

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Public Record

BNSF RAILWAY COMPANY and
MUSKET CORPORATION,

Petitioners,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

Docket No. FD 35740

**REPLY OF UNION PACIFIC RAILROAD COMPANY TO
PETITIONERS' MOTION FOR LEAVE TO FILE AND
MOTION FOR LEAVE TO FILE FURTHER REPLY**

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BNSF Railway Company (“BNSF”) and Musket Corporation (“Musket”) filed a petition for declaratory order. Union Pacific Railroad Company (“UP”) filed a reply. Petitioners then filed what they called a “reply” to “[UP’s] request for dismissal,” but it was plainly an unauthorized reply to UP’s reply.¹ The Board should disregard petitioners’ reply.

If, however, the Board considers petitioners’ reply, it should also accept this response, which shows that petitioners (a) essentially concede their petition is premature, (b) fail to dispute any of the verified facts in UP’s reply, and (c) misstate and misapply the law. Consideration of UP’s response will further the Board’s interest in compiling a more complete record.²

ARGUMENT

1. *Petitioners’ reply confirms the petition is premature.* Petitioners acknowledge recent improvements in BNSF car switching and train turn times at the Texas International Terminals (“TXIT”) facility. They also suggest that they are now prepared to work with UP to develop metrics for monitoring operations at TXIT. UP has already begun to implement such measures and would welcome petitioners’ participation in this effort. Even if the Board had authority to provide the relief that petitioners seek (and UP believes it does not), it makes no sense for the Board to intervene when service has improved and UP is developing data to evaluate the need for any additional operational changes.

¹ UP did not file a motion to dismiss; it argued that petitioners provided an inadequate basis for instituting a declaratory order proceeding. In contrast, the cases petitioners cite at footnote 1 of their reply all involve situations in which a respondent filed a motion to dismiss or other motion that was more than a substantive response to arguments set forth in the petition.

Petitioners’ assertion that UP’s reply should be treated as a motion to dismiss would convert into a motion any substantive opposition to a petition for a declaratory order. This would encourage parties to refrain from putting their best case forward at the outset and would defeat the Board’s rule that a reply to a reply is not permitted (49 C.F.R. § 1104.13(c)).

² Cf. *City of Alexandria, Va. – Petition for Declaratory Order*, FD 35157, slip op. at 2. (STB served Nov. 6, 2008) (accepting filing “[i]n the interest of compiling a full record”); *Denver & Rio Grande Ry. Historical Found. d/b/a Denver & Rio Grande R.R. – Petition for Declaratory Order*, FD 35496, slip op. at 3 (STB served Feb. 23, 2012) (same).

In addition, petitioners' new request that the Board order the parties to exchange "reciprocal switching protocols and service monitoring procedures that would be acceptable to them" (BNSF/Musket Reply at 9) puts the cart before the horse by asking the Board to impose requirements on UP before there has been any determination that regulatory intervention is appropriate. UP has already explained the switching procedures for TXIT. If petitioners have suggestions for improving the switching operations, UP is more than willing to consider them. However, petitioners' tactics suggest that they have no constructive proposals and are simply trying to enlist the Board in their campaign to obtain direct BNSF access to TXIT.

2. *Petitioners' reply fails to dispute the verified facts presented in UP's reply.*

While petitioners assert summarily that they contest the facts presented in UP's reply (BNSF/Musket Reply at 5, 8), they fail to dispute any of the specific verified facts that UP presented. Specifically, petitioners do not dispute:

- UP's description of the established procedures for switching BNSF cars;
- that UP recently provided land and TXIT has constructed new tracks on that land to stage BNSF cars near the entrance to TXIT's loop tracks, facilitating greater throughput for these cars;
- that there is limited capacity at the TXIT facility and that TXIT controls when cars move to and from its loop tracks;
- that BNSF's own operating procedures and capacity limitations have led to delays in the receipt and delivery of BNSF cars at TXIT; or
- that UP has accepted loaded BNSF cars at any time and has accommodated BNSF by providing a second daily switch of loaded BNSF cars into the TXIT facility.

Petitioners have not shown that a proceeding is needed to resolve any material dispute of fact.

3. *Petitioners misstate the law and misapply precedent in various respects.*

First, petitioners ignore the plain language of 49 U.S.C. § 11102(c), which states that the Board may prescribe terms for reciprocal switching agreements if it first finds such agreements to be “practicable and in the public interest” or “necessary to provide competitive rail service.” Petitioners are not entitled to have the Board prescribe terms for a voluntary reciprocal switching arrangement where it has not made the requisite statutory findings.

Second, petitioners’ discussion of the *SP/SSW Switching* case is misleading.³ Petitioners ignore both the regulatory context of the case and a subsequent decision clarifying the agency’s understanding of its authority. The case involved an investigation of a proposed increase in reciprocal switching charges that was instituted before the passage of the Interstate Commerce Commission Termination Act, when the Interstate Commerce Commission (“ICC”) had broad authority to investigate tariff changes for violations of the prohibitions against unreasonable rates and practices. *See* former 49 U.S.C. § 10707(a) (1998). Even with these broader powers, the ICC declined to provide the sort of relief petitioners seek here. In a later decision in the same proceeding, the agency made clear that it would not use its general authority over rates and practices to circumvent the requirement that it make specific findings before prescribing the terms of reciprocal switching agreements.⁴

³ *See SP/SSW Switching Charges on Carloads of Grain at Kansas City*, Docket No. 40178 (ICC served Oct. 24, 1989) (rejecting an argument that the level of switching compensation could be prescribed under the predecessor to § 11102(c)). The agency’s statement that it had not made (and had not been asked to make) the requisite statutory findings with respect to the voluntary switching arrangement at issue there (*id.*, slip op. at 6) in no way suggested that it would have applied any other statutory provision to modify the terms of the arrangement, as shown by the agency’s later decision cited in footnote 4 below.

⁴ *See SP/SSW Switching Charges on Carloads of Grain at Kansas City*, Docket No. 40178, slip op. at 2 (ICC served Jan. 19, 1990) (explaining that prescription of reciprocal switching terms prior to an assessment of the factors enumerated in the predecessor to § 11102(c) and in the competitive access rules “could have a chilling effect on the formation of voluntary agreements”).

Third, petitioners mischaracterize the scope of 49 U.S.C. § 10742, which requires carriers to provide “reasonable, proper, and equal interchange facilities.” Petitioners assert that the ICC previously concluded that a carrier performing reciprocal switching is considered a “connecting line” within the meaning of § 10742. BNSF/Musket Reply at 6. But in the case petitioners cite, the ICC made clear that this was *not* its holding: “neither party has convinced us of its position, [and] we do not feel that the contract violates [§ 10742], even if applicable.”⁵ Petitioners also suggest that § 10742 requires UP to provide BNSF with switching service comparable to UP’s direct service to the TXIT facility. BNSF/Musket Reply at 8. But the legal test for unequal treatment under § 10742 is whether UP treats BNSF differently than it treats carriers *other than UP* for which it switches TXIT traffic under substantially similar circumstances. *See Burlington N.R.R. v. United States*, 731 F.2d 33, 40 (D.C. Cir. 1984). There are no other such carriers at TXIT.⁶

Fourth, petitioners assert that a carrier must provide “‘reasonable’ service on reasonable request,”⁷ yet they fail to identify any request for service that Musket has made to UP. The movements at issue are switches provided under a voluntary arrangement between two carriers. Accordingly, there is no basis for concluding that UP has violated its common carrier obligation.

⁵ *Chi. & N.W. Transp. Co. v. Peoria & Pekin Union Ry.*, 360 I.C.C. 168, 182-83 (1979). To the extent the ICC thought it “more persuasive” that the switching carrier in the *Peoria* case was a “connecting line” under § 10742, it appears to have rested on the fact that the carrier acted as an intermediary in various through routes. This is very different from UP’s role at TXIT.

⁶ Petitioners note that § 10742 also covers facilities for delivering passengers and property, *see* BNSF/Musket Reply at 7 n.5, but this is not a case involving such facilities.

⁷ BNSF/Musket Reply at 8-9, quoting *Savannah Port Terminal R.R. – Petition for Declaratory Order – Certain Rates and Practices as Applied to Capital Cargo, Inc.*, FD 34920 (STB served May 30, 2008). That case addressed whether a carrier had adequately responded to a customer’s request for switching; it did not involve a carrier that was providing reciprocal switching for another carrier under a voluntary arrangement between the carriers.

CONCLUSION

If the Board does not disregard petitioners' improper reply to UP's reply, it should accept this response, and for the foregoing reasons and the reasons presented in UP's reply, the Board should deny the petition for declaratory order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July 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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