

UP/SP-422

BEFORE THE
SURFACE TRANSPORTATION BOARD

245107

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

ENTERED
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February 1, 2018
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BNSF RAILWAY COMPANY
— TERMINAL TRACKAGE RIGHTS —
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

**UNION PACIFIC RAILROAD COMPANY'S
MOTION TO ESTABLISH PROCEDURAL SCHEDULE**

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**UNION PACIFIC RAILROAD COMPANY’S
MOTION TO ESTABLISH PROCEDURAL SCHEDULE**

Union Pacific Railroad Company respectfully asks the Board to establish a procedural schedule that gives parties a fair opportunity to complete on-going discovery and file replies to BNSF Railway Company’s January 12, 2018 petition in the captioned matter (“Petition”). Specifically, Union Pacific proposes a 60-day period to complete discovery, then a 90-day period from the completion of discovery to file replies.¹

BNSF’s Petition asks the Board to establish conditions of use and compensation for BNSF’s proposal to provide direct service over the Rosebluff Lead, the Montell Lead, and track connecting the Rosebluff and Montell Leads to a LyondellBasell (“LYB”) facility in Westlake, Louisiana. Neither BNSF nor the Board expressly addressed operations to LYB’s facility on the Montell Lead in the underlying Board decision in this sub-docket, which focused on a BNSF plan to directly serve a CITGO Petroleum facility on the Rosebluff Lead. *See BNSF Ry.—Terminal Trackage Rights—Kansas City S. Ry. & Union Pac. R.R.*, FD 32760 (Sub-No. 46) (STB served July 5, 2016).

¹ Counsel for Union Pacific consulted with counsel for BNSF to determine whether BNSF would consent to the proposed procedural schedule, but the parties were unable to reach agreement. Counsel for Kansas City Southern indicated KCS would be open to discussing a procedural schedule at the appropriate time.

BNSF's Petition includes 18 pages of arguments of counsel and two verified statements. One statement, from a BNSF employee, appends a proposed "Operating Plan" and "animation" and describes an "observation study" of rail operations in the Lake Charles area conducted in October 2017. (Petition, Reilly VS at 10 & Ex. A & B.) The other statement, from an outside consultant, presents data drawn from the consultant's "workpapers." (*Id.*, Baranowski VS at 3, 5, 6, 10, 12, 14 & 15.)

Union Pacific cannot reply to the Petition without obtaining discovery from BNSF. BNSF did not produce its observation study or its consultant's workpapers when it filed the Petition. BNSF also did not produce documents reflecting or supporting the assumptions inherent in its proposed Operating Plan and animation. And BNSF did not produce documents showing its authority to operate over the track it would use in addition to the Rosebluff Lead. (For example, the Montell Lead appears to be owned by the Lake Charles Harbor and Terminal District.) Accordingly, Union Pacific has served a limited set of discovery requests on BNSF. (*See* Attachment A.) Once BNSF provides the requested information, Union Pacific should be able to file its reply in 90 days.

A 90-day period for filing a reply would be consistent with the minimum amount of time BNSF apparently took to prepare its Petition. The underlying Board decision in this sub-docket was served July 5, 2016. The Board granted BNSF terminal trackage rights over the Rosebluff Lead and held it was "most appropriate and efficient for the carriers to concurrently negotiate regarding both the operating conditions and the compensation." Decision at 20. Pursuant to the Board's decision, Union Pacific engaged in timely, good-faith negotiations to accommodate BNSF's desire to directly serve LYB.

BNSF apparently chose to focus on litigation, rather than negotiation. BNSF first sought direct access to LYB more than four months after the Board's decision in a letter dated November 7, 2016. Three days later, at a meeting scheduled to discuss BNSF access to CITGO, BNSF proposed an operating plan to serve LYB. On December 7, Union Pacific proposed an alternative operating plan. BNSF then took *more than two and a half months*, until February 29, 2017, to propose a revised plan. Union Pacific, BNSF, and KCS met on March 7 to discuss BNSF's revised plan, and Union Pacific memorialized its response in a letter dated April 21. Union Pacific received no response from BNSF for *nearly eight and a half months*, until January 10, 2018, when BNSF said it would seek relief from the Board. Union Pacific now recognizes BNSF must have been preparing its Petition since at least October 2017, when it conducted the Lake Charles area observation study described in the Petition.

Union Pacific recognizes our proposed schedule may be inconsistent with BNSF's request for Board action by early March or early July. However, BNSF has only itself to blame for the passage of time since its request to directly serve LYB, including the nearly nine months it took between receiving Union Pacific's response on April 21, 2017, and filing its Petition on January 12, 2018. The Board should not restrict Union Pacific's right to conduct discovery or reduce the time to file a reply to accommodate delay created by BNSF.

For the reasons discussed above, Union Pacific asks the Board to establish a 60-day discovery period, and a 90-day period for filing replies after discovery is complete.

Respectfully submitted,

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*Attorneys for Union Pacific
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February 1, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2018, I caused a copy of the foregoing document to be served by email on counsel for BNSF, KCS, and CITGO.

/s/ Michael L. Rosenthal

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UNION PACIFIC’S FIRST SET OF DISCOVERY REQUESTS TO BNSF

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, Union Pacific Railroad Company hereby requests that BNSF Railway Company produce documents and information responsive to the following requests within twenty days from the date hereof, unless otherwise agreed by the parties, to Michael L. Rosenthal, Esq., at Covington & Burling LLP, One CityCenter, 850 Tenth Street, NW, Washington, D.C. 20001.

DEFINITIONS

As used in these Discovery Requests, irrespective of capitalization:

1. “BNSF Railway Company” or “BNSF” means BNSF Railway Company, and its predecessors and successors in interest, as well as the present and former directors, officers, employees, agents, managing agents, representatives, contractors, attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, area offices, and regional offices of the foregoing companies; and all persons acting or purporting to act on their behalf.
2. “Communication” means any transmission or receipt of information (whether by one or more persons or between two or more persons) by means including but not limited to telephone conversations, letters, telegrams, teletypes, telexes, telecopies, electronic mail, text messages, instant messages, other computer linkups, written memoranda, and in-person conversations.

3. “Direct service” includes past, current, actual, prospective, planned, and proposed direct service.

4. “Document” has the broadest meaning permissible under 49 C.F.R. § 1114.30(a)(1), including but not limited to electronically stored information and any writing, drawing, graph, chart, photograph, sound recording, image, video, and other data or data compilation stored in any medium from which information can be obtained, translated, if necessary, through detection devices into reasonably usable form. “Document” includes, without limitation, any studies or work papers.

5. “Lake Charles Area” means Lake Charles, West Lake Charles, and Westlake, Louisiana.

6. “Lacassine Yard” means the rail yard operated by BNSF in Lacassine, Louisiana.

7. “Petition” means BNSF’s Petition to Establish Conditions of Use and Compensation filed with the Surface Transportation Board on January 12, 2018.

8. “Port of Lake Charles” means the Port of Lake Charles and its predecessors and successors in interest, as well as its present and former directors, officers, employees, agents, managing agents, representatives, attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, area offices, and regional offices; and all persons acting or purporting to act on its behalf.

9. “Rosebluff Lead” means the former SP-operated single track which begins on the former SP Lafayette Subdivision between Dawes, Texas and Avondale, Louisiana, at MP 222.3 and extends to the south for approximately 9 miles and includes the Rosebluff Yard.

10. “Rosebluff Yard” means the rail yard on the Rosebluff Lead approximately 0.50 miles south of the former SP Lafayette Division.

11. “SP” means Southern Pacific Transportation Company, the Denver & Rio Grande Western Railroad Company, St. Louis Southwestern Railway Company and SPCSL Corp.

12. Unless a different time period is specified, these requests cover the period from January 1, 2015, to the present.

13. All other terms used within this document, including any terms used within the Definitions section, possess their customary or standard meaning within the railroad industry.

INSTRUCTIONS

1. If BNSF objects to any portion of any document request, BNSF should identify the portion to which it objects, state the basis for the objection, and respond to the remainder. If BNSF has objections, Union Pacific’s counsel requests that BNSF promptly confer with undersigned counsel for Union Pacific so that the objection can be addressed and resolved.

2. If BNSF withholds documents on the basis of a claimed privilege or on the basis of the attorney work product doctrine, then for each such document, BNSF should provide the following information: the date of the document, type of document (*e.g.*, letter, memo, notes), author(s), addressee(s)/recipient(s) of the document, custodian and location of the document, general subject matter of the document, and the basis for the claim of privilege or attorney-work product. Such information should be supplied in sufficient detail to permit Union Pacific to assess the applicability of the privilege claimed.

3. If any of the requested documents was but is no longer in BNSF’s possession or subject to its control, state what disposition was made of it and when, and explain the reasons for such disposition.

4. These document requests are continuing in nature. Union Pacific requests that BNSF supplement its responses and production be provided as additional information or documents become available.

REQUESTS FOR PRODUCTION OF DOCUMENTS

Request for Production No. 1

Produce all documents (i) referred to or relied upon in the Verified Statement of Rob Reilly appended to the Petition or any of the exhibits attached thereto (“Reilly VS”); (ii) supporting any of the facts, analyses, contentions, or claims asserted in the Reilly VS; or (iii) consulted or relied upon by Mr. Reilly in preparing, writing, verifying, confirming, drafting, or editing the Reilly VS.

Request for Production No. 2

Produce all documents (i) referred to or relied upon in the Verified Statement of Michael R. Baranowski appended to the Petition or any of the figures included therein or exhibits attached thereto (“Baranowski VS”); (ii) supporting any of the facts, analyses, contentions, or claims asserted in the Baranowski VS; or (iii) consulted or relied upon by Mr. Baranowski in preparing, writing, verifying, confirming, drafting, or editing the Baranowski VS.

Request for Production No. 3

Produce all documents (not otherwise produced in response to Requests for Production Nos. 1 or 2) reflecting BNSF’s studies, analyses, reports, or observations of train operations between Lacassine Yard and customers served using the Rosebluff Lead.

Request for Production No. 4

Produce all documents (not otherwise produced in response to Requests for Production Nos. 1, 2, or 3) regarding rail capacity or rail congestion in the Lake Charles Area.

Request for Production No. 5

Produce all Documents concerning BNSF's plans or proposals for direct service to LyondellBasell's facility served using the Rosebluff Lead.

Request for Production No. 6

Produce all Communications between BNSF and LyondellBasell regarding direct service by BNSF in the Lake Charles Area.

Request for Production No. 7

Produce all Communications with shippers other than LyondellBasell regarding direct service by BNSF using the Rosebluff Lead.

Request for Production No. 8

Produce all Communications with the Port of Lake Charles or the Lake Charles Harbor and Terminal District (including but not limited to communications with members of the Board of Commissioners of the Lake Charles Harbor and Terminal District) regarding direct service by BNSF to shippers in the Lake Charles Area using the Rosebluff Lead.

Request for Production No. 9

Produce all Documents created during or in connection with BNSF surveillance or observation, whether by human or technological means, of the Lake Charles Area.

INTERROGATORIES

Interrogatory No. 1

Regarding traffic that BNSF would move to and from LyondellBasell's facility served using the Rosebluff Lead, identify frequency and volume (including specifying manifest versus unit volumes), and timing of delivery of loaded cars and removal of empty cars, and the operating characteristics of trains BNSF would use to perform these services.

Interrogatory No. 2

Identify all assumptions utilized in preparing the Reilly VS or Baranowski VS, including (i) the “LyondellBasell Operating Plan” (Exhibit A to Reilly VS) and (ii) what BNSF refers to as the “animation video depicting this BNSF operating plan and its interaction with existing operations” (Exhibit B to Reilly VS).

Respectfully submitted,

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January 23, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2018, I caused a copy of the foregoing document to be served by email on counsel for BNSF Railway, Kansas City Southern Railway, and CITGO Petroleum Corporation.

/s/ Michael L. Rosenthal