

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

REPLY TO BNSF RAILWAY COMPANY'S
"APPLICATION FOR TERMINAL TRACKAGE RIGHTS"

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**REPLY TO BNSF RAILWAY COMPANY’S
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Union Pacific Railroad Company (“UP”) hereby replies to the “Application for Terminal Trackage Rights” filed on February 27, 2013, by BNSF Railway Company (“BNSF”). BNSF’s application relates to a dispute over access to a facility owned by CITGO and located in West Lake Charles, Louisiana, which can be physically accessed only by using track that is subject to certain joint facility agreements between UP and The Kansas City Southern Railway Company (“KCS”). BNSF already has access to CITGO and other Lake Charles-area shippers using UP haulage and reciprocal switching; however, BNSF is now seeking to establish direct service to CITGO.

UP is filing this reply to address several inaccurate statements in BNSF’s application. UP is not addressing the application’s merits at this time. In fact, UP is not even certain that BNSF’s filing constitutes an application for terminal trackage rights because BNSF contemplates submitting the evidence the Board would need to authorize terminal trackage rights only *after* the Board issues a procedural schedule. (Application at 3.) UP also is not certain that BNSF’s effort to obtain trackage rights in this manner is consistent with the Board’s instructions to BNSF,

KCS, and UP about how the parties should attempt to resolve disputes over BNSF's access to shippers in the Lake Charles, Louisiana area. *See Union Pacific/Southern Pacific Merger*, FD 32760, Decision No. 63, slip op. at 9-10 (STB served Dec. 4, 1996) ("Decision No. 63").

The inaccuracies in BNSF's application primarily relate to BNSF's attempts to blame its inability to directly serve CITGO on UP and KCS, when BNSF has not followed the procedures set forth in Decision No. 63 that would be necessary for BNSF to establish direct service to CITGO.

The conditions the Board imposed on the UP/SP merger contemplated that BNSF could obtain trackage rights to serve shippers that had been "open to SP and KCS at West Lake Charles, LA." Decision No. 63, slip op. at 2; *see also Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 427-29 (1996). CITGO is one such shipper. However, the Board subsequently recognized KCS's claim to have veto power over BNSF access to shippers in the Lake Charles area, including West Lake Charles, under the terms of four joint facilities agreements entered into between KCS and UP predecessors, long before the UP/SP merger. *See* Decision No. 63, slip op. at 5-6. Ultimately, the Board did not resolve KCS's claim.

In response to KCS's contention that the Board could not authorize BNSF to conduct trackage rights operations on the lines subject to the joint facilities agreements unless the Board approved a terminal trackage rights application, the Board established a procedure for resolving the dispute. The Board said that KCS, BNSF, and UP should try to reach agreement on access, and if they could not agree, they should pursue arbitration under the terms of the joint facilities agreements. *See id.*, slip op. at 9-10. The Board also said that if arbitration "produces a situation where BNSF access to the Lake Charles area is blocked, BNSF may return to the Board to seek approval of a terminal trackage rights application," and if the application is denied, "an override

of the terms of the four joint facility agreements might be necessary under old 49 U.S.C. 11341(a).” *Id.*, slip op. at 10.

BNSF has not attempted to resolve the access dispute by reaching an agreement with UP and KCS. BNSF asserts that it engaged in “months of negotiation” with KCS and UP over access to CITGO (Application at 1), but BNSF’s exhibits belie that claim. As BNSF’s exhibits show, the current issue arose when BNSF sent UP a letter last May asserting a right to institute direct service to CITGO. (Application, Ex. 1, letter from C. Bigoness to D. Hartmann, dated May 24, 2012.) BNSF had not previously tried to negotiate alternative access with UP. Nor, apparently, had BNSF tried to reach an agreement with KCS: BNSF later told UP that it did “not believe KCS concurrence ... is an appropriate condition on [BNSF’s] direct access.” (*Id.*, Ex. 3, email from S. Bailiff to G. Sturm, dated July 30, 2012.) BNSF’s exhibits also show that KCS suggested to BNSF that the parties attempt to resolve the direct access issue by negotiation, but the exhibits do not contain any response from BNSF. (*Id.*, Ex. 6, email from W. Wochner to R. Weicher, dated Dec. 18, 2012.) Finally, BNSF’s exhibits show that UP reached out to both BNSF and KCS in an effort to resolve the access issue through negotiation, but before any meeting could be arranged, BNSF filed its application. (*Id.*, Ex. 9, letter from G. Thal to W. Wochner and R. Nober, dated Feb. 4, 2013.)

BNSF also has not sought to invoke arbitration under the joint facility agreements. BNSF asserts that the Board expected KCS or UP to reach agreement or initiate arbitration on their own to resolve KCS’s concerns about BNSF access to shippers in the Lake Charles area (Application at 1-2, 6), but Decision No. 63 belies that claim. In Decision No. 63, the Board said it expected “that, *if and to the extent BNSF so requests*, [UP] will invoke [the] arbitration remedy on behalf of BNSF.” Decision No. 63, slip op. at 10 n.29 (emphasis added). BNSF never asked

UP to invoke arbitration on behalf of BNSF. On the contrary, for nearly 16 years following the UP/SP merger, BNSF appeared satisfied to serve Lake Charles-area shippers using UP haulage and reciprocal switching. BNSF claims it demanded that UP invoke arbitration in a letter to UP dated January 9, 2013 (Application at 8), but the January 9 letter did not demand that UP invoke arbitration. Rather, the letter asserted that UP *previously* “should have undertaken arbitration” (*id.*, Ex. 7, letter from S. Bailiff to G. Sturm, dated Jan. 9, 2013) – an erroneous claim that UP promptly refuted (*id.*, Ex. 8, letter from G. Sturm to S. Bailiff, dated Jan. 18, 2013). As just discussed, the Board expected UP to initiate arbitration only “*if and to the extent BNSF so requests.*” Decision No. 63, slip op. at 10 n.29 (emphasis added).

BNSF’s application also is inaccurate to the extent it suggests that BNSF’s ability to provide competitive rail service to CITGO has been impeded by a lack of direct access. BNSF asserts that “[w]ithout direct access ... to CITGO and other West Lake Charles facilities, BNSF cannot serve as the remedy to competitive harms envisioned in the UP/SP merger decision and settlement agreements.” (Application at 14.) However, BNSF has had access to CITGO and other Lake Charles-area shippers ever since the UP/SP merger, and it has served those shippers for the past decade and a half using a combination of UP haulage and reciprocal switching. BNSF never pursued efforts to directly serve Lake Charles-area shippers before it raised the issue in May 2012 – nearly 16 years after the UP/SP merger. Moreover, UP is unaware of any claims by shippers that BNSF is not providing a competitive alternative to UP in the Lake Charles area. BNSF says the Board should act so “direct competitive service can finally be established by BNSF, as envisioned by the CMA and the Board years ago” (Application at 10), but nothing prevented BNSF from pursuing direct service “years ago.” Instead, BNSF and Lake

Charles-area shippers apparently have been satisfied with BNSF's ability to compete using UP haulage and reciprocal switching.

BNSF's statements about its proposed operations are confusing and contradictory. As BNSF's exhibits demonstrate, since BNSF first asserted its interest in directly serving CITGO, UP's objective has been to ensure that any BNSF operations do not interfere with UP's ability to operate efficiently and serve CITGO and the other Lake Charles-area shippers who use the same trackage that BNSF would have to traverse to institute direct service. At first, UP understood that BNSF planned to operate unit trains to CITGO, and UP identified several major issues associated with BNSF's provision of direct unit train service. (Application, Ex. 2, letter from D. Hartmann to C. Bigoness, dated June 21, 2012.) Several months later, BNSF told UP that "UP's concerns regarding unit train service [were] not relevant" because BNSF would be "mov[ing] traffic in manifest quantities." (*See id.*, Ex. 3, letter from C. Bigoness to D. Hartmann, dated Nov. 2, 2012.) Now, BNSF's application suggests that BNSF again plans to operate unit trains to CITGO, stating that "BNSF cannot effectively compete for unit train service without direct access." (Application at 7.) BNSF promises to provide more information in subsequent filings, so its actual operational intentions remain unclear for now. But whether BNSF plans to provide manifest service or unit train service, BNSF, UP, and KCS would have to coordinate operating plans to address the existing operational and capacity constraints in the Lake Charles area generally and at CITGO's facility in particular.

Ultimately, if the Board allows BNSF to proceed along its current course and grants its application, the Board will not need to address the details of BNSF's operating plan. Rather, UP and BNSF agreed upon a process for reviewing new BNSF trackage rights operations as part of the BNSF Settlement Agreement. Under the agreement, once BNSF proposes an operating plan

for initiating service to a shipper, UP must promptly notify BNSF of its “approval or disapproval of BNSF’s plan.” (BNSF Settlement Agreement § 5(d).) If UP disapproves of BNSF’s plan, UP must “propose an alternative operating plan that would be acceptable to UP and also be no more onerous than the operating plan that UP would establish for service provided by UP.” (*Id.*) “If UP approves BNSF’s plan but establishes conditions on that approval, those conditions shall be set forth in writing and shall be no more onerous than UP would establish for service provided by UP.” (*Id.*) Of course, KCS would also have a role to play in ensuring that there is no interference with its own rights to serve CITGO and other shippers in the Lake Charles area.

BNSF should not pursue its application unless it is prepared to compensate KCS for using the terminal trackage rights. BNSF asserts that if the Board grants its application, “any terminal trackage rights compensation due to KCS is the responsibility of UP” (Application at 15), but BNSF is wrong. Under 49 U.S.C. § 11102(a) and (b), the rail carrier granted use of terminal facilities must compensate the facilities’ owner. BNSF should know this. When BNSF obtained terminal trackage rights over several other segments of KCS-owned track to effectuate other provisions of the BNSF Settlement Agreement and the Board’s conditions on the UP/SP merger, the Board required *BNSF* to compensate KCS. See *Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 449 (“Section [11102(a)] provides that the carriers are responsible for establishing the conditions and compensation applicable to terminal trackage rights awarded under [Section 11102], and we will therefore allow BNSF and KCS an opportunity to reach an agreement respecting such matters.”). Here, BNSF voluntarily accepted the benefits and the obligations that go along with the Lake Charles-area merger conditions, including the obligation to compensate KCS if BNSF obtains terminal trackage rights. When KCS urged the Board to reconsider the Lake Charles-area conditions, suggested an alternative condition that did not

require BNSF access, and argued that BNSF needed terminal trackage rights to serve Lake Charles-area shippers, BNSF urged the Board to uphold the original conditions. *See* Decision No. 63.¹ If BNSF is not prepared to compensate KCS for using the terminal trackage rights it seeks, there is no reason for this proceeding to go forward.

Finally, if this proceeding goes forward, the Board should allow UP at least 60 days to reply to BNSF's Opening Statement and Evidence. BNSF could have submitted all its evidence supporting its request for relief in its application, yet it asks the Board for 30 days after the Board adopts a procedural schedule to submit its opening evidence. Then, BNSF suggests that UP and KCS should have 30 days to file reply evidence, while seeking the same amount of time to file its rebuttal evidence. UP does not know what BNSF will say in its opening evidence that could not have been included in the “application,” or why BNSF expects to need so much time to file rebuttal evidence, but given the time BNSF seeks to reserve for itself under the procedural schedule, UP believes fairness requires that UP have at least 60 days to file reply evidence. BNSF professes concern that the statute requires proceedings to be completed within 180 days after the filing of a request for relief. (Application at 17.) But BNSF could have chosen to file evidence with its application or proposed shorter periods for making its own evidentiary submissions. UP should not be placed at a disadvantage because of BNSF’s strategic choices.

¹ *See also* Reply of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to KCS’s Petition to Reopen/Reconsider (BN/SF-70), *Union Pacific/Southern Pacific Merger*, FD 32760 (filed Sept. 23,1996).

Respectfully submitted,

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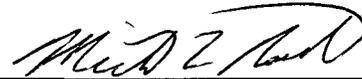
March 19, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2013, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery on

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and all parties as listed on the Board's website for the service list in Finance Docket No. 32760.



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