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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

**UNION PACIFIC RAILROAD COMPANY'S REPLY
TO BNSF'S PETITION TO ESTABLISH CONDITIONS OF USE**

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INTRODUCTION

The Board should deny BNSF’s request to establish abstract “principles” and a special “process” to govern potential future disputes over direct service on the Rosebluff Lead. Union Pacific does not expect additional efforts by BNSF to establish direct service on the Lead will produce significant operating disputes. Union Pacific will cooperate with BNSF to develop appropriate operating plans. However, appropriate operating plans might look different for shippers with different infrastructure located at different points on the Lead, and, going forward, the plans will need to account for already implemented BNSF service and the changes to Union Pacific service made to accommodate that service. Unnecessarily entrenching presumptions about appropriate conditions of use could have the unintended consequence of impeding collaborative efforts to develop effective solutions.

I. BNSF bears responsibility for its inability to directly serve Lyondell and other shippers on the Rosebluff Lead.

Since the Board approved the UP/SP merger in 1996, Union Pacific has cooperatively addressed hundreds of requests by BNSF to directly serve shippers under the BNSF Agreement. Before 2012, BNSF had never asked to directly serve any shipper on the Rosebluff Lead. BNSF

instead captured a significant share of the business using a combination of haulage and reciprocal switching rights it obtained from Union Pacific under the BNSF Agreement.¹

BNSF's February 2013 application for terminal trackage rights to directly serve CITGO, a shipper on the Rosebluff Lead, presented a rare instance in which Union Pacific disagreed with BNSF's interpretation of the BNSF Agreement. The case was particularly complicated because BNSF's access request affected KCS, which jointly owns the Lead. The Board granted the application in July 2016.²

Despite prevailing at the Board, BNSF abandoned its pursuit of direct service to CITGO. In January 2018, BNSF petitioned the Board to establish conditions of use and compensation for BNSF to directly serve a different shipper, Lyondell. In May 2018, the Board ordered BNSF to supplement its petition and established a schedule that, as amended, gave Union Pacific and KCS just 45 days to reply to the supplemented petition.³ In its reply, Union Pacific offered a global solution: BNSF could step into Union Pacific's shoes, handling traffic directly to all shippers currently served by Union Pacific on the Lead and providing reciprocal switching to Union Pacific under the same terms that apply when Union Pacific provides switching to BNSF. However, BNSF declined the offer.

In February 2020, the Board served its decision establishing conditions for BNSF direct service to Lyondell, allowing BNSF to begin direct service to Lyondell as soon as BNSF secures rights needed to operate over certain connecting trackage required to reach the Lyondell facility.⁴

¹ See Union Pacific's Reply to BNSF's Opening Statement and Evidence at 2 (Aug. 24, 2015); Union Pacific's Reply to BNSF's Petition to Establish Conditions of Use and Compensation at 1–2 (June 25, 2018).

² See Decision No. 3 (STB served July 5, 2016).

³ See Decision No. 5, slip op. at 2 (STB served May 15, 2018).

⁴ See Decision No. 8, slip op. at 8 (STB served Feb. 21, 2020).

BNSF apparently has not secured the necessary rights. Nor has BNSF asked to directly serve any shippers on the Lead other than Lyondell. Thus, BNSF bears responsibility for its inability to provide direct service to Lyondell or any other shippers on the Lead.

II. The Board should not establish special rules for potential future BNSF requests to directly serve shippers on the Rosebluff Lead.

The Board should not establish special rules for handling potential future BNSF requests to directly serve shippers on the Lead. BNSF's concern about delay in resolving potential future requests is unfounded. Here, the initial proceedings were lengthy because of the need to resolve the fundamental dispute over BNSF's right to operate its own trains on the Lead. More time was then consumed after BNSF shifted its focus from CITGO to Lyondell. With the general dispute resolved and the specific experience gained from addressing service to Lyondell, Union Pacific expects the parties will be able to cooperatively negotiate conditions for any new direct service. At this point, the establishment of special rules would be more likely to harden positions and generate conflict than to promote effective, private solutions.⁵

Conflict would be especially likely to arise if the Board were to establish a special rule that any potential future direct service will be based on BNSF's proposed "principles" of "an exclusive BNSF operating window during UP's 12-hour window for Rosebluff Yard operations" and "an exclusive unimpeded route over the Rosebluff Lead for BNSF's train" for the duration of its operating window on the Lead. Petition at 9.

⁵ Although BNSF says it lost business because of the delay in gaining direct access to shippers on the Lead, *see* Petition at 2, the evidence shows BNSF has been a very successful competitor for business on the Lead, *See* note 1, *supra*. Union Pacific believes BNSF abandoned its plan to directly serve CITGO because of changes in crude oil markets. Also, BNSF acknowledges that Lyondell used BNSF for its Lake Charles business until just recently, *see* Petition at 2, so direct service plainly was not the critical issue in BNSF's dealings with Lyondell.

First, application of BNSF's proposed principles would result in inefficient consumption of limited capacity used to serve other shippers on the Line. In fact, BNSF's proposed principles do not actually reflect the Board's order regarding BNSF service to Lyondell. The Board did not award BNSF exclusive use of Rosebluff Yard for any period of time; rather, the Board required Union Pacific and KCS to ensure BNSF has "one clear running track" when it is ready to move through the Yard. Decision No. 8 at 9. Similarly, the Board did not award BNSF an "exclusive unimpeded route" over the Lead while BNSF spends hours at Lyondell's facility, which would unnecessarily bring service to other customers to a standstill; rather, the Board required Union Pacific and KCS to "clear[] all [their] trains from the sections of the Rosebluff Lead that BNSF must traverse to access Lyondell" while BNSF moves to or from Lyondell. *Id.*

Second, even the Board's actual principles for service to Lyondell could not necessarily be applied to other facilities without substantially impairing service to the remaining shippers on the Lead. *Cf.* 49 U.S.C. § 11102(a). The Board did not purport to create a one-size-fits-all plan. The Board's plan was based on "the unique facts of [the] case." Decision No. 8 at 10. In developing its plan, Board accounted for factors that are specific to Lyondell, including that the facility is not located directly on the Lead and that BNSF service was expected to take just one to two hours. *See id.* at 6. The Board also accounted for the need to coordinate BNSF service to Lyondell with service to other shippers on the Lead. *See id.* at 8–10. Any future BNSF direct service requests would likely involve different facts and circumstances. Other shippers might not have enough industry track for BNSF's train to clear the Lead while serving their facilities. Other shippers might not have sufficient loading or unloading capacity for BNSF to complete service within two hours. Other shippers might be located on parts of the Lead where immediately clearing the track to accommodate arriving or departing BNSF trains would be

particularly disruptive. The Board should be encouraging parties to negotiate workable solutions, which is what it did even as it established conditions for direct operations to Lyondell. *See id.* at 11 (“[T]he parties are free to adjust the prescribed timing by mutual agreement based on actual operating experience.”). The Board should not discourage negotiation by freezing default rules into place – particularly the first set of rules ever developed, which have never even been shown to work in practice.

The Board also should decline to adopt a special process for handling potential future BNSF requests to directly serve additional shippers on the Lead. BNSF’s proposed process is itself likely to generate unnecessary disputes. BNSF proposes different timelines depending on whether a proposed operating plan “mirrors the terms of use set by the Board in *Decision No. 8* in all material respects.” Petition at 11. But how would one determine whether a plan to serve a different shipper in a different location “mirrors the terms” for BNSF direct service to Lyondell “in all material terms?” And what is achieved by creating new potential sources of disputes? If BNSF wants to directly serve another shipper on the Lead, it should provide an operating plan to Union Pacific and KCS. The parties should agree to the proposed plan or collaborate to develop an alternative. If BNSF is not satisfied at any point in the process, it remains free to seek relief from the Board.⁶

The Board also has no reason to commit in advance to a special schedule for evidentiary submissions. If BNSF ever needs to seek relief from the Board, the Board can set a schedule that

⁶ Union Pacific recognizes BNSF’s institution of direct service to additional shippers would be pursuant to the terminal trackage rights awarded in Decision No. 3, not the BNSF Agreement. However, Union Pacific would seek to comply with the election-of-service provisions of the BNSF Agreement, which require a response within 30 days of receiving BNSF’s proposed operating plan, but recognizing that more than 30 days might be required in some instances because of the need to coordinate with KCS.

allows it to receive sufficient information to establish conditions of use that do not substantially impair service to other shipper on the Lead. *See* 49 U.S.C. § 11102(a).

CONCLUSION

The Board should reject BNSF's request to establish special rules to govern potential future disputes over BNSF direct service on the Rosebluff Lead. If any disputes do arise, the Board can resolve them in a timely manner using its existing procedures and processes.

Respectfully submitted,

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January 19, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2021, I caused a copy of the foregoing document to be served by email or first-class mail, postage prepaid, on all parties of record in Finance Docket No. 32760 (Sub-No. 46).

/s/ Michael L. Rosenthal