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Office of Proceedings
December 6, 2018
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EXPEDITED CONSIDERATION REQUESTED

By E-Filing

December 5, 2018

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

**Re: Docket No. FD 36186, Texas Railway Exchange LLC –
Construction & Operation Exemption – Galveston
County, TX**

Dear Ms. Brown:

Attached for e-filing is Union Pacific Railroad Company's motion for an extension of time to reply to the petition filed by Texas Railway Exchange LLC ("TREX") in the referenced matter on November 21, 2018.

Union Pacific requests *expedited consideration* of its motion because its reply to TREX's petition would otherwise be due on December 11, 2018.

Please contact the undersigned with any questions.

Sincerely,



Michael L. Rosenthal

cc: Peter A. Pfohl, Esq.

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36186

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

**UNION PACIFIC RAILROAD COMPANY'S
MOTION FOR EXTENSION OF TIME**

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December 5, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36186

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

**UNION PACIFIC RAILROAD COMPANY’S
MOTION FOR EXTENSION OF TIME**

Union Pacific Railroad Company (“Union Pacific”) requests that the Board extend the time to reply to the petition for exemption filed by Texas Railways Exchange LLC (“TREX”) until 20 days after TREX completes its responses to Union Pacific’s discovery requests served on December 4, 2018 (attached hereto as Exhibit 1). If the Board does address TREX’s petition without allowing time to complete discovery, we ask the Board to make clear it is not precluding discovery or prejudging issues potentially affected by information we obtain through discovery. We also ask the Board to refrain from issuing a certificate of public convenience and necessity until TREX finalizes the route for its proposed track and shows it is entitled to cross affected tracks and operate over other affected property owned by Union Pacific.

On November 21, 2018, the day before Thanksgiving, TREX filed a petition seeking an exemption to construct and operate a track between BNSF Railway Company’s Valley Yard and a facility owned by Texas International Terminals Ltd. (“TIT”).¹ TREX’s proposed track would cross two Union Pacific lines north of Valley Yard and extend over other Union Pacific property between Valley Yard and TIT. In fact, TREX’s calculations show its preferred route would use

¹ TREX sent Union Pacific’s Chief Legal Officer a courtesy copy of its petition, but she did not receive the copy until November 26, five days after the petition was filed at the Board.

Union Pacific's property for 34% to 43% of the total route.² Unless the Board grants our request for an extension, Union Pacific's reply will be due on December 11, just twelve business days after TREX filed its petition on the eve of a holiday.

Union Pacific has had no opportunity to conduct discovery regarding TREX's petition and barely any time to investigate the potential impacts of TREX's proposed construction on Union Pacific's operations and property. Once Union Pacific learned of TREX's petition, we promptly served discovery on TREX, but TREX's responses are not due until December 19.³ Allowing Union Pacific sufficient time to conduct discovery and investigate the facts before replying to TREX's petition is a matter of fundamental fairness and will allow the Board to address the issues raised by TREX's petition based on a full and complete record.

TREX may say an extension of time to permit discovery would interfere with its need for expedited action, but such claims should be entitled to no weight. TREX says it needs expedited action to remedy "significant operational constraints and customer delay/train turnaround issues" at TIT. (Petition at 14.) However, TREX mischaracterizes the operating environment at TIT,⁴

² See Petition at 2 (stating TREX's preference for "Blue" route); *id.*, Meadows V.S. at 3, 7 & 8 (stating length of proposed track and amount of Union Pacific property used by alternate routes).

³ The Board's rules require parties serving interrogatories to allow the person upon whom the interrogatories have been served not less than 15 days to serve answers and objections. See 49 C.F.R. § 1114.26(a). Realistically, Union Pacific expects TREX will need additional time to complete its responses to Union Pacific's interrogatories and document requests.

Union Pacific provided TREX with a proposed protective order when we served our discovery requests. Union Pacific plans to file a motion to enter the protective order early next week, hopefully with TREX's consent.

⁴ TREX refutes its own complaints by stating elsewhere in its petition that the proposed track should "not increase the total volume of rail traffic moving to TIT, as it is being constructed to accommodate existing BNSF unit trains." (*Id.* at 6.)

and it is also a long way from constructing any new track.⁵ Discovery will not cause any real delay, so there is no reason to short-circuit the Board's process.

TREX also says expedited action is necessary because "it would be difficult, if not impossible, for TREX to approve and finance" a diamond needed to cross over Union Pacific's tracks "without at least conditional approval from the Board." (Petition at 14.) However, TREX does not explain why conditional approval would affect its financing. TREX might be assuming its tactics will enhance prospects for final approval by limiting potential challenges to its plans, thus making the project more attractive to investors, but that would not be a valid reason to expedite Board action.⁶

Moreover, TREX controlled the timing of its petition and could have filed much earlier, if speed was an issue. It began the environmental review process in early 2018. (Petition at 6 n.7.) Its witness statements are supported by documents from fall 2018. It apparently began soliciting support letters in October or early November 2018. (*Id.*, Sullivan V.S., Exs. 3 & 4.) TREX does not explain its sudden need for expedited action. Nor does it try to reconcile its purported need for expedited action with its failure even to discuss its proposed construction project with Union Pacific before filing its petition. Indeed, Board action will be moot if TREX cannot operate over Union Pacific's property. *Cf. Holrail LLC – Construction & Operation Exemption – In Orangeburg & Dorchester Counties, SC*, FD 34421 (STB served Feb. 12, 2007).

⁵ The environmental review is still in progress, and manufacturing a key track component is projected to take one year. (*Id.* at 14). TREX's petition also suggests TREX might need 12 to 18 months to obtain required permits for an alternate route if it cannot use its preferred route. (*Id.*, Counsel's Ex. 2, Table 3.)

⁶ TREX also does not explain why investors are unconcerned with the legal hurdles TREX will have to clear in order to cross Union Pacific's tracks and operate over other property owned by Union Pacific between Valley Yard and TIT.

If the Board does grant TREX's petition without allowing time for discovery, Union Pacific asks the Board to make clear: (i) TREX still must respond to Union Pacific's discovery requests; (ii) the exemption will not be effective until after the environmental review process is completed; (iii) the conditional exemption is subject to revocation (*e.g.*, if discovery reveals the track is not a railroad line under § 10901); and (iv) the conditional exemption does not prejudice issues relating to crossing Union Pacific tracks and operating over other Union Pacific property. *See Midwest Generation, LLC – Exemption from 49 U.S.C. 10901 – For Construction in Will County, IL*, FD 34060 (STB served Mar. 21, 2002). 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

December 5, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2018, I caused a copy of the foregoing document to be served by email and first-class mail, postage prepaid, on:

Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

/s/ Michael L. Rosenthal
Michael L. Rosenthal

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36186

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

**UNION PACIFIC RAILROAD COMPANY’S FIRST SET
OF DISCOVERY REQUESTS TO TEXAS RAILWAY EXCHANGE LLC**

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, Union Pacific Railroad Company hereby requests that Texas Railway Exchange LLC produce documents and information responsive to the following requests to Michael L. Rosenthal at Covington & Burling LLP, One CityCenter, 850 Tenth Street, NW, Washington, D.C. 20001, no later than December 19, 2018.

DEFINITIONS

A. “Communication” means any transmission or receipt of information by one or more persons or between two or more persons by means including but not limited to telephone conversations, letters, telecopies, electronic mail, text messages, written memoranda, and in-person conversations.

B. “Document” means all types of documents that are subject to discovery under 49 C.F.R. § 1114.30(a)(1). “Document” includes every copy of a document that is not identical to the original or any other copy.

C. “Petition” refers to the “Petition of Texas Railway Exchange LLC for an Exemption Under 49 U.S.C. § 10502 From the Requirements of 49 U.S.C. § 10901,” dated November 21, 2018.

- D. “Meadows V.S.” means the Verified Statement of R. Lee Meadows, Jr. accompanying the Petition.
- E. “Sullivan V.S.” means the Verified Statement of Todd Sullivan accompanying the Petition.
- F. “Proposed Track” refers to the track that is the subject of the Petition.
- G. “BNSF” means BNSF Railway Company.
- H. “TREX” means Texas Railway Exchange LLC.
- I. “TIT” means Texas International Terminals Ltd.
- J. “Union Pacific” and “UP” mean Union Pacific Railroad Company.

INSTRUCTIONS

1. These requests extend to any documents or information in the possession, custody, or control of TREX, its present and former directors, owners, members, officers, employees, attorneys, and any other agents or representatives.
2. Unless a different time period is specified, these requests cover the period from January 1, 2018 to the present.
3. If TREX for any reason withholds documents or information responsive to any of these discovery requests, state the factual and legal basis for doing so and produce documents or information for any part of the request not alleged to be objectionable or to call for production of protected information. If TREX withholds documents on the basis of a claimed privilege, or on the basis that the documents are attorney work product, then for each such document, TREX should provide the following information: the document’s date, type (*e.g.*, letter, memo, notes), author(s), addressee(s)/recipient(s), general subject matter, and the basis for withholding the document.

INTERROGATORIES

Interrogatory No. 1

What shipper facilities other than TIT's facility will be or could be served by the Proposed Track? If shipper facilities other than TIT will be or could be served by the Proposed Track, identify all communications regarding those shipper facilities.

Interrogatory No. 2

Will TREX or the entity providing service over the Proposed Track provide regularly scheduled service over the Proposed Track? If so, describe the service schedule. If not, describe the projected timing and frequency of service over the Proposed Track.

Interrogatory No. 3

What volume of traffic is projected to move over the Proposed Track, assuming construction is completed?

Interrogatory No. 4

Who will maintain the Proposed Track, assuming construction is completed?

Interrogatory No. 5

Will the Proposed Track be used to switch cars between BNSF's Valley Yard and TIT's loop track, assuming construction is completed?

Interrogatory No. 6

Identify every instance in which Union Pacific "declined TIT's special switch requests" where "TIT has provided UP with adequate notice of requested special switches and has complied with all UP instructions." (Sullivan V.S. ¶ 30.)

Interrogatory No. 7

Identify every instance in which Union Pacific “failed to switch BNSF half unit trains on weekdays.” (Sullivan V.S. ¶ 27.)

Interrogatory No. 8

Identify the specific dates of the “seven (7) times since December 2018” when Union Pacific “delivered entire BNSF unit trains in one switch to TIT.” (Sullivan V.S. ¶ 18.)

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?

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?

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.)

Interrogatory No. 12

Do TIT’s customers or potential customers ask about turnaround times for cars that are or might be transported to TIT by BNSF? If so, does TIT explain that BNSF unit trains must be switched by Union Pacific into and out of TIT’s facility?

Interrogatory No. 13

Do TIT’s contracts with customers address car turnaround times? If so, what do those contracts provide with regard to turnaround times for cars transported to TIT by BNSF?

Interrogatory No. 14

Under TREX's operating plan, would cars transported by BNSF use the train landing or railcar storage trackage "that was paid for by TIT and installed on leased property owned by Union Pacific Railroad Company?" (Sullivan V.S. ¶ 11.) If so, how would TREX use that trackage and how would cars move between the Proposed Track and that trackage?

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?

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.

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?

Interrogatory No. 18

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

Interrogatory No. 19

Does TREX expect TIT customers to pay more to move traffic to TIT via BNSF after construction of the Proposed Track? If not, how does TREX expect to earn revenue from construction or operation of the Proposed Track?

Interrogatory No. 20

Has TREX discussed compensation for BNSF's use of the Proposed Track with BNSF?

If so, describe the substance of those discussions, including proposed amounts of compensation.

Interrogatory No. 21

Identify any owners of, or partners in, TREX other than Todd Sullivan, William Sullivan, and John Sullivan, and identify the percentage interests of all the owners/partners in TREX.

Interrogatory No. 22

Do any of the owners of, or partners in, TREX have any experience operating a railroad?

If so, describe that experience.

Interrogatory No. 23

Does TREX have insurance that would cover damage to Union Pacific property and business resulting from construction and operation of the Proposed Trackage? If so, describe TREX's insurance coverage.

Interrogatory No. 24

Identify all communications involving BNSF regarding the proposed routing, construction, and operating plan described in the TREX Petition.

Interrogatory No. 25

What "engineering and other plans relating to the proposed line" (Petition at 14-15), apart from ordering crossing diamonds, would TREX not move forward with absent a conditional grant of exemption?

Interrogatory No. 26

Do any entities other than Union Pacific and TIT own real estate or other real property required for the construction, operation, and maintenance of the Proposed Track? If so, identify those entities, and identify all communications with those entities regarding the Proposed Track.

Interrogatory No. 27

Identify all communications between TREX and any shipper served using the Union Pacific tracks that would be crossed by the Proposed Track.

Interrogatory No. 28

Identify the “engineering drawings provided by TREX” that are referenced on page 4 of the Meadows V.S.

Interrogatory No. 29

Describe TREX’s plan for constructing track between the crossing diamonds it plans to install (see pages 8-9 of the Meadows V.S.) and the at-grade crossing at Old Port Industrial Road (see pages 10-11 of the Meadows V.S.), particularly, describe how long construction will occur on Union Pacific property, whether and where construction equipment will occupy Union Pacific property outside the Proposed Track’s right-of-way, and the impacts of the construction on Union Pacific operations to TIT and other affected customers of Union Pacific.

Interrogatory No. 30

When BNSF loaded unit trains are divided into two cuts to facilitate spotting the cars for unloading, as described in Exhibit 5 to the Meadows V.S., where will the trains be divided into two cuts?

Interrogatory No. 31

When the two cuts of empty cars from BNSF unit trains are assembled into a single, outbound empty unit train that would be returned to BNSF's Valley Yard, as described in Exhibit 5 to the Meadows V.S., where would the two cuts of cars be assembled into a single unit train?

Interrogatory No. 32

Describe the train movements required and the tracks that will be used for the movements during the "approximately three times per train" a BNSF unit train will be switched, as described in Exhibit 5 to the Meadows V.S.

Interrogatory No. 33

How many movements on the Proposed Track will cross Union Pacific tracks per day?

Interrogatory No. 34

How many cars per movement on the Proposed Track will cross Union Pacific tracks?

Interrogatory No. 35

How long will a BNSF loaded unit train take to move between Valley Yard and TIT's facility, from the time the train begins moving out of Valley Yard until the time the last car clears (a) Union Pacific tracks to be crossed by the Proposed Track, and (b) Union Pacific property?

Interrogatory No. 36

How long will a BNSF empty unit train take to move between TIT's facility and Valley Yard, from the time the train enters Union Pacific property until the last car clears the Union Pacific tracks to be crossed by the Proposed Track?

Interrogatory No. 37

Will TREX or the entity maintaining the Proposed Track need to occupy Union Pacific property to maintain the Proposed Track, assuming construction is completed? If so, describe TREX's plans for maintaining the Proposed Track, including the frequency of maintenance and the Union Pacific property that would be occupied while maintenance is performed.

DOCUMENT REQUESTS

Request for Production No. 1

Produce all documents identified in TREX's responses to the Interrogatories.

Request for Production No. 2

Produce all documents relating to TREX's operating plan.

Request for Production No. 3

Produce all documents relating to the projected or expected volume of traffic that will move over the Proposed Track.

Request for Production No. 4

Produce all documents relating to coordination between BNSF and TREX "regarding the proposed routing, construction, and operating plan described in the TREX Petition for Exemption," as described in Counsel's Exhibit 1 to the Petition.

Request for Production No. 5

Produce all contracts between TREX and TIT relating to the Proposed Track, including but not limited to contracts addressing construction, operation, and maintenance of the Proposed Track.

Request for Production No. 6

Produce all contracts between TREX and BNSF relating to the Proposed Track, including but not limited to contracts addressing construction, operation, and maintenance of the Proposed Track.

Request for Production No. 7

Produce all documents containing or reflecting communications with Union Pacific regarding service issues involving (a) Union Pacific direct service to TIT, or (b) Union Pacific's provision of reciprocal switching service for BNSF.

Request for Production No. 8

Produce all documents containing or reflecting communications with TIT customers or potential customers regarding (a) the Proposed Track; (b) service issues involving Union Pacific direct service to TIT; or (c) service issues involving Union Pacific's provision of reciprocal switching service for BNSF.

Request for Production No. 9

Produce all documents relating to the October 18, 2018, conference call between TIT and Union Pacific described in paragraph 24 of the Sullivan V.S.

Request for Production No. 10

Produce all studies, analyses, and reports created since January 1, 2017, regarding turnaround times for cars transported to TIT by BNSF (via reciprocal switching provided by Union Pacific).

Request for Production No. 11

Produce a copy of TREX's most current income statement and balance sheet.

Request for Production No. 12

Produce all documents relating to the funding of (a) construction of the Proposed Track, and (b) acquisition of real property required to construct the Proposed Track.

Request for Production No. 13

Produce all documents relating to funding of operations or maintenance of the Proposed Track.

Request for Production No. 14

Produce all documents relating to TREX's projected revenue or income from construction or operation of the Proposed Track.

Request for Production No. 15

Produce a copy of any insurance policies that would cover damage to Union Pacific property or business during the construction, operation, or maintenance of the Proposed Track.

Request for Production No. 16

Produce all engineering drawings relating to the Proposed Track created on or after January 1, 2017, including but not limited to drawings showing preliminary or alternative routings for the Proposed Track as described in the Meadows V.S.

Request for Production No. 17

Produce all documents relating to the site inspection described in the Meadows V.S.

Request for Production No. 18

Produce the Wetland Delineation Report, dated August 8, 2018, referenced in Counsel's Exhibit 2 to the Petition.

Request for Production No. 19

Produce documents sufficient to show the ownership of the real estate and other real property to be traversed by the Proposed Track.

Request for Production No. 20

Produce all documents containing or reflecting communications with entities other than Union Pacific that own real estate or other real property to be traversed by the Proposed Track.

Request for Production No. 21

Produce all documents relating to “[e]fforts [that] have been made in the past to directly connect with BNSF.” (Sullivan V.S. ¶ 28.)

Request for Production No. 22

Produce all documents relating to efforts to obtain support for construction of the Proposed Track at the Surface Transportation Board.

Request for Production No. 23

Produce all documents addressing support for construction of the Proposed Track by “TIT’s neighbors.” (Sullivan V.S. ¶ 52.)

Request for Production No. 24

Produce all documents supporting the conclusions in Exhibit 5 to the Meadows V.S. regarding the reduction in the number of at-grade road crossings and the reduction in the number of times a BNSF unit train will be required to be switched.

Request for Production No. 25

Produce all documents relating to the amount of time trains or cars moving between Valley Yard and TIT would occupy property owned by Union Pacific as they move over the Proposed Track.

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Attorneys for Union Pacific Railroad Company

December 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2018, I caused a copy of the foregoing document to be served by email and first-class mail, postage prepaid, on:

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/s/ Michael L. Rosenthal
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