

UP/SP-431

BEFORE THE
SURFACE TRANSPORTATION BOARD

247193

Finance Docket No. 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY
— TERMINAL TRACKAGE RIGHTS —
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

ENTERED
Office of Proceedings
February 25, 2019
Part of
Public Record

**UNION PACIFIC RAILROAD COMPANY'S
REPLY TO SUBMISSIONS IN RESPONSE TO DECISION NO. 6**

RHONDA S. FERGUSON
CRAIG V. RICHARDSON
ELISA B. DAVIES
JEREMY M. BERMAN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-7004

MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

February 25, 2019

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY
— TERMINAL TRACKAGE RIGHTS —
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

**UNION PACIFIC RAILROAD COMPANY’S REPLY
TO BNSF’S AND KCS’S RESPONSES TO DECISION NO. 6**

BNSF uses its response to Decision No. 6 to seek rulings on two issues the Board did not ask the parties to address. Union Pacific replies briefly to BNSF’s requests before discussing similarities and differences in the parties’ responses to the Board’s requests for information.

A. Reply to BNSF’s Requests

BNSF’s response to Decision No. 6 seeks two unlawful rulings from the Board.

First, BNSF asks the Board to “permit BNSF to commence operations *now* under an interim compensation scheme.” BNSF Response at 1. However, the Board cannot grant that request for two reasons: (1) this proceeding involves more than the compensation BNSF would owe KCS for trackage rights over the Rose Bluff Industrial Lead – the Board must also establish conditions for BNSF’s use of the Rose Bluff Industrial Lead; and (2) BNSF does not have rights to operate over all the track necessary to serve LyondellBasell directly– specifically, BNSF lacks the right to operate over the track connecting the Rose Bluff Industrial Lead to the Montell Lead and the Montell Lead itself. Additionally, the Board has no reason to take extraordinary action. BNSF already has access to LyondellBasell – access via reciprocal switching, which BNSF has used during the 20-plus years since the UP/SP merger to serve Lake Charles-area shippers and

capture the lion's share of LyondellBasell's traffic. *See* Union Pacific's Reply to BNSF's Petition to Establish Conditions of Use and Compensation (UP/SP-429) at 2, 61.

As explained in Union Pacific's reply to BNSF's Petition to Establish Conditions of Use and Compensation, the Board should condition BNSF's use of the Rose Bluff Industrial Lead on BNSF's agreement to swap responsibility with Union Pacific for Rose Bluff Yard, the Rose Bluff Industrial Lead, and the Montell Lead. *See id.* at 59. A swap would provide BNSF with direct access to LyondellBasell and other nearby shippers, while avoiding the substantial harms that would arise from adding a third railroad to an extremely challenging operating environment, and also avoiding a fundamental change in the use of property jointly owned by KCS. A swap also would likely be the fastest way to resolve the many difficult issues raised by this case with finality, including compensation issues, because it would essentially maintain the competitive status quo. If BNSF had embraced the swap proposal when Union Pacific made it back in June 2018, it likely would have established direct service by now. Union Pacific remains willing to effectuate a swap with BNSF.

Second, BNSF asks the Board to disregard 49 U.S.C. § 11102(a)'s requirement that the carrier granted use of terminal facilities compensate the facilities' owner. BNSF says the Board should require *Union Pacific* to "pay KCS the amount due to KCS under the compensation terms set by the Board." BNSF Response at 4. However, the Board correctly recognized § 11102(a) required *BNSF* to compensate KCS when it granted BNSF rights to use KCS-owned terminal trackage in Shreveport and Beaumont in an earlier stage of the UP/SP merger proceeding. *See Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 449 (1996) ("Section [11102(a)] provides that the carriers are responsible for establishing the conditions and compensation applicable to terminal trackage rights awarded under [Section 11102], and we will therefore allow BNSF and

KCS an opportunity to reach an agreement respecting such matters.”). Section 11102(a) requires the same result here: if BNSF voluntarily accepts the benefits associated with a grant of terminal trackage rights, it must accept the obligations, including the obligation to compensate KCS.

BNSF never addresses the statute or Board precedent. Instead, BNSF says Union Pacific promised BNSF would not pay more than the negotiated trackage rights fee to exercise trackage rights granted in the BNSF Settlement Agreement. *See* BNSF Response at 3. BNSF is incorrect. The negotiated trackage rights fee addresses BNSF’s obligations to Union Pacific. Union Pacific never agreed to subsidize BNSF by paying other costs BNSF might incur when it elects to use trackage rights. In many cases, such costs will be internal to BNSF – *e.g.*, the costs of acquiring equipment, training crews, and operating trains. However, the nature of the costs is irrelevant. In this case, as in the case of the Shreveport and Beaumont terminal trackage rights, BNSF’s costs would include any compensation BNSF must pay KCS under § 11102(a). Indeed, the case for requiring BNSF to compensate KCS is even stronger here, because BNSF already has access to LyondellBasell through reciprocal switching, and it does not need trackage rights to compete effectively with Union Pacific. *See* Union Pacific’s Reply to BNSF’s Petition to Establish Conditions of Use and Compensation (UP/SP-429) at 2, 61.¹

¹ BNSF also suggests Union Pacific should be responsible for any compensation BNSF owes KCS because we agreed to grant BNSF trackage rights over the Rose Bluff Industrial Lead. *See* BNSF Response at 3. But if BNSF was not willing to accept the risk that it might be required to compensate KCS if it elected to use trackage rights, it should have said so before Union Pacific consummated the UP/SP merger. We believe both parties recognized there were uncertainties in granting rights over the many lines covered by the BNSF Settlement Agreement, and thus they provided for alternatives if any of the rights “cannot be implemented because of lack of sufficient legal authority to carry out such grant” in Section 8(n) of their Agreement. We are not seeking to relitigate the Board’s conclusion that “Section 8(n) does not apply here.” Decision No. 3 at 12. But even if Section 8(n) did not apply and Union Pacific should have joined BNSF in applying for terminal trackage rights, as the Board said in Decision No. 3, *see id.* at 12 n.9, Union Pacific and BNSF would be in the same position as when they jointly applied for BNSF trackage rights over KCS in Shreveport and Beaumont – *i.e.*, BNSF could use trackage rights,

BNSF also suggests it might not be able to compete effectively using trackage rights if it must compensate KCS under § 11102(a). *See* BNSF Response at 3-4. However, BNSF presents no evidence to support its claim. To the contrary, BNSF cites findings that the trackage rights fee is “‘well within a reasonable level.’” *Id.* at 3 (quoting *Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 413). Those findings imply BNSF would be competitive even if it pays more for direct access. And, as discussed above, BNSF has proven to be extremely capable of competing via reciprocal switching, which it can continue to use if it is unwilling to compensate KCS under § 11102(a).

BNSF also is wrong when it says it should not be required to compensate KCS under § 11102(a) because Lake Charles-area shippers “have an independent right under the CMA Agreement and the Lake Charles Merger Conditions to receive direct BNSF service subject to the Prescribed Fee.” BNSF Response at 4. Neither the CMA Agreement nor the Board’s merger conditions give shippers a right to force BNSF to use trackage rights when it elects to serve them using reciprocal switching. And neither requires BNSF to set rates in any relationship to access costs. Instead, they simply require Union Pacific and BNSF to treat Lake Charles-area shippers the same as actual “2-to-1” shippers under the BNSF Settlement Agreement, *see Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 427-28, which gives BNSF the initiative to choose between serving “2-to-1” shippers using trackage rights and serving them through reciprocal switching, *see Union Pacific’s Submission in Response to Decision No. 6 (UP/SP-430), Att. 2, § 5(c)-(d).*²

but BNSF must compensate KCS. BNSF has known this all along. KCS raised the issue on September 3, 1996 – before Union Pacific consummated its merger. *Union Pacific/Southern Pacific Merger*, Decision No. 63, FD 32760, slip op. at 9 n.28 (STB served Dec. 4, 1996).

² As KCS notes in its response, the LyondellBasell facility at issue here was not a “2-to-1” shipper facility (*i.e.*, a facility open to both Union Pacific and Southern Pacific and no other

Here, LyondellBasell and other Lake Charles-area shippers have been treated like actual “2-to-1” shippers, and they have benefited greatly from their access to BNSF.³

B. Reply to BNSF and KCS Responses to Decision No. 6

Request No. 1: Provide documents sufficient to demonstrate the current fee that BNSF pays to UP for reciprocal switching on the Rosebluff Lead, including governing agreements, terms, and clauses (e.g., escalation clauses).

Union Pacific’s submission reflected BNSF’s payments for haulage service as of the submission’s original due date in 2018. BNSF’s submission correctly reflects compensation terms as of January 1, 2019.

Request No. 2: Provide documents sufficient to demonstrate the current Prescribed Fee (i.e., the trackage rights fee that BNSF pays to UP under the UP/SP merger agreements/conditions), including the governing agreements, terms, and clauses (e.g., escalation clauses).

Union Pacific’s submission reflected the fees BNSF paid Union Pacific for UP/SP merger-related trackage rights as of the submission’s original due date in 2018. BNSF’s submission correctly reflects the fees as of January 1, 2019.

railroad before the UP/SP merger). Before the UP/SP merger, the facility was open to KCS and Southern Pacific and no other railroad before the UP/SP merger. *See* KCS Response at 4 n.3.

³ Union Pacific expects BNSF will be more motivated to negotiate appropriate compensation terms once the Board makes clear it must compensate KCS. Such negotiated terms would reflect market rates much more accurately than KCS’s proposal to rely on rates rail carriers charge each other for switching at other shipper facilities in other locations. Switching rates generally do not reflect market-based access compensation even for shippers and locations subject to those rates. For example, the rates may reflect pre-Staggers Act cost-based ratemaking principles or even below-cost arrangements based on reciprocity. *See, e.g., Increased Switching Charges at Kansas City, Mo.*, 356 I.C.C. 887, 890 (1977) (“Reciprocal switching charges have frequently been constructed without regard to the actual cost of the service on the theory that the mutually incurred costs balance out. However, when substantial reciprocity is absent, as it is in this case, the cost of performing the service is the most important factor in determining the justness and reasonableness of a proposed switching charge.” (citations omitted)); *City of Sheboygan, Wis. v. Chi. & N.W. Ry.*, 215 I.C.C. 65, 70-71 (1936) (“Clearly such rates are not a fair measure of the reasonableness of other switching rates. This is particularly true where, as here, the use for that purpose would deprive a carrier of its long haul” (citation omitted)).

Request No. 3: If the Board determines that its SSW Compensation methodology should be used to calculate the trackage rights fees owned to one or more owners of the Rosebluff Lead/Yard,

- a. What adjustments or modifications to the SSW Compensation methodology would be needed if BNSF is allocated one daily, exclusive window of time for direct operations on the Rosebluff Lead and BNSF's window occurs:**
- i. during UP's 12-hour window in Rosebluff Yard;**
 - ii. during KCS's 12-hour window in Rosebluff Yard;**
 - iii. during both UP's and KCS's 12-hour window in Rosebluff Yard?**

BNSF appears to share Union Pacific's confusion about what operations the Board envisions when it refers to allocating BNSF "one daily, exclusive window of time for direct operations." See BNSF Response at 6-8. However, Union Pacific does not agree with BNSF's statement that the same variable costs "would be incurred irrespective of when the exclusive BNSF operating window suggested by the Board would occur." *Id.* at 7. Union Pacific agrees with KCS that the costs imposed by BNSF operations would likely vary depending on the actual timing of those operations. See KCS Response at 39. BNSF operations would be much more disruptive at certain times of day, and those costs would properly be included in calculating compensation under SSW Compensation.⁴

⁴ See *St. Louis S.W. Ry.—Trackage Rights Over Mo. Pac. R.R.—Kan. City to St. Louis*, 5 I.C.C.2d 525, 529 (1989) ("The use of variable costs *incurred as a result of tenant's operations* is clearly an application of the RAPB Principle of Causality, and represents the level of costs that could be avoided by the landlord railroad if the tenant's traffic did not move over the joint track. . . . In future proceedings, parties are free to introduce site-specific, or actual, expenses based on direct observation of special studies.").

Request No. 3.b.: Would the SSW Compensation methodology need to be modified to properly account for operations in Rosebluff Yard if BNSF's proposed direct train service traverses Rosebluff Yard without stopping or switching?

Union Pacific disagrees with BNSF's suggestion that BNSF's operations in Rose Bluff Yard would affect only one run-through track and that BNSF could consistently operate its trains through the yard without stopping. See BNSF Response at 8. BNSF's own evidence, including its operating animation, is to the contrary. However, BNSF and Union Pacific appear to agree that spill-over effects of BNSF's operations could be addressed under the SSW Compensation methodology.

Request No. 3.c.: What method should be used to calculate the interest rental component? Provide all information and data needed to support the suitability of your preferred method and to calculate the interest rental component under this method.

Union Pacific, BNSF, and KCS appear to agree that more data and more time would be required to build a record and apply the SSW Compensation methodology to the facts of this case. See BNSF Response at 8-9; KCS Response at 40.

Request No. 3.d.: Should the below-the-wheel variable costs and maintenance-of-way costs be calculated based on actual costs or system-average costs under the Uniform Railroad Costing System (URCS)?

Union Pacific continues to believe, and BNSF appears to agree that, if the Board were to use the SSW Compensation methodology, below-the-wheel variable costs and maintenance-of-way costs should be billed based on actual costs. See BNSF Response at 9. We expect maintenance costs would be above system-average costs in the Lake Charles area – for example, our experience is that wood ties have a shorter average life in this environment.

Request No. 3.e.: Should the SSW Compensation methodology take into account how costs and fees are currently allocated between the two owners of the Rosebluff Lead/Yard? If so, explain how certain SSW Compensation cost categories (e.g., maintenance-of-way) should be allocated between the owners of the property? What other adjustments or modifications to the SSW Compensation methodology would be needed to account for the fact that the Rosebluff Lead/Yard has two owners?

Union Pacific, BNSF, and KCS appear to agree that the current allocation of costs and fees between Union Pacific and KCS would not in and of itself be relevant to calculations under the SSW Compensation methodology. See BNSF Response at 10; KCS Response at 42-43.

Request No. 3.f.: Should the trackage rights fee set by the Board be calculated on a carload, per car-mile, or per ton-mile basis?

Union Pacific disagrees with BNSF's view that any fee calculated using the SSW Compensation methodology should be based on ton-miles. See BNSF Response at 10. Union Pacific agrees with KCS that a per carload fee is more appropriate under the circumstances because parties customarily use carload rates for short-haul moves. See KCS Response at 43.

Request No. 3.g.: Identify additional costs, if any, specific to the Rosebluff Lead/Yard that would not be accounted for under the Board's SSW Compensation methodology.

Union Pacific and BNSF may not agree on what costs ultimately should be included, but they appear to agree the SSW Compensation methodology is flexible enough to account for all the costs associated with BNSF's routine use of the Rose Bluff Industrial Lead and Rose Bluff Yard. See BNSF Response at 10. Union Pacific agrees with KCS that BNSF should be required to bear any costs of capital improvement required to accommodate its initial access, as well as an appropriate share of the costs of any future capital improvements and other non-routine costs to the extent such improvements and costs are caused by or benefit BNSF. See KCS Response at 43. BNSF's responsibility to bear such costs would be consistent with its obligations under the

BNSF Settlement Agreement. *See* Union Pacific's Submission in Response to Decision No. 6 (UP/SP-430), Att. 2, § 9(b) & (c).

Respectfully submitted,

RHONDA S. FERGUSON
CRAIG V. RICHARDSON
ELISA B. DAVIES
JEREMY M. BERMAN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-7004

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

Attorneys for Union Pacific Railroad Company

February 25, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2019, I caused a copy of the foregoing document to be served by email or first-class mail, postage prepaid, on all parties of record in Finance Docket No. 32760 (Sub-No. 46).

/s/ Michael L. Rosenthal