

BNSF-133

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EXPEDITED CONSIDERATION REQUESTED

Before the
SURFACE TRANSPORTATION BOARD

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

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

APPLICATION FOR TERMINAL TRACKAGE RIGHTS

**BNSF's Reply to Union Pacific Railroad Company's
Motion to Establish Procedural Schedule**

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Motion to Establish Procedural Schedule**

BNSF Railway Company ("BNSF")¹ hereby replies to UP's Motion to Establish Procedural Schedule, filed on February 1, 2018 (UP/SP-422, the "UP Motion"), as supplemented by UP's "Supplement" to that Motion, filed on February 7, 2018 (UP/SP-423, the "UP Supplement").

BNSF agrees with UP in principle that the Board should "establish a procedural schedule that gives parties a fair opportunity to complete on-going discovery and file replies to [the Petition]." UP Motion at 2. However, BNSF cannot accept UP's proposal for "a 60-day period to complete discovery, then a 90-day period from the completion of discovery to file replies." *Id.* UP's proposal would unnecessarily delay implementation of BNSF's terminal trackage rights granted by the Board in Decision No. 3 and threaten to eclipse the statutory deadline that governs this proceeding. UP's proposal would also create an uncertain schedule with no clear deadlines

¹ The acronyms and defined terms used herein are the same as those used in the BNSF Petition to Establish Conditions of Use and Compensation (BNSF-132, the "Petition") filed in this proceeding on January 12, 2018.

for filings or even any mechanism to determine when the 60-day and 90-day periods would begin.

In its Supplement, UP asks the Board to “defer any ruling” on the UP Motion until after the Board addresses KCS’s motion to dismiss, filed on February 1, 2018 (the “KCS Motion”). UP Supplement at 1. As discussed in the BNSF Reply to the KCS Motion (BNSF-134, filed concurrently with this Reply), the KCS Motion is wholly without merit, and the Board should summarily deny the KCS Motion.

Therefore, BNSF respectfully requests that the Board expeditiously proceed to establish the following procedural schedule:

- **January 12, 2018:** Filing of BNSF Petition and Petition Evidence
- **March 28, 2018:** Replies and Reply Evidence Due
- **May 7, 2018:** BNSF Rebuttal Argument and Evidence Due
- **July 11, 2018:** Board Decision²

Neither the Board’s regulations nor its precedent describe the procedures applicable to the Board’s establishment of conditions of use and compensation in terminal trackage rights proceedings. Notwithstanding this procedural uncertainty, this is an appropriate matter for the use of the Board’s modified procedures set forth in 49 C.F.R. Part 1112. Under those modified procedures, BNSF’s Petition would be considered an “opening statement,” UP and KCS would file replies to the Petition, and BNSF would file a rebuttal to the UP and KCS replies. Principles

² As BNSF stated in the Petition at 1, if the Board requires additional time to establish compensation terms for BNSF’s terminal trackage rights operations, BNSF requests that the Board impose the conditions of use and interim compensation terms by July 11, 2018, with such interim compensation terms to be reconciled once the Board ultimately establishes the final compensation terms. *See also* Petition at 16-17 (“BNSF is willing to pay the Prescribed Fee as interim compensation for such operations, or otherwise ‘adequately secure’ such payment, in accordance with 49 U.S.C. § 11102(a).”).

of fairness and the Board's interest in completing a full record dictate that BNSF must have the ability to respond to UP's and KCS's evidentiary submissions in this proceeding.³

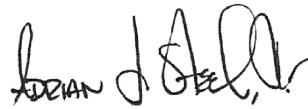
This approach is also consistent with the procedural schedule adopted by the Board for consideration of BNSF's terminal trackage rights application in this proceeding, where the Board ordered replies and reply evidence to be filed 60 days after BNSF's opening statement and evidence, and BNSF's rebuttal argument and evidence to be filed 30 days after the replies. *See BNSF Ry. Co.—Terminal Trackage Rights—Kan. City S. Ry. Co. & Union Pac. R.R. Co.*, FD-32760 (Sub-No. 46), Decision No. 2 (served Dec. 1, 2014). Under BNSF's proposal here, replies would be due 75 days after BNSF filed its Petition and BNSF's rebuttal would be due 40 days later.

BNSF's proposed schedule also sets specific deadlines for the submission of pleadings, allowing the Board ample time to review the record and issue a decision by July 11, 2018, consistent with the mandate in 49 U.S.C. § 11102(d) that the Board complete this proceeding within 180 days. UP has proposed no specific dates for future submissions, and it is unclear from the UP Motion both when the proposed 60-day "discovery period" would begin or end, and who would determine when the proposed 90-day period for preparing replies would begin. Under UP's proposed schedule, replies may be due six months or more after BNSF filed its Petition, and the Board would likely not have sufficient time to issue a decision by the statutory deadline of July 11, 2018.

³ *See, e.g., UP/SP Merger*, Decision No. 109, slip op. at 1 n.2 (served Jan. 31, 2018) (accepting supplemental filings by UP, BNSF, and another party "[i]n the interest of compiling a more complete record").

BNSF requests expedited consideration of its request, because any delay by the Board in establishing such a schedule could threaten the 180-day statutory deadline that governs this proceeding and unnecessarily further delay implementation of BNSF's terminal trackage rights.

Respectfully submitted,



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Counsel for BNSF Railway Company

Dated: February 21, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2018, copies of the foregoing BNSF's Reply to Union Pacific Railroad Company's Motion to Establish Procedural Schedule have been served by e-mail on Counsel for UP, KCSR and CITGO.

A handwritten signature in black ink, appearing to read "Adrian L. Steel, Jr.", written over a horizontal line.

Adrian L. Steel, Jr.