

UP/SP-435

BEFORE THE
SURFACE TRANSPORTATION BOARD

302314

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

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

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**UNION PACIFIC RAILROAD COMPANY'S REBUTTAL BRIEF
REGARDING COMPENSATION FOR BNSF'S USE OF THE ROSEBLUFF LEAD**

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In Decision No. 3, the Board granted BNSF’s application for terminal trackage rights over the Rosebluff Lead pursuant to 49 U.S.C. § 11102(a).¹ The Board invoked its “broad and flexible authority” to grant terminal trackage rights over non-party carriers “to prevent carriers opposing a merger from blocking [the Board’s] ability to craft merger conditions that are clearly in the public interest.”² When the Board has previously granted terminal trackage rights under similar circumstances, it has ordered the carrier that was granted use of the terminal facilities to compensate the owner of the facilities, as required by § 11102(a).³ Here, § 11102(a) and Board precedent require BNSF, as the carrier that was granted use of the Lead, to compensate KCS, as the owner of the Lead.⁴

¹ *BNSF Ry. – Terminal Trackage Rights – Kansas City S. Ry.*, FD 32760 (Sub-No. 46) (STB served July 5, 2016).

² *Id.* at 8 (quoting *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 449 (1996)).

³ See *Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 449; *Union Pacific – Control – Missouri Pacific; Western Pacific (UP/MP/WP)*, 366 I.C.C. 459, 574–76 (1982).

⁴ To simplify this proceeding, Union Pacific, which jointly owns the Lead, is not seeking compensation for BNSF’s use of the Lead. See Union Pacific Railroad Company’s Opening Statement Regarding Compensation for BNSF’s Use of the Rosebluff Lead (Jan. 26, 2021) (Union Pacific Opening Statement).

BNSF cannot dispute that § 11102(a) and Board precedent require it to compensate KCS for its use of the Rosebluff Lead. However, BNSF says *Union Pacific* should compensate KCS because Union Pacific breached its promise under the Restated and Amended BNSF Agreement (RASA)⁵ to grant BNSF trackage rights over the Lead.⁶ BNSF also says requiring it to pay more than the Prescribed Fee to operate using trackage rights on the Lead would frustrate conditions the Board imposed on the UP/SP merger to ensure BNSF could provide competitive service to shippers on the Lead.⁷ Because BNSF made the same claims in its Opening Statement, Union Pacific refers the Board to its detailed Reply Statement and provides a streamlined Rebuttal below to address the many inaccuracies in BNSF’s claims.

I. Section 11102(a) and Board precedent require BNSF to compensate KCS if BNSF exercises its terminal trackage rights over the Rosebluff Lead.

Section 11102(a) requires BNSF to compensate KCS for use of the terminal trackage rights over the Rosebluff Lead that BNSF obtained in Decision No. 3. Section 11102(a) allows the Board to require terminal facilities owned by a rail carrier to be used by another rail carrier in certain circumstances, but provides that the user must compensate the owner. *See also* 49 U.S.C. § 11102(b) (“A rail carrier whose terminal facilities are required to be used by another rail carrier under this section is entitled to recover damages from the other rail carrier . . . if the amount of compensation is not paid promptly.”).

Board precedent confirms that § 11102’s “user pays” rule applies when the user obtains terminal trackage rights over a non-party carrier to implement a merger condition. The Board

⁵ The RASA is the current version of the “BNSF agreement” – the settlement agreement entered into by BNSF, Union Pacific, and Southern Pacific in connection with the UP/SP merger.

⁶ *See* BNSF’s Reply to KCS’s and UP’s Opening Statements on Compensation (BNSF Reply) at 6 (Apr. 12, 2021).

⁷ *See id.* at 10.

applied the “user pays” rule in the original UP/SP merger proceeding when it granted BNSF’s application for rights to use KCS-owned terminal trackage in Beaumont, Texas, and Shreveport Louisiana, so BNSF could replace competitive service previously provided by Southern Pacific.⁸ Similarly, in *UP/MP/WP*, the Interstate Commerce Commission ordered Denver & Rio Grande Western Railroad (DRGW) to compensate Atchison, Topeka, and Santa Fe Railway (ATSF) for using ATSF-owned terminal trackage between Pueblo and Nyberg, Colorado, so DRGW could replace competitive service previously provided by Missouri Pacific.⁹

In its Reply, BNSF says the Beaumont and Shreveport situations “differ materially from the present situation” because “[t]here was no joint ownership in those instances that created a compensation allocation issue that needed to be addressed.”¹⁰ However, the Board has already rejected BNSF’s claim that joint ownership of the Lead precludes the application of § 11102(a)’s compensation provisions.¹¹ Also, Union Pacific eliminated any possibility that “a compensation allocation issue” could somehow produce a situation in which BNSF would be required to pay more to use the Lead than if KCS solely owned the Lead by waiving BNSF’s obligation to pay Union Pacific *any* compensation for its use of the Lead when BNSF operates trains directly to Lyondell.¹² Thus, contrary to BNSF’s claim, requiring BNSF to compensate KCS pursuant to § 11102(a) would treat the Lead exactly like KCS’s Beaumont and Shreveport trackage.

⁸ See *Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 449 (“Section [11102(a)] provides that the carriers are responsible for establishing the conditions and compensation applicable to terminal trackage rights awarded under [Section 11102], and we will therefore allow BNSF and KCS an opportunity to reach an agreement respecting such matters.”).

⁹ See *UP/MP/WP*, 366 I.C.C. at 572–76; see also *id.* at 576 n.114.

¹⁰ BNSF Reply at 9.

¹¹ See Decision No. 3 at 18 (“[T]he statute must encompass situations involving multiple rail-carrier owners.”).

¹² See Union Pacific Opening Statement at 3.

In fact, when KCS asserted its right to veto BNSF's use of trackage rights over the Lead in the UP/SP merger proceeding, *BNSF* said the situation could have been addressed in the same way as the Beaumont and Shreveport trackage rights – if only KCS had objected in a more timely manner:

[H]ad KCS raised its concerns as to UP/SP's alleged lack of contractual authority to grant BN/Santa Fe access in April when the CMA Agreement was first announced, there might have been time for a terminal trackage rights application to have been filed and processed along with the primary application.¹³

Ultimately, BNSF's trackage rights over the Lead *were* handled exactly like its trackage rights over the Beaumont and Shreveport trackage – BNSF applied for, and the Board granted, terminal trackage rights over the Lead pursuant to § 11102(a). In these circumstances, § 11102(a) and Board precedent plainly require BNSF to compensate KCS.

II. BNSF's contract-based claims against Union Pacific lack merit, and BNSF bears responsibility for any delay in instituting trackage rights operations over the Lead.

A. BNSF's contract-based claims lack merit and could only be resolved in a different forum.

In its Reply, BNSF continues to claim Union Pacific should pay any amount owed to KCS for BNSF's use of the Rosebluff Lead because Union Pacific breached its promise to grant BNSF trackage rights over the Lead.¹⁴ If BNSF actually believed it had valid a contract claim, it would have raised that claim long ago in a proper forum.¹⁵ Union Pacific fully complied with its

¹³ Reply of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to KCS's Petition to Reopen/Reconsider at 11, *Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, FD 32760 (Sept. 23, 1996). The relevant portion of BNSF's reply to KCS's Petition is attached as Exhibit A.

¹⁴ See BNSF Reply at 6.

¹⁵ The RASA provides for arbitration. See Union Pacific Reply Statement, Ex. A, RASA § 15.

contractual obligations by providing BNSF highly competitive alternative access to all shippers on the Lead¹⁶ – access BNSF has used with great success since 1996.¹⁷

Moreover, as discussed in Union Pacific’s Reply Statement, Board proceedings are not a proper forum for resolving contract disputes.¹⁸ The Board did not grant BNSF’s application for terminal trackage rights based on its interpretation of Union Pacific’s and BNSF’s agreements in the RASA. Instead, the Board granted BNSF’s application to implement the Board’s intent in imposing conditions on the UP/SP merger that BNSF should have the option to use trackage rights on the Lead.¹⁹ If BNSF wants to use terminal trackage rights granted by the Board pursuant to § 11102(a) to implement a merger condition, it must pay KCS as required by § 11102(a).

¹⁶ As discussed in Union Pacific’s Reply Statement, Union Pacific and BNSF recognized that Union Pacific might lack sufficient legal authority to grant all promised trackage rights, and thus they agreed in Section 8(n) of the RASA that, in such circumstances, Union Pacific would provide BNSF with an alternative means of access of commercially equivalent utility. *See* Union Pacific Reply Statement at 5 & n.13.

¹⁷ In 2018, BNSF handled nearly all Lyondell’s business and more than half of all the loaded cars Union Pacific picked up and delivered to shippers using the Lead. *See* Union Pacific Railroad Company’s Reply to BNSF’s Petition to Establish Conditions of Use and Compensation at 2 (June 25, 2018); *see also* Union Pacific’s Reply to BNSF’s Opening Statement and Evidence at 2 (Aug. 24, 2015) (discussing BNSF’s success in capturing CITGO’s business on the Lead).

¹⁸ *See* Union Pacific Reply Statement at 6–7.

¹⁹ *See* Decision No. 3 at 12 (“While informative, arguments concerning whether the parties intended to apply Section 8(n) in such situations are not controlling here because Section 8(n) was imposed by the Board as a merger condition.”); *see also id.* at 12 n.8 (“Thus, the Board is not interpreting a private contract, which the agency has concluded is a matter generally reserved for the courts.”).

The Board suggested in dicta that Union Pacific might have had an obligation under the RASA to assist BNSF in applying for terminal trackage rights, rather than provide alternative service. *See id.* at 12 n.9. However, in that situation, BNSF would be in the same place today – with terminal trackage rights over the Lead and the accompanying obligation to compensate KCS pursuant to § 11102(a).

BNSF also says it should not be required to compensate KCS because its decision to seek terminal trackage rights was not “voluntary.”²⁰ However, BNSF’s “voluntariness” argument is just a variation on its contract claim – it relies on the irrelevant (and erroneous) claim that Union Pacific unconditionally promised to provide it trackage rights over the Lead. This proceeding is about compensation due to KCS for terminal trackage rights *the Board* granted BNSF because BNSF agreed to provide a competitive alternative on the Lead in the UP/SP merger – just like BNSF agreed to provide a competitive alternative on routes that include KCS’s Beaumont and Shreveport trackage.²¹ Moreover, BNSF is not *obligated* to use trackage rights on the Lead. In Decision No. 3, the Board gave BNSF the *option* to use trackage rights.²² BNSF can still choose to serve shippers using Union Pacific-provided haulage and switching – the same alternative BNSF has willingly used from 1996 through the present day, except in the case of CITGO (briefly) and Lyondell.

B. BNSF’s bears responsibility for any delays in establishing trackage rights operations on the Lead.

BNSF’s Reply also suggests Union Pacific should pay any amount owed to KCS for BNSF’s use of the Rosebluff Lead as punishment for not promptly securing BNSF’s right to

²⁰ BNSF Reply at 6.

²¹ As discussed in Union Pacific’s Reply Statement, BNSF cannot claim the option to use trackage rights on the Lead was critical to its overall agreement in the RASA. BNSF’s access to the Lead was a windfall, and BNSF knew before Union Pacific consummated the merger that KCS might block its access to the Lead. *See* Union Pacific Reply Statement at 5–6. BNSF could have declined the additional rights to serve shippers on the Lead. *See Major Rail Consolidation Procedures*, 5 S.T.B. 539, 570 (2001) (“[I]mposing such conditions on carriers that are not applicants or controlled by applicants is not within our merger conditioning authority . . .”).

²² *See* Decision No. 3 at 13 (finding terminal trackage rights are in the public interest because “the preservation of BNSF’s *option* of direct access is necessary to effectuate the merger conditions”) (emphasis added).

operate over the Lead.²³ However, as discussed above, Union Pacific fully complied with its obligations to BNSF. Moreover, *BNSF* bears responsibility for its inability to conduct trackage rights operations on the Lead. BNSF disregarded the process the Board established in 1996 to address its use of trackage rights on the Lead, and it still has not instituted trackage rights operations, despite receiving all necessary authority from the Board in February 2020.

In 1996, after KCS asserted the right to veto BNSF's use of trackage rights, the Board established a process for resolving the dispute.²⁴ The Board said BNSF, KCS, and Union Pacific should try to negotiate an agreement, and if negotiations failed, BNSF should ask Union Pacific to submit any differences in interpretation of the joint facility agreements governing use of the Lead to arbitration "on behalf of BNSF."²⁵ The Board further said that if BNSF could not gain trackage rights access to the Lead through arbitration, "BNSF may return to the Board to seek approval of a terminal trackage rights application."²⁶

BNSF's response to the Board's order was to do nothing. It never asked to negotiate. It never asked to arbitrate. It never expressed any desire to use trackage rights over the Lead for the next 15-plus years, until May 2012, when it sent Union Pacific a letter asserting a unilateral right to use trackage rights to serve CITGO, a shipper located on the Lead.²⁷ What was BNSF

²³ See BNSF Reply at 6–8.

²⁴ See *Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, FD 32760 (STB served Dec. 4, 1996) (Decision No. 63).

²⁵ Decision No. 63 at 9–10 & n.29; see also *id.* at 10 n.29 ("We expect . . . that BNSF . . . will accept the arbitration remedy . . .").

²⁶ *Id.* at 10.

²⁷ See Decision No. 3 at 4.

doing from 1996 through 2012? BNSF was successfully serving CITGO and other shippers on the Lead using a combination of haulage and switching service provided by Union Pacific.²⁸

In 2013, BNSF filed its application for terminal trackage rights without trying to negotiate a resolution, and without asking Union Pacific to invoke arbitration on its behalf.²⁹ Nonetheless, the Board allowed BNSF to proceed, and it ultimately granted BNSF's application. However, despite prevailing at the Board, BNSF abandoned its pursuit of trackage rights service to CITGO. In 2018, BNSF petitioned the Board to establish conditions of use and compensation to serve a different shipper on the Lead, Lyondell. In response, Union Pacific proposed a global solution: BNSF could step into Union Pacific's shoes, directly serving all the shippers currently served by Union Pacific on the Lead and providing switching to Union Pacific under the same terms that apply when Union Pacific provides switching to BNSF.³⁰ BNSF declined.

In 2020, the Board served its decision establishing conditions for BNSF's trackage rights service to Lyondell.³¹ The Board expressly allowed BNSF to begin service to Lyondell as soon as BNSF secured rights needed to operate over certain connecting trackage required to reach the Lyondell facility.³² BNSF apparently has not secured the necessary rights. Nor has BNSF asked to use trackage rights to serve any shipper on the Lead other than Lyondell. Thus, BNSF bears

²⁸ See note 17, *supra*.

²⁹ See Reply to BNSF Railway Company's "Application for Terminal Trackage Rights" at 4–5 (Mar. 19, 2013).

³⁰ See Union Pacific Railroad Company's Reply to BNSF's Petition to Establish Conditions of Use and Compensation at 2, 59–60 (June 25, 2018).

³¹ See *BNSF Ry. – Terminal Trackage Rights – Kansas City S. Ry.*, FD 32760 (Sub-No. 46) (STB served Feb. 21, 2020).

³² See *id.* at 17.

responsibility for its inability to provide trackage rights service to Lyondell or any other shipper on the Lead.

Remarkably, BNSF now says KCS's consent might not be required for Union Pacific to grant BNSF trackage rights on the Lead, so this proceeding may have been a waste of time.³³ If BNSF were correct, it had the knowledge and ability to resolve this matter long ago. Its lawyers have had the relevant agreements since 1996, when KCS filed them with the Board. The Board told BNSF to ask Union Pacific to invoke the agreements' arbitration provisions "on behalf of BNSF" to resolve "any differences in interpretation."³⁴ Union Pacific would have willingly allowed BNSF to arbitrate in its place. But BNSF never asked to arbitrate. To the contrary, BNSF asked the Board to override the agreements' consent provisions.³⁵

In sum, BNSF chose after 15-plus years to serve two shippers on the Lead using trackage rights rather than the haulage and switching service that Union Pacific has provided since 1996. BNSF also chose to immediately file an application for terminal trackage rights under § 11102(a) instead of following the dispute resolution process spelled out by the Board. BNSF has no basis for complaining about delays resulting from its choices, and no basis for avoiding the requirements of § 11102(a), including the requirement to compensate KCS.

III. Section 11102(a)'s requirement that BNSF compensate KCS for using the Rosebluff Lead does not undermine the conditions the Board imposed on the UP/SP merger.

In its Reply, BNSF repeats its claim that requiring it to compensate KCS for its use of terminal trackage rights on the Rosebluff Lead would "frustrate [the Board's] carefully crafted

³³ See BNSF Reply at 7.

³⁴ Decision No. 63 at 9–10 & n.29.

³⁵ See *id.* at 9.

conditions” on the UP/SP merger.³⁶ However, as explained in Union Pacific’s Reply Statement, the Board should have no concern with requiring BNSF to pay an *SSW Compensation*-based fee for its use of the Lead.³⁷ *SSW Compensation* principles were specifically developed to establish “compensation for trackage rights granted to redress the effects of a merger.”³⁸ Thus, BNSF can fulfill the Board’s conditions as long as it does not pay more than an *SSW Compensation*-based fee for trackage rights over the Lead. And BNSF will not pay more than an *SSW Compensation*-based fee. Union Pacific eliminated *any* possibility that BNSF’s payments for using the Lead could exceed an *SSW Compensation*-based fee by agreeing to waive BNSF’s obligation to pay Union Pacific for use of the Lead when it operates its own trains directly to Lyondell.³⁹ Under these circumstances, BNSF can both compensate KCS as required by § 11102(a) and provide competitive service to fulfill the Board’s conditions on the UP/SP merger.

Finally, as Union Pacific explained in its Reply Statement, if BNSF believes it cannot compete successfully while paying KCS the compensation required by § 11102(a), it can always continue serving shippers on the Lead using the same combination of haulage and switching access it has used successfully for nearly 25 years.

³⁶ BNSF Reply at 10.

³⁷ See Union Pacific Reply Statement at 7–8.

³⁸ *New England Cent. R.R. – Trackage Rights Order – Pan Am Southern*, FD 35842, slip op. at 4 (STB served Oct. 31, 2017).

³⁹ See Union Pacific Opening Statement at 3.

Respectfully submitted,

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May 11, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 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

BN/SF-70

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY

-- CONTROL AND MERGER --

SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

REPLY OF BURLINGTON NORTHERN RAILROAD COMPANY AND
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
TO KCS'S PETITION TO REOPEN/RECONSIDER

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September 23, 1996

route restrictions that had been included in ¶ 8 of the CMA Agreement. KCS bases its argument, however, on a complete misreading of the Board's rationale for removing those restrictions.

As discussed above, the Board removed the route restrictions in order to ensure that BN/Santa Fe would have the ability to serve plastics shippers in the Lake Charles area unhampered by any concerns on the part of the shippers that they would have to return their cars from BN/Santa Fe's SIT facilities to their plants to make arrangements to use a different carrier if the final delivery destination of the cars was one that BN/Santa Fe could not serve under the ¶ 8 route restrictions. Decision No. 44, at 153. There is simply no language at all in the Board's discussion concerning the removal of the route restrictions that gives any indication that the Board's decision was in any way based on a concern over a lack of sufficient SIT capacity. Thus, all of KCS's arguments challenging the removal of the route restrictions on the ground that BN/Santa Fe has sufficient SIT capacity to handle the Lake Charles area traffic are irrelevant.

C. KCS's Consent Is Not Required For BN/Santa Fe
Access To Lake Charles Area Shippers

KCS's final argument seeking to overturn the Board's decision is a claim that UP/SP lacked the contractual authority to grant BN/Santa Fe access to four segments of track necessary to serve shippers at Westlake and West Lake Charles. KCS further claims that UP/SP and BN/Santa Fe should have been required to file a terminal trackage rights application under 49 U.S.C. § 11102

(formerly § 11103) to obtain such access. KCS's claims are without merit.

First, even assuming that BN/Santa Fe would need to use portions of the Lake Charles area trackage covered by the four SP-UP joint facilities agreements KCS cites to serve shippers directly, KCS's consent is not required for such BN/Santa Fe access.^{10/} As the Board held in Decision No. 44, an override of the consent restrictions in the underlying contractual agreements is appropriate and necessary if a terminal trackage rights application is not available. Decision No. 44, at 169-170.

Here, a terminal trackage rights application could not have been filed at the time the primary application was filed since BN/Santa Fe's access to the Lake Charles area was granted as a part of a settlement agreement executed more than four months after the primary application was filed. Moreover, as discussed below, had KCS raised its concerns as to UP/SP's alleged lack of contractual authority to grant BN/Santa Fe access in April when the CMA Agreement was first announced, there might have been time for a terminal trackage rights application to have been filed and processed along with the primary application. By not timely raising its concerns about UP/SP's contractual authority to grant BN/Santa Fe access to the trackage, KCS has itself made the

Indeed, if BN/Santa Fe chooses to access the various Lake Charles area shippers by reciprocal switch rather than by direct service via trackage rights, then KCS's argument concerning UP/SP's contractual authority to grant BN/Santa Fe access to the joint trackage facilities would be moot, since BN/Santa Fe's right to serve the Lake Charles area shippers by reciprocal switch is in no way affected by the joint facilities agreements KCS cites.

alternative of a terminal trackage rights application unavailable, and the override authority of § 11341(a) should be held to be applicable.^{11/}

D. KCS's Petition Should Be Denied As Untimely

Finally, KCS's challenge to BN/Santa Fe access to the Lake Charles area is untimely. KCS was aware of UP/SP's grant of that access to BN/Santa Fe pursuant to the CMA Agreement as early as April 19, 1996, when the Agreement was filed with the Board and served on all parties. Although KCS asserts that the Board precluded it from submitting evidence and argument on the CMA Agreement, that is simply not true. In both Decision No. 35 (at 3) and Decision No. 38 (at 5), the Board made it clear that KCS could take the depositions of UP/SP and BN/Santa Fe personnel regarding the CMA Agreement and include information gained in such depositions in its brief.^{12/} Further, previously in Decision No. 31 (at 3), the Board had stated that non-applicant parties (such as KCS) that believed that they would be harmed by a condition proposed by another party could submit evidence in their April 29, 1996 filings in response to the requested condition. Since ¶ 8 of the CMA Agreement required the BNSF Agreement to be amended and the

^{11/} In this regard, if KCS remains of the view that UP/SP has in some way violated the provisions of the four joint facilities agreements at issue, then KCS may pursue any contractual remedies it may have against UP/SP.

^{12/} Counsel for KCS attended the deposition of George R. Speight, Jr. of CMA (May 14, 1996) as well as the depositions of Richard B. Peterson of UP (May 8, 1996) and Carl R. Ice of BN/Santa Fe (May 10, 1996). At each such deposition, KCS's counsel asked a number of questions about the CMA Agreement, but none of those questions were directed to the issues KCS has raised in its Petition.