

SERVICE DATE – FEBRUARY 7, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 22218

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

Digest:¹ The Board denies, in part, and grants, in part, BNSF Railway Company's motion to compel the production of additional discovery responses by Union Pacific Railroad Company. This decision also directs the parties to meet and confer on a proposed revised procedural schedule for the remainder of this proceeding.

Decided: February 6, 2025

On May 15, 2023, the Board granted a petition by Union Pacific Railroad Company (UP), as successor to Southern Pacific Transportation Company, 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, over a 67.8-mile UP-owned rail line between Kern Junction and Mojave, Cal., known as the Tehachapis Line (the Line). See Atchison, Topeka & Santa Fe Ry.—Operating Rts.—S. Pac. Transp. Co. (May 2023 Decision), FD 22218, slip op. at 4 (STB served May 15, 2023).

On June 26, 2024, BNSF filed a motion to compel UP to produce documents in response to certain BNSF discovery requests. (BNSF Mot. to Compel 1.) As discussed below, the Board will deny in part and grant in part BNSF's motion to compel. UP and BNSF will also be directed to meet and confer on a proposed revised procedural schedule.

BACKGROUND

In the May 2023 Decision, the Board provided a 60-day period for discovery, assigned and authorized an administrative law judge to address any discovery disputes, directed the parties to participate in Board-sponsored mediation, and directed the parties to propose a procedural schedule if mediation was unsuccessful. See May 2023 Decision, FD 22218, slip op. at 3-4.

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).

Following the discovery period and unsuccessful mediation,² the Board adopted a procedural schedule proposed by UP and BNSF. Atchison, Topeka & Santa Fe Ry.—Operating Rts.—S. Pac. Transp. Co. (December 2023 Decision), FD 22218 (STB served Dec. 5, 2023). Under that procedural schedule, the parties were permitted to file opening statements and evidence (including expert reports) by May 3, 2024, reply statements and evidence by July 17, 2024, and final briefs by August 16, 2024. The procedural schedule also permitted the parties to seek written discovery on opening statements and evidence, and take depositions of experts, between the filing of opening statements and replies (“post-opening discovery”).

In accordance with that schedule, the parties filed their opening statements and evidence on May 3, 2024. On June 26, 2024, as part of the post-opening discovery period, BNSF filed a motion to compel UP to produce documents and requested expedited relief. (BNSF Mot. to Compel 1, 11.)³ In its motion to compel, BNSF asserts that UP has objected to BNSF’s discovery requests seeking (1) UP’s trackage rights agreements currently in effect with other Class I railroads and their corresponding rates, (2) UP’s traffic forecast data for the Line for the period from 2013 to 2018, and (3) UP’s appraisals or valuations of intangible assets since 2019. (BNSF Mot. to Compel 1; Ex. B, C.)

On July 5, 2024, BNSF filed a motion to modify the procedural schedule, seeking a 30-day extension of the remaining filing deadlines in this proceeding. (BNSF Mot. to Modify Procedural Schedule 2.) On July 9, 2024, UP replied in support of that motion. (UP Reply to Mot. to Modify Procedural Schedule 2.) The Board held the proceeding in abeyance pending further Board order to allow the Board to rule on BNSF’s motion to compel.⁴ See Atchison, Topeka & Santa Fe Ry.—Operating Rts.—S. Pac. Transp. Co., FD 22218 (STB served July 12, 2024).

On July 16, 2024, UP filed a reply to BNSF’s motion to compel. UP objects to BNSF’s discovery requests on a number of grounds. (UP Reply to Mot. to Compel 3-6.)

DISCUSSION AND CONCLUSIONS

Motion to Compel

Parties are generally entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). Further, information is relevant when it “might be able to affect the outcome of a proceeding.” Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in

² See Board Letter, Dec. 19, 2023.

³ BNSF also requested that UP be required to respond in five days to the motion and that the Board require UP to produce responsive documents no later than July 9, 2024. (BNSF Mot. to Compel 11.)

⁴ The Board also stated it would address the procedural schedule once it ruled on BNSF’s motion to compel and therefore denied BNSF’s motion to modify the procedural schedule as moot.

Aroostook Cnty., Me., AB 124 (Sub-No. 2) et al., slip op at 2 (STB served Nov. 14, 2003). Further, it “is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(2). Under 49 C.F.R. § 1114.21(c), however, discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought. See also FMC Wyo. Corp. v. Union Pac. R.R., NOR 42022, slip op. at 5 (Feb. 4, 1998) (finding that, when the production of certain evidence is burdensome on its face, a substantial showing of relevance and need is necessary to outweigh the burden of producing evidence).

As an initial matter, BNSF and UP dispute whether post-opening discovery was limited only to seeking information relevant to the opening statements. (BNSF Mot. to Compel 5 (“Contrary to UP’s position, the Procedural Schedule does not require that a party’s opening statement and evidence ‘address’ a topic in order for discovery on the topic to be appropriate.”); UP Reply to Mot. to Compel 3 (“BNSF’s requests for additional trackage rights agreements plainly go beyond the limited scope of discovery permitted by the procedural schedule[] [because] BNSF is not seeking discovery on Union Pacific’s opening statement and evidence.”).) The Board adopted a procedural schedule jointly proposed by UP and BNSF that allows for a new discovery period following the submission of opening statements and specifically provides for “written discovery *on opening statements and evidence.*” December 2023 Decision, FD 22218, slip op. at 2 (emphasis added). This language, as well as the fact that this new discovery period is to take place *after* the filing of opening statements, indicates an intent by the parties to limit the second discovery period to the gathering of evidence related to opening statements. BNSF’s arguments to the contrary do not find support in the jointly proposed procedural schedule.

In light of that determination, the Board addresses BNSF’s motion to compel as follows.

A. Trackage rights agreements currently in effect with other Class I railroads and their corresponding rates

BNSF seeks from UP the production of UP’s trackage rights agreements with other Class I railroads that are currently in effect and the corresponding compensation rates under those agreements. (BNSF Mot. to Compel 4.) BNSF argues that UP’s opening statement and evidence puts at issue whether the compensation provided to UP for BNSF’s access to the Line is fair and equitable, and that the rates that UP has agreed to under other trackage rights agreements with other Class I railroads are probative of the reasonableness of a rate for the Line. (Id. at 6.) BNSF further argues that the details of other trackage rights agreements are necessary to analyze whether the statement made by UP’s expert witness, Dr. Mathur—that the Capitalized Earnings (CE) method results in interest rental payments that are reasonable relative to BNSF’s traffic traversing the Line—is correct. (Id.) BNSF notes that UP has already produced trackage rights agreements that it has entered into since 2018 in response to a prior discovery request, confirming the discoverability of trackage rights agreements in terms of relevance and burden. (Id.) On reply, UP contends BNSF’s request is improper because it seeks evidence that goes beyond UP’s opening statement and evidence. (UP Reply to Mot. to Compel 3.) UP further argues that BNSF urged the Board to apply the CE method in its opening statement and,

therefore, BNSF has already taken a favorable position on Dr. Mathur's statement regarding reasonableness of the use of the CE method.⁵ (Id. at 4.)

BNSF's argument here—that the rates UP receives under trackage rights agreements with other carriers bear on the reasonableness of the rate BNSF pays for access to the Line—goes to the main issue in this proceeding: i.e., what the “new interest rental rate” should be for BNSF's use of the Line. (BNSF Mot. to Compel 4.) By BNSF's own admission, it already “explored that issue [of market rates] through its initial discovery requests in 2023[,]” and UP has already produced trackage rights agreements that it has entered into since 2018. (BNSF Mot. to Compel 5-6.) Although BNSF claims that the additional trackage rights agreements are now needed because rates have “taken on increased importance,” (id. at 5), rates were already a central issue in the case. BNSF does not explain what specifically in UP's opening evidence now makes the additional agreements relevant or more significant to the rate determination here. BNSF also argues that the trackage rights agreements are needed to specifically refute an assertion by Dr. Mathur on opening, but the statement that BNSF references is simply a general statement that CE is the most reasonable method to determine the interest rental component for the Line—an assertion with which BNSF agrees. (BNSF Opening 13.) In short, BNSF has failed to demonstrate how discovery of these additional agreements is related to UP's opening statement. Accordingly, this portion of BNSF's motion to compel will be denied.

B. Traffic forecast data for the Line for the period from 2013 to 2018

BNSF also seeks UP's traffic forecast data for the period between 2013 to 2018 for the Line. (BNSF Mot. to Compel 8.) BNSF asserts that, by noting the growth in UP and BNSF's system-wide profits between 2013 and 2022, UP's expert “expressly put UP's system-wide growth for the period starting in 2013 at issue.” (Id. (citing UP Opening, Ex. B., V.S. Mathur 58).) BNSF further argues that it is entitled to test the appropriateness of Dr. Mathur's decision to use a system-wide multiplier. (Id. at 9 (citing UP Opening, Ex. B., V.S. Mathur 59 (explaining that a multiplier is used to convert current earnings on the Line into a valuation)).) BNSF states that it needs UP's traffic forecasts for the Line to consider whether those forecasts are consistent with the earnings growth assumptions in Dr. Mathur's multiplier. (Id.) BNSF rejects an assertion by UP that this request would impose an undue burden, noting that UP previously produced recent forecast data for 2019 to 2026 in a timely manner. (Id.) UP objects to the production of additional forecast data on the grounds that BNSF does not explain why it needs old traffic forecasts to reply to a statement about actual growth or test market expectations for future growth. (UP Reply to Mot. to Compel 5.) UP also contends that it did not refer to or rely on UP's traffic forecasts in its opening evidence and that Dr. Mathur's testimony does not make any assumptions based on UP's traffic forecasts. (Id. at 4-5.)

⁵ UP also argues that it would be improper for BNSF to submit, on reply, a new analysis that relies on any new information it would receive in discovery because UP would have no opportunity to submit a rebuttal analysis under the procedural schedule. (UP Reply to Mot. to Compel 4.) Because the Board denies this aspect of BNSF's motion to compel on other grounds, it is unnecessary for the Board to address UP's argument.

BNSF has not demonstrated how these traffic forecasts are responsive to information presented in UP's opening statement and evidence. To be sure, Dr. Mathur cited growth in BNSF's and UP's system-wide profits for the period from 2013 to 2022 in support of her argument that it would not be reasonable to assume that current earnings on the Line would remain constant and, therefore, that an earnings multiplier should be applied to value the Line, rather than a multiplier based on the inverse cost of capital. (See UP Opening, Ex. B, V.S. Mathur 58-60.) But in making that observation, Dr. Mathur relied on UP's *actual* profitability figures for that period, not forecasts. (See *id.* at 59-60 n.153 (explaining that profit growth was measured by comparing UP's 2013 10-K statement against its 2022 10-K statement).) Moreover, in calculating the multiplier to apply to the Line's earnings for 2021 and 2022, Dr. Mathur divided UP's enterprise value for those years by its system-wide earnings. (*Id.* at 60-61.) BNSF does not explain how traffic forecasts from 2013 to 2018 are relevant, given Dr. Mathur's reference to actual profit growth from that time period and her methodology for calculating the multiplier. To the extent that BNSF seeks to challenge whether the "market's expectations for future growth" (i.e., what Dr. Mathur contends is reflected in the system-wide multiplier) are consistent with UP's traffic forecasts for the Line, UP already produced traffic growth projections from 2019 to 2026 in response to requests made by BNSF during the initial, broader discovery period. BNSF has not explained how older traffic forecasts would help it assess the propriety of valuing the Line based on recent market expectations. Accordingly, this portion of BNSF's motion to compel will also be denied.

C. UP's appraisals or valuations of intangible assets since 2019

BNSF's final discovery request seeks all documents and communications related to any appraisals or valuations of intangible assets UP has conducted or commissioned from 2019 to present. (BNSF Mot. to Compel 9.) BNSF asserts that this evidence is needed to evaluate and rebut Dr. Mathur's analysis. (*Id.* at 10.) BNSF argues that Dr. Mathur attributed UP's system-wide earnings either to valuation of road assets or valuation of equipment, and then scaled the system-wide earnings multiplier to reflect only the value derived from road assets, but not equipment. (*Id.*) BNSF suggests that the earnings multiplier should be further scaled to account for intangible assets because this asset class may also contribute to UP's market-based valuation. (*Id.*) UP objects to the burden of "scour[ing] its records" to produce all documents and communications relating to appraisals or valuations of intangible assets, but states that it is willing to provide the same type of information about intangible assets that the Board uses in connection with road property and equipment assets, specifically, "information regarding the book value of the [intangible] assets." (UP Reply to Mot. to Compel 6.)

The Board will order UP to provide "information regarding the book value of [its] [intangible] assets" as specified in its reply, which the Board understands to include such information between 2019 to the present. (UP Reply to Mot. to Compel 6.) BNSF, however, has not explained why discovery of additional information regarding "how UP has appraised and valued" its intangible assets is appropriate in the more targeted, post-opening discovery stage. Nor has it justified burdening UP to produce "all" documents relating to "any" appraisals or valuations of intangible assets when the information UP has agreed to produce would appear to adequately address BNSF's professed need. With the information offered by UP in its reply, BNSF should have the information needed to assess and reply to UP's opening statement.

Procedural Schedule

In its reply to BNSF's motion to modify the procedural schedule, UP suggests that the Board order the parties to meet and confer on an appropriate adjustment to the procedural schedule once the discovery dispute has been resolved. (UP Reply to Mot. to Modify Procedural Schedule 2.) The Board agrees that having the parties attempt to revise the procedural schedule is preferable. Accordingly, the parties are directed to meet and confer and jointly submit to the Board a proposed revised procedural schedule by February 14, 2025. Should the parties be unable to reach agreement, each party may submit its own proposal.

It is ordered:

1. BNSF's motion to compel discovery is denied in part and granted in part as described herein.
2. The parties shall meet and confer and submit to the Board (jointly, if possible, otherwise separately) by February 14, 2025, a proposed procedural schedule for the remainder of this proceeding.
3. This decision is effective on its service date.

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