

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35781

BRAZOS RIVER BOTTOM ALLIANCE
--PETITION FOR DECLARATORY ORDER--
IN ROBERTSON COUNTY, TX

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**UNION PACIFIC RAILROAD COMPANY'S REPLY
TO BRAZOS RIVER BOTTOM ALLIANCE'S
MOTION TO COMPEL DISCOVERY**

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In its Petition for Declaratory Order filed on October 24, 2013 ("Petition"), Brazos River Bottom Alliance ("BRBA") asked the Board to institute a declaratory proceeding to examine whether Union Pacific Railroad Company ("UP") must obtain Board approval pursuant 49 U.S.C. § 10901(a) to construct a proposed classification yard in Robertson County, Texas ("Hearne Classification Yard"). With its Petition, BRBA submitted ten requests for production of documents pursuant to 49 C.F.R. § 1114.30. UP's Reply to BRBA's Petition filed on November 13, 2013 ("UP Reply") demonstrated that BRBA's Petition should be denied. UP's Reply also addressed BRBA's discovery requests by showing that discovery is generally not permitted in declaratory order proceedings before the Board and that BRBA's requests in particular were unnecessary and overbroad. UP Reply at 27-28.

BRBA's Motion should be denied because the discovery requests are untimely and unnecessary. The question raised in BRBA's Petition can be resolved as a matter of law on the record currently before the Board without the need for discovery. Moreover, the requests are overbroad and responding to the requests would place an undue burden on UP.

I. ARGUMENT

A. BRBA's Motion Should Be Denied Because Its Discovery Requests Are Untimely and Unnecessary

1. Discovery is Not Allowed Until the Board Institutes a Proceeding

The Board's regulations do not allow for discovery before a proceeding is instituted. Under 49 C.F.R. § 1114.21(a)(1), parties may obtain discovery "which is relevant to the subject matter *involved in a proceeding*." (emphasis added). Until the Board decides to institute a declaratory order proceeding there is no "proceeding" within the meaning of 49 C.F.R. § 1114.21. See e.g., Diana Del Grosso – Petition for Declaratory Order, FD 35652, n.7 (STB served May 8, 2013) (agreeing with argument that there is no proceeding within § 1114.21(a)(1) until the Board institutes a proceeding). BRBA's Petition asks the Board "to commence a declaratory order proceeding." Petition at 2, 33 (requesting that the Board institute a proceeding). The Board has not ruled on BRBA's request and no proceeding exists yet. Thus, no discovery is permitted at this time.

The chief case that BRBA relies on for its claim that it is entitled to discovery actually confirms that its discovery requests are premature. In Reasonableness of BNSF Railway Co. Coal Dust Mitigation Tariff Provisions, FD 35557, 2012 WL 735637 (STB served March 5, 2012), a procedural schedule that included discovery was jointly proposed by the parties *after* the Board had instituted the proceeding in a decision served on November 22, 2011.

BRBA asked the Board to institute a proceeding on October 24, 2013. To date, no proceeding has been instituted. BRBA is not entitled to conduct discovery before the Board institutes a proceeding, should the Board decide to do so.¹

¹ BRBA's Motion is also premature under the Board's rules because UP's responses to the discovery requests are not yet due. The Board's regulations allow a party to file a motion to compel discovery within ten days after discovery responses are due. 49 C.F.R. § 1114.31(a). Discovery responses are due

2. Discovery is Normally Not Allowed in Declaratory Order Proceedings

The Board generally does not order discovery in matters involving largely legal issues, such as this matter. Norfolk Southern Railway Co.--Petition for Declaratory Order, FD 35701, 2012 WL 6200264, fn.1 (STB served December 12, 2012). UP's Reply established that the law placing classification yards within § 10906 excepted track is well-settled and that no case has found construction of a classification yard to require § 10901 authorization. The facts submitted by BRBA's Petition and the affidavit sponsored by BRBA's expert witness demonstrate there is no question that the proposed project in Robertson County would not constitute a rail line extension into a new market or territory. Accordingly, the dispute here involves a legal issue with a record sufficient to resolve the alleged controversy without discovery. In such cases, the Board does not generally order discovery. Maryland Transit Administration--Petition for Declaratory Order, FD 34975, 2008 WL 4281987, *5 (STB served September 19, 2008); Town of Babylon and Pinelawn Cemetery--Petition for Declaratory Order, FD 35057, 2008 WL 275697, n.4 (STB served February 1, 2008). This matter is no exception.

B. BRBA's Motion Should Be Denied Because There Are No Relevant Fact Questions Necessitating Discovery

Apparently recognizing that discovery is the exception and not the rule in STB declaratory order proceedings, BRBA's Motion largely repeats its Petition by attempting to restate the law and thereby transform a proposed rail yard in Robertson County, Texas into rail lines reaching to Mexico and other markets far beyond Hearne. BRBA selectively quotes snippets from cases while ignoring what the decisions hold. BRBA also ignores facts that its own

within the time period designated by the requesting party, but not less than 15 days after service of the requests. 49 C.F.R. §§ 1114.26(a), 1114.27(a), and 1114.30(b). BRBA's discovery requests, attached as Exhibit C to its Petition, did not designate a time within which UP's responses were due. Thus, BRBA's Motion to Compel discovery is premature under 49 C.F.R. § 1114.31(a) and should be denied on that separate ground.

witness placed into the record in hopes of bypassing the Board's normal procedures to obtain detailed and sensitive discovery into a classification yard project that lies beyond the Board's § 10901 authority. The Board has all of the information required to decide this matter on the parties' submissions.

1. The Controversy Involves a Legal Issue

The question for the Board to decide is whether it should follow ninety years of precedent that classification yards fall within the § 10906 exception and therefore the proposed Hearne Classification Yard does not require prior construction approval from the Board. Track constitutes a § 10901 extension of a rail line subject to STB authority only if it physically extends the line of a carrier into new territory. Texas & P. Ry. Co. v. Gulf, C. & S.F. Ry. Co., 270 U.S. 266, 278 (1926) (“Texas & Pacific”). BRBA's Motion ignores the controlling line of cases that consistently have found the inherent nature of classification yards to facilitate the movement of traffic renders them incidental track within § 10906. See UP Reply at 10. Construction authority is not needed for the Hearne Classification Yard because, based on firmly established law, such classification yards do not extend UP's rail lines into new territory. See UP Reply at 11.

Instead, BRBA tries to obscure the relevant legal question by asking the Board to look at a variety of factors that it claims relate to the purpose and effect of the proposed Hearne Classification Yard in an effort to escape the precedent of Nicholson v. I.C.C., 711 F.2d 364 (D.C. Cir. 1983).² Motion at 4. Under the purpose and effect test, a track is an extension of a rail line requiring construction authority if the “purpose and effect of the new trackage is to extend

² Accord Georgia S. & F. Ry. Co. v. Duval Connecting R. Co., 324 F.2d 801 (5th Cir. 1963); Oregon-Washington R.R. & Navigation Co. Construction, 275 I.C.C. 591, 598 (1950) Terminal Ry. Ala. State Docks-Operation, Mobile, Ala., 354 I.C.C. 747 (1978); and Boston Terminal Co. Reorganization, 312 I.C.C. 373 (1960).

substantially the *line* of a carrier into new territory.” Texas & Pacific, 270 U.S. at 278 (emphasis added). As the court found in Nicholson, a classification yard adjacent to existing track merely allows a railroad to improve its existing service, not to expand its service into new areas. Nicholson, 711 F.2d at 365-366. Thus, there is no “larger purpose and effect” of the Hearne Classification Yard for the Board to examine.³

BRBA also points to the possible size of the proposed yard as creating a factual question about whether the projects falls within § 10906. Motion at 12. This argument ignores the relevant legal standard and fails as a matter of law. As shown in UP’s Reply, the size of the Hearne Classification Yard is irrelevant to the Board’s analysis. UP Reply at 25-26. The yards at issue in Nicholson and Georgia S. & F. Ry. Co. covered many miles and hundreds of acres and did not require construction authority, as a matter of law. BRBA can cite no case that found a classification yard came within the Board’s § 10901 authority merely because it was large.⁴ BRBA’s Motion provides no reason for the Board to disregard precedent and rely on a classification yard’s size to determine whether construction authority is required.

2. The Record Is Sufficient to Find that the Proposed Project is a Classification Yard that Does Not Require Construction Authority

BRBA backtracks from evidence that it submitted with its Petition demonstrating that the proposed Hearne Classification Yard would not extend UP’s lines into new territory or markets. In its Motion, BRBA claims there is no record before the Board and then attacks the information

³ The purpose and effect test is also relied on to find that track is subject to § 10901 where the track constitutes the entire operation of a railroad. See e.g. Riverview Trenton Railroad Company--Petition for an Exemption from 49 U.S.C. 10901, FD 34040, 2003 WL 21108179, *6 (STB served May 15, 2003). As explained below, such is not the case here.

⁴ BRBA finds significance in the fact that the proposed Hearne Classification Yard, estimated by BRBA to be 1,800 acres, could be larger than UP’s Livonia Yard at issue in Nicholson. Motion at 12. UP’s Bailey Yard in North Platte, Nebraska is the largest classification yard in the world at 2,850 acres stretching over eight miles. See http://www.up.com/aboutup/facilities/bailey_yard/ and http://en.wikipedia.org/wiki/Bailey_Yard. However, § 10901 approval was neither sought nor required for UP to construct the hump yards and bowl tracks at Bailey Yard.

already before the Board. Motion at 5. BRBA then alleges there is a “larger purpose and effect” that the Board must examine in an attempt to abuse the Board’s discovery procedures and obtain detailed commercial information from UP.⁵ Motion at 6. BRBA’s claims ignore information that it submitted to the Board and the status of the proposed project.

First, BRBA claims “that no record exists.” Motion at 13. BRBA points to the lack of transaction documents for BRBA or the Board to review. *Id.* This criticism ignores that the project in question is still only a proposal and has not yet been submitted to or authorized by UP’s Board of Directors. UP Reply at 5. Further, the proposed project is a construction project and does not involve a transaction under §§ 10901(a)(3) or (4), where one would expect to find sale agreements, operating agreements and other transaction documents.

More importantly, BRBA’s claim ignores that its own expert witness describes the project as a classification yard in his affidavit submitted under penalty of perjury. The R.L. Banks Report, submitted as part of the John McLaughlin affidavit attached as Exhibit A to BRBA’s Petition, describes the proposed construction project as a classification yard:

- “The flow of commodities through this area has continued, but now that UP owns the entire system, it can create a *classification yard to process those commodities.*” McLaughlin Affidavit, p.1 of 9. (emphasis added).
- “As the map in the introduction displays, two UP predecessor railroads and, subsequently seven of its operating subdivisions, converge in the immediate vicinity of Hearne, making it a prime location, from the railroad's perspective, to build a *classification yard at which to sort its manifest trains and redistribute goods over its rail network.*” *Id.* at 8. (emphasis added).

⁵ Specifically, BRBA claims that the “larger purpose and effect” will be determined by “what activities and markets the rail lines will serve, what demand exists in the territory served, what other purposes the new trackage may serve based on market needs and the timing of the construction, and what the actual effects of the new trackage will be.” Motion at 6. As explained more fully in UP’s Reply, at 27-29, these facts have no bearing on whether the Hearne Classification Yard would be an extension of a rail line under § 10901. No information sought by BRBA can contradict the undisputed fact that several of UP’s existing rail lines converge in Robertson County and thus a new yard in Robertson County will not physically extend into territory where UP does not currently operate.

- “the subject *classification yard certainly will handle a portion of the manifest shipments as they are sorted and redistributed across the nation.*” Id. (emphasis added).

The description in UP’s Reply, at 5-7, merely confirms the accuracy Mr. McLaughlin’s description.

Next, BRBA alleges three carve-outs to the general rule that “spur track” is excepted from Board construction authority which it claims could place a classification yard within leav§ 10901. Motion at 10. Notably, BRBA has failed to identify even one instance where any classification yard has been determined to be § 10901 track since 1920 when Congress gave the ICC authority to approve line construction.⁶ Moreover, none of the three carve-outs applies in this instance.

The first carve-out is for switching track that would constitute the entire operation of a new carrier. Motion at 10. The proposed classification yard will be located in Robertson County. No information sought by BRBA can refute the fact that UP’s operations extend far beyond that county. UP’s R-1 Schedule 702 for 2012 filed with the Board reports that UP operates over 31,868 miles of rail track in 25 states. Clearly, the project in question will not represent UP’s entire operation and this carve-out does not apply.

The second carve-out would apply if the project allows a switching carrier “to extend its operations into, or invade, new territory.” Motion at 10. This second carve-out cannot apply since, according to BRBA’s own expert, UP already serves the area and there are no other rail carriers whose territory can be invaded. BRBA’s expert witness submitted an affidavit about UP’s “new railroad classification yard between Mumford and Hearne, Texas” and included a map showing UP rail lines in Robertson County. McLaughlin Affidavit, p.1 of 9. Mr.

⁶ BRBA similarly failed to direct the Board to instances besides Nicholson where classification yards have been found not to require construction authority. See supra note 2.

McLaughlin describes how several predecessors of UP operated multiple lines in Robertson County and concludes that all of those lines are in “an area which is now *owned by one company*” and that “*UP owns the entire system*” of rail lines in the area. Id. (emphasis added).

The third alleged carve-out would apply if the line in question were essential to the through movement of traffic from shipper to consignee.⁷ But again, BRBA’s own evidence demonstrates this exception does not apply. BRBA’s Petition challenges a project located in Robertson County because its members object to agricultural land in *rural Robertson County* being diverted to use in a rail project. Petition at 2 and 3. Its expert witness Mr. McLaughlin by his own testimony “scoured the internet, railroad journals, trade magazines and other sources to determine what new market growth Union Pacific Railroad (UP) was engaging in would result in its need to develop a rail yard *in Robertson County, Texas.*” McLaughlin Affidavit, p.1 of 9. (emphasis added). Yet, Mr. McLaughlin identifies numerous origins and destinations for the existing and new traffic that might use the proposed Hearne Classification Yard that lie outside Robertson County including:

- Permian Basin, Eagle Ford and Bakken oil moving to Gulf Coast refineries (Id. at 2-3),
- Pecos, Texas and Odessa rail yard (Id. at 3, 9),
- Panama Canal expansion which may increase traffic delivered to Gulf Coast ports (such as Corpus Christi, Brownville, and Houston) and Atlantic ports for rail movement beyond (Id. at 5),
- Mexican-originated manufactured goods (Id. at 7), and
- Export coal through Texas and Louisiana ports or into Mexico (Id. at 7, 8).

⁷ While BRBA may have correctly paraphrased the text of a decision for this proposition BRBA again ignores the actual holding. Even if a “track is, in a literal sense, necessary to move the cars from their starting point to their destination” the track does not necessarily fall within § 10901 where the track is used for switching in a yard. Bhd. of Locomotive Engineers v. United States, 101 F.3d 718, 730 (D.C. Cir. 1996).

None of these shipper or consignee locations are in Robertson County, Texas. As such, no railroad track that UP would build in or near Hearne could connect UP directly to these supposedly “new” markets or “new” customers to enable a through movement that UP cannot carry today.⁸

As Mr. McLaughlin concludes in his report for BRBA the purpose of UP’s proposed Hearne project is “to build a classification yard at which to sort [UP’s] manifest trains and redistribute goods over its rail network.” McLaughlin Affidavit, p.8. In other words, Mr. McLaughlin’s “scouring” identified numerous UP customers extending throughout UP’s system but no customers in Robertson County. Moreover, his testimony confirms that the purpose of the project is to provide operational benefits by sorting and redistributing manifest shipments to expedite the flow of traffic over UP. McLaughlin Affidavit, p.8. The record provides ample support for the Board to find that the third carve-out does not apply.

Finally, since the Board is being asked to address a legal question of whether a classification yard is always § 10906 excepted track, there is no need for a comprehensive factual record. The Petition and UP’s Reply provide sufficient record for the Board to decide the question before it.

3. The Record is Composed of BRBA’s Own Evidence and Publicly Available Information

BRBA goes on to argue that discovery is needed because UP relied on “self-serving statements” to establish a record that the Hearne Classification Yard will be used as a classification and that UP already serves the four markets at issue (fracking, coal, Panama Canal

⁸ The law is clear that even if a classification yard enables a railroad to handle larger volumes or new traffic, the yard is still excepted track under 10906. Nicholson v. I.C.C., 711 F.2d 364, 368 (D.C. Cir. 1983) and Bhd. of Locomotive Engineers v. UP, FD 32394, 1995 WL 646763, *4 (ICC served Nov. 6, 1995).

Expansion, Mexico Traffic). Motion at 10-11. As UP noted in its Reply, all of the evidence presented by UP was taken from BRBA's Petition, Petition exhibits or a publicly available source. UP's Reply is replete with citations to the McLaughlin affidavit and materials submitted with that affidavit. UP Reply 15-18, 21. As UP's extensive citations to BRBA's own evidence demonstrate, BRBA submitted sworn testimony that is more than sufficient for the Board to determine the proposed project falls squarely within § 10906. Contrary to BRBA's assertion, UP's Reply did not include "litigation-generated graphics." The graphics and other evidence were created by UP for non-litigation purposes and were publicly available prior to BRBA filing its Petition with one exception.⁹ The facts relevant to the actual legal issue are undisputed and BRBA's motion should be denied.

C. BRBA's Motion Should Be Denied Because the Discovery Requests Are Overbroad and Unduly Burdensome

A document production request "should set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity." 49 CFR 1114.30(b). BRBA has not done this. Instead, BRBA identified the documents sought by overly broad categories by using the description "all documents" in nine of its ten requests.¹⁰ Such broad requests are not allowed. Scio Pottery Co. v. Consolidated Rail Corp., Docket No. 40330, 1990 WL 287229, *2 (ICC decided January 18, 1990) (denying document requests using the description "all documents" as overly broad). Moreover, BRBA does not sufficiently limit the scope of the documents sought. For example, Request No. 4 seeks "All documents concerning the traffic and congestion" along certain UP lines in Robertson County since 2007. As noted throughout the pleadings, seven UP subdivisions converge in

⁹ The only exception is Figure 2, which is essentially a recreation of a map found in BRBA's Petition. UP also annotated Figures 4 and 6 to indicate the location of Hearne, Texas, as a convenient reference as noted in its Reply.

¹⁰ Request No. 1 uses the description "documents" instead of "all documents."

Robertson County. This request is likely to yield thousands, if not hundreds of thousands, of documents such as waybills and other transportation documents completely unrelated to the proposed Hearne Classification Yard. Responding to this request will unnecessarily burden UP as it will force UP to retrieve and sort through all documents related to traffic that moves over these lines in Robinson County. All of BRBA's requests are similarly overbroad and will require UP to expend significant time and energy while providing little value to the Board.

BRBA's Motion should be denied because it is substantially more efficient to stay discovery until the Board rules on BRBA's Petition.¹¹ If the Board agrees with UP, BRBA's discovery requests become moot. Further, supposing the Board institutes a proceeding, it has discretion to narrow the issues and thereby limit the scope of discovery. Moreover, if UP were required to proceed with discovery now, the Board would have to address UP's objections to the discovery requests and the parties would be forced to devote substantial time and resources to resolving discovery disputes.

II. CONCLUSION

BRBA's Motion should be denied because the discovery sought is untimely, unnecessary and overbroad. If the Board were to endorse BRBA's untimely and unjustified discovery requests, it would expose any rail capacity project within the § 10906 exception to similar obstructions and create delay and uncertainty where none exists today.

¹¹ Should there come a time where these discovery requests are properly submitted in an established proceeding, UP reserves the right to make specific responses and objections.

Respectfully submitted,



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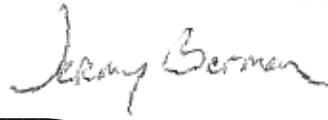
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December 16, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December 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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A handwritten signature in cursive script that reads "Jeremy Berman". The signature is written in black ink and is positioned above a horizontal line.

Jeremy M. Berman