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April 2, 2024

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
April 2, 2024
Part of
Public Record

Re: STB Docket No. FD 32760 (Sub-No. 48), *BNSF Railway Co.—Petition for Enforcement—Service to Granite Mountain Quarries*

Dear Ms. Brown:

I write to provide a limited response to a new issue raised by UP¹ in its Reply to BNSF's Petition for Clarification, filed in the above-referenced proceeding on March 13, 2024, to ensure that the Board has a full and complete record.²

After almost a year of taking a different position in private correspondence with BNSF, UP now explains to the Board that UP has stumbled at the last minute upon a new reason to allow UP to continue to bar Granite Mountain Quarries ("GMQ") and its customers from receiving competitive BNSF access. UP claims that a newly-discovered Supplement 149 to Tariff MP 8170-C shows that the GMQ facility at Little Rock, AR was actually **not** open to reciprocal switching before the UP/SP merger. Therefore, UP concludes, GMQ does not qualify as a "2-to-1" Shipper Facility under the RASA.³

¹ The acronyms and defined terms used herein are the same as those used in the BNSF Petition for Enforcement filed in this proceeding on February 8, 2024.

² While the Board's rules, 49 C.F.R. § 1104.13(c), do not permit a reply to a reply, the Board often accepts such replies in the interest of compiling a more complete record. To the extent that the Board deems it necessary, BNSF hereby seeks leave to provide this limited response to the UP reply.

³ UP previously argued in correspondence with BNSF that GMQ was not a "2-to-1" Shipper Facility under the RASA because GMQ was open to both SP and LRWN, a shortline railroad. As noted in BNSF's Petition at pages 7-8, LRWN's access to GMQ imposed no real competitive discipline on UP or SP given LRWN's limited route structure and the fact that it could interchange with only UP and SP.

To be clear, UP acknowledged in its earlier correspondence with BNSF that the GMQ facility **was open** to reciprocal switching before the UP/SP merger. UP stated without qualification: “In fact, prior to the UP-SP merger **reciprocal** switching for Granite Mountain Quarries at Drury Spur was limited, applying ‘only to or from stations on the LRWN and SSW not served by the MP.’” BNSF Pet., Ex. D, Letter from Sanford (UP) to Martucci (BNSF) (July 21, 2023) (emphasis added). Rather than a “mistake,” as UP now claims, this statement reflected UP’s understanding of its own tariff and expressly confirmed the parties’ joint understanding as to how the tariff should be interpreted.

But even if UP is now correct and GMQ’s omission from Supplement 149 indicates GMQ was not open to reciprocal switching, UP overstates the importance of its newly-found evidence. GMQ could qualify as a “2-to-1” Shipper Facility under the RASA if it was “open to both UP and SP, whether via direct service or via reciprocal switching, joint facility or **other arrangements**, and no other railroad when the 1995 Agreement was executed.” BNSF Pet., Ex. B, RASA at 3 (emphasis added).

If GMQ was not open to SP/SSW via reciprocal switch, then Item 2525 of Tariff MP 8170-C indicates that GMQ was open to SP/SSW via “other arrangements.”⁴ BNSF submitted the full tariff page containing Item 2525 as

The Board confirmed this reading in a decision issued in a separate proceeding yesterday, stating that the Board in the *UP/SP Merger* proceeding “focused on competition between the Class I railroads providing line-haul service.” *TGS Cedar Port R.R.—Operation Exemption—in Chambers Cnty., Tex.*, FD 36627, slip op. at 7, n.12 (STB served Apr. 1, 2024). In fact, the Board noted that UP and SP had themselves “identified 2-to-1 points as those that can be served directly, or through reciprocal switching, by UP and SP but no other Class I railroad.” *Id.* Regardless, UP has apparently dropped this argument, as UP only provided a conclusory response in its Reply to BNSF’s assertion. *See* UP Reply at 3-4, n.3.

⁴ Supplement 149 did not affect the validity of Item 2525. As UP explained in footnote 2 of its Reply, if a matter was addressed by Supplement 149, the Supplement language controlled over Tariff 8170-C. But if a matter was not addressed by Supplement 149, Tariff 8170-C controlled. And, collectively, Supplement 149 and Tariff 8170-C constituted “the tariff” applicable at the time of the UP/SP merger. Item 2525 was not cancelled by Supplement 149 nor, to BNSF’s knowledge, any other supplement to Tariff 8170-C prior to the UP/SP merger. The attached chart excerpted from Supplement 149 comprehensively lists the Items in Tariff 8170-C that were changed or added by the Supplement. Item 2525 is not among the Items identified. Thus, the language of Item 2525 remained in effect through the time of the merger (and thereafter), and UP’s new-found arguments based on its self-serving reading of Supplement 149 are irrelevant here.

Exhibit C to its Petition, and I excerpt the relevant language here for ease of reference:

ITEM	STATION	BETWEEN MILE POST (Except as noted)	AND MILE POST (Except as noted)
2520	Little Rock AR North Little Rock AR	342.2 on north 349.21 on east	352.14 on south 345.1 on west
2525		Granite Mountain Quarries, Drury Spur, AR, will be considered in the switching limits of Little Rock--North Little Rock, AR, on CL shipments of Sand, Gravel, Stone, including Rip Rap, and articles taking same rates or related thereto. Applicable only to or from stations on the LRWN and SSW not served by the MP and only on cars switched to or from connection of the MP by Granite Mountain Quarries.	

UP claims that this Item 2525 language “allowed GMQ to take advantage of Union Pacific’s tariff rate for **inter-terminal switching**,” not reciprocal switching. UP Reply at 4 (emphasis added). According to UP, this meant that GMQ was open to switching from MP to SP/SSW for movements between points **within** the switching limits of Little Rock or North Little Rock, and that any such inter-terminal switch from MP to SP/SSW could not be performed in connection with further line-haul service by SP/SSW. *Id.* at 3. In UP’s reading, this meant that GMQ was not “open” to SP/SSW for the purposes of the RASA definition of a “2-to-1” Shipper Facility. *Id.* at 5.

The purported distinction UP makes between inter-terminal switching and other types of customer access is contrary to any reasonable interpretation of Item 2525. The second sentence of Item 2525 meant that MP would provide a switch from GMQ to SP/SSW or LRWN so that those railroads could access stations on their respective railroads “not served by MP.” UP’s reading of Item 2525 would render this sentence and the reference to “stations . . . not served by MP” meaningless, as MP, of course, did serve the Little Rock/North Little Rock stations.

Instead, a logical interpretation of this sentence – which UP itself put forth in its previous correspondence to BNSF on this matter – is that Item 2525 applied to stations (in other words, origins and destinations) outside of the Little Rock/North Little Rock stations. This interpretation makes practical sense, as MP likely did not want GMQ to utilize SP/SSW for long-haul moves to stations that MP could serve itself. But MP would not have had a similar incentive to prevent GMQ from accessing SP/SSW stations where MP could not provide a competitive move. Accordingly, and consistent with UP’s previous correspondence on this matter, Item 2525 must have meant something more than simply opening GMQ to inter-terminal switching. It therefore follows that GMQ was open via a reciprocal switch or some “other arrangement” to both UP/MP and SP/SSW, thus falling within the “2-to-1” Shipper Facility definition under the RASA.

In short, nothing UP has introduced in its Reply changes the fact that GMQ qualifies as a “2-to-1” Shipper Facility under the RASA, open to BNSF access. The Board should not allow UP to bar GMQ and its customers from receiving the

competitive BNSF service that they are entitled to under the UP/SP merger conditions.

Please contact me with any questions.

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton
Attorney for BNSF Railway Company

IL CC A-503

**SUPPLEMENT
TO**

ICC MP 8170-C



MISSOURI PACIFIC RAILROAD COMPANY

SUPPLEMENT 149

TO

TARIFF MP 8170-C

(Cancels Supplements 78, 89, 127, 134, 135, 136, 137, 138, 146 and 148)

Supplement 149 and Special Supplements shown on page 2 herein contain all changes.

LOCATION OF NEW OR CHANGED ITEMS

The latest complete list of all new or changed items in effective Supplements is published in this Supplement.

ABSORPTIONS OF SWITCHING AND OTHER TERMINAL CHARGES

AND

ALLOWANCES

AT STATIONS

ON

**MISSOURI PACIFIC RAILROAD
DONIPHAN, KENSETT & SEARCY RAILWAY**

(Except as Noted in Item 325)

THIS TARIFF APPLIES ON INTRASTATE TRAFFIC IN THE STATES OF ARKANSAS, COLORADO, ILLINOIS, KANSAS, LOUISIANA, MISSOURI, NEBRASKA, OKLAHOMA, TENNESSEE (MEMPHIS) AND TEXAS.

SWITCHING TARIFF

ISSUED OCTOBER 17, 1994

EFFECTIVE DECEMBER 2, 1994

K. H. SCHROEDER
Manager-Pricing Services
Omaha, Nebraska

Issued by
G. OSLER
Publishing Officer
1416 Dodge St.
Omaha, Nebraska 68179

(D.W.C.)

137 SPECIAL SUPPLEMENTS

Supplement 23 - Adoption Notice.

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123 POSTPONEMENT NOTICE

The effective date of Supplement 131 to Tariff ICC MP 8170-C is hereby postponed from February 4, 1994 to February 25, 1994.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2024, I have caused the foregoing letter to 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