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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 22218

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
—OPERATING RIGHTS—
SOUTHERN PACIFIC TRANSPORTATION CO.

PETITION TO REOPEN

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PETITION TO REOPEN

In accordance with Condition 30 of the Terms and Conditions prescribed by the Interstate Commerce Commission (“ICC”) in its decision of December 4, 1967, in this proceeding,¹ Union Pacific Railroad Company (“UP”), as successor to Southern Pacific Transportation Company (“SP”), hereby petitions that this proceeding be reopened for the purpose of revising Condition 16, which governs additions and betterments, and Condition 17, which governs the interest rental paid by BNSF Railway Company (“BNSF”), as successor to The Atchison, Topeka & Santa Fe Railway Company (“ATSF”). The Board should make any revisions retroactive to January 3, 2023.

As discussed below, UP is proposing a procedural schedule that will allow for orderly consideration of the issues presented by this Petition.

I. Background

This Petition seeks revision of the ICC’s 1967 Order, which established terms and conditions for ATSF’s use of trackage rights over a 67.8-mile SP line between Kern Junction and Mojave, California, known as the Tehachapis Line. SP’s predecessor built

¹ *Atchison, T. & S.F. Ry. Co.—Operating Agreement*, 331 I.C.C. 367 (1967), *modified*, 333 I.C.C. 342 (1968). The 1967 and 1968 decisions are referred to in this Petition as the “1967 Order.”

the line in 1876. ATSF contracted to use the line in 1899, rather than build a parallel line. In 1912, the parties renegotiated their original agreement. When that agreement expired in 1961, the parties were unable to agree on terms and conditions for renewal, so they submitted the issues to the ICC. The 1967 Order prescribed 31 separate terms and conditions for ATSF's use of the line.

On May 15, 1991, SP petitioned to reopen this proceeding to modify various provisions of the 1967 Order. In a decision served March 3, 1992, the ICC granted SP's petition only to the extent it sought reconsideration of the condition setting the interest rental for ATSF's use of the line.² In granting SP's petition, the ICC agreed the rental provided as prescribed in Condition 17 of the 1967 Order was "clearly inequitable."³

In June 1993, SP and ATSF negotiated a settlement that included changes to the conditions addressing both interest rental and additions and betterments.⁴ They called their settlement the "Joint Stipulation and Agreement." At the parties' request, the ICC entered an order formally incorporating the provisions of the Joint Stipulation and Agreement as a modification to the conditions prescribed in the 1967 Order.⁵

The Joint Stipulation and Agreement included an initial term of 17 years and provided it would continue thereafter in effect until terminated by either party, with at least six months' prior written notice to the other party.⁶

² *Atchison, T. & S.F. Ry. Co.—Operating Agreement*, 8 I.C.C.2d 297 (1992).

³ *Id.* at 303.

⁴ *See Atchison, Topeka & Santa Fe Ry.—Operating Agreement—Southern Pac. Transp. Co.*, FD 22218 & FD 22218 (Sub-No. 1) (ICC served July 8, 1993). In March 1993, SP had filed a petition to reopen the 1967 Order for the purposes of considering proposed revisions to Condition 16 (additions and betterments).

⁵ *See id.*

⁶ *See id.* at 4.

On June 29, 2022, UP served BNSF with notice that it was electing to terminate the Joint Stipulation and Agreement as of December 31, 2022. UP elected to terminate the Joint Stipulation and Agreement because the interest rental provision no longer provides fair compensation to UP for BNSF's use of the line. But terminating the Joint Stipulation and Agreement does not resolve the problem. UP was required to terminate the Joint Stipulation to seek reopening, and terminating the Joint Stipulation restored the 1967 Order's condition addressing interest rental, which remains "clearly inequitable."⁷

The 1967 Order establishes a process for addressing this issue. Condition 30 of the 1967 Order provides that either party may petition for revision of the conditions on each succeeding fifth anniversary of the effective date of the transaction.⁸ Condition 30 further provides the ICC will retain jurisdiction over the transaction for the purpose of revising the conditions upon the basis for a petition from a party.⁹ The most recent fifth year anniversary date was January 3, 2023.¹⁰ Accordingly, UP is asking the Board to commence a proceeding to revise the conditions prescribed in the 1967 Order, retroactively to January 3, 2023.¹¹

⁷ *Atchison, T. & S.F. Ry. Co.—Operating Agreement*, 8 I.C.C.2d at 303.

⁸ *Atchison, T. & S.F. Ry. Co.—Operating Agreement*, 331 I.C.C. at 404.

⁹ *Id.*

¹⁰ The ICC's 1967 Order was issued December 4, 1967, and became effective 30 days later. *Cf. Atchison, T. & S.F. Ry. Co.—Operating Agreement*, 8 I.C.C.2d at 298 ("The next 5-year anniversary occurs in January 1993.").

¹¹ If BNSF were to argue UP missed the precise anniversary date and the Board were to conclude the precise date is significant, it should nonetheless reopen this proceeding for good cause and because conditions have substantially changed since the ICC's imposed the terms of the trackage rights in its 1967 Order. That was the ICC's basis for granting SP's petition to reopen in 1992, rather than requiring it to wait for the next 5-year anniversary date in 1993. *See id.* at 303.

II. Procedural Proposal

UP expects this proceeding, like the one commenced 1992, to focus on the methodology to be used in setting the interest rental for the Tehachapis Line. UP therefore suggests the Board adopt a procedural schedule similar to the one the ICC adopted in the prior proceeding.

In the prior proceeding, the ICC agreed with SP that the interest rental provided in the 1967 Order was inequitable and should be recomputed to be consistent with the ICC's decisions in *St. Louis Southwest Ry. Co. Company—Trackage Rights*, 4 I.C.C.2d 668 (1987), 5 I.C.C.2d 525 (1989), and 8 I.C.C. 80 (1991) (“*SSW*”), and *Arkansas and Missouri R. Co. v. Missouri Pacific R. Co.*, 6 I.C.C.2d 619 (1990), *clarified*, 7 I.C.C.2d 164 (1990) (“*A&M*”).¹² The ICC observed that, in setting the rental component for the line, it had to determine (1) the appropriate valuation base of the line, (2) the interest rental rate to apply, and (3) the portion ATSF should pay.¹³ The ICC also recognized each topic was potentially subject to methodological disputes. Based on its experience in *SSW* and *A&M*, the ICC established a schedule under which it would resolve any methodological disputes before the parties submitted actual data to be evaluated.¹⁴

The Board still uses the same general approach to prescribing trackage rights described in *SSW* and *A&M*, and it still must address methodological disputes in applying that approach to the circumstances of individual cases.

¹² *Atchison, T. & S.F. Ry. Co.—Operating Agreement*, 8 I.C.C.2d at 303.

¹³ *Id.*

¹⁴ *Id.*

UP therefore suggests the Board adopt the same procedural approach here as in the prior proceeding—that is, establish a schedule that provides first for resolution of methodological disputes, then for submission of evidence implementing the selected methodologies. Such an approach would reduce the burdens on the parties associated with developing evidence to implement methodologies the Board ultimately rejects. It would reduce the burdens on the Board by eliminating any need to resolve discovery disputes over evidence that ultimately would be irrelevant. Finally, such an approach may facilitate settlement. In the prior proceeding, SP and ATSF entered into the Joint Stipulation and Agreement after the ICC issued its decision on methodology, but before the two railroads submitted their opening evidence. That is, once the parties knew what approach the ICC would apply, they were able to reach a voluntary agreement without further agency action.

Accordingly, UP proposes that, when the Board issues an order reopening this proceeding pursuant to Condition 30, it should provide both parties 45 days to file simultaneous opening statements on methodology, then 30 days to file their simultaneous replies.¹⁵

Once the Board issues its decision resolving any methodological disputes, it should provide the parties 45 days to conduct and complete discovery, then 45 days to file simultaneous opening statements, then 30 days to file simultaneous reply statements,

¹⁵ *See id.* at 306.

and then 30 days to file simultaneous briefs.¹⁶ The Board should also appoint an Administrative Law Judge to oversee discovery.¹⁷

III. Conclusion

For the foregoing reasons, the Board should grant UP's petition to reopen the 1967 Order and establish the procedural schedule set forth above.

Respectfully submitted,

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¹⁶ See *Atchison, Topeka & Santa Fe Ry.—Operating Agreement—Southern Pac. Transp. Co.*, FD 22218, slip op. at 11 (ICC served Mar. 26, 1993).

¹⁷ See *id.*

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2023, I caused a copy of the foregoing document to be served by Federal Express on:

Jill K. Mulligan
Chief Legal Officer
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131

/s/ Michael L. Rosenthal