRBA Letter is a reply to a reply in direct contravention of the Board’s rules under 49 C.F.R. § 1104.13(c). If, however, the Board decides to accept the BRBA Letter as part of the record, then it would be prejudicial to reject UP’s response.

The BRBA Letter does not change the ultimate outcome because it is irrelevant and immaterial to the question presented in BRBA’s own Petition: whether a classification yard requires Board approval under 49 U.S.C. § 10901. As a matter of well-established law, classification yards are incidental track within § 10906 that do not require STB approval for construction. Other federal agencies are charged with, and are actively, addressing safety concerns associated with crude-oil transportation.

The BRBA Letter is an Impermissible Reply to a Reply

The Board’s rules do not permit a reply to a reply. 49 C.F.R. § 1104.13(c). While the BRBA Letter is not captioned as a reply, it is clearly intended to be one.¹ BRBA filed its Petition for Declaratory Order (the “Petition”) on October 24, 2013. The Petition included a lengthy

¹ See e.g. South Kansas & Oklahoma R.R., Inc.--Acquisition & Operation Exemption, FD 31802, slip op. at n.3 (ICC served Nov. 27, 1992) (Refusing to allow a pleading entitled a supplemental brief as an impermissible reply to a reply under § 1104.13).



discussion of BRBA's safety concerns surrounding UP's proposed construction of a classification yard in Robertson County, Texas. Petition at 6, 12-13. In its Reply to the Petition filed on November 13, 2013, UP responded to these concerns substantively and demonstrated that these concerns are irrelevant to the issue presented in this matter. Reply at 26-27.

The BRBA Letter claims to supplement the record with new factual developments concerning the safety of crude oil shipments. BRBA Letter at 1. These supposedly "new" facts serve only to respond to the arguments in UP's Reply that safety concerns are irrelevant to the question of whether the Board has statutory authority to approve construction of a rail yard. The BRBA Letter is therefore an impermissible reply to a reply.

BRBA has not shown good cause for the Board to accept its impermissible filing. The only reason offered for the Board to accept the BRBA Letter is that BRBA wanted to draw the Board's attention to safety concerns stemming from recent incidents involving trains carrying crude oil. BRBA Letter at 1. BRBA had the opportunity to present arguments related to safety in its Petition and did, in fact, present such arguments. Moreover, with very few exceptions, the "new" facts were known *before* BRBA filed its Petition on October 24, 2013. BRBA merely seeks another opportunity to make its case under the guise of informing the Board of recent incidents that received wide coverage on the national level.² A supplemental filing consisting of public information, nearly all pre-dating the original Petition and all irrelevant to the issue before the Board, does not justify the Board making an exception to its rule against replies to replies.

The BRBA Letter Is Irrelevant to Whether Yard Construction Requires Approval

The Board and UP are mindful of the importance of safety, but the existence of possible safety issues cannot confer jurisdiction on the Board where none otherwise exists. "The extent of, or intensity of debate over, a project's environmental and safety issues, however, does not, by itself, confer jurisdiction on the Board." Union Pac. R.R. Co.--Petition for Declaratory Order, FD 33611, slip op. at 7 (STB served August 21, 1998) see also Friends of the Aquifer, et al.--Petition for Declaratory Order, FD 33966, slip op. at 8 (STB served Aug. 15, 2001). The only question before the Board is whether it has authority over the construction of classification yards. Ninety years of precedent finds such projects fall within the § 10906 exception and therefore UP's

² BRBA acknowledges that these incidents "made national headlines." In light of this, it is likely the Board was already aware of the incidents.

proposed classification yard does not require prior construction approval from the Board. In addition, the undisputed facts already before the Board establish that a classification yard in Robertson County will not extend UP's rail lines into new territory.³ Accordingly, the "new" facts in the BRBA Letter are completely irrelevant to the question before the Board.

Safety issues associated with the incidents mentioned in the BRBA Letter are already being addressed by those federal agencies that Congress has charged with jurisdiction over safe transportation of hazardous materials and railroad safety. Recent actions taken by the Federal Railroad Administration ("FRA") and the Pipeline and Hazardous Materials Safety Administrations ("PHMSA") include:

- December 2012 – FRA began Bakken Rail Accident Mitigation Project (RAMP), which includes conducting additional hazardous materials safety inspections, increasing efforts to reduce highway-rail grade crossing trespass accidents, and facilitating hazardous materials safety training seminars with shippers, consignees, contractors, and sub-contractors.⁴
- July 29, 2013 – In a letter to the American Petroleum Institute, DOT informed the industry that the FRA will utilize PHMSA's test sampling program to ensure that crude oil is being properly tested and classified for shipment in HMR authorized tank cars.⁵
- August 2, 2013 – The FRA issued Emergency Order No. 28, requiring railroads to properly secure rolling equipment. FRA also published a Safety Advisory recommending railroads take additional action to eliminate risk throughout the rail network.⁶
- August 27-28, 2013 – FRA and PHMSA held a meeting to receive public input on improving the safe transport of hazardous materials by rail, including a discussion on enhanced design specifications for the "DOT 111" tank cars commonly used to transport petroleum crude oil and ethanol.⁷
- August 29, 2013 – The Department of Transportation announced that FRA and PHMSA launched a joint inspection operation in North Dakota's Bakken oil region to verify that crude oil is being properly classified in accordance with

³ BRBA repeats the claim that the proposed classification yard in Robertson County will allow UP to serve new markets including the Bakken and Eagle Ford shale formations. BRBA Letter at 1. In reality, however, the BRBA Letter reaffirms that UP already serves these markets and therefore the proposed classification yard will not extend UP's lines into new territory or markets.

⁴ FRA's Action Plan for Hazardous Materials Safety, <http://www.fra.dot.gov/eLib/details/L04721>.

⁵ Id.

⁶ Id.

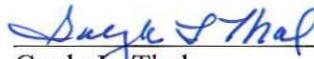
⁷ Id.

federal regulations. This includes activities such as unannounced spot inspections, data collection and sampling at strategic terminal and transloading locations that service crude oil.⁸

- September 6, 2013 – PHMSA published an Advance Notice of Proposed Rulemaking to solicit comments from stakeholders as well as data related to the cost implications of implementing a rule requiring comprehensive improvements to rail safety of flammable liquids.⁹
- November 20, 2013 – PHMSA and FRA issued a safety advisory reinforcing the importance of proper characterization, classification, and selection of a packing group for Class 3 materials, and the corresponding requirements in the Federal hazardous materials regulations for safety and security planning.¹⁰
- January 2, 2014 – PHMSA issued a safety alert to notify the general public, emergency responders and shippers and carriers that recent derailments and resulting fires indicate that the type of crude oil being transported from the Bakken region may be more flammable than traditional heavy crude oil.¹¹

No fact in the BRBA Letter justifies the Board in reversing its well-established practice of deferring on safety matters to PHMSA and FRA in order to reach beyond its statutory authority to claim jurisdiction over construction of a classification yard.¹²

Respectfully,



Gayla L. Thal

cc: James B. Blackburn, Counsel for Petitioner
Louise Anne Rinn
Jeremy M. Berman

⁸ Id.

⁹ Hazardous Materials: Rail Petitions and Recommendations to Improve the Safety of Railroad Tank Car Transportation, 78 Fed. Reg. 54,849 (Sept. 6, 2013).

¹⁰ Safety and Security Plans for Class 3 Hazardous Materials Transported by Rail, 78 Fed. Reg. 69,745 (Nov. 20, 2013).

¹¹ http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/1_2_14%20Rail_Safety_Alert.pdf

¹² See V&S Railway, LLC--Petition For Declaratory Order, FD 35459, slip op. at n.24 (STB served January 14, 2014) (“the safety issues [petitioner] raises are subject to the primary authority of the FRA”); BNSF Railway Company--Petition For Declaratory Order, FD 35164, slip op. at 7 (STB served December 2, 2010) (“The FRA, not the Board, has primary jurisdiction over rail safety matters at the federal level.”).