

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 22218

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

**REPLY TO BNSF'S REQUESTS
REGARDING MEDIATION AND DISCOVERY**

CRAIG V. RICHARDSON
JAMES B. BOLES
TONYA W. CONLEY
TANYA SPRATT
WHITNEY C. LARKIN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179

MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

February 2, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 22218

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

**REPLY TO BNSF’S REQUESTS
REGARDING MEDIATION AND DISCOVERY**

UP agrees with BNSF’s suggestion that the parties should be allowed to conduct discovery prior to any decision regarding the appropriate methodology for establishing trackage rights fees in this case. However, UP disagrees that Board-sponsored mediation would be productive at this time.¹

BNSF is correct in recognizing that “[i]nformation developed through 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.” BNSF Reply at 4–5. Before UP filed its Petition, it tried to obtain such information from BNSF. UP’s informal efforts were not successful, which is why UP filed its Petition, and why mediation would not be productive now.² However, BNSF’s proposed five-month discovery period would be unnecessarily long, given the narrow focus of this case. UP proposes adding to the schedule a 45-day discovery period before the parties would submit their opening statements on methodology.

¹ Mindful of the Board’s rule prohibiting replies to replies, UP is responding only to the new procedural suggestions BNSF presented in its Reply. That UP is not addressing all BNSF’s factual and legal assertions does not reflect its agreement with any of them.

² As UP’s Petition describes, UP formally notified BNSF that it would terminate the parties’ then-existing agreement in June 2022.

In addition, UP proposed a bifurcated schedule because it believes the parties may be able to resolve this matter without additional litigation once they both obtain the information needed to better assess potential outcomes. At that point, Board-sponsored mediation might prove helpful. However, at this point, the potential outcomes are too uncertain for the parties to find common ground—as BNSF’s own argument for early discovery seem to confirm. Thus, the Board should not order mediation at this time.

Respectfully submitted,

CRAIG V. RICHARDSON
JAMES B. BOLES
TONYA W. CONLEY
TANYA SPRATT
WHITNEY C. LARKIN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179

/s/ Michael L. Rosenthal
MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

February 2, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2023, I caused a copy of the foregoing document to be served by email on counsel of record for BNSF Railway Company.

/s/ Michael L. Rosenthal