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**BEFORE THE**  
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March 14, 2019  
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Public Record

Finance Docket No. 36186

TEXAS RAILWAY EXCHANGE LLC  
– CONSTRUCTION AND OPERATION EXEMPTION –  
GALVESTON COUNTY, TX

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**UNION PACIFIC RAILROAD COMPANY’S REPLY**  
**TO TEXAS RAILWAY EXCHANGE LLC’S**  
**PETITION FOR EXEMPTION**

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**UNION PACIFIC RAILROAD COMPANY’S REPLY  
TO TEXAS RAILWAY EXCHANGE LLC’S  
PETITION FOR EXEMPTION**

The Board should deny the petition for a conditional exemption filed by Texas Railways Exchange LLC (“TREX”). If the Board grants an exemption, it should not rely on TREX’s misleading claims about Union Pacific service to Texas International Terminals (“TIT”).

If this were a routine construction case, Board precedent would support granting a conditional exemption. The proposed construction falls under the Board’s authority because TREX would become a new carrier and the track at issue would constitute its entire operation. *See Effingham R.R. – Pet. for Declaratory Order – Constr. at Effingham, IL*, 2 S.T.B. 606, 609-610 (1997), *aff’d sub nom. United Transp. Union-Ill. Legislative Bd. v. STB*, 183 F.3d 606 (7th Cir. 1999). In addition, the Board routinely exempts construction of short, new track from the prior approval requirements of 49 U.S.C. § 10901 because new construction is generally procompetitive and such transactions are regarded as limited in scope.

But this is not a routine case. TREX’s proposed track would cross Union Pacific’s lines. It would also extend laterally over other property owned by Union Pacific. TREX’s prospects of constructing the proposed track are sufficiently uncertain that the Board should not grant a conditional exemption. TREX filed a petition for crossing authority on February 22, 2019. The

Board should not conditionally grant TREX's construction petition before resolving the crossing petition. *Cf. Holrail LLC – Constr. & Operation Exemption – In Orangeburg & Dorchester Counties, SC*, FD 34421 (Sub-No. 1) (STB served Feb. 12, 2007) (denying petition for crossing authority and thus a related petition for construction and operation exemption).

TREX recognizes this is not a routine case. TREX says it is willing to negotiate for rights to construct and operate over Union Pacific's property, but its construction petition is antagonistic. TREX repeatedly and inaccurately criticizes Union Pacific service to TIT, even though service issues are normally irrelevant in construction cases. *See Midwest Generation LLC – Exemption from 49 U.S.C. 10901 – For Constr. in Will County, IL*, FD 34060, slip op. at 4 (STB served Mar. 21, 2002). Moreover, TREX doubles down on its inflammatory approach, using its misguided service claims to justify not only its exemption request, but also its jurisdictional arguments and its request for expedited action. *See* Petition at 8-9, 10-14.

If the Board grants TREX's request for a conditional exemption, it should take care not to rely on TREX's misleading claims regarding Union Pacific service to TIT. For example, TREX fundamentally misrepresents the physical constraints on Union Pacific's ability to switch cars delivered by BNSF into TIT's facility. Union Pacific physically cannot deliver an intact BNSF unit train to TIT's loop tracks. BNSF delivers loaded cars to Union Pacific's interchange tracks near TIT in multiple cuts, because none of the interchange tracks is long enough to accommodate a full unit train. Union Pacific then moves BNSF's cars from the interchange tracks to industry tracks TIT constructed on property made available by Union Pacific, and none of those tracks can accommodate a full unit train. TIT then moves BNSF's cars from its industry tracks to its loop tracks, as the tracks become available. Because of the physical constraints on operations, Union Pacific's service plan for BNSF traffic is to switch in and out cuts of 54 cars per day,

when cars are available for switching. That is, Union Pacific can drop off one loaded cut and pick up one empty cut per day. Union Pacific's one-in/one-out constraint exists because Union Pacific's crews generally do not have time to switch more than one cut each way and still complete their assignments for other customers.

TREX thus misrepresents the facts when it claims Union Pacific "has moved full [BNSF] unit trains to TIT in the past." Petition at 3. TREX may be referring to a few occasions on which Union Pacific crews have been able to provide more than one switch per day to TIT to drop off cars delivered in a BNSF unit train. As Union Pacific explained to TIT in January 2018, Union Pacific crews occasionally have time to perform an extra switch – that is, they separately switch two cuts of cars to TIT. See Petition, Sullivan VS, Ex. 2. However, Union Pacific crews cannot provide such extra service on a sustained basis while maintaining service levels to other shippers. See *id.*

TREX also misrepresents the facts when it complains about Union Pacific's provision of special switches to TIT. TREX refers to TIT requests for special switches "from March 2017 to the present." Petition at 3. However, as Union Pacific explained to TIT in January 2018, most of TIT's requests did not comply with Union Pacific policies, which require a request on 36-hours' notice for each day a special switch is needed. See Petition, Sullivan VS, Ex. 2. Union Pacific addressed the issue by meeting with TIT and providing instructions on its policies in January 2018. *Id.* Since the meeting, TIT has requested special switches just seven times. In every instance, Union Pacific either complied with the request or switched the cars *even earlier than requested*.

Union Pacific's responses to TIT's requests for special switches since January 2018 can be seen in Figure 1 below, which reproduces part of a document TREX produced in discovery.

**Figure 1**  
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The document shows:

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In sum, TREX's complaints about Union Pacific's provision of special switches to TIT are entirely unjustified. Union Pacific has consistently met or exceeded TIT's requirements.

However, TREX's unjustified complaints about special switches are useful because they help highlight the misleading nature of TREX's complaint that Union Pacific's local crews do not operate 24 hours a day, seven days a week. *See* Petition at 4. As Union Pacific explained to TIT in January 2018, TIT and other nearby shippers simply do not have the volume of traffic to

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<sup>1</sup> Material within brackets is Confidential and is redacted from the public version of this reply.

justify service on a 24/7 basis. *See* Petition, Sullivan VS, Ex. 2. As shown above, TIT needed a special switch just four times since January 2018, which demonstrates Union Pacific’s current service plan reasonably accommodates TIT’s need for service. Union Pacific cannot justify keeping a local crew available on a 24/7 basis to address the handful of times each year TIT might request an extra switch. In fact, on most days, TREX has no BNSF cars to switch. According to Union Pacific’s records, from January 1, 2018, through December 31, 2018 TIT received just { } from BNSF.<sup>2</sup> Union Pacific’s current service plan can readily accommodate that volume, with plenty of room for growth.<sup>3</sup>

TREX also misleads the Board when it claims BNSF trains are “slow-switched into TIT’s facility with excessive turnaround times.” Petition at 4. Union Pacific works diligently to move BNSF cars to TIT. Outside the litigation context, TIT tells a different story than it is telling the Board. For example, Union Pacific instituted weekly calls with TIT and BNSF in October to address planning and performance during TIT’s busy season. The parties subsequently agreed to discontinue the scheduled calls and instead address any issues as they arose because operations “are running smoothly.” *See* Attachment B.<sup>4</sup>

The Board also should not credit TREX’s claims that the proposed construction will improve BNSF’s competitive position in relationship to Union Pacific. *See* Petition at 8-9, 12-13. Such claims are inconsistent with TREX’s claim that the proposed track should “not increase the total volume of traffic moving to TIT, as it is being constructed to accommodate existing

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<sup>2</sup> { }

<sup>3</sup> 54 cars/day x 261 days = 14,094 cars.

<sup>4</sup> TREX witness Sullivan refers to the first of these calls in his verified statement. He implies that Union Pacific discouraged TIT from requesting special switches. *See* Petition, Sullivan VS ¶ 24. However, Union Pacific’s notes from that call, which were circulated to the participants, show Union Pacific simply noted that provision of special switches was always subject to resource availability. *See* Attachment C.

BNSF unit trains.” *Id.* at 6. TREX must expect the proposed track will benefit TIT somehow, perhaps by allowing TIT to capture more revenue from existing BNSF traffic. However, TREX concedes in its Petition, and confirms in response to Union Pacific’s discovery requests, that it does not expect traffic either to shift from Union Pacific to BNSF, or to otherwise grow on BNSF, as a result of the proposed construction. *See* Attachment D (TREX responses to Union Pacific Interrogatory Nos. 9 & 10).

Finally, if the Board grants TREX’s request for a conditional exemption, it should take care not to rely on TREX’s claim that a conditional exemption would allow it “to approve and finance” the manufacturing of a diamond needed to cross Union Pacific’s tracks. Petition at 14. TREX never explains why a conditional exemption would affect its financing. In fact, TREX’s responses to discovery reveal TREX “is not seeking financing with any other entity”; instead, TREX’s “managing members expect to be directly financing the construction of the Proposed Track and acquisition of real property.” Attachment D (TREX responses to Union Pacific Interrogatory Nos. 15 & 16).

Given the substantial uncertainties surrounding TREX’s proposal to construct track on property owned by Union Pacific, this is not a case in which a conditional exemption is appropriate. If the Board does grant a conditional exemption, it should take care not to rely on TREX’s misleading claims about Union Pacific service to TIT or the benefits of a conditional exemption. The Board should also make clear it is not prejudging issues relating to crossing Union Pacific tracks and operating over other Union Pacific property. Union Pacific also asks the Board to refrain from issuing any certificate of public convenience and necessity until all questions about the proposed track’s routing are resolved, and the Board concludes it can and must exercise its authority under 49 U.S.C. § 10901(d), consistent with Board precedent. *See*

*Midwest Generation, LLC – Exemption from 49 U.S.C. 10901 – For Construction in Will  
County, IL, FD 34060 (STB served Oct. 4, 2002).*

Respectfully submitted,

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*Attorneys for Union Pacific Railroad Company*

March 14, 2019

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of March, 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. 36186.

/s/ Michael L. Rosenthal  
Michael L. Rosenthal

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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| TEXAS RAILWAY EXCHANGE LLC –           | ) |          |
| Construction and Operation Exemption – | ) | FD 36186 |
| Galveston County, TX                   | ) |          |
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**TEXAS RAILWAY EXCHANGE LLC’S RESPONSES AND OBJECTIONS  
TO UNION PACIFIC RAILROAD COMPANY’S FIRST DISCOVERY REQUESTS**

Texas Railway Exchange LLC (“TREX”) pursuant to 49 C.F.R. Part 1114, hereby responds to the First Set of Interrogatories and First Request for Production of Documents (“Requests”) served on December 4, 2018 by the Union Pacific Railroad Company (“UP”).

TREX is conducting a reasonable, good faith search for non-privileged information and documents responsive to the Requests. Subject to, and without waiving the general and specific objections that follow, and to the extent reasonably available, responsive non-privileged information and documents will be produced.

**GENERAL RESPONSES AND OBJECTIONS**

In addition to the specific objections raised below in response to individual Requests, TREX objects to UP’s Definitions, Instructions, Interrogatories, and Requests for Production of Documents as follows:

1. TREX objects to UP’s Requests on the grounds that UP has not sought to intervene or obtain party status in this proceeding. 49 C.F.R. § 1112.4 (specifying the standards for requesting intervention in proceedings set for modified procedure). Under the Board’s rules, only parties may seek discovery. *Id.* § 1114.21. TREX also objects to UP’s

reasonable search and will provide documents sufficient to show the dates and times “when UP ‘delivered entire BNSF unit trains in one switch to TIT.’” 49 C.F.R. § 1114.26(b) (option to produce business records).

**Interrogatory No. 9**

How much traffic does TREX project or expect will shift from Union Pacific service to BNSF service as a result of construction and operation of the Proposed Track?

**Response:**

TREX objects to this interrogatory on the grounds that how much traffic “will shift from Union Pacific service to BNSF service” is unduly vague and open-ended. TREX also objects to this interrogatory on grounds that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence related to the Board’s pertinent review criteria of exemption petitions under 49 U.S.C. § 10502. In addition, TREX objects to this request on the grounds that UP, as the present handler of all traffic to TIT, is in the best position with access to pricing, contracts, and origin information to attempt to project potential traffic “shifting” from UP to the BNSF. Subject to, and without waiving these objections, TREX states that the purpose of TREX’s proposed rail line construction is to provide more efficient and direct rail service for the existing rail traffic to TIT. The purpose is not to “shift [traffic] from Union Pacific service to BNSF service.” TREX does not have access to individual rail contracts or pricing information and thus has no way to project and has not projected how much, if any, existing traffic to TIT could change from UP service to BNSF service as a result of the Proposed Track. Again, the purpose of its proposed track is not to shift traffic volumes from one carrier to another, other than replace

inefficient reciprocal switching currently being performed by UP for BNSF trains to TIT with more efficient and direct rail service to TIT.

**Interrogatory No. 10**

How much does TREX project or expect BNSF traffic to TIT will increase as a result of construction and operation of the Proposed Track?

**Response:** TREX objects to this interrogatory on grounds that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence related to the Board's pertinent review criteria of exemption petitions under 49 U.S.C. § 10502. TREX also objects to this interrogatory as speculative and premature because it appears to pertain to a possible future crossing petition under 49 U.S.C. § 10901(d), and whether the traffic volumes of future operations could materially interfere with the operation of the crossed line. Over three weeks ago, on November 27, 2018, TREX asked UP about its willingness to discuss rail line operations and crossing issues associated with the Petition. On December 5, 2018, UP responded that it was "carefully evaluating" the request and "will substantively respond to your inquiry with all deliberate speed," yet it has failed to follow-up to the request to date, further demonstrating the prematurity of UP's interrogatory, and leaving open the issue of whether TREX may need to file a formal Section 10901(d) crossing petition with the Board. *See also Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry. Co.*, STB Docket No. 42038 (STB served May 11, 1999) (denying requests to "preview" case). TREX further objects to this interrogatory as unnecessary, because UP, as the carrier that presently handles all rail traffic destined to TIT, is already aware of all of the present traffic volumes of its own trains and BNSF's trains. Subject to, and without waiving these objections, TREX states that the purpose of TREX's

proposed rail line construction is to provide more efficient and direct rail service for the existing rail traffic to TIT. The anticipated traffic routed over the Proposed Track is expected to be limited to the BNSF unit train traffic destined to TIT's facility, the traffic levels are not anticipated at this time to depart from existing levels. TREX will also provide responsive documents to RFP 3, from which UP will be able to derive the projected traffic volumes of BNSF unit train traffic. Additionally, TREX anticipates that, due to UP's refusal to date to discuss with it crossing and operational issues with its proposed rail line, it will likely need to file a formal Section 10901(d) crossing petition. That petition will include appropriate information on anticipated traffic volumes and an operating plan to meet the requirements of Section 10901(d), which will provide UP with additional supporting information on the lack of material interference with the operation of the crossed line which UP will have available to review and use for purposes of any potential reply filing in such future proceeding.

**Interrogatory No. 11**

How much traffic has TIT lost because of the alleged "significant operational problems and service constraints on BNSF train service to TIT?" (Petition at 12.)

**Response:** TREX objects to this interrogatory on grounds it misstates and mischaracterizes the Petition, which does not state that TIT has lost traffic because of UP's reciprocal service limitations. TREX also objects to this interrogatory because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence related to the Board's pertinent review criteria of exemption petitions under 49 U.S.C. § 10502. TREX is under no obligation to provide this information as "inadequacy of existing service is not a necessary showing under the statutory criteria for the

**Interrogatory No. 15**

How does TREX propose to fund (a) construction of the Proposed Track, and (b) acquisition of real property required to construct the Proposed Track?

**Response:**

TREX objects to this interrogatory because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence related to the Board's pertinent review criteria of exemption petitions under 49 U.S.C. § 10502, including that the Board's exemption procedures do not require a "hard look" at the financing of proposed rail line projects. Subject to, and without waiving these objections, TREX states that its managing members expect to be directly financing the construction of the Proposed Track and acquisition of real property. TREX also refers UP to further pertinent investor and financing information for proposed construction contained in the Sullivan V.S. at ¶¶ 53-57.

**Interrogatory No. 16**

Identify all communications TREX has had with any other entity regarding funding for (a) construction of the Proposed Track, and (b) acquisition of real property required to construct the Proposed Track.

**Response:** TREX objects to this interrogatory on the grounds that the request for communications with "any other entity" is unduly vague and open-ended. Trex also objects to this request because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence related to the Board's pertinent review criteria of exemption petitions under 49 U.S.C. § 10502, including that the Board's exemption procedures do not require a "hard look" at the financing of proposed rail line

projects. Subject to, and without waiving these objections, please see TREX's response to INT No. 15. TREX further states that it is not seeking financing with any other entity for the line construction project and there are no such communications with any such parties.

**Interrogatory No. 17**

What is TREX's projected net income from operations over the Proposed Track in the two years following completion of construction, assuming construction is completed?

**Response:** TREX objects to this interrogatory on grounds it misstates and mischaracterizes the Petition and mistakenly presupposes that TREX it will be operating over the Proposed Track. TREX also objects to this interrogatory because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence related to the Board's pertinent review criteria of exemption petitions under 49 U.S.C. § 10502, including that the Board's exemption procedures do not require a "hard look" at the financing or possible revenues associated with proposed rail line projects. Subject to, and without waiving these objections, TREX states that TREX's proposed rail line will provide a dependable connection from the BNSF Valley Yard to TIT's loop track that will allow BNSF trains to move directly to and from TIT's facility. It is anticipated that BNSF would serve TIT through overhead trackage rights on the line. TREX would also have the option to provide common carrier switching on the line, or possibly through arrangements with an existing short line, or have TIT provide private switching of BNSF trains. TREX has performed no projected net income analysis from its potential operations.

**Interrogatory No. 18**

How will TREX pay for operation and maintenance of the Proposed Track?