

SERVICE DATE – APRIL 13, 2022

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. 10

Digest:¹ The Board grants, in part, the request of BNSF Railway Company (BNSF) to establish general principles the Board expects parties to include in any future operating plans for direct service by BNSF on the Rosebluff Lead, pursuant to terminal trackage rights granted in a 2016 decision in this proceeding. The Board also denies BNSF's request for an expedited process for resolving disputes over conditions of use.

Decided: April 12, 2022

By decision served in this subdocket on July 5, 2016, the Board granted BNSF Railway Company (BNSF) terminal trackage rights over the Rosebluff Lead, a single track, approximately nine miles in length, jointly owned by Kansas City Southern Railway Company (KCS) and Union Pacific Railroad Company in the Lake Charles area of Louisiana. BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. (Decision No. 3), FD 32760 (Sub-No. 46) (STB served July 5, 2016). In a subsequent decision in this subdocket, the Board, pursuant to 49 U.S.C. § 11102(a), established conditions of use for BNSF to directly serve a LyondellBasell (Lyondell) facility at West Lake Charles, La., and set forth a procedure for setting compensation. BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. (Decision No. 8), FD 32760 (Sub-No. 46) (STB served Feb. 21, 2020).

By petition filed on December 18, 2020, BNSF requests that the Board: (1) establish that any future terms of BNSF's use of the terminal trackage rights granted in Decision No. 3 will be based on the principles set forth in Decision No. 8; and (2) establish an expedited process for resolving any disputes over conditions of use for shippers other than Lyondell that BNSF may later elect to serve using its terminal trackage rights. (BNSF Pet. 3.) UP and KCS filed in opposition to BNSF's petition, with KCS also arguing that this proceeding should be held in abeyance or dismissed as moot, (KCS Reply 11-12, Jan. 19, 2021). As discussed below, the Board will grant BNSF's petition, in part, by establishing general service principles it expects to

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 Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

consider regarding future operating plans governing BNSF's direct service to certain shippers on the Rosebluff Lead but will deny the petition's other requests. In addition, the Board denies KCS's request to dismiss or hold this proceeding in abeyance.

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 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 certain rights to handle traffic of Lake Charles area² shippers (the Lake Charles Merger Conditions), which 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 by KCS to reopen or reconsider UP/SP Decision No. 44. 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 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, in this subdocket. 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,

² The Lake Charles area encompasses Westlake, West Lake Charles, and Lake Charles, La.

BNSF's option to directly access 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. Decision No. 3, FD 32760 (Sub-No. 46), slip op. 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 19.³

In a decision served May 1, 2018, and corrected on May 4, 2018, the Board clarified 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 the Lyondell facility, and that the Board's findings in Decision No. 3 as to § 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).⁴

Despite engaging in private negotiations and additional Board-sponsored mediation, BNSF, UP, and KCS were unable to reach an agreement establishing conditions and compensation for BNSF's use of the Rosebluff Lead to serve Lyondell.⁵ The Board therefore, in Decision No. 8, established conditions pursuant to § 11102(a) for BNSF's use of the Rosebluff Lead to directly serve the Lyondell facility and set forth a procedure for setting compensation. As relevant here, the Board established that, unless the parties mutually agreed otherwise, BNSF's direct service on the Rosebluff Lead would be limited to one exclusive, four-hour

³ 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. Kan. City S. Ry. v. STB, No. 16-1608, slip op. at 1 (D.C. Cir. Jan. 3, 2017).

⁴ 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.

⁵ (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).

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.). Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 9. The Board explained that by requiring an "exclusive" window, it expected UP and KCS to ensure that BNSF's train had an unimpeded route along the Rosebluff Lead between the 50/50 Line and the Montell Lead⁶ 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. Id. The Board stated that UP shall notify BNSF of the anticipated time for BNSF's train to depart Lacassine Yard⁷ and that UP's notification must occur a reasonable time in advance of the BNSF's local crew call time. Id. The Board noted that, if BNSF completed its direct operations on the Rosebluff Lead in fewer than four hours, BNSF should promptly notify UP and KCS so that they could resume operations over the cleared portions of the Rosebluff Lead and Rosebluff Yard as quickly as possible. Id. The Board further noted that, if BNSF did not complete its direct operations on the Rosebluff Lead in four hours, 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. Id. at 9-10.⁸

In its December 18, 2020 petition, BNSF argues that, despite the Board's previous decisions, "KCS and UP have repeatedly erected roadblocks" to prevent BNSF from providing direct service on the Rosebluff Lead through opposition and litigation-induced delays. (BNSF Pet. 2.) Thus, "[t]o ensure that these Board decisions can be effectively implemented, and that the competition that the Board intended to preserve with the Lake Charles Merger Conditions can in fact be fully and timely maintained," (id. at 8), BNSF requests that the Board establish that any future terms of use for the Rosebluff Lead terminal trackage rights be based on the following principles set forth in Decision No. 8:

- an exclusive BNSF operating window during UP's 12-hour window for Rosebluff Yard operations;
- an exclusive unimpeded route over the Rosebluff Lead for BNSF's train; and
- flexibility by all parties if BNSF completes its operations sooner or later than anticipated.

(BNSF Pet. 9.)

⁶ The Rosebluff Lead begins at the 50/50 Line at milepost 222.3. The 50/50 Line, also referred to as the Lafayette Subdivision, is located between Dawes, Tex., and Avondale, La., and is jointly owned by UP and BNSF. The Lyondell facility is accessed via the Montell Lead, which connects with the Rosebluff Lead approximately 2.37 miles southwest of the Rosebluff Yard and is owned by the Port of Lake Charles.

⁷ BNSF's Lacassine Yard is located on the 50/50 Line, 20 miles east of the Rosebluff Yard.

⁸ KCS has sought judicial review of Decision No. 8 in the U.S. Court of Appeals for the District of Columbia Circuit. Kan. City S. Ry. v. STB, No. 20-1116 (D.C. Cir. Apr. 7, 2020) (granting motion to consolidate review of Decision No. 8 with review of Decision No. 3).

BNSF also seeks to establish an expedited process for resolving any disputes over conditions of use for shippers that BNSF may later elect to serve using its terminal trackage rights. (*Id.* at 10.) Specifically, BNSF proposes that any operating plan that “mirrors the terms of use set by the Board in Decision No. 8 in all material respects” take effect within 30 days of delivery to KCS and UP. (BNSF Pet. 10-11.) If a proposed operating plan materially differs from the terms set forth in Decision No. 8, BNSF, UP, and KCS would meet to reach an agreement on an operating plan, applying the principles described above. (BNSF Pet. 11.) If no agreement is reached within 30 days after BNSF delivers a proposed plan to UP and KCS, BNSF may submit its proposed plan to the Board for approval. (*Id.*) BNSF also proposes a procedural schedule, should an operating plan be submitted to the Board, which allows 20 days for UP and KCS to reply, 10 days for BNSF to file a rebuttal, and 30 days for the Board to issue its decision establishing the terms for use. (*Id.*)

On January 19, 2021, UP replied in opposition to BNSF’s petition. UP asserts that BNSF’s concerns regarding delay in resolving future requests is unfounded. (UP Reply 3.) UP states that it expects the parties will be able to cooperatively negotiate conditions for any new direct service and that the establishment of special rules would be more likely to harden positions and generate conflict than to promote effective, private solutions. (*Id.*) UP further asserts that BNSF’s proposed principles do not actually reflect the Board’s order regarding BNSF service to Lyondell and that any future BNSF direct service requests would likely involve different facts and circumstances than the Lyondell direct service request. (*Id.* at 4.) UP contends that BNSF’s proposed expedited process would likely generate unnecessary disputes and asserts that the Board has no reason to commit in advance to a special schedule for evidentiary submissions. (*Id.* at 5.)

KCS also filed in opposition to BNSF’s petition, on January 19, 2021, asserting that BNSF “seeks to avoid the statutory requirements applicable to seeking terminal trackage rights to serve shippers other than Lyondell.” (KCS Reply 4, Jan. 19, 2021.) Specifically, KCS contends that, “[i]f BNSF seeks to directly serve such a shipper, BNSF should be required to show that such a shipper is covered by the Lake Charles Condition[s] and that the ‘public interest’ [under 49 U.S.C. § 11102(a)] justifies direct BNSF service.” (KCS Reply 7, Jan. 19, 2021.) Further, KCS argues that BNSF’s petition attempts to “short-circuit the statutory requirement” to show that direct service to a new shipper is practicable and “would not ‘substantially impair[]’ KCS’s (and UP’s) ability ‘to handle its own business.’” (*Id.* at 8.) KCS asserts that compensation evidence and “operational findings specific to Lyondell cannot and should not be automatically applied to other Rosebluff Lead shippers,” (*id.* at 8-10), and that this proceeding should be held in abeyance or dismissed, as there is no shipper currently requesting direct service from BNSF, (*id.* at 11-12). On February 8, 2021, BNSF filed a reply to KCS’s request to hold this proceeding in abeyance.

For the reasons discussed below, BNSF’s petition will be granted in part and denied in part.

DISCUSSION AND CONCLUSIONS

The Board has granted BNSF terminal trackage rights over the Rosebluff Lead to facilitate BNSF's direct access to Lake Charles area shippers, having determined that giving BNSF these rights was the most effective way to assure continued competition for those shippers. UP/SP Decision No. 63, FD 32760, slip op. at 8. The Board has already determined that these rights—and the Board's findings that such rights are practicable and in the public interest under § 11102(a)—apply to all customers accessible via the Rosebluff Lead and covered by the Lake Charles Merger Conditions. See Decision No. 4, FD 32760 (Sub-No. 46), slip op. at 5-7; Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 9-18. Given that BNSF's efforts to provide this direct service have been hindered over time, the Board finds it appropriate to establish general service principles the Board expects parties to include in any future operating plan(s) for BNSF's direct service to certain customers accessible via the Rosebluff Lead, pursuant to Decision No. 3. By providing these general service principles, as supported by the record to date, the Board intends to give the parties information that will facilitate the establishment of operating agreements, preferably without Board intervention, regarding BNSF's direct access to Lake Charles area shippers, and in doing so, effectuate the Board's previous decisions that seek to maintain competition on the Rosebluff Lead.

Based on the record in this proceeding, the Board limits the application of these general service principles to direct service for shippers located in the northern portion of Zone 2,⁹ as the Board has previously determined that operations in the northern portion of Zone 2 would not interrupt UP's operations in the southern portion of Zone 2. See Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 10 n.17 (establishing conditions for use for BNSF to provide direct service to Lyondell, noting that BNSF's operations during the direct-service window in the northern half of Zone 2 would not interrupt UP's operations in the southern portion of Zone 2); Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 17 (noting that UP would be able to move and switch cars in the southern portion of Zone 2 while BNSF operated in the northern portion of Zone 2 during its direct service window).

Accordingly, the Board provides the following general service principles for BNSF's direct service on the Rosebluff Lead to customers located in the northern portion of Zone 2:

⁹ As described in Decision No. 3, since 1981, KCS and UP (or UP's predecessor SP) have, as a matter of 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 Rosebluff Yard, while Zone 2 customers are located south of the Rosebluff Yard. Currently, KCS switches customers in Zone 1, and UP switches customers in Zone 2. Each carrier moves cars for the other in its assigned zone. UP and KCS, each of which operates its own yard off nearby mainline track, both use the Rosebluff Yard to exchange cars destined to or originating from the other carrier's zone. See Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 2. By "northern portion of Zone 2," the Board refers to the section of Zone 2 located north of, and including, the turnout leading to the CITGO facility and other shipper facilities accessible via that turnout. See id. at 17.

- an exclusive BNSF operating window, not to exceed four hours, during UP's 12-hour window for Rosebluff Yard operations,
- an exclusive unimpeded route, for the duration of the BNSF operating window, over the Rosebluff Lead for BNSF trains to access customers located in the northern portion of Zone 2,
- UP notification of the anticipated time for BNSF trains to depart Lacassine Yard,¹⁰ and
- flexibility by all parties to cooperate and coordinate with each other in implementing BNSF's direct service. If BNSF completes its operations sooner than anticipated, BNSF 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.

The parties remain responsible for attempting to establish the conditions governing direct service to a particular shipper under 49 U.S.C. § 11102(a), and the Board expects UP and KCS to cooperate with BNSF in promptly implementing operating plans that conform to the principles described herein. By providing a set of general service principles, the Board anticipates that the parties will be able to reach agreements more quickly without Board intervention. The Board recognizes that any operating plan for direct service to a particular shipper must account for circumstances specific to that shipper. Accordingly, these principles merely set forth broad parameters and are intended to allow for flexibility and negotiation.

If parties cannot agree on the terms of an operating plan, they may request that the Board establish conditions for use. However, the Board will expeditiously review proposed operating plans that fall within the above parameters so that service can begin. Closer Board scrutiny would be afforded only to operating plans that materially deviate from these principles. Given the expeditious review the Board anticipates for proposed operating plans that conform to these principles, the Board finds that the review process proposed by BNSF is unnecessary.

The Board finds no merit in KCS's argument that BNSF's petition seeks to avoid the statutory requirements of 49 U.S.C. § 11102(a). KCS suggests that BNSF must show that direct service to any new shipper on the Rosebluff Lead, pursuant to the trackage rights granted in Decision No. 3, is practicable and in the public interest. However, the terminal trackage rights granted in Decision No. 3 encompass BNSF's direct access to all Lake Charles area shipper facilities accessible via the Rosebluff Lead and covered by the Lake Charles Merger Conditions. As discussed in Decision No. 4, the Board need not individually assess the public interest implications or the practicability of service as to each shipper facility to be directly served by BNSF pursuant to the terminal trackage rights granted in Decision No. 3. Decision No. 4, FD 32760 (Sub-No. 46), slip op. at 5-6.

Further, the Board finds no basis for dismissing or placing this proceeding in abeyance, as KCS has requested. As discussed, the trackage rights granted in this proceeding apply to

¹⁰ As the Board stated in Decision No. 8, UP's notification must occur a reasonable time in advance of BNSF's local crew call time. Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 9.

BNSF's direct service to any shipper accessible via the Rosebluff Lead and covered by the Lake Charles Merger conditions, and the general service principles addressed here apply to a subset of these shippers. Moreover, the Board has yet to determine the compensation methodology to be used in this proceeding, a methodology that the Board will apply in future cases involving shippers on the Rosebluff Lead. Given these outstanding issues, the Board finds no basis for dismissing or holding this proceeding in abeyance.

It is ordered:

1. BNSF's petition is granted in part and denied in part, as discussed above.
2. KCS's request to dismiss or hold this proceeding in abeyance is denied.
3. This decision is effective on the date of service.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.