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June 26, 2013

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Re: STB Docket No. FD 35740: Reply to Request for Dismissal

JUN 26 2013

Dear Ms. Brown:

Part of
Public Record

Enclosed for filing in the above case are an original and ten copies of a Reply of BNSF Company and Musket Corporation to Union Pacific Railroad Company's Request for Dismissal. Please date-stamp the extra copy of this pleading and return it to our representative. Thank you.

Sincerely yours,

Robert M. Jenkins III
Robert M. Jenkins III

RMJ/bs

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

BNSF RAILWAY COMPANY and
MUSKET CORPORATION,

Petitioners,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

Docket No. FD 35740



**REPLY OF BNSF RAILWAY COMPANY AND MUSKET CORPORATION
TO UNION PACIFIC RAILROAD COMPANY'S
REQUEST FOR DISMISSAL**

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JUN 26 2013

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DATED: June 26, 2013

1. UP's principal argument is that the reciprocal switching operations at issue in this matter were not Board-ordered and therefore, UP contends, they are not subject to the Board's regulatory authority. UP Reply at 2, 9-10. UP asserts that the Board has authority to regulate the conditions of reciprocal switching arrangements only if it finds such arrangements are required under 49 U.S.C. § 11102(c) and the competitive access rules at 49 C.F.R. § 1144.2. UP Reply at 9-10. Yet the very first case cited by UP for this proposition (*id.* at 10) actually demonstrates why UP's position is wrong. Far from suggesting that the Board cannot regulate voluntary reciprocal switching terms and conditions, the proceedings in *SP/SSW Switching Charges on Carloads of Grain at Kansas City*, ICC Dkt. No. 33388 and associated dockets (collectively "*SP/SSW Switching*"), specifically concerned the regulation of voluntary switching terms and conditions.

The proceedings in *SP/SSW Switching* began when Southern Pacific Transportation Company ("SP") revised its reciprocal switching tariffs to institute system-wide increases in its reciprocal switching charges at industry, warehouse, and interchange tracks served by SP, in connection with linehaul movements via many of the other Class I carriers in the West and Midwest, including UP. Believing, among other things, that SP's tariff actions and the subsequent retaliatory tariff actions by other Class I carriers could constitute an "unreasonable practice," the Interstate Commerce Commission ("ICC") instituted a broad investigation of the railroads' reciprocal switching terms and conditions. *See Reciprocal Switching Charges, S. Pac. Sys.*, ICC Dkt. No. 40178 (Sub-No. 1), 1988 WL 226773, at *2 (served Apr. 5, 1988). At no point did the ICC suggest that it had no jurisdiction over voluntary reciprocal switching rates and

as matter of course and reserving question whether to strike respondent's proffered rebuttal). If leave from the Board is deemed necessary for the filing of this Reply, BNSF and Musket request such leave in order to have an opportunity to address UP's legal argument for dismissal.

practices unless it found that the imposition of involuntary switching was compelled by then-Section 11103(c) (now Section 11102(c)) and the ICC's competitive access rules.

Indeed, the ICC was puzzled by UP's suggestion in those proceedings that the ICC should prescribe the level of compensation for SP's switching services pursuant to Section 11103(c). Here, in its Reply, UP selectively quotes the ICC's observation that its prescriptive power under Section 11103(c) was limited to cases in which it found that a switching arrangement is mandated. UP Reply at 10 (quoting *SP/SSW Switching*, ICC Dkt. No. 40178, 1989 WL 239591, at *4 (served Oct. 24, 1989)). But UP omits the ICC's crucial concluding sentence: "No such finding has been made (or sought) with respect to the voluntary switching arrangement involved here." 1989 WL 239591, at *4. The ICC's point, in context, was that if UP desired relief under then-Section 11103(c) and the competitive access rules, it would need to seek a mandatory switching order under those provisions.² But that by no means suggested that those provisions provided the only source of relief. On the contrary, the ICC made clear that it could and would entertain claims, among other things, that "SP acted unreasonably in increasing its switching charges, in violation of either [then-]49 U.S.C. 10701a (requiring reasonable rate levels) or [then-]10701 (requiring reasonable railroad practices)." 1989 WL 239591, at *2.

² That was also the Board's point in the other case misleadingly cited by UP for the proposition that the Board only has authority to regulate switching that it has mandated. UP Reply at 10 (citing *CSX – Control & Operating Leases/Agreements – Conrail*, STB Fin. Dkt. No. 33388, slip op. at 3 n.6 (served Aug. 24, 1998)). In that case, the Board was commenting on a case in which the courts had upheld the authority of the ICC to entertain a petition by the Delaware & Hudson Railway for mandatory reciprocal switching. The Board made a flat statement that Section 11102(c) gave it authority over conditions and compensation in reciprocal switching agreements. In context, all the Board was doing was identifying the statutory basis for its authority to prescribe the terms of mandatory reciprocal switching agreements. Nothing in the decision suggests that the Board believed, or believes, that it does not have regulatory authority over voluntary switching arrangements.

2. UP's second jurisdictional argument is related to its first one, and it suffers from the same fundamental flaw. UP claims that the Board cannot entertain an unreasonable practice claim under 49 U.S.C. § 10702(2) regarding reciprocal switching terms and conditions because there is a more specific statutory provision, Section 11102(c), that governs reciprocal switching. UP Reply at 11. UP cites a case that did not involve reciprocal switching, *Entergy Ark., Inc. v. Union Pac. R.R.*, STB Dkt. No. 42104, slip op. at 10 (served June 26, 2009), for the proposition that “[c]onduct is not appropriately challenged under section 10702 where there is another statutory provision that specifically governs the lawfulness of the conduct in question.” In that case, the plaintiff claimed “unreasonable practice” to invoke a regulatory remedy—Board intervention to establish a new through route—that was specifically governed by the Section 10705 of the statute. The Board held that “[b]ecause section 10705 provides a means to directly address and remedy the precise problem about which Entergy complains, it is the appropriate provision to invoke in this case.” *Id.* at 2.

BNSF and Musket do not contest that *if* BNSF did not already have open access to the TXIT facility, and *if* it were seeking a Board order imposing reciprocal switching at that facility, BNSF would need to invoke Section 11102(c), which specifically addresses requests for mandatory switching. But UP already provides reciprocal switching to the TXIT facility. The issue here is not whether it should provide reciprocal switching service, but the reasonableness of the service and facilities it provides.³ As the ICC determined in *SP/SSW Switching*, a petitioner

³ UP cites a 1938 case, *Joseph A. Goddard Realty Co. v. N.Y., C. & St. L. R.R.*, 229 I.C.C. 497, for the proposition that shippers complaining about the lack of reciprocal switching should have invoked the old terminal trackage rights provision of the statute. UP Reply at 11. Whether this is a fair reading of the case is debatable, but what is not debatable is that the railroad defendant there had *cancelled* reciprocal switching to the shippers. 229 I.C.C. at 497. It was incumbent on them, therefore, to demonstrate that reciprocal switching should be mandated by the ICC. BNSF

dissatisfied with the voluntary reciprocal switching it receives need not begin a mandatory reciprocal switching proceeding in order to challenge the respondent's voluntary reciprocal switching rates or practices on rate reasonableness or unreasonable practice grounds.

UP concludes its argument about BNSF and Musket's unreasonable practice claim by stating that it cannot be factually supported. UP Reply at 11-12. BNSF and Musket vigorously dispute many of the assertions in the Background section of UP's Reply (at 4-9)—including, but not limited to, UP's claim that BNSF's communications with UP about this issue “have reflected no interest in improving reciprocal switching operations.” *Id.* at 8. The Board, however, should not attempt to resolve the factual disputes between the parties without a proper evidentiary proceeding. As we discuss at the end of this Reply, procedurally BNSF and Musket are in substantial agreement with the suggestions UP makes at the end of its pleading for how the Board should proceed. With an appropriate schedule, evidence, and argument, the Board will have the record it needs to decide this matter.

3. In addition to arguing that the Board does not have jurisdiction to entertain BNSF and Musket's claim of unreasonable practice under Section 10702(2), UP argues that BNSF and Musket's claim that UP has failed to provide “reasonable, proper, and equal interchange facilities,” in violation of 49 U.S.C. § 10742, is defective as a matter of law. UP Reply at 12-14. UP starts by arguing that BNSF and Musket's claim under Section 10742 is an improper attempt to avoid meeting the requirements of Section 11102(c) and the competitive access rules. *Id.* at 12. This argument, however, is no more persuasive than UP's earlier argument that BNSF and Musket are barred from making an unreasonable practice claim, because they have not sought mandatory reciprocal switching. BNSF already has access to the TXIT facility. BNSF and

and Musket need not make such a demonstration, because BNSF already has reciprocal switching rights to and from the TXIT facility.

Musket do not need to seek to have the Board impose an interchange when BNSF already has access to the TXIT facility in Galveston through reciprocal switching.

UP next argues that Section 10742 is inapplicable because it addresses the “interchange of traffic” with a “connecting line.” UP argues that it is not a connecting carrier providing an interchange because there is no “through route” or “through rate” and UP is not charging a “division” of a joint rate. UP Reply at 12. The ICC was confronted with a similar argument in *Chicago & North Western Transp. Co. v. Peoria & Pekin Union Railway*, 360 I.C.C. 168 (1979), and determined that the “more persuasive” position is that a carrier providing switching services operates as a “connecting link” for through traffic and accordingly that it would rely on Section 10742 and other statutory provisions dealing with through traffic to assess the reasonableness of switching terms and conditions. 360 I.C.C. at 182-83. The Board has also confirmed that it has “regulatory authority over inter-carrier switching to assure that rail traffic is switched and movements completed,” and in that regard the Board specifically cited Sections 11101 and 10742 for the proposition that “railroads, upon reasonable request, must provide service to transport a shipper’s traffic from any origin to any destination and, if necessary to complete movements, accept traffic from other railroads and provide reasonable interchange facilities for the interchange of such traffic.” *Wisc. Central Ltd. – Petition for Declaratory Order – Certain Rates and Practices of the Baltimore & Ohio Chicago Terminal R.R. and CSX Transp., Inc.*, STB Dkt. No. 41995, slip op. at 3 & n.4 (served June 20, 2001).⁴

⁴ In the *Wisconsin Central* case, the Board declined to exercise its regulatory authority because the terms of the switching at issue were governed by a contract between the railroad parties. Slip op. at 4-5. Here, there is no such contract. As discussed in BNSF and Musket’s Petition for Declaratory Order, BNSF has repeatedly sought to enter into a contract that would establish protocols for UP’s reciprocal switching service, to no avail.

UP cites a Supreme Court case, *Atlantic Coast Line R.R. v. United States*, 284 U.S. 288, 293 (1932), for the proposition that the term “connecting lines” is “commonly used as referring to all the lines making up a through route” and employs that as the springboard for claiming that Section 10742 applies only where traffic moves under through routes and rates. UP Reply at 12. But that does not follow. The *Atlantic Coast Line* case did not involve Section 10742, which nowhere refers to through routes or rates. The issue in *Atlantic Coast Line* was whether lines that did not physically connect could be “connecting lines,” within the meaning of an ICC order authorizing a lease, if they were part of the same through route. The Court held that they could be. 284 U.S. at 293. The Court did not suggest that the line of a rail carrier providing switching services as part of a movement could not also be a “connecting line” within the meaning of Section 10742. As the ICC concluded in the *Chicago & North Western* case, *supra*, the “more persuasive” position is that it can be.⁵

UP states that “[i]f Musket were to request a through rate and through route from UP and BNSF for its shipments to TXIT, UP would establish an appropriate rate and interchange point”

⁵ All but one of the remaining cases cited by UP deal with what constitutes a through route or rate and whether a switching carrier is a participant in a through rate. None of these concerns Section 10742. UP Reply at 12. One case, *S. Ry. v. Louisville & Nashville R.R.*, 185 F. Supp. 645 (W.D. Ky. 1960), *aff'd*, 289 F.2d 939 (6th Cir. 1961), does cite the predecessor to Section 10742, but only in passing in connection with the court’s interpretation of a railroad’s tariff regarding traffic “interchanged” between carriers. 185 F. Supp. at 653. In the narrow technical sense, as that court noted, traffic moving between carriers through reciprocal switching is not “interchanged,” because it does not move into the account of the switching carrier. But this does not mean that traffic that is moved from one carrier to another via reciprocal switching is not “interchanged” in the broader sense of being transferred from one carrier to another. *See, e.g., Omaha Pub. Power Dist. v. Union Pac. R.R.* STB Dkt. No. 42006, slip op. at 1 (served Oct. 17, 1997) (discussing traffic handed off by BNSF to UP at “interchange point” five miles from destination pursuant to reciprocal switching tariff). Furthermore, Section 10742 covers not only facilities for traffic that is “interchanged,” but also facilities “for the receiving, forwarding, and delivering of passengers and property” (emphasis added) between one railroad’s line and the connecting line of another railroad. Thus, while “interchange facilities” is often used as a shorthand to describe the subject of Section 10742, including by the Petitioners here, it is not limited to traffic that moves from the account of one railroad to another.

(UP Reply at 13), but no such route or rate is required. Musket already has a route to the TXIT facility over BNSF, and, as just discussed, BNSF and Musket do not need to invoke the through route and rate provisions of Section 10705 in order for Section 10742 to apply.

On the assumption that Section 10742 applies, UP concludes (UP Reply at 13) that BNSF and Musket cannot make a case that UP has failed to provide “reasonable, proper, and equal facilities” (49 U.S.C. § 10742) to handle their traffic. But that assumes UP’s version of the facts is persuasive, which BNSF and Musket vigorously contest. The facilities that UP has provided for the delivery of BNSF’s unit trains have *not* been reasonable. UP does not deny that its unit trains are typically switched in 12-24 hours, while BNSF’s have generally taken anywhere from two to seven *days*. The Board should initiate a declaratory order proceeding to determine on a full record why this has been so and whether UP’s refusal to agree to protocols and proper facilities to prevent this discriminatory treatment from happening in the future is unreasonable.

4. UP’s final legal argument is that BNSF and Musket’s claim under Section 11101 provides no basis for relief. UP’s argument, in a nutshell, is that all Section 11101 requires is for UP to “provide in writing common carrier rates to any person requesting them and to provide rail service pursuant to those rates upon reasonable request.” UP Reply at 14. For this proposition it cites two cases in which the Board addressed the alleged refusal of carriers to provide service. *Id.* (citing *Montana v. BNSF Ry.*, STB Dkt. No. NOR 42124, slip op. at 7 (served Apr. 26, 2013), and *Union Pac. R.R. – Petition for Declaratory Order*, STB Fin. Dkt. No. 35219, slip op. at 3 (served June 11, 2009)). The issue in those cases was whether the railroads had refused to provide service at all. Here, BNSF and Musket are not claiming that UP has refused to provide service at all. The issue is whether the service UP has provided is reasonable. As the Board has made clear, it is not enough for a railroad to provide service. Under Section 11101, it must

provide “reasonable” service on reasonable request. *See, e.g., Savannah Port Terminal R.R. – Petition for Declaratory Order – Certain Rates and Practices as Applied to Capital Cargo, Inc.*, STB Fin. Dkt. No. 34920, slip op. at 2 n. 3 (served May 30, 2008). BNSF and Musket’s contention here is that UP’s service has not been reasonable, and they have suffered competitive harm as a result.

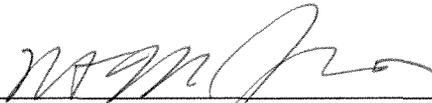
5. UP concludes its Reply by suggesting that a declaratory order proceeding is impractical and premature, but that if the Board determines to initiate a proceeding, it should require the parties to negotiate a procedural schedule that affords time to investigate the relevant facts. UP Reply at 15-16. As to practicality, if the Board finds that UP has failed to provide reasonable service or commit to protocols that will ensure reasonable service in the future, BNSF and Musket believe that BNSF and UP will be able to arrive at protocols that ensure such service, particularly with oversight by the Board’s Office of Public Assistance, Government Affairs, and Compliance.⁶

As to prematurity, to date UP has refused to agree to any kind of protocols that will ensure that UP’s performance achieves, and consistently remains at, an acceptable level. That said, BNSF and Musket do acknowledge that UP’s service has improved since the Petition for Declaratory Order was filed. Cars are being switched more timely, and the turn time of BNSF’s trains appears, on average, to be improving. That improvement is encouraging, and supports BNSF and Musket’s belief that BNSF and UP should ultimately be able to arrive at protocols that ensure satisfactory UP service, especially if accompanied by appropriate Board oversight to ensure that the recent improvements in UP service continue.

⁶ Contrary to UP’s suggestion, BNSF and Musket do not seek “indefinite monitoring” by OPAGAC. Once satisfactory protocols are entered into, there should be no need for further oversight.

As to the procedural schedule, BNSF and Musket agree with UP that the parties should negotiate a schedule that affords time to investigate the relevant facts. To help narrow the issues in dispute, BNSF and Musket submit that UP and petitioners should exchange descriptions of the reciprocal switching protocols and service monitoring procedures and metrics that would be workable and acceptable to them.

Respectfully submitted,

/s/ 

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DATED: June 26, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2013, I caused a copy of the foregoing Reply of BNSF Railway Company and Musket Corporation to Union Pacific Railroad Company's Request for Dismissal to be served by first-class U.S. Mail, postage prepaid, on:

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