

SERVICE DATE – MAY 15, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 22218

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

Digest:¹ This decision grants Union Pacific Railroad Company’s unopposed petition to reopen this proceeding, provides a period for discovery, assigns and authorizes an administrative law judge to address any discovery disputes, directs the parties to participate in Board-sponsored mediation, and directs the parties to propose a procedural schedule if mediation is unsuccessful.

Decided: May 15, 2023

Union Pacific Railroad Company (UP), as successor to Southern Pacific Transportation Company (SP), has filed a petition to reopen this proceeding to revise conditions governing trackage rights of BNSF Railway Company (BNSF), as successor to the Atchison, Topeka & Santa Fe Railway Company (ATSF), over a 67.8-mile UP-owned rail line between Kern Junction and Mojave, Cal., known as the Tehachapis Line (the Line). (Pet. 2.) The conditions at issue govern the additions and betterments to the Line and the interest rental paid by BNSF to UP for use of the Line. (*Id.* at 2; BNSF Reply 2.) BNSF does not oppose the petition to reopen, (BNSF Reply 6), but the parties disagree on how to move forward procedurally.

The Board will grant the unopposed petition to reopen, and, as discussed in more detail below, set a period for discovery and assign an administrative law judge to address any discovery disputes. Thereafter, the parties will be ordered to participate in Board-sponsored mediation, and, if mediation does not resolve the matter in its entirety, to meet and confer and propose a procedural schedule at the end of the mediation period.

BACKGROUND

In 1967, the Board’s predecessor, the Interstate Commerce Commission (ICC), established terms and conditions for ATSF’s use of trackage rights over the Line. Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Co., 331 I.C.C. 367 (1967), modified, 333 I.C.C. 342 (1968) (jointly referred to as the 1967 Order). In 1991, SP petitioned to reopen

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).

this proceeding to modify various provisions of the 1967 Order. In 1992, the ICC granted SP's petition to the extent it sought reconsideration of the condition setting the interest rental paid to SP for ATSF's use of the Line (Condition 17), and the process for reconsidering that condition was initiated. Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Transp. Co. (1992 Decision), 8 I.C.C. 2d 297, 303 (1992). The parties ultimately negotiated a settlement that included changes to Condition 17 and the condition addressing additions and betterments to the Line (Condition 16). (UP Pet. 3 & n.4.) The provisions of the settlement (the Joint Stipulation and Agreement) were formally incorporated as a modification to the 1967 Order. (UP Pet. 3 (citing Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Transp. Co. (1993 Order), FD 22218 et al., slip op. at 1 (ICC served July 8, 1993).) The Joint Stipulation and Agreement included an initial term of 17 years and provided that it would continue in effect until terminated by either party, with at least six months' prior written notice to the other party. (UP Pet. 3 (citing 1993 Order, FD 22218 et al., slip op. 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, thus, UP asserts, restoring Condition 17 of the 1967 Order. (Pet. 4.) UP states that it elected to terminate the Joint Stipulation and Agreement because Condition 17 no longer provides fair compensation to UP for BNSF's use of the Line, and argues that Condition 17 remains "clearly inequitable," as the ICC determined in the 1992 Decision. (Pet. 4. (quoting 1992 Decision, 8 I.C.C.2d at 303).)

On January 6, 2023, UP filed the current petition to reopen pursuant to Condition 30 of the 1967 Order, for the purpose of revising Conditions 16 and 17. UP states that, under Condition 30, either party may petition for revision of the conditions on each succeeding fifth anniversary of the effective date of the transaction and that the agency will retain jurisdiction over the transaction for the purpose of revising the conditions. (Pet. 4 (citing 1967 Order, 331 I.C.C. at 404).)² UP asks the Board to commence a proceeding to revise the conditions prescribed in the 1967 Order, retroactively to January 3, 2023. BNSF acknowledges that the Joint Stipulation and Agreement was terminated by UP as of December 31, 2022, and agrees that the effect of that termination is to restore any terms and conditions of the 1967 Order that were modified or superseded by, or were inconsistent with, the provisions of the Joint Stipulation and Agreement. (BNSF Reply 1.) BNSF also agrees that Condition 30 of the 1967 Order allows either BNSF or UP to petition the Board "for revision of such of the terms and conditions imposed on the transaction as may have become inequitable." (BNSF Reply 1-2 (quoting 1967 Order, 331 I.C.C. at 404).) As such, BNSF asks the Board to grant UP's petition to reopen. (BNSF Reply 6.)

UP asks the Board to adopt a bifurcated procedural schedule that would provide for the resolution of any disputes regarding methodologies for establishing trackage rights fees in this case before the submission of evidence based on the selected methodologies. (Pet. 6.) UP also asks the Board to appoint an administrative law judge to oversee discovery. (Id. at 7.) In its

² Both parties acknowledge that the most recent fifth-year anniversary date was January 3, 2023. (See Pet. 4; BNSF Reply 2 n.2.) Although UP filed its petition on January 6, 2023, three days after the deadline, BNSF states that it is not asking the Board to reject the petition as untimely. (BNSF Reply 2 n.2.)

reply, filed January 26, 2023, BNSF asks the Board to grant the petition to reopen, order the parties to engage in Board-sponsored mediation under 49 C.F.R. part 1109, and defer setting a procedural schedule until after mediation is complete. (BNSF Reply 3.) BNSF asks that, if the Board decides to set a procedural schedule before mediation, the Board allow for discovery prior to any Board determination regarding the appropriate methodology. (*Id.* at 4.) BNSF argues that a period for discovery similar to the five months provided in BNSF Railway—Terminal Trackage Rights—Kansas City Southern Railway, FD 32760 (Sub-No. 46), slip op. at 2 (STB served Apr. 1, 2020), would be appropriate here. (BNSF Reply 5.)

On February 2, 2023, UP filed a reply to BNSF's requests regarding mediation and discovery, stating that it agrees the parties should be allowed to conduct discovery prior to any decision about methodologies but that 45 days would be more appropriate than the five months requested by BNSF. (UP Reply 2.) UP also states that it is not in favor of mediation now, but it believes the parties may be able to resolve the matter once the parties have the information needed to better assess potential outcomes. (*Id.* at 3.)

DISCUSSION AND CONCLUSIONS

UP's unopposed petition to reopen will be granted. The parties agree they should be permitted to conduct discovery prior to any decision regarding the appropriate methodology for establishing trackage rights fees. UP has stated that it believes the parties may be able to resolve this matter without additional litigation once they obtain the information needed to better assess potential outcomes. The Board finds that allowing discovery prior to determining the appropriate methodology could help resolve the issues in this case. However, the Board finds that the five-month discovery period proposed by BNSF would be unnecessarily long given the narrow scope of the issues, while UP's proposed schedule may be too short. The period for discovery will be set at 60 days, followed by a 30-day period for mediation beginning on the date of the first mediation session.

Administrative Law Judge. The Board has signed a Memorandum of Understanding with the Federal Mine Safety and Health Review Commission to employ the services of administrative law judges on a case-by-case basis to perform discrete, Board-assigned functions such as adjudicating discovery disputes in cases pending before the Board. The Board hereby assigns and authorizes Administrative Law Judge Thomas McCarthy to entertain and rule upon discovery matters and to resolve initially any disputes concerning discovery in this proceeding that are filed after the service date of this decision. The parties are directed to send copies of all their filings and documents in this proceeding, including submissions already filed with the Board, to Judge McCarthy at 1331 Pennsylvania Avenue, N.W., Suite 520N, Federal Mine Safety and Health Review Commission, Washington, DC 20004-1710, and at ctolbert@fmshrc.gov and cbrightwell@fmshrc.gov.

Mediation. The Board favors the resolution of disputes through mediation in lieu of formal Board proceedings whenever possible. 49 C.F.R. § 1109.1. While UP states that it does not believe mediation would be helpful at this time, both parties acknowledge that, after obtaining more information, the parties could resolve this matter without additional litigation. This proceeding raises important and complex issues, and the parties, rather than the Board, are

better suited to resolve the commercial issues underlying this case. As such, the Board will hereby order UP and BNSF to engage in Board-sponsored mediation pursuant to 49 C.F.R. § 1109.2(a)(1) following the discovery period. While the parties are encouraged to work out as many issues as possible, the scope of the mediation will not encompass any grant, denial, stay, or revocation of regulatory authority. See 49 C.F.R. § 1109.1.

The Chairman will appoint one or more mediators pursuant to 49 C.F.R. § 1109.3(a). Once appointed, the mediator or mediators will contact the parties to discuss the timing and logistics for conducting the mediation, and other matters. At least one principal of each party, who has authority to commit that party, shall participate in the mediation and be present at any session at which the mediator or mediators request(s) that the principal be present.

The mediation period shall be 30 days, beginning on the date of the first mediation session, id. § 1109.3(b), which shall not take place until discovery is concluded. The Board may extend mediation pursuant to mutual written requests of all parties to the mediation proceeding. Id. The mediator or mediators are instructed to inform the Board when mediation has ended, with or without a resolution.

If mediation does not resolve the matter in its entirety, the parties shall meet and confer, and jointly submit to the Board a proposed procedural schedule for the resolution of any remaining issues. The proposed procedural schedule will be due seven days following the last day of the mediation period. Should the parties be unable to reach agreement on a proposed procedural schedule, each party may submit its own proposed schedule.

It is ordered:

1. UP's petition to reopen is granted.
2. UP's request for a procedural schedule is granted in part. A period for discovery will begin on the service date of this decision and end on July 14, 2023.
3. Following the period for discovery, the parties are ordered to engage in Board-sponsored mediation as described above.
4. If mediation does not resolve the matter in its entirety, no later than seven days after the last day of the mediation period, the parties shall meet and confer and submit to the Board (jointly, if possible) a proposed procedural schedule for adjudication of any outstanding issues.
5. The Board hereby ratifies the loan of Administrative Law Judge Thomas McCarthy to the office of administrative law judge in the Surface Transportation Board, under terms and conditions prescribed in 5 U.S.C. § 3344 and 5 C.F.R. § 930.208, and the Board today approves his appointment as the Board's own action under the Constitution.
6. This proceeding is assigned to Judge McCarthy for the handling of all discovery matters and initial resolution of all discovery disputes.

7. In addition to filing pleadings with the Board and serving copies on parties of record, parties must send a copy of all filings and documents, including submissions already filed with the Board, to Judge McCarthy at 1331 Pennsylvania Avenue, N.W., Suite 520N, Federal Mine Safety and Health Review Commission, Washington, DC 20004-1710, and at ctolbert@fmshrc.gov and cbrightwell@fmshrc.gov.

8. Judge McCarthy will be added to the service list in this proceeding and a copy of this decision will be served upon him.

9. A copy of this decision will be served on the U.S. Office of Personnel Management (OPM), at Human Resource Solutions, ALJ Program Office, 1900 E Street N.W., Suite 2469, Washington, DC 20415-9400 and electronically at karyn.lusby@opm.gov. Judge McCarthy shall send a copy of the notice or order that constitutes the final disposition of his assignment of this case to OPM at the above address.

10. This decision is effective on its service date.

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