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October 9, 2012

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E-FILED

Cynthia Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
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ENTERED
Office of Proceedings
October 9, 2012
Part of
Public Record

Re: STB Docket No. AB 33 (Sub-No. 277X), Union Pacific Railroad
Company – Abandonment Exemption – In Lafourche Parish,
LA
Finance Docket No. 35601, BNSF Railway Company --
Trackage Rights Exemption -- Union Pacific Railroad Company

Dear Ms. Brown:

Attached for filing with the Surface Transportation Board please find
the Reply of BNSF Railway Company in the above-referenced
proceedings.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in cursive script that reads 'Karl Morell'.

Karl Morell
Of Counsel

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB 33 (Sub-No. 277X)

UNION PACIFIC RAILROAD COMPANY
--ABANDONMENT EXEMPTION--
IN LAFOURCHE PARISH, LA

FINANCE DOCKET NO. 35601

BNSF RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION--
UNION PACIFIC RAILROAD COMPANY

REPLY

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Attorneys for BNSF Railway Company

Dated: October 9, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB 33 (Sub-No. 277X)

UNION PACIFIC RAILROAD COMPANY
--ABANDONMENT EXEMPTION--
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BNSF RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION--
UNION PACIFIC RAILROAD COMPANY

REPLY

BNSF Railway Company ("BNSF") hereby replies to the Motion To Modify Notice of Exemption ("Motion") filed by Union Pacific Railroad Company ("UP") with the Surface Transportation Board ("Board") on September 20, 2012, in Docket No. AB 33 (Sub-No. 277X) ("UP Abandonment").

In its Motion, UP seeks to convert the requested abandonment of the rail line located between milepost 1.7, near Raceland, and milepost 14.2, near Jay, Louisiana (the "Line") to a discontinuance of operations over the Line. UP states that, if its request is granted, there would no longer be a need for a stay in the related Finance Docket No. 35601 in which BNSF is seeking a trackage rights exemption to operate the entire Lockport Branch.¹ Motion at 7. UP, however,

¹ By decision served March 21, 2012, Chairman Elliot postponed the effective date of the notice of exemption in Finance Docket No. 35601.

then suggests this Board should proceed to grant the trackage rights exemption with an advisory ruling that in so doing the Board is not making a determination that BNSF has the actual right to operate the line, since UP states categorically, with no supporting rationale, that “UP does not agree that BNSF has a right to operate over the Line using trackage rights.” *Ibid.*

UP invites the STB to facilitate UP’s end game with this maneuver: terminate UP’s common carrier obligations, forestall any potential OFA acquisitions by imposition of a discontinuance in lieu of abandonment, discontinue the Louisiana & Delta Railroad (“LDRR”) leasehold, and fabricate a cloud on BNSF’s right to operate the Line, so that no present or prospective shipper on the Line can avail itself of competitive common carrier service absent protracted litigation – presumably in another forum, UP would argue -- over the scope of BNSF’s rights clearly and unequivocally acknowledged in STB Finance Docket No. 33630, *The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company – Acquisition Exemption – Lines Between Dawes, TX, and Avondale, LA* (not printed), served September 29, 1998 (“*Acquisition Exemption*”).

In a seemingly innocuous pleading suggesting that all parties’ concerns would be addressed with UP’s proposed course of action, UP essentially argues that the validation of BNSF’s rights is of no consequence to the competitive circumstances of shippers on the Lockport Branch and the ultimate rulings in this case. But the legitimacy of BNSF’s continuing right to operate the branch in the absence of UP and LDRR service is fundamental to determining whether abandonment, or discontinuance as the case may be, is consistent with the public convenience and necessity. UP suggests that the concerns of Valentine, a presently inactive customer, are addressed since UP will not salvage the line. And nowhere does UP mention how UP’s discontinuance, paired with a cloud of uncertainty as to BNSF’s residual

operating rights to directly serve the branch, may impact the plans of the prospective shipper, Rail Solutions LLC, which has been working with BNSF to locate one of its facilities adjacent to the Lockport Branch beyond Milepost 1.7.² UP's categorical statement that BNSF has no right to operate the branch, regardless of the Board's actions in Finance Docket No. 35601 or any additional actions that it may take in Finance Docket No. 33630, is misleading and plainly contrary to the Board's prior decisions.

As is demonstrated below, the Board has already recognized the scope of the trackage rights at issue (the "Lockport Trackage Rights") in *Acquisition Exemption*. Moreover, the Lockport Trackage Rights are related to conditions imposed by the Board in *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) ("UP/SP Merger") and subsequent actions taken to shore up and enhance those rights following the Gulf Coast Service Crisis issues that ensued after the merger. It is incumbent on the Board to make it clear, in the face of UP's tactics, that present and future shippers on the branch will have access under the governing agreements to direct common carrier service by BNSF.³

² See Rail Solutions's February 10, 2012 letter in UP Abandonment urging the Board to ensure BNSF's authority to serve future industries on the branch.

³ Two provisions of the subject agreements govern BNSF's right to conduct trackage rights operations on the Lockport Branch (as well as other former SP branches and spurs connected to the 50/50 Line). First, BNSF is required to give 45 days notice to UP of the type of service it has elected to use to serve a shipper on the Line. See Section 2.1(e) of the September 1, 2000 Joint Operating Agreement (the "Joint Operating Agreement"). (The Joint Operating Agreement is attached as Exhibit 2 to BNSF's Comments filed on February 9, 2012, in the UP Abandonment proceeding ("February Comments")). Second, BNSF can operate over the Line only when it needs to do so to serve a shipper on the Line. See *Id.* (Definition of "Customer Trackage"). The provisions are straight forward and self-implementing, and there is no need for the Board to countenance UP's efforts to persuade the Board to indicate that the issue of BNSF's right to operate via trackage rights needs to be resolved in state court or by arbitration. Moreover, once UP's and LDRR's discontinuances are granted, the 45-day notice of BNSF's election of the type of service it will use will become moot since direct service will be the only type of service available to BNSF.

In *Acquisition Exemption*, the Board read the Term Sheet Agreement between UP and BNSF⁴ as granting BNSF “access to all present and future shipper facilities on the line and on former SP branches or spurs that connect to the line, as well as on new branches and spurs added to the line.”⁵ Slip op. at 2.

In their Joint Petition for Exemption filed on July 7, 1998, in STB Finance Docket No. 33630 (“Petition”), UP joined BNSF in representing to the Board that the Term Sheet Agreement granted both railroads the “right to serve all present and future industries or facilities originating or terminating traffic on the Line or on former Southern Pacific branches or spurs, and any new branches or spurs, connecting to the Line.” Petition at 6. In its December 23, 2011 letter-filing in the UP Abandonment proceeding (“December Filing”), UP argued that neither BNSF nor UP has direct access to shippers located on the various branch lines under lease to LDRR. UP acknowledged, however, that once LDRR consummates its discontinuance of the portion of the Lockport Branch between Mileposts 1.7 and 14.2, which LDRR has done, BNSF will have the right to serve any present or future shippers located along that portion of the Lockport Branch. December Filing at 2.

Although UP does not provide any rationale or support for its most recent contention, the contention is squarely at odds with past representations that UP has made to the Board and agreements that UP has entered into with BNSF.

For Example, Section II. 2 of the Term Sheet Agreement unequivocally states that:

“It is the intention of the parties that UP and BNSF shall have the right to serve **all present and future industries or facilities originating or terminating traffic on the 50/50 Line and on**

⁴ A copy of the Term Sheet Agreement is attached as Exhibit 1 to the February Comments.

⁵ The Lockport Branch is former Southern Pacific Transportation Company (“SP”) branch line located on the 50/50 line. The 50/50 line is the former SP Lafayette Subdivision located between Dawes, TX and Avondale, LA.

former SP branches and spurs connecting to the 50/50 Line or any new branches or spurs connecting to these lines. These industries and facilities shall be open to BNSF on the same basis that BNSF serves '2-to-1' customers per Section 5 of the Settlement Agreement..." (emphasis added).

Similarly, Section 1.1 of the Joint Operating Agreement defines "Customer Access Trackage" as:

"trackage ... which from time to time would be utilized to provide access to present and future industries or facilities originating or terminating traffic on the former SP Lafayette Subdivision between Dawes (MP 353.0) and Avondale (MP 14.94) and **on the former SP branches and spurs connecting to the said section of the Lafayette Subdivision...**" (emphasis added).

Also, as previously mentioned, UP's Motion is not as benign as it facially appears. By converting its abandonment to a discontinuance of service, UP will deprive any interested party from making an offer of financial assistance to acquire the Line. Also, if UP is permitted to pursue its specious contract interpretation claim in state court or other forum, the customer wishing to locate on the Lockport Branch, Rail Solutions LLC, may be forced for commercial considerations to locate elsewhere. It is obvious that UP does not want to serve customers on the Line. But it is also obvious that UP's tactics here are designed to deny BNSF the ability to serve customers on the Line.

The three agreements BNSF and UP entered into addressing the 50/50 Line, in part, implement conditions imposed by the Board in the *UP/SP Merger* proceeding as later modified in subsequent Board proceedings to address impacts arising from the combined joint operations of the parties, particularly in the Gulf Coast region. Consequently, the Board must retain jurisdiction over those agreements to insure the UP remains in compliance with the commitments it made in the *UP/SP Merger* related proceedings. See, e.g., *Union Pacific/Southern Pacific*, 2 S.T.B. 697 (1997)(interpreting Settlement Agreement between BNSF and UP).

At the end of the five year formal oversight process, the Board stated:

“Although we are concluding our formal oversight process for the UP/SP merger, we will continue to have authority to enforce the conditions we imposed on the merger. Under 49 U.S.C. 11327, we have continuing authority to enter supplemental orders and to modify decisions entered in merger and control proceedings under 49 U.S.C. 11323.”

Union Pacific/Southern Pacific Merger, 5 S.T.B. 1159, 1177 (2001).

UP should not be permitted to fabricate a cloud on BNSF's rights arising out of the *UP/SP Merger* and related agreements with a simple statement in this docket that such rights are irrelevant and/or do not exist. Leaving such determinations for another forum for another day undermines the legitimacy of this Board's regulatory processes and its role as overseer of the rights and obligations flowing out of the UP/SP merger and arbiter of impacts to the public convenience and necessity in these dockets. UP's machinations to unduly delay the full implementation of conditions imposed by the Board and possibly erode or circumvent those conditions to the detriment of existing or potential competition should not be rewarded.

CONCLUSIONS

BNSF respectfully urges the Board to lift the stay in STB Finance Docket No. 35601 as soon as possible and, in so doing, affirmatively confirm that BNSF has the right to direct access to present and future customers along the Lockport Branch pursuant to the terms and conditions of the governing agreements. Validation of BNSF's continuing right to directly access the Branch would, in turn, support granting UP's proposed discontinuance in UP Abandonment, as there would be no impacts to present or prospective customers along the Lockport Branch to receive common carrier service. Such actions by the Board would be consistent with the conditions imposed by the Board in the *UP/SP Merger* related proceedings and would preserve rail service on the Lockport Branch and promote competition.

Respectfully submitted,



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Dated: October 9, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2012, I have caused a copy of the foregoing Reply to be served on all parties of record in STB Docket No. AB 33 (Sub-No. 277X) and Finance Docket No. 35601.


Karl Morell