

SERVICE DATE – APRIL 4, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36186 (Sub-No. 1)

PETITION OF TEXAS RAILWAY EXCHANGE LLC FOR ISSUANCE OF A CROSSING  
ORDER PURSUANT TO 49 U.S.C. § 10901(D)

Digest:<sup>1</sup> The Board denies Union Pacific Railroad Company's motion to strike Texas Railway Exchange LLC's reply and sets a procedural schedule.

Decided: April 3, 2019

On February 22, 2019, Texas Railway Exchange LLC (TREX) filed a petition for issuance of a crossing order pursuant to 49 U.S.C. § 10901(d) (Crossing Petition) to allow a proposed new rail line to cross tracks owned by Union Pacific Railroad Company (UP) in Galveston, Tex.<sup>2</sup> Along with its Crossing Petition, TREX also filed a petition for a modified procedural schedule (Procedural Petition). In its Procedural Petition, TREX states that its Crossing Petition constitutes a complete evidentiary submission and therefore should be considered an opening statement under the Board's modified procedures. (Procedural Pet. 2 (citing WFEC R.R.—Constr. & Operation Exemption—Choctaw & McCurtain Ctys., Oak.—Pet. for Issuance of an Order Pursuant to 49 U.S.C. § 10901(d), FD 32607 (Sub-No. 1) (ICC served May 5, 1995); Chi. & N.W. Ry.—Constr. & Operation Exemption—City of Superior, Douglas Cty., Wis.—Pet. for Issuance of an Order Pursuant to 49 U.S.C. § 10901(d), FD 32433 (ICC served Nov. 15, 1994)).) Under TREX's proposed schedule, UP's reply to the Crossing Petition would be due 45 days from the service date of the Board's procedural order, and TREX's rebuttal would be due 30 days after receipt of UP's reply.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> In the related construction proceeding, TREX filed a petition on November 21, 2018 (Construction Petition), for an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate approximately one-half mile of rail line in Galveston County, Tex. (the Line), to provide Texas International Terminals Ltd. (TIT) with a connection to the BNSF Railway Company. See Tex. Ry. Exch. LLC—Constr. & Operation Exemption—Galveston Cty., Tex., Docket No. FD 36186. TREX's exemption petition is still pending before the Board.

On February 27, 2019, UP filed a reply to TREX's Procedural Petition. UP states that, at this time, it objects to TREX's proposed crossing and intends to seek discovery relating to the Crossing Petition. UP further states that while UP has engaged in some discovery relating to the Construction Petition, TREX objected to several of UP's requests as "'speculative and premature' because they appeared 'to pertain to a possible future crossing petition.'" (UP Reply 2 n.2.) Additionally, according to UP, this is not a straightforward crossing case because TREX is seeking authority to not only cross UP's lines but also to build track laterally within UP's right-of-way. (*Id.* at 2-3.) UP therefore proposes a lengthier procedural schedule to accommodate additional discovery. Under UP's proposed schedule, its reply to the Crossing Petition would be due 95 days from the service date of the Board's procedural order, which would be 45 days from the date TREX's discovery responses would be due to UP. TREX would not be provided time to file rebuttal evidence.

On February 28, 2019, TREX filed a response to UP's reply to TREX's Procedural Petition. TREX argues that UP's reply is tantamount to a separate request to which it is entitled to respond, but to the extent necessary, seeks leave to respond. TREX opposes additional discovery, stating that in "[a]lmost all instances where TREX objected on grounds of prematurity . . . TREX has supplied ample responsive information in its Crossing Petition, along with its supporting exhibits, appendices, and workpapers." (TREX Reply 3.) Additionally, TREX asserts that "UP already knows all of the facts and circumstances relevant to the transportation at issue because it presently carries 100 percent of the traffic to TIT." (*Id.* at 4.)

On March 4, 2019, UP filed a motion to strike TREX's February 28, 2019 response as an impermissible reply to a reply, citing 49 C.F.R. § 1104.13(c). UP also requested that, if the Board denies its motion, the Board grant it time to file a reply to TREX's February 28, 2019 response. (UP Mot. to Strike 3.) On March 5, 2019, TREX filed a letter in opposition to UP's motion to strike, arguing that TREX replied directly to UP's alternative procedural schedule, which departs dramatically from the Board's modified procedures, and that TREX sought leave to respond to UP's proposed schedule to the extent deemed necessary.

Although UP is correct that the Board's rules generally prohibit replies to replies, see 49 C.F.R. § 1104.13(c), UP's response to TREX's procedural motion is more than that: it includes a new request for relief—the adoption of a proposed procedural schedule substantially different from TREX's—to which TREX is entitled to respond. Therefore, UP's motion to strike will be denied. UP's contingent request for permission to reply to TREX's February 28 submission, also will be denied. TREX's submission merely responds to UP's proposed schedule; it includes no new request for relief. At this point, both parties have proposed a procedural schedule, and both have replied to each other's. No additional submissions are needed.

In order both to develop a more complete record and to expeditiously consider the merits of TREX's Crossing Petition, the Board will provide for limited discovery pertaining to the

Crossing Petition as well as a rebuttal from TREX. Thus, the following procedural schedule will be adopted:

|                                      |               |
|--------------------------------------|---------------|
| UP serves discovery requests on TREX | April 9, 2019 |
| Discovery complete                   | May 4, 2019   |
| UP files reply to Crossing Petition  | June 18, 2019 |
| TREX files rebuttal                  | July 18, 2019 |

It is ordered:

1. TREX's February 28, 2019 reply is accepted.
2. UP's motion to strike and contingent request for permission to reply to TREX's February 28, 2019 reply are denied.
3. The procedural schedule described above is adopted.
4. This decision is effective on the date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.