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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.

BNSF'S REQUEST FOR MEDIATION AND
REPLY TO PETITION TO REOPEN

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Dated: January 26, 2023

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BNSF Railway Company (“BNSF”) hereby replies to the Petition to Reopen filed in this proceeding by Union Pacific Railroad Company (“UP”) on January 6, 2023.¹ As described further below, BNSF requests that the Board, pursuant to 49 C.F.R. Part 1109, commence Board-sponsored mediation in an effort to reach a private resolution of the issues raised by UP.

1. Background

BNSF acknowledges that, as of December 31, 2022, UP has terminated the 1993 Joint Stipulation and Agreement (“JSA”) that modified in certain respects the terms and conditions for BNSF’s use of UP’s Kern-Mojave Line (also referred to as the Tehachapis Line) set by the ICC in the 1967 Order. BNSF agrees with UP that the effect of such termination is to restore any terms and conditions of the ICC’s 1967 Order that were modified or superseded by, or were inconsistent with, the provisions of the 1993 JSA. BNSF further acknowledges that Condition 30 of the 1967 Order allows either BNSF or UP

¹ Unless otherwise defined in this reply, the acronyms and defined terms used in this filing are the same as those used in the UP Petition.

to petition the STB “for revision of such of the terms and conditions imposed on the transaction as may have become inequitable.”²

In its Petition to Reopen, UP has asked the Board to revise Condition 16 of the 1967 Order, which governs additions and betterments to the Line, and Condition 17, which governs the interest rental paid by BNSF to UP for use of the Line.³ UP suggests that the Board adopt a bifurcated procedural schedule “that provides first for resolution of methodological disputes [regarding interest rental calculation], then for submission of evidence implementing the selected methodologies.” (Petition 6.) UP claims that this bifurcated schedule “may facilitate settlement,” because the parties could negotiate after the first phase of the proceeding with the knowledge of the methodology that the Board would apply in setting an interest rental amount. (*Id.*)

2. Argument

A. The Board should order the parties to engage in Board-sponsored mediation.

BNSF believes that this matter could be resolved under the auspices of Board-sponsored mediation, given BNSF’s prior positive experiences with Board-sponsored mediation, particularly those facilitated by the Federal

² *Atchison, T. & S.F. Ry.—Operating Agreement—S. Pac. Co.*, 331 I.C.C. 367, 404 (1967). As UP notes, Section 30 of the 1967 Order allows for such petitions on each succeeding fifth anniversary of the effective date of the transaction. BNSF agrees with UP that the most recent fifth anniversary date was January 3, 2023. UP’s Petition to reopen was filed three days after that deadline. (*See* UP Petition 4 n.11.) However, BNSF does not ask the Board to reject the Petition to Reopen as untimely, given the inconsequential period of time that elapsed following the deadline.

³ While UP mentions at the beginning of its Petition to Reopen that UP will ask the Board to revise the Condition 16 additions and betterments terms, the Petition is otherwise entirely focused on the interest rental terms set forth in Condition 17. UP does not explain how UP would propose to modify the terms of Condition 16, and the procedural schedule proposed by UP appears to be focused entirely on the interest rental terms of Condition 17.

Mediation and Conciliation Service. Therefore, BNSF requests that the Board grant the UP Petition to Reopen, order the parties to conduct Board-sponsored mediation under 49 C.F.R. Part 1109 for an initial period of 30 days, and defer the setting of any procedural schedule until after the mediation has completed.

Consistent with the Board's rules, 49 C.F.R. § 1109.2, the Board has previously ordered mediation by its own order, or where one of the parties does not consent.⁴ The Board should do so here, even if UP does not consent. The Board has made it clear that it "favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible." 49 C.F.R. § 1109.1.⁵ As the Board knows well, trackage rights compensation proceedings can take years to complete, consuming enormous amounts of resources from both the agency and the litigants.⁶ BNSF hopes that the parties can avoid the costly and burdensome

⁴ See, e.g., *Lake Providence Port Comm'n—Feeder Line Appl.—Line of Delta S. R.R. Located in E. Carroll & Madison Pars., La.*, FD 36447, slip op. at 3 (STB served Oct. 21, 2021) (the Board directed the parties to participate in Board-sponsored mediation pursuant to § 1109.2(a)(2) where only one party was "amenable" to mediation and the Board believed that "mediation could be productive"); *R.J. Corman R.R. Prop., LLC—Aban. Exemption—in Scott, Campbell, & Anderson Cntys., Tenn.*, AB 1296X, slip op. at 4 (STB served Dec. 1, 2020) (the Board granted a joint request for Board-sponsored mediation from two of the three parties, with opposition from the third party, pursuant to § 1109.2(a)(1)); *BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry.*, FD 32760 (Sub-No. 46), slip op. at 2 (STB served July 3, 2019) (the Board granted a joint request for Board-sponsored mediation from two of the three parties, with opposition from the third party, pursuant to § 1109.2(a)(1)).

⁵ See also *BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry.*, FD 32760 (Sub-No. 46) (STB served April 14, 2014); *Nat'l R.R. Passenger Corp.—Investigation of Substandard Performance of the Capitol Ltd.*, NOR 42141 (STB served Apr. 7, 2015).

⁶ See, e.g., *New England Central R.R., Inc.—Trackage Rights Order—Pan Am Southern LLC (NECR/PAS)*, FD 35842 (nearly four years between initial filing and final Board decision on reconsideration); *BNSF Ry. Co.—Terminal Trackage Rights—Kansas City S. Ry. Co. & Union Pac. R.R. Co. (Lake Charles Compensation)*, FD 32760 (Sub-No. 46) (STB served Apr. 1, 2020) (nearly three years has elapsed since the Board adopted a procedural schedule to set compensation terms).

proceeding requested by UP by reaching a private agreement – much as their predecessors did in reaching the 1993 Joint Stipulation and Agreement.

Indeed, where trackage rights arrangements between BNSF and UP have been updated in recent years, the host has approached the tenant with a proposal, and the parties have successfully negotiated the terms. But here UP sought Board intervention without first approaching BNSF with a proposal, or even notifying BNSF that it was planning to file the Petition to Reopen. Board-sponsored mediation would provide the parties with an opportunity to reach agreement on the issues raised by UP without requiring a regulatory remedy.

B. Any procedural schedule should allow for discovery prior to any decision regarding the appropriate methodology.

As noted above, BNSF requests that the Board wait to set a procedural schedule until after mediation has completed.⁷ If the Board decides to set a procedural schedule now, BNSF requests that the Board allow for discovery prior to any Board determination regarding the appropriate methodology – whether that determination comes in an interlocutory decision as requested by UP or in a single decision at the end of the proceeding.

BNSF is concerned that the bifurcated schedule proposed by UP would not allow for discovery until **after** the first phase of the proceeding, where the Board resolves any methodological disputes. Information developed through

⁷ The Board's rules allow BNSF to request that this proceeding "be held in abeyance while mediation procedures are pursued." *See* 49 C.F.R. § 1109.3(e). BNSF does not believe that the Board must formally hold this proceeding in abeyance in order to defer the setting of any procedural schedule until after mediation has completed. But if the Board disagrees, BNSF hereby makes that abeyance request along with its mediation request. Furthermore, the Board's rules state that "[w]here one or both parties to mediation do not voluntarily consent to mediation, the Board will not hold the underlying proceeding in abeyance" *Id.* Given the early stage of this proceeding, UP would not be prejudiced if the Board ordered the parties to mediate the dispute before setting deadlines for discovery and briefing.

discovery will be very relevant to the methodology issue, and the parties would benefit from access to that information in forming their arguments regarding the proper methodology here.

In a recent trackage rights compensation case, the Board rejected a similar request for bifurcation where the parties would not be able to conduct discovery until after the Board had ruled on the appropriate methodology. *See NECR/PAS*, FD 35842, slip op. at 4 (STB served Feb. 12, 2016) (citing *Toledo, Peoria & W. Ry.—Trackage Rights Compensation—Peoria & Pekin Union Ry.*, FD 26476 (Sub-No. 1), slip op. at 4 n.9 (ICC served Sept. 20, 1994)). As the tenant railroad here without access to important information regarding the line owned by UP, BNSF “should have an opportunity to build a record through discovery and obtain the data it needs to make its case on the appropriate valuation method for the Board to use in determining trackage rights compensation.” *Id.*

In a pending trackage rights compensation case involving BNSF and UP, the parties jointly proposed a procedural schedule that allowed for discovery prior to a single round of briefing on preferred methodology and application of that methodology. *See Lake Charles Compensation*, slip op. at 2. That procedural schedule called for five months of written discovery, and BNSF believes that a similar amount of time would be appropriate for this case. *Id.* The other time periods proposed by UP in its Petition for briefing seem reasonable to BNSF.

3. Conclusion

For the reasons set forth above, BNSF asks that the Board grant the UP Petition to Reopen, grant BNSF's request for mediation, and defer the setting of any procedural schedule until after the mediation has completed.

Respectfully submitted,

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Dated: January 26, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *BNSF's Request for Mediation and Reply to Petition to Reopen* be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams

Attorney for BNSF Railway Company

January 26, 2023