

Before the
SURFACE TRANSPORTATION BOARD

248023

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

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

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APPLICATION FOR TERMINAL TRACKAGE RIGHTS

BNSF's Reply to KCS and UP Letter Regarding Mediation

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Dated: June 25, 2019

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BNSF hereby replies to the letter filed in this proceeding on June 18, 2019, by counsel for KCS on behalf of KCS and UP (the “June 18 Letter”). KCS and UP have requested that the Board “schedule a mediation session in this matter utilizing the services of the Federal Mediation and Conciliation Service (“FMCS”) in conjunction with Board staff.”¹

At every step in this lengthy proceeding, KCS and UP have sought to block and delay BNSF from implementing the direct access rights to the Rosebluff Lead promised by UP and the Board to BNSF and Lake Charles area shippers nearly 23 years ago in order to offset the loss of competition from the UP/SP merger. *See UP/SP Decision No. 44*, 1 S.T.B. at 243, 427-29; *Decision No. 3*, slip op. at 2-3. As the Board is well aware, BNSF filed its application for terminal trackage rights in this proceeding more than six years ago. Following an unsuccessful mediation

¹ The acronyms and defined terms used herein are the same as those used in BNSF's Petition to Establish Conditions of Use and Compensation (BNSF-132, the “Petition”) filed in this proceeding on January 12, 2018, as modified to reflect the Board's usage in *Decision No. 4* in this proceeding, served on May 4, 2018.

session sponsored by the Board and extensive evidentiary submissions and briefing, the Board granted BNSF terminal trackage rights over the Rosebluff Lead in July 2016, nearly three years ago, through *Decision No. 3*. KCS then filed a petition for review of the Board's decision in the U.S. Court of Appeals for the District of Columbia Circuit.²

Despite BNSF's best efforts to negotiate a private agreement with UP and KCS on conditions of use and compensation, the parties were unable to reach a mutually agreed solution. *See* Petition at 4-7. BNSF then filed the instant Petition nearly eighteen months ago, requesting that the Board set the conditions of use and compensation, pursuant to the Board's direction in *Decision No. 3* and the Board's statutory authority to impose these terms. The parties fully briefed their positions on the conditions of use, after which the parties engaged in another full-day Board-sponsored mediation session at the Board's offices that failed to produce a solution. In response to an order by the Board in *Decision No. 6*, the parties provided the Board earlier this year with certain information intended to assist the Board in establishing compensation for BNSF's use of the Rosebluff Lead.

BNSF commends the Board's staff for the energy and expertise that they contributed to the prior two rounds of Board-sponsored mediation in this proceeding. BNSF agrees with KCS and UP that the three parties could have effectively resolved the conditions of use and compensation issues outstanding in this proceeding through mutual agreement rather than Board prescription. Unfortunately, despite BNSF's sincere efforts, the parties were unable to reach a solution on these issues across a number of private meetings and Board-sponsored mediation sessions over the last seven years.

² The D.C. Circuit has held that case in abeyance pending resolution of the conditions of use and compensation for BNSF's use of the terminal trackage rights granted by the Board.

Now that the Board has heard the evidence and argument from the parties, the Board should proceed to establish the conditions of use for BNSF's terminal trackage rights and permit BNSF to commence trackage rights operations on the Rosebluff Lead immediately under an interim compensation scheme. *See* BNSF-139 at 10-12 (filed Feb. 4, 2019); BNSF-140 at 15-16 (filed Feb. 25, 2019).

BNSF is concerned that the latest request for mediation is yet another effort by KCS and UP to slow this proceeding and delay the implementation of BNSF's direct access rights. There simply is no reason to believe that another round of mediation involving the FMCS and the Board would reach a different result from the prior rounds of mediation and negotiation. If KCS and UP were now sincerely interested in a mutually agreed solution, they would have contacted BNSF prior to filing their letter with the Board. They did not. Moreover, the letter does not indicate that KCS and UP intend to change their positions taken in their briefs and in prior Board-sponsored mediation and private negotiation sessions.

If the Board is nevertheless inclined to order another round of mediation with the FMCS and Board staff, then BNSF would suggest that certain conditions be adopted. First, the Board should affirm that it will not hold this proceeding in abeyance or otherwise delay the prompt resolution of this proceeding. Second, the Board should affirm that the mediation would be limited to issues relating to conditions of use and compensation, and not whether BNSF is entitled to direct access to the Rosebluff Lead. Third, the Board should require KCS and UP to identify the issues they are willing to mediate, including reconsideration of their prior positions on these issues and KCS's appeal of *Decision No. 3*. Otherwise, if KCS and UP simply advance and adhere to the same positions that they have taken in the past, there is no reason to conduct a further mediation.

In conclusion, the goal of any mediation is to achieve a mutually agreeable resolution of the parties' disputes. The prior two mediation sessions guided by

expert Board staff with detailed knowledge of the underlying issues were unproductive, and nothing different can be expected here. The Board should proceed to issue a decision establishing the conditions of use and permit BNSF to commence trackage rights operations on the Rosebluff Lead immediately under an interim compensation scheme. Lake Charles area shippers have waited nearly 23 years for the BNSF direct access promised to them by the Board and by UP through the CMA Agreement, and they should wait no longer.

Respectfully submitted,



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Attorneys for BNSF Railway Company

Dated: June 25, 2019

CERTIFICATE OF SERVICE

I certify that I have, on June 25, 2019, served copies of BNSF's Reply to KCS and UP Letter Regarding Mediation (BNSF-141) upon all parties of record in this proceeding, by electronic mail.

A handwritten signature in black ink, appearing to read 'Peter W. Denton', written over a horizontal line.

Peter W. Denton
Attorney for BNSF Railway Company