

SERVICE DATE – FEBRUARY 21, 2020

SURFACE TRANSPORTATION BOARD

DECISION

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

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

Decision No. 8

Digest:¹ In this decision, the Board establishes conditions for direct service by BNSF Railway Company to a facility in West Lake Charles, La., pursuant to Board-authorized terminal trackage rights granted in a 2016 decision. The Board also sets forth a procedure for establishing compensation for such trackage rights and orders the parties to submit a joint procedural schedule to govern discovery and briefing on the remaining issues regarding compensation.

Decided: February 20, 2020

By petition filed on January 12, 2018, BNSF Railway Company (BNSF) requests that the Board establish conditions of use and compensation for BNSF to directly serve a LyondellBasell (Lyondell) facility at West Lake Charles, La., “over the Rosebluff Lead and related tracks via the terminal trackage rights granted by the Board” in BNSF Railway—Terminal Trackage Rights—Kansas City Southern Railway (Decision No. 3), FD 32760 (Sub-No. 46) (STB served July 5, 2016). (BNSF Pet. 1.) In Decision No. 3, the Board granted BNSF’s application for terminal trackage rights over the Rosebluff Lead, a nine-mile single track jointly owned by Union Pacific Railroad Company (UP) and Kansas City Southern Railway Company (KCS). In this decision, pursuant to 49 U.S.C. § 11102(a), the Board establishes conditions for BNSF’s use of the Rosebluff Lead to directly serve the Lyondell facility and sets forth a procedure for setting compensation.

BACKGROUND

This sub-docketed proceeding arises out of the 1996 merger between the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) (collectively, UP) and the rail carriers controlled by Southern Pacific Rail

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) (collectively, SP). See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 44), 1 S.T.B. 233, 241 (1996). In approving the merger, the Board imposed numerous conditions, including, notably, the terms of a series of settlement agreements between UP/SP and BNSF, referred to as the BNSF Agreement, and the terms of the settlement agreement among UP/SP, BNSF, and the Chemical Manufacturers Association, referred to as the CMA Agreement. Under the BNSF Agreement, BNSF received trackage rights over approximately 4,000 miles of UP/SP's lines to serve all "2-to-1" shippers, i.e., those who would otherwise have their options reduced from two rail carriers (UP and SP) to only one rail carrier (the merged UP/SP entity) after the merger, at a fee designed to allow BNSF to garner sufficient traffic and compete effectively with the newly merged UP/SP. UP/SP Decision No. 44, 1 S.T.B. at 368, 413-417. Under the CMA Agreement, which modified the BNSF Agreement,² BNSF also received, among other things, certain rights to handle traffic of Lake Charles area³ shippers (the Lake Charles Merger Conditions). See UP/SP Decision No. 44, 1 S.T.B. at 243, 427-29; Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 2-3.⁴ Specifically, the Lake Charles Merger Conditions allowed BNSF to handle traffic of shippers open to all of UP, SP, and KCS at Lake Charles and Westlake, and to handle traffic of shippers open to SP and KCS at West Lake Charles, "on the same basis" as BNSF's access to "2-to-1" points, which included the option of "direct" or "reciprocal switch" access. See UP/SP Decision No. 44, 1 S.T.B. at 427-29; Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 2-3, 9-10.

In a decision served December 4, 1996, the Board denied a petition to reopen or reconsider UP/SP Decision No. 44 filed by KCS. In its petition, KCS had sought to eliminate certain aspects of the conditions that gave BNSF access to shippers in the Lake Charles area. See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 63), FD 32760 (STB served Dec. 4, 1996). Specifically, KCS had argued that various joint facility agreements between it and UP prohibited UP from providing BNSF direct access to shippers at Westlake and West Lake Charles without KCS's consent, and that the Board could only require KCS to provide such access if BNSF filed a terminal trackage rights application under 49 U.S.C. § 11103 (now 49 U.S.C. § 11102). See UP/SP Decision No. 63, FD 32760, slip op. at 5-6. The Board, however, refused to reconsider the conditions imposed in UP/SP Decision No. 44, finding that "giving BNSF additional rights was the most effective way to assure continued competition for Lake Charles area shippers." UP/SP Decision No. 63, FD 32760, slip op. at 8. The Board further stated that, if KCS, BNSF, and UP were unable to come to an agreement regarding the

² The March 2002 Restated and Amended BNSF Settlement Agreement (RASA), which was approved by the Board in the context of its review of the UP/SP merger, incorporates subsequent amendments to the BNSF Agreement. See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 5 S.T.B. 1173, 1174, 1178 (2001).

³ The Lake Charles area encompasses Westlake, West Lake Charles, and Lake Charles, La.

⁴ For additional background, see Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 2-3.

terms of the joint facility agreements, any differences in interpretation of the joint facility agreements could be submitted to arbitration and that, in the event of an impasse, BNSF could return to the Board to seek approval of a terminal trackage rights application. Id. at 9-10.

On February 27, 2013, BNSF filed a terminal trackage rights application with the Board, initiating the present sub-docketed proceeding. In response to that application, in Decision No. 3, the Board granted BNSF terminal trackage rights over the Rosebluff Lead to facilitate BNSF's direct access to Lake Charles area shippers. The Board found the requested terminal trackage rights to be in the public interest under 49 U.S.C. § 11102(a), because they were necessary to effectuate the Lake Charles Merger Conditions imposed in UP/SP Decision No. 44 and reaffirmed in UP/SP Decision No. 63—specifically, BNSF's option of directly accessing Lake Charles area shippers, including those on the Rosebluff Lead, via trackage rights. Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 9-13. The Board also found that preservation of BNSF's option of direct access was necessary to maintain the Lake Charles area shippers' access to multiple competitive carriers and routing options. Id. at 10. The Board further determined, under 49 U.S.C. § 11102(a), that BNSF's use of the terminal facilities would be practicable and would not substantially impair the ability of the rail carriers owning the facility (UP and KCS) to handle their own business. Id. at 13-18. While the Board's analysis focused on the impact of BNSF's direct service to CITGO Petroleum Corporation (CITGO), the shipper upon which BNSF's application was primarily focused, it also addressed the possibility of BNSF providing direct service to other shippers on the Rosebluff Lead that were covered by the Lake Charles Merger Conditions. See id. at 18, 19. The Board directed the parties to “collectively develop conditions governing their use of the Rosebluff Lead, including BNSF's access (if it so elects) to directly serve shippers other than CITGO.” See id. at 19.⁵

In its January 12, 2018 petition, BNSF requests that the Board establish conditions of use and compensation for BNSF to directly serve a Lyondell facility at West Lake Charles, “over the Rosebluff Lead and related tracks,” pursuant to the terminal trackage rights granted in Decision No. 3. (BNSF Pet. 1.) BNSF states that the Lyondell facility is accessed via the Montell Lead, which is owned by the Port of Lake Charles and connects with the Rosebluff Lead approximately 2.37 miles southwest of the Rosebluff Yard, which is located at the northern end of the Rosebluff Lead. (See id. at 7, V.S. Reilly 4.) BNSF states that, despite its extensive negotiations with UP and KCS, the parties were unable to reach an agreement regarding conditions and compensation for BNSF's use of the Rosebluff Lead and its direct access to the Lyondell facility, and that Board intervention is appropriate at this time. (Id. at 5-7.) In support of its petition, BNSF includes a proposed operating plan for its direct service to the Lyondell facility. (Id. at V.S. Reilly, Ex. A.)

⁵ KCS has sought judicial review of Decision No. 3 in the U.S. Court of Appeals for the District of Columbia Circuit. Kan. City S. Ry. v. STB, No. 16-1308 (D.C. Cir. Sept. 1, 2016). On January 3, 2017, the court granted the Board's motion to hold the case in abeyance pending further order of the court.

In a decision served May 1, 2018, and corrected on May 4, 2018, the Board determined that BNSF's trackage rights over the Rosebluff Lead applied to all customers accessible via the Rosebluff Lead and covered by the Lake Charles Merger conditions, including Lyondell, and that the Board's findings in Decision No. 3 under § 11102(a) were not limited to BNSF's service to the CITGO facility. BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 4), FD 32760 (Sub-No. 46), slip op. at 5-7 (STB served May 4, 2018) (denying KCS's motion to dismiss BNSF's petition to establish conditions of use and compensation).⁶ As discussed below, pursuant to BNSF Railway—Terminal Trackage Rights—Kansas City Southern Railway (Decision No. 6), FD 32760 (Sub-No. 46), slip op. at 2 (STB served Dec. 7, 2018), BNSF, UP, and KCS each submitted additional information on February 4, 2019, relevant to computing compensation for BNSF's use of the Rosebluff Lead.⁷

DISCUSSION AND CONCLUSIONS

Section 11102(a) provides that the Board may require terminal facilities owned by a rail carrier to be used by another rail carrier “if the Board finds that use to be practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities . . . to handle its own business.” Under § 11102(a), parties are responsible for establishing the conditions and compensation for use of terminal facilities, but if they cannot agree, “the Board may establish conditions and compensation for use of the facilities under the principle controlling compensation in condemnation proceedings.” As discussed, despite engaging in private negotiations and additional Board-sponsored mediation, BNSF, UP, and KCS have been unable to reach an agreement establishing conditions and compensation for BNSF's use of the Rosebluff Lead.⁸ Therefore, Board intervention is appropriate at this time.

Conditions of BNSF's Use of the Rosebluff Lead.

Current operations in the Lake Charles Area. The Rosebluff Lead is a single-track line that extends nine miles south from the former SP Lafayette Subdivision between Dawes, Tex., and Avondale, La., at milepost 222.3. The Lafayette Subdivision, now jointly owned by UP and BNSF, is also referred to as “the 50/50 Line.” The Rosebluff Lead runs through Rosebluff Yard,

⁶ Additionally, in response to the Board's request, KCS, UP, and BNSF indicated a willingness to participate in Board-sponsored mediation. By decision served May 15, 2018, the Board initiated meditation, which ultimately did not result in a resolution.

⁷ In response to a joint request for mediation filed by KCS and UP, the Board initiated mediation by a decision served on July 3, 2019. This mediation, which concluded in November 2019, ultimately did not result in a resolution.

⁸ (See BNSF Pet. 4-5, 15; UP Reply 12-13, June 25, 2018; KCS Reply 2, June 25, 2018.) See also Ltr. from Lucille L. Marvin, Dir. of Office of Public Assistance, Governmental Affairs, and Compliance, to Cynthia Brown, Chief of Section of Administration (Oct. 17, 2018); Ltr. from Janie Sheng, Office of Public Assistance, Governmental Affairs, and Compliance, to Chairman Ann Begeman (Nov. 29, 2019).

which consists of five yard tracks and one running track. See Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 1-2.

Although BNSF and UP jointly own the 50/50 Line, UP and KCS jointly own the Rosebluff Lead and the Rosebluff Yard under the terms of several joint facility agreements between KCS and UP/SP predecessor Texas & New Orleans Railroad Company (T&NO).⁹ Pursuant to those agreements, UP and KCS now own the Rosebluff Lead and the Rosebluff Yard equally, with equal rights to use the tracks. Since 1981, however, KCS and UP (or UP's predecessor SP) have, for their convenience, divided their operations on the Rosebluff Lead into two customer zones, Zone 1 and Zone 2. Zone 1 customers are generally located north and east of the Yard while Zone 2 customers, including Lyondell, are located south of the Yard. Today, KCS switches customers in Zone 1, and UP switches customers in Zone 2. Each carrier moves cars for the other in its assigned zone. See Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 2, and citations therein.

UP and KCS, each of which operates its own yard off nearby mainline track, both use the Rosebluff Yard in alternating, separate 12-hour windows to exchange cars destined to or originating from the other carrier's zone: UP is scheduled to operate exclusively in the Rosebluff Yard from 6:00 a.m. to 6:00 p.m., and KCS is scheduled to operate exclusively in the Rosebluff Yard from 6:00 p.m. to 6:00 a.m. UP states that, during its 12-hour window, its crews operate over all six tracks in the Rosebluff Yard to break down trains and build trains for switching into Zone 2, forwarding to UP's nearby Lake Charles Yard (also known as North Yard), or to interchange cars with KCS. (See UP Reply 6-7, June 25, 2018.)¹⁰

BNSF currently serves Lake Charles area shippers, including Lyondell, via reciprocal switching by UP. BNSF delivers cars to UP at UP's Lake Charles Yard, which is located on the 50/50 Line. UP then moves BNSF traffic to Rosebluff Yard, where it is sorted and delivered to various industries accessible via the Rosebluff Lead by either UP or KCS, depending on the location of the industry. (See id. at 6-7; Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 2.)

Parties' Arguments Regarding the Operating Plan. By its January 2018 petition, BNSF seeks to exercise the option of delivering its cars directly from its Lacassine Yard (located on the 50/50 Line, 20 miles east of the Rosebluff Lead) to Lyondell, allowing BNSF to avoid stops at UP's Lake Charles Yard and the Rosebluff Yard and, according to BNSF, freeing up capacity and reducing congestion in those yards. (BNSF Pet., V.S. Reilly 9.) BNSF bases its proposed operating plan on data provided by UP and KCS in this proceeding, as well as an observational

⁹ In 1961, T&NO merged into SP, and T&NO ceased to exist as a separate entity. See S. Pac. Co.—Merger—Tex. & New Orleans R.R., 312 I.C.C. 598, 600-01 (1961). Thus, SP was T&NO's successor to the joint facility agreements and co-owner of the Rosebluff Lead with KCS from 1961 until the UP/SP merger.

¹⁰ UP and KCS note that they do not always complete their work within each carrier's designated 12-hour window in the Rosebluff Yard, which can cause delays on the Rosebluff Lead. (UP Reply 7-8, June 25, 2018; KCS Reply 23, June 25, 2018.)

study that BNSF conducted in October 2017 of UP and KCS operations at the Rosebluff Yard and on the Rosebluff Lead and the Montell Lead. (BNSF Pet. 11, 13.)

Under BNSF's proposed operating plan, one BNSF train would operate seven days a week, typically handling 15-20 cars per day for the Lyondell facility during UP's window for operating in Rosebluff Yard. A "BNSF job"¹¹ would come on duty at 6:00 a.m. at the Lacassine Yard and would depart the Lacassine Yard at 7:30 a.m. The BNSF job would contact the Lake Charles Yardmaster, the other jobs working on the Rosebluff Lead, and the 50/50 Line dispatcher to request authority and identify a clear track to move through the Rosebluff Yard. Between approximately 7:30 a.m. and 9:30 a.m., the BNSF job would pass through the Rosebluff Yard via whichever clear track is available and continue southbound to the Montell Lead. By approximately 9:30 a.m., the BNSF train would arrive at the Lyondell facility on the Montell Lead. From approximately 9:30 a.m. to 11:30 a.m., BNSF would serve the Lyondell facility, which BNSF expects to take approximately one to two hours. After serving the facility, the BNSF job would prepare to depart by 1:00 p.m. and would again contact the Lake Charles Yardmaster, the other jobs working on the Rosebluff Lead, and the 50/50 Line dispatcher to coordinate the movement from the Montell Lead onto the Rosebluff Lead, through the Rosebluff Yard on whichever clear track is available, and back to BNSF's Lacassine Yard. (BNSF Pet. 9-10, V.S. Reilly 6-9.)

As clarified in its rebuttal, BNSF's operating plan relies on the occurrence of periodic operating windows during which neither UP nor KCS trains occupy the Rosebluff Lead or the Rosebluff Yard. BNSF states its train could operate both to and from the Lyondell facility during these "natural windows" that create clear tracks through the Rosebluff Yard and the 50/50 Line. (BNSF Rebuttal 17-21, V.S. Baranowski 4, Fig. 1, July 16, 2018.) BNSF states that it understands that its proposed plan would require communication and coordination, particularly with UP, to ensure fluid operations, maximize velocity, and reduce congestion in the Lake Charles area. The proposed plan assumes flexibility in working with UP on a local operating level, as adjustments may be necessary. (*Id.* at 15-17.) Based on its analysis of data presented in this proceeding and observations of operations on the Rosebluff Lead, Rosebluff Yard, and the Montell Lead, BNSF states that the proposed operating plan would not materially disrupt UP's service. (BNSF Pet., V.S. Baranowski 8-16.) BNSF concludes that there is adequate capacity to accommodate its proposed operations under the existing Rosebluff Yard and Rosebluff Lead track configurations and that additional capital improvements are not required to implement direct service to Lyondell. (BNSF Pet., V.S. Reilly 10.)

UP argues that BNSF's proposed operating plan is not viable and that BNSF cannot directly serve Lyondell without substantially impairing service to other shippers unless track capacity is added to the route from Lacassine Yard to the Lyondell facility. (UP Reply 13-14, June 25, 2018.) UP asserts that BNSF's calculations regarding track availability are misleading because they address only part of the route a BNSF job would travel (the Rosebluff Yard) and that these calculations overstate BNSF's opportunities to move through the Yard. (*Id.* at 15-27.)

¹¹ A local train that picks up and drops off cars at customer locations.

UP faults BNSF's plan for failing to consider blockages on the Rosebluff Lead that would prevent BNSF's trains from entering or exiting the Rosebluff Yard and for not addressing blockages on the Montell Lead. (*Id.* at 17-18.) Referring to BNSF's observational study, as well as UP's own observations of Rosebluff operations, UP notes numerous conflicts that would have occurred had BNSF implemented its proposed operating plan on two particular days. (*Id.* at 29-40, 50-53.) UP further asserts that BNSF's direct service would create cascading delays in the area, as even a minor adjustment, such as holding a train or clearing a track, would impair service to customers along the Rosebluff Lead and put UP's network and its customers needlessly at risk. (*Id.* at 53-59.)

KCS likewise objects to BNSF's proposed operating plan.¹² Although the proposed plan involves BNSF's operations taking place within UP's 12-hour window for Rosebluff Yard operations, KCS argues that, because its and UP's operations on the Rosebluff Lead are so intertwined, to whatever extent UP's operations are adversely interrupted, delayed, or prevented, those impacts would affect KCS operations and service to KCS customers. (KCS Reply 20, June 25, 2018.) KCS asserts that BNSF must be held to its representations that it will operate in UP's Rosebluff Yard window and proposes that the Board impose a delay penalty on BNSF should its operations delay KCS. (*Id.* at 21-24.) KCS further argues that BNSF should be held to its commitment to pass through the Rosebluff Yard without performing any interchange, setout, or other operations in the Rosebluff Yard. (*Id.* at 25.) KCS otherwise offers no alternative plan for BNSF's operations.

In light of its concerns about BNSF's direct service to the Lyondell facility, UP proposes that the Board condition BNSF's use of the Rosebluff Lead on BNSF's agreement to swap responsibility with UP for the Rosebluff Yard, the Rosebluff Lead, and the Montell Lead. (UP Reply 59, June 25, 2018.) UP's proposal would have BNSF handling traffic directly where UP currently serves shippers directly, interchanging traffic with KCS as UP currently does, and providing reciprocal switching to UP under the same terms that apply when UP provides reciprocal switching to BNSF. (*Id.* at 59-60.) UP asserts that under its proposal, BNSF would be fully free to operate a direct train to Lyondell and have full authority to adjust its other operations to accommodate this service. (*Id.* at 60.)

In response, BNSF asserts that the Board should not impose UP's proposal as a condition for BNSF's use of its terminal trackage rights. BNSF argues that requiring BNSF to "fully step into UP's shoes" would be contrary to the Board's findings of practicability and lack of substantial impairment of three-carrier service on the terminal facilities. (BNSF Rebuttal 27-28,

¹² In its reply, KCS reiterates numerous previously raised arguments challenging the Board's findings and conclusions in Decision No. 3 (as reaffirmed and clarified in Decision No. 4). (See KCS Reply 5-20, June 25, 2018.) Although KCS has sought judicial review of Decision No. 3, see *supra* note 5, KCS did not seek administrative reopening or reconsideration of Decision No. 3 or Decision No. 4. Accordingly, in this decision, the Board will not address KCS's arguments that challenge the prior decisions in this docket.

July 16, 2018.) However, BNSF states that it would consider the proposal further and potentially discuss the issue with UP after BNSF is allowed to begin direct service. (Id. at 28.)

KCS asserts that the Board does not have the authority to impose UP's proposal for BNSF to swap responsibility with UP for the Rosebluff Yard, the Rosebluff Lead, and the Montell Lead, as BNSF did not file a petition for reciprocal switching rights under 49 U.S.C. § 11102(c); rather, BNSF filed (and the Board has analyzed) a terminal trackage rights application under 49 U.S.C. § 11102(a). (KCS Rebuttal 2-3, July 16, 2018.) KCS further argues that, absent a grant of "forced switching access" under 49 U.S.C. § 11102(c), UP does not have the contractual right to transfer or swap its switching responsibilities without KCS's consent. (Id. at 3-5.)

Conditions for Use of the Rosebluff Lead. As the Board recognized in Decision No. 3, the Rosebluff Lead and the 50/50 Line experience sizeable traffic volumes and have various capacity constraints that create challenges in accessing shippers. Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 15. As the Board further noted, the addition of a third carrier could entail many operational adjustments, some of which may be complicated. Id. at 16. Mindful of these operational complexities, yet also mindful of the Board's prior conclusion in Decision No. 3 that the original merger conditions gave BNSF the option of serving Lake Charles shippers directly, the Board sets forth conditions for BNSF's use of the Rosebluff Lead, based in part on BNSF's proposed operating plan but with substantial modifications. The operating conditions set forth here are limited to operations on the Rosebluff Lead only and assume that BNSF will secure the necessary rights to operate over the connecting trackage required to reach the Lyondell facility.¹³

As discussed below, the most significant modification to BNSF's operating plan concerns the proposed "natural windows" approach. The record shows that, during typical daily operations by UP and KCS on the Rosebluff Lead, the "natural windows" that BNSF relies on do not occur with sufficient regularity or in the necessary succession to allow efficient passage by BNSF from its Lacassine Yard, across the 50/50 Line, over the Rosebluff Lead, through Rosebluff Yard, to the Montell Lead, to Lyondell, and back out to Lacassine Yard. (See, e.g., BNSF Rebuttal, V.S. Baranowski, Ex. MRB-2, July 16, 2018 (BNSF's color-coded timeline showing UP and KCS train locations at various points along the Rosebluff Lead).) As UP

¹³ In its reply, KCS reiterates previously raised arguments, challenging the Board's authority to impose terminal trackage rights over the connecting trackage between the Rosebluff Lead and the Lyondell facility (i.e., the Montell Lead and an allegedly separate 0.40-mile segment that connects the Rosebluff Lead to the Montell Lead). (KCS Reply 12-16, June 25, 2018.) As the Board has previously stated, the fact that BNSF is still in the process of acquiring the rights to traverse the connecting trackage does not prevent the Board from establishing conditions and compensation for use of the Rosebluff Lead. See Decision No. 4, FD 32760 (Sub-No. 46), slip op. at 7-8. Because the scope of this proceeding is limited to the Rosebluff Lead/Yard, the Board must, however, make certain assumptions regarding BNSF's direct access over other portions of its route from Lacassine Yard to the Lyondell facility.

explains, requiring BNSF to insert its daily train into ongoing UP/KCS operations on the Rosebluff Lead could cause conflicts and cascading delays. (See UP Reply 53-59, June 25, 2018.) The Board's modifications to BNSF's proposal are intended to alleviate these concerns.

Specifically, unless the parties mutually agree otherwise, BNSF's direct service on the Rosebluff Lead shall be limited to one exclusive, four-hour window of time, to occur each day during UP's 12-hour window for Rosebluff Yard operations (i.e., between 6:00 a.m. and 6:00 p.m.). By "exclusive" window, the Board means that UP and KCS must ensure that BNSF's train has an unimpeded route along the Rosebluff Lead between the 50/50 Line and the Montell Lead for the duration of the four-hour window, including maintaining one clear running track through the Rosebluff Yard and clearing all UP and KCS trains from the sections of the Rosebluff Lead that BNSF must traverse to access Lyondell. BNSF's four-hour window shall begin at approximately the same time each day. To facilitate this, UP shall notify BNSF of the anticipated time for BNSF's train to depart Lacassine Yard.¹⁴ UP's notification must occur a reasonable time in advance of the BNSF's local crew call time. BNSF's four-hour window will officially begin when BNSF's locomotive enters the Rosebluff Lead, and all parties shall coordinate to ensure that BNSF accesses the Rosebluff Lead no later than 2:00 p.m.

Per BNSF's proposed operating plan, the BNSF train will begin at the Lacassine Yard on the 50/50 Line, proceed onto the Rosebluff Lead, pass through the Rosebluff Yard without stopping, and proceed down to the Montell Lead—a process that should take approximately 60 minutes, assuming unimpeded access along the Rosebluff Lead/Yard.¹⁵ (BNSF Pet. 9-10, V.S. Reilly 7-8; V.S. Reilly Ex. A at 5.) Next, assuming BNSF secures the necessary rights to traverse the connecting trackage, BNSF will access the Lyondell facility via the Montell Lead and serve the facility—a process that BNSF estimates will take one to two hours. (BNSF Pet. 9-10, V.S. Reilly 7-8.) Finally, BNSF will depart the Lyondell facility, proceed to the Rosebluff Lead, pass back through the Rosebluff Yard without stopping, and access the 50/50 Line via the Rosebluff Lead, which should take approximately 30 to 60 minutes. Based on the evidence and the Board's requirement that BNSF have unimpeded access to the Rosebluff Lead/Yard, BNSF should be able to conduct all direct service to Lyondell within the designated four-hour window. If BNSF completes its direct operations on the Rosebluff Lead in fewer than four hours, BNSF shall promptly notify UP and KCS so that they have the opportunity to resume operations over the cleared portions of the Rosebluff Lead and Rosebluff Yard as quickly as possible. If BNSF does not complete its direct operations on the Rosebluff Lead in four hours (as measured from

¹⁴ KCS must notify UP, on a timely basis, of any situation under KCS's control that may impede BNSF's movement over the Rosebluff Lead. It is incumbent on UP to apprise BNSF of these situations.

¹⁵ With unimpeded access along the Rosebluff Lead/Yard, the BNSF train can be expected to arrive at the Montell Lead in 60 minutes. Under BNSF's Option 1, which assumes potential impediments from other trains on the Rosebluff Lead, BNSF's train departs Lacassine Yard at 8:05 a.m. and arrives at the Montell Lead to begin service to Lyondell at 9:00 a.m. (See BNSF Pet., V.S. Reilly Ex A at 7.)

the time at which BNSF's locomotive enters the Rosebluff Lead), the BNSF train must cede access of the Rosebluff Lead back to UP and KCS as soon as practicable, unless BNSF obtains consent from UP and KCS to extend its operating period. As BNSF recognizes in its proposed plan, BNSF is expected to communicate and coordinate closely with the other parties, their designated dispatchers and yardmasters, and any trains along the route to ensure operations run smoothly and safely. BNSF is further expected to coordinate closely with Lyondell to confirm that the facility is accessible and ready to receive BNSF's trains on time.

Based on the present record, the Board finds that this modified version of BNSF's operating plan is the best approach in light of the scope of this proceeding, the unique facts of this case, the parties' proposals, and the parties inability to reach mutual agreement. As an initial matter, BNSF and UP submitted operating proposals, while KCS did not. The Board declines to adopt UP's proposal that the Board condition BNSF's use of the Rosebluff Lead on BNSF's agreement to swap responsibility with UP for the Rosebluff Yard, the Rosebluff Lead, and the Montell Lead. BNSF and KCS object to this condition, and mandating a "swap" of reciprocal switching responsibilities does not fall within the scope of this 49 U.S.C. § 11102(a) trackage rights proceeding. Rather, such a requirement would appear to implicate the reciprocal switching provision under 49 U.S.C. § 11102(c).¹⁶ Therefore, BNSF's proposal is the remaining operating plan option in the record.

Nevertheless, BNSF's operating plan, while providing a general framework, is being modified by the Board to mitigate potential service disruptions to all parties. As noted above, BNSF's and UP's evidence—including BNSF's own color-coded timeline showing train locations along the Rosebluff Lead—demonstrate that conflicts may arise and BNSF could have few reliable, efficient "windows" for direct service if its train is simply inserted into existing UP and KCS operations. (See, e.g., BNSF Rebuttal, V.S. Baranowski, Ex. MRB-2, July 16, 2018; UP Reply 29-40, 50-53, June 25, 2018.) Therefore, to allow BNSF's direct service to be completed more efficiently, the Board has, as discussed above, modified BNSF's proposal to require an exclusive window for BNSF's access to certain portions of the Rosebluff Lead. The Board understands that UP and KCS conduct operations throughout the day along various portions of the Rosebluff Lead and that the Board's operating conditions may necessitate certain adjustments to existing service (e.g., moving trains off some portions of the Rosebluff Lead/Yard to service other portions or facilities during BNSF's exclusive window¹⁷). On the present record,

¹⁶ While the remedies imposed by the Board here fall within the scope of this proceeding, the parties themselves are encouraged to continue negotiating other potential solutions, including a "swap" of switching responsibilities or any other arrangement they agree to for achieving practical and efficient three-carrier access in the Lake Charles area.

¹⁷ As the Board has previously found, it appears UP will be able to move and switch cars without interference in the southern portion of Zone 2 during a BNSF direct-service window in the northern half of Zone 2. In addition, BNSF's direct service will free up capacity and eliminate some of the congestion in Rosebluff Yard, as numerous BNSF cars will no longer be switched or stored there. Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 17.

the Board finds that the timing and notification requirements regarding BNSF's four-hour window should allow the parties to better plan when and where to allocate their trains and crews. The Board also recognizes that the inclusion of BNSF's direct access requires some degree of flexibility and the concerted efforts of all three carriers to cooperate and coordinate with each other in implementing BNSF's direct service. The Board reminds the parties that after implementing the Board's conditions, the parties are free to adjust the prescribed timing by mutual agreement based on actual operating experience.

As the Board has previously found, operational adjustments and increased coordination are often needed in terminal trackage situations and do not make multi-carrier service impracticable. Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 16. While the Board expects that these terms of use should give BNSF direct access over the Rosebluff Lead (as presently configured) without substantially impairing UP's and KCS's ability to handle their business, should three-carrier operations on the Rosebluff Lead, in fact, cause substantial impairment after implementation of this decision, any party may petition the Board to reopen Decision No. 3 or seek to modify the conditions of use set forth in this decision on the basis of such new evidence or materially changed circumstances. See Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 18.

Compensation for BNSF's Use of the Rosebluff Lead.

As noted above, if, as here, "the rail carriers cannot agree" on the terms of compensation for use of terminal facilities, "the Board may establish . . . compensation for such use under the principle controlling compensation in condemnation proceedings." 49 U.S.C. § 11102(a). Compensation must be paid or adequately secured before a rail carrier may begin to use the facilities of another rail carrier. 49 U.S.C. § 11102(a); see also S. Pac. Transp. Co. v. ICC, 736 F.2d 708, 723-724 (D.C. Cir. 1984).

In Decision No. 6, the Board sought additional information relevant to establishing compensation, including input on various considerations and calculations under the "SSW Compensation methodology." The SSW Compensation methodology, which has consistently been used by the Board for setting trackage rights compensation, involves calculating the sum of three elements: (1) the variable cost incurred by the owning carrier due to the tenant carrier's operations over the owning carrier's track; (2) the tenant carrier's usage-proportionate share of the track's maintenance and operation expenses; and (3) an interest rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track. See St. Louis S.W. Ry.—Trackage Rights Over Mo. Pac. R.R.—Kan. City to St. Louis, 1 I.C.C.2d 776 (1984) (SSW Compensation I), 4 I.C.C.2d 668 (1987) (SSW Compensation II), 5 I.C.C.2d 525 (1989) (SSW Compensation III), 8 I.C.C.2d 80 (1991) (SSW Compensation IV), & 8 I.C.C.2d 213 (1991) (SSW Compensation V) (collectively, the SSW Compensation cases), aff'd sub nom. Union Pac. Corp. v. ICC, 978 F.2d 745 (D.C. Cir. 1992), cert. denied, 508 U.S. 951 (1993). In the Board's experience, the most contentious element of SSW Compensation methodology has been the interest rental component. Depending on the track's particular use

and other case-specific circumstances, the interest rental component may be computed in several different ways, to most accurately reflect a fair valuation base for the property.¹⁸ The SSW Compensation methodology has been flexibly applied in many different situations, including where trackage rights are imposed as a merger condition and where trackage rights agreements are entered into voluntarily. See, e.g., SSW Compensation II, 4 I.C.C.2d 668 (1987); New England Cent., FD 35842, slip op. at 4; Ark. & Mo. R.R. v. Mo. Pac. R.R., 6 I.C.C.2d 619, 622 (1990), aff'd sub nom. Mo. Pac. R.R. v. ICC, 23 F.3d 531 (D.C. Cir. 1994).

Parties' Arguments Regarding Compensation. BNSF, UP, and KCS have each submitted multiple filings concerning compensation, including supplemental filings in response to Decision No. 6. BNSF argues that the level of compensation that BNSF should pay has been conclusively established in UP/SP Decision No. 44 as the "Prescribed Fee," the trackage rights fee imposed by the Board's merger conditions.¹⁹ BNSF claims it should pay no more than the Prescribed Fee, and UP should then be responsible for any compensation due to KCS beyond the Prescribed Fee. (BNSF Pet. 15-16.) According to BNSF, UP assumed the obligation, under the Board's merger conditions and various BNSF-UP agreements, to provide BNSF with direct access to Lake Charles area shippers if BNSF so elected; yet, UP has "repeatedly failed" to uphold those obligations "by failing to obtain the consent of KCS" (its 50% co-owner) and necessitating the filing of this terminal trackage rights proceeding. (Id. at 16; BNSF Rebuttal 31, July 16, 2018.) BNSF argues that, rather than reopening the merger by making BNSF pay more than the Prescribed Fee for direct access, the Board should make UP bear responsibility for whatever compensation is due to KCS and unaccounted for by the merger conditions. (BNSF Rebuttal 31-32, July 16, 2018.) BNSF asserts that the Lake Charles area shippers have "an independent

¹⁸ See Burlington N. Inc.—Control & Merger—Santa Fe Pac. Corp. (BN/SF Decision No. 38), 10 I.C.C.2d 661, 770 n.118 (1995). The interest rental is derived by first multiplying (i) the value of the assets by (ii) a rate of return equal to the current pre-tax nominal cost of capital. Then, the resulting product is apportioned to the tenant carrier according to its percentage of cars traversing the line. See New England Cent. R.R.—Trackage Rights Order—Pan Am S. LLC, FD 35842, slip op. at 3 (STB served Oct. 31, 2017); BN/SF Decision No. 38, 10 I.C.C.2d at 770 n.118. In cases involving Class I carriers, the Board has accepted four different methods of determining the appropriate valuation base for the interest rental component: (a) capitalized earnings (CE) (also known as going concern value, or "GCV"), (b) reproduction cost new less depreciation (RCNLD), (c) comparable lines method, and (d) stand-alone cost (SAC). See New England Cent., FD 35842, slip op. at 3. Cf. Dardenelle & Russell Ville R.R.—Trackage Rights Compensation—Ark. Midland R.R., FD 32625, slip op. at 4 (STB served June 3, 1996) (employing a fifth method, net liquidation value, in the case of smaller carriers).

¹⁹ (See BNSF Pet. 15-16.) The Prescribed Fee—currently set by Section 9(a), as escalated by Section 12, of the Restated & Amended BNSF Agreement—is the Board-established fee for trackage rights granted by UP to BNSF pursuant to the UP/SP merger decision, including Board-approved amendments made by UP and BNSF based on their subsequent 50/50 Line Agreement. (See id. at 15; BNSF Suppl. 6, Feb. 4, 2019; UP Suppl. 2, Feb. 4, 2019.)

right” under the merger conditions to receive direct BNSF service at the Prescribed Fee, which the Board knowingly set at a lower rate than would be applied under the SSW Compensation methodology in part to permit BNSF to compete effectively. (BNSF Rebuttal 32, July 16, 2018; BNSF Suppl. 3-4, Feb. 4, 2019 (citing UP/SP Decision No. 44, 1 S.T.B. at 413-417).) BNSF proposes that the Board establish compensation terms under the principle controlling compensation in condemnation proceedings. If that compensation amount exceeds the Prescribed Fee, BNSF proposes that the Board require BNSF to pay UP the Prescribed Fee, and require UP to pay KCS any amount due to KCS under the condemnation-based terms established by the Board.²⁰ (See BNSF Pet. 15-16; BNSF Suppl. 4, Feb. 4, 2019.)

BNSF further asserts that the SSW Compensation methodology has been repeatedly used by the agency in cases involving compensation under condemnation principles and is sufficiently comprehensive to account for all relevant costs here. (BNSF Reply 13-15, Feb. 25, 2019; BNSF Suppl. 10, Feb. 4, 2019.) BNSF indicates, however, that it does not have the UP and KCS data necessary to compute the valuation base to be used under the SSW Compensation method, should the Board apply that approach. (BNSF Suppl. 8-9 & Ex. E, Feb. 4, 2019.) BNSF also requests that the Board permit BNSF to commence operations immediately under an interim compensation scheme while the compensation determination remains pending. (*Id.* at 10-12; BNSF Pet. 16-17.)

UP contends that BNSF should be responsible for paying both UP and KCS to use the Rosebluff Lead, in two different ways. First, UP argues that, regardless of when BNSF moves its trains and “regardless of the methodology used to calculate appropriate compensation under 49 U.S.C. § 11102(a),” BNSF should pay UP the trackage rights fee established under the merger, i.e., the Prescribed Fee. (UP Suppl. 3, Feb. 4, 2019.) Second, UP asserts that, “to the extent KCS is entitled to compensation under the SSW Compensation methodology or any other methodology, BNSF is obligated to pay KCS under § 11102(a).” (*Id.*; see also UP Reply 61, June 25, 2018.) In support, UP notes that in UP/SP Decision No. 44, 1 S.T.B. at 449, when the Board granted BNSF terminal trackage rights over KCS-owned segments in Shreveport and Beaumont, Tex., BNSF assumed the obligation to compensate KCS under the predecessor to § 11102(a). According to UP, the case for BNSF directly compensating KCS is even stronger here, because BNSF already has access to Lyondell through reciprocal switching, and BNSF’s decision to use direct trackage rights instead is “entirely voluntary” and a “unilateral decision.” (UP Reply 61, June 25, 2018.)

UP further asserts that in a typical terminal trackage rights case under § 11102(a), the track owner should be compensated “for any spill-over effects of the terminal trackage rights—i.e., impacts on the owner’s other operations.” (UP Suppl. 4, Feb. 4, 2019.) UP argues that such effects could be addressed “through the variable cost component and the interest rental component (by including other affected tracks and traffic in the interest rental calculations).”

²⁰ Alternatively, BNSF states it would be willing to pay KCS directly under the compensation terms set by the Board and then pay UP the Prescribed Fee, less the amount paid to KCS by BNSF. (See BNSF Rebuttal 30, July 16, 2018; BNSF Suppl. 4, Feb. 4, 2019.)

(*Id.*) More generally, UP agrees with BNSF that the SSW Compensation methodology is “flexible enough to account for all the costs associated” with BNSF’s use of the Rosebluff Lead and Rosebluff Yard. (UP Reply 8, Feb 25, 2019.) However, UP notes that the process of developing its case for compensation would be “time-consuming,” likely requiring the retention of outside consultants. (UP Suppl. 5, Feb. 4, 2019.) UP also notes it does not have access to BNSF or KCS data required to apply the capitalized earnings method. (*Id.*)

KCS argues that setting compensation such that BNSF only has to pay the Prescribed Fee is inconsistent with § 11102(a) and will force UP and KCS to subsidize BNSF and could eventually inhibit, rather than promote, competition in the Lake Charles region. (KCS Reply 26, 29, 32-33, June 25, 2018.) Although KCS recognizes that UP and BNSF have already agreed on the compensation due to UP through the merger conditions, (*see id.* at 33, 42), it proposes several possible methodologies for compensating KCS. First, it suggests that BNSF should pay KCS “an access fee consistent with the principles of Efficient Component Pricing (‘ECP’).” (*Id.* at 4, 35-36.) Acknowledging “the difficulty associated with applying ECP[,]” KCS also proposes a “market-based” fee comprising: (a) a per-car fee approximated by the “comparable switching rate” that UP charges KCS for access to Lake Charles, (b) a proportionate share of maintenance costs on a usage basis, and (c) a \$842.00 per hour delay charge for “any operational delays caused by the presence of BNSF’s trains.” (*Id.* at 4, 35-37.) Finally, in its supplemental filing, KCS argues that if the SSW Compensation methodology is used, the Board should compute compensation to KCS based on market-based rates *plus* “an adjusted application of SSW Compensation.” (KCS Suppl. 30, Feb. 4, 2019; *see also id.* at 33-35.) Specifically, KCS asserts it should receive the total of: (a) an SSW Compensation-based fee for BNSF’s actual usage of Rosebluff Lead²¹; (b) a “market-based access fee” to account for KCS’s “lost contribution” toward network costs, computed based on comparable rates charged by UP, KCS, and BNSF for access to shippers, less the SSW Compensation rate (to avoid double-counting its costs or interest rental); and (c) penalty charges for operational delays or interference caused by BNSF’s presence on the Rosebluff Lead. (KCS Suppl. 33-35, 43, 45, Feb. 4, 2019.) KCS claims that its “SSW Compensation Plus” approach is necessary because the SSW Compensation methodology fails to account for lost profits that BNSF’s direct access may precipitate on *other* parts of KCS’s network (outside the Rosebluff Lead and Rosebluff Yard)—lost profits to which KCS believes it is entitled under the Fifth Amendment’s takings clause and the rail transportation policy at 49 U.S.C. § 10101. (*Id.* at 30-31 & n.32.)

KCS also expresses concern about the Board’s use of SSW Compensation more generally. It claims that the SSW Compensation methodology does not account for certain additional costs that KCS might incur due to BNSF’s presence on the line, including, e.g., paying overtime, adding crews, and incurring additional car hire charges. (*Id.* at 4-5, 20-21, 39-40.) KCS further argues that the Board has generally applied SSW Compensation when determining compensation for overhead trackage rights—not, as here, for access to local shippers—and has

²¹ KCS proposes applying the RCNLD method of calculating the line’s value for interest rental purposes. (*See* KCS Suppl. 35-38, 40-41, V.S. Carey 11-12, Feb. 4, 2019.)

never used the SSW Compensation methodology to impose compensation in a § 11102(a) terminal trackage rights case unless the parties consented to its use. (*Id.* at 22-25.)

Procedure for Setting Compensation. This case presents unique circumstances regarding the interplay between the Board’s merger conditions in UP/SP and § 11102(a). As the parties have recognized, KCS is entitled to compensation under § 11102(a), as half-owner of property subject to the Board’s grant of direct terminal trackage rights to BNSF.²² Under the UP/SP merger conditions, UP is entitled to no more than the Prescribed Fee, a below-SSW Compensation rate that UP voluntarily negotiated, offered to BNSF, and accepted (through merger consummation) despite apparently never seeking KCS’s consent.²³

As the Board stated in Decision No. 3, “the question of compensation had been settled” as part of the UP/SP merger conditions, on the assumption that UP was “the only owner of the Rosebluff Lead.” Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 20. Clearly, UP is not the only owner, and in Decision No. 3, the Board further noted that the merger conditions do “not specifically address the existence of a third-party joint owner of the line.” *Id.* Unlike a “typical” grant of terminal trackage rights (e.g., the Beaumont and Shreveport segments that UP references), the Rosebluff Lead grant affects two different line owners, each subject to a different compensation scheme. The parties’ central disagreement here is whether (1) BNSF should pay more than the Prescribed Fee for its access to these terminal trackage rights to account for any amount to which KCS is entitled; or whether (2) UP should make up any shortfall to KCS. However, because the parties agree that KCS’s compensation under § 11102(a) cannot be calculated without further proceedings, the Board need not resolve the allocation issue at this time.

As for the actual calculation of compensation due to KCS, the parties appear to agree that the Board should allow the parties an opportunity to conduct compensation-related discovery, submit expert testimony, and fully brief the Board regarding their preferred methodologies. (See, e.g., BNSF Suppl. 8-9 & Ex. E, Feb. 4, 2019; UP Suppl. 5, Feb. 4, 2019; UP Reply 7, Feb. 25, 2019; KCS Suppl. 2 n.2, 40-41, Feb. 4, 2019; KCS Reply 3, Feb. 25, 2019.) In light of this, the Board will provide a period for further record development on compensation. In a subsequent decision, the Board will set compensation based on an application of the Prescribed

²² (See BNSF Pet. 15-16; UP Suppl. 3, Feb. 4, 2019; UP Reply 2-4, Feb. 25, 2019; KCS Reply 4, 26, 29, June 25, 2018.)

²³ (See BNSF Suppl. 3-4, Feb. 4, 2019; UP Suppl. 3, Feb. 4, 2019; KCS Suppl. 33, Feb. 4, 2019.) As the Board has observed, the Prescribed Fee was a component of a much broader agreement through which UP/SP received numerous other rights of significant value to it—rights that remain outside the scope of (and unaffected by) the Board’s decisions here. See UP/SP Decision No. 47, 1 S.T.B. 591, 615 (1996); UP/SP Decision No. 44, 1 S.T.B. at 371. In light of this and UP’s acceptance of BNSF’s trackage rights and the Prescribed Fee under the merger conditions, no party argues that UP is due full compensation under condemnation principles in accordance with § 11102(a).

Fee and the principles controlling compensation in condemnation proceedings, including SSW Compensation.

With regard to KCS's concerns about the potential application of the SSW Compensation methodology here, the Board observes generally that the SSW Compensation method is a flexible approach that can be (and has been) modified to account for the particular facts of each case, including difficulties in valuation, various types of costs, and the specific nature and extent of the line's use. See, e.g., CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., 3 S.T.B. 196, 344-345 (1998); Ark. & Mo. R.R., 6 I.C.C.2d at 622-627; SSW III, 5 I.C.C.2d at 529. By considering case-specific facts concerning the market value of the property, the tenant's proportionate use, and the costs associated with such use, SSW Compensation is designed to fairly compensate the owning carrier for the tenant's partial use thereof. The Board has concluded in prior cases that the SSW Compensation methodology satisfies the principles of compensation in condemnation proceedings.²⁴

Because the Board is not, at this time, making a final determination regarding the details of the compensation methodology (pending further arguments and evidence to be submitted, as described below), the Board will not address the specific methodological variants proposed by KCS and the other parties. The Board intends to assess fully each party's proposal in the next phase of this proceeding, upon receipt of all necessary data and supporting argument.

The Board will order the parties to submit a joint proposed procedural schedule to govern discovery and briefing on the calculation of compensation due to KCS, including all applicable elements of the SSW Compensation methodology. Once a schedule is approved by the Board, the parties shall conduct discovery and submit briefs detailing their positions. The parties are advised that the Board intends to resolve the issue of compensation as quickly as possible. As such, in this final round of briefing, the parties must submit *all* data and arguments necessary to fully implement their compensation proposal.

²⁴ See UP/SP Decision No. 47, 1 S.T.B. 591, 616 (1996) (setting compensation for terminal trackage rights, including access to local shippers); SSW Compensation I, 1 I.C.C.2d at 792-794, 804 (establishing compensation method for trackage rights imposed in the UP/MP/WP merger, including segments within the terminal areas of Kansas City and St. Louis, see Union Pac. Corp.—Control—Mo. Pac. Corp., 366 I.C.C. 459, 576 n.114, 585, 587-588 (1982)); see also Pyco Indus., Inc.—Alternative Rail Serv.—S. Plains Switching, Ltd., FD 34889, slip op. at 6-8 (STB served Jan. 11, 2008) (setting compensation for alternative rail service on an emergency and temporary basis under § 11102(a)). Indeed, SSW Compensation's key tenet, the proportionate "rental" fee, has long served as a basis for compensation under condemnation principles. See Mo.-K.T.R. Co. v. Kan. City Terminal Ry., 198 I.C.C. 4, 7-8 (1933) (terminal trackage rights holder has essentially "become a tenant of respondent [owning carrier], and the just and reasonable compensation which it is required to pay is in effect a rental"); see also Chi., Milwaukee, St. Paul & Pac. R.R.—Trackage Rights—Louisville & Nashville R.R., 342 I.C.C. 578, 589-590, 603 (1973).

The Board's pledge to set appropriate compensation under the Prescribed Fee and condemnation principles fulfills the alternative requirement in § 11102(a) that compensation be "adequately secured" before commencement of terminal trackage rights operations. See S. Pac. Transp. Co. v. ICC, 736 F.2d at 723-24. It remains unclear whether BNSF may immediately commence direct operations all the way to Lyondell given the parties' dispute over BNSF's access to the Montell Lead and 0.40-mile segment between the Rosebluff Lead and the Montell Lead. See Decision No. 4, slip op. at 3-5, 7-8. Nevertheless, if the terms of compensation have not been resolved prior to BNSF's commencement of trackage rights operations over the Rosebluff Lead, compensation will accrue from the actual date of the start of such operations, and will be payable after terms have been established. See UP/SP Decision No. 44, 1 S.T.B. at 425-426.

It is ordered:

1. The conditions for BNSF's use of the Rosebluff Lead to provide direct service to Lyondell are set forth above.
2. BNSF, UP, and KCS shall submit a joint proposed procedural schedule to govern discovery and briefing on the remaining issues regarding compensation, including the various considerations and calculations required under the SSW Compensation methodology, by March 16, 2020.
3. This decision is effective 15 days from the date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.