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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

Re: **FD 36627**
TGS Cedar Port Railroad LLC—Operation
Exemption—Track in Chambers County, Tex.

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is **TGS Cedar Port Railroad LLC's Verified Reply in Opposition to Union Pacific Railroad Company's Petition to Revoke**, dated April 24, 2023.

If you have any questions regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter.

Respectfully submitted,

/s/ *R.A. Wimbish*

Robert A. Wimbish
Attorney for TGS Cedar Port Railroad LLC

RAW:bjs

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36627

TGS CEDAR PORT RAILROAD LLC
— OPERATION EXEMPTION —
TRACK IN CHAMBERS COUNTY, TEX.

**TGS CEDAR PORT RAILROAD LLC'S VERIFIED REPLY IN OPPOSITION TO
UNION PACIFIC RAILROAD COMPANY'S PETITION TO REVOKE**

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**ATTORNEYS FOR TGS CEDAR PORT
RAILROAD LLC**

Dated: April 24, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36627

TGS CEDAR PORT RAILROAD LLC
— OPERATION EXEMPTION —
TRACK IN CHAMBERS COUNTY, TEX.

**TGS CEDAR PORT RAILROAD LLC’S VERIFIED REPLY IN OPPOSITION TO
UNION PACIFIC RAILROAD COMPANY’S PETITION TO REVOKE**

TGS Cedar Port Railroad LLC (“TGSC”) hereby replies in opposition to Union Pacific Railroad Company’s (“UP”) petition to revoke (the “Petition”) as void *ab initio* TGSC’s roughly nine-month-old class exemption in the above-referenced docket. TGSC *agrees* with UP that certain passages contained in TGSC’s class exemption filing of July 7, 2022 (the “Notice”) addressing the subject transaction’s anticipated competitive impact are indeed material statements bearing upon the propriety of TGSC’s invocation of the new carrier class exemption procedures. Furthermore, TGSC agrees that the expansive logistics facility—the TGS Cedar Port Industrial Park (the “Park”)—within which TGSC has commenced providing common carrier service pursuant to the Notice is a “2-to-1” location, identified as such in the Union Pacific/Southern Pacific merger proceeding (“UP/SP”).¹ Petition, 3.

But TGSC and UP fundamentally *disagree* about whether – (a) UP is legally entitled to block Park customers from access to direct BNSF Railway Company (“BNSF”) service going forward simply because rail service within the Park has changed from private

¹ *Union Pacific Corp. — Control & Merger — Southern Pacific Rail Corp.* (Decision No. 44), 1 S.T.B. 233 (1996) (“UP/SP”), *aff’d sub nom. Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999).

switching (provided in the past by a non-carrier TGSC affiliate) to common carriage; and (b) the Board's conditional, merger-authorizing decision in *UP/SP* and the corresponding March 1, 2002 Restated and Amended Settlement Agreement (the "RASA") entitles Park customers to continue to enjoy direct BNSF access regardless of the legal status of the Park's rail service provider.

For all of the Petition's many subsidiary defects, its main one is that, despite UP's arguments to the contrary, UP is not legally entitled to block the Park—an undisputed 2-to-1 facility and its numerous customers from direct BNSF access simply because the Park's owner has chosen to provide federally-regulated first-mile/last-mile rail service.² The Petition asks the Board to find that the agency has, through *UP/SP* and the RASA, somehow agreed that UP may behave anticompetitively because the new short line operator of an acknowledged 2-to-1 facility is not listed on the RASA's roughly 20-year-old catalogue of short lines.³ If the Board were to agree with UP's predatory efforts as set forth in its Petition, it would do nothing but elevate

² The Park—and its dozens of shippers—are a single station on the UP network. Another rail operator is required to respectively receive cars from and tender cars to the actual customers within the more than 15,000 acre-Park. The Park's owner has determined it should provide this "first mile/last mile" service on a common carrier basis.

³ See *UP/SP*, FD 32760 (Sub-No. 21) (*General Oversight*), Decision No. 21, 5 S.T.B. 1173, 1175-1176 at n. 8 (2001) ("UP's evidence demonstrates that the BNSF Agreement has allowed BNSF to access (generally via trackage rights and line purchases) all 2-to-1 shippers and shortline connections; that, as a result of the BNSF Agreement, all 2-to-1 shippers (the majority of whom are located in Texas, Arkansas, Utah, Nevada, and California) have access to two competitive rail systems with comprehensive networks that can provide efficient single-line access to far more points than either UP or SP served before the merger . . .") (hereinafter "*General Oversight*"). See also, "Applicants' Reply to Comments" filed Aug. 21, 1997 in *General Oversight*, 25-26 ("For several reasons, there may never be a 100%-perfect '2-to-1' facility list, and such a perfect and comprehensive list is simply not necessary. First such a list is a moving target Second, among the universe of '2-to-1' facilities are all shipper facilities located on '2-to-1' shortlines . . . Third, since the definition of '2-to-1' includes any existing facility that had direct access at the time of the merger, whether or not it had shipped via either railroad for many years or ever, it is very difficult—and not of practical value—to catalogue these facilities exhaustively with 100% perfection.").

hyper-technical form at the expense of competition-preserving substance. Were it instead to agree that the Park remains entitled to direct BNSF access via direct TGSC-BNSF interchange, then the Board should hold that the Notice is not materially false or misleading, and, in turn, it should uphold TGSC's exemption.

BACKGROUND

TGS Cedar Port Industrial Park and its longstanding direct access to competitive line-haul railroad service.

The Park is owned by TGSC affiliate, TGS Cedar Port Partners LP ("TGSLP"). TGSC and TGSLP are controlled by Trans-Global Solutions, Inc. ("TGSI"). Until TGSC's commencement of operations on April 1, 2023, TGSI had for several years provided private railroad switching services for Park customers under a services contract with TGSLP. UP has not challenged the accuracy of the Notice's recitation of the foregoing facts. UP has added, correctly, that, under TGSI operations, BNSF and UP each picked up and delivered cars destined from and to Park customers using Park trackage (which UP refers to as "ancillary" track).⁴ Although TGSC is a common carrier within the Park, and nominally "interchanges" traffic with UP and BNSF (pending the outcome of this proceeding, at least) the scope of pick up and set off operations with BNSF and UP are essentially unchanged, functionally, from the days of TGSI switching. TGSC does not believe that BNSF and UP operations to and from the Park are materially different than they were when Park rail service was provided by TGSI.

The Park premises were once part of the sprawling United States Steel ("USX") Texas Works facility in Baytown, Texas, historically served by UP's predecessor Missouri

⁴ Petition, 3.

Pacific Railroad Company (“MP”) and SP via separate routes into the USX plant.⁵ Those independent routes into the Texas Works complex existed at the time of the UP/SP merger in 1996.⁶ TGSI’s interests in the Park date to 1997, when it first negotiated track lease terms with USX, culminating in 2014 with TGS LP’s purchase of some 11,000 acres of the former Texas Works premises and industrial track located therein from Cedar Crossing, L.P. (a primarily real estate operation that acquired the rail and industrial property from USX), forming what is now the Park. Since 2014, TGS LP has continued to add additional acreage to the point that the Park now occupies of some 15,000 acres. In contrast to a single, rail-service dependent customer prior to 1996, the premises that now constitute the Park have grown such that the Park now hosts 18 on-site, railroad service-dependent businesses, and supports an additional 65 customers that utilize the Park’s railroad facilities for such things as car storage (including storage-in-transit), freight car cleaning and repair, and rail-to-truck and rail-to-barge transloading.

⁵ SP reached the facility via its Baytown Branch off of SP’s Lafayette Subdivision. UP and BNSF now each own one-half of the former SP Lafayette Subdivision running generally west-to-east between Dawes, Texas, and Avondale, Louisiana (the “50/50 Line”). *Burlington N. & Santa Fe Ry. Co. & Union Pac. R.R. Co. — Acquisition Exemption — Lines Between Dawes, Tex., & Avondale, La.*, FD 33630 (STB served Sept. 29, 1998), 2 (noting that BNSF was “gain[ing] access to all present and future shipper facilities . . . on former SP branches or spurs that connect to the [50/50 Line], as well as on new branches and spurs added to the line.”).

⁶ UP has since abandoned the former MP line to the site. *Union Pacific Railroad Company — Abandonment Exemption — In Harris and Chambers Counties, Tex.*, AB 33 (Sub-No. 324X) (STB served Mar. 29, 2017). As part of the abandonment process, UP published a “Public Notice” that was clear about the 2-to-1 impact of the UP/SP merger on this location: “The [U.S. Steel] mill shut down permanently in 1988 and was redeveloped as the Cedar Point Industrial Park. In 1996, the Union Pacific Railroad merged with the Southern Pacific Railroad, which had a separate line to the US Steel site at Cedar Point, rendering the [MP] line duplicative.” AB 33 (Sub-No. 324X), UP Verified Notice of Exemption, filed Mar. 9, 2017, Exhibit 4 (“Historic Condition Letter”), Exhibit 7 thereto. As it must, UP continues to explicitly concede the 2-to-1 status of the Park in its current filing. Petition at 3.

The Park is considered to be the largest master-planned rail-and-barge-served industrial park in the U.S., and the fifth largest industrial park in the world. More information about the immense scope of the Park can be found at: <https://www.tgscedarport.com/park-overview.php>. Additional information about the Park's railroad transportation services can be found at: <https://www.tgscedarport.com/rail.php>. TGSC invites the Board to review an audio/visual presentation covering the Park's location in the greater Houston area, its importance to Gulf Coast, domestic and international commerce, its customers, and the multitude of logistics benefits of the Park at: <https://www.tgscedarport.com/index.php>. In 2022, TGSI handled slightly more than 41,000 separate inbound railroad shipments, including cars delivered to the Park to make use of the Park's storage-in-transit offerings. TGSC expects that total carloads handled inbound in 2023 will exceed 42,000 cars⁷ and forecasts that, by 2027, total annual TGSC-handled inbound carloads will approach 50,000. It is easy to appreciate why UP and BNSF would each be very interested in the traffic moving to and from the Park, and each line-haul carrier has, over the years, proven to be an important partner. But UP's recent anti-competitive, bullying behavior threatens to undermine an otherwise productive, mutually-beneficial relationship, and *UP/SP's* competition-preserving conditions.

Based on this size and scope, one can appreciate how operations at the Park may have resembled a common carrier operation in nature even before TGSC took up operations. But

⁷ As additional information regarding the scope of railroad freight service to and from the Park, between April 1, 2023 (the commencement date of TGSC common carrier operations) and April 16, 2023, UP has interchanged traffic with TGSC on 36 separate occasions, involving a total of 3,323 cars, which would annualize to a total of 75,920 inbound and outbound railcar movements. During that same time frame, BNSF has interchanged traffic with TGSC on 14 separate occasions, involving a total of 860 cars, which would annualize to a total of 19,710 inbound and outbound railcar movements.

beyond that, TGSI elected to move ahead with the TGSC common carrier service initiative, driven by several practical, business-driven considerations, including the following:

- Improved monitoring of demurrage and communication with Park customers, which will result in improved car utilization efficiencies, including potential reduction in customer demurrage accrued.
- TGSC will no longer be restricted (as TGSI was) from assessing accessorial fees to BNSF and UP for railcars each delivers in error to TGSC. TGSC incurs considerable costs, annually, associated with cars received in error from BNSF and UP, which delivered cars must be extracted from other interchange traffic, and placed on outbound interchange tracks back to the interchanging carrier, much as TGSC's non-carrier predecessor had done. Between April 1 and April 16, for example TGSC has received (and has returned) eight railcars delivered to TGSC in error from BNSF, and 69 from UP, an average of almost 5 erroneously interchanged inbound cars per day. UP and BNSF will each, under the accessorial fee regime, be better commercially incentivized to improve the accuracy of its respective car routing under TGSC's common carrier operations.
- Improved visibility of railcars and railcar movement within the Park for other railroads participating in particular traffic movements in coordination with TGSC.
- Improved transparency of billing processes for customers who move cars to and from the Park.
- TGSC will have access to improved online data as a common carrier (and interchange partner to line-haul carriers) to better monitor inbound line-haul traffic movements en route to the Park, and to prepare for shipment handling once shipments are received in interchange from BNSF and UP and, in the process improve car handling and operating and switching services efficiencies.
- TGSC, as a railroad common carrier, will have increased opportunities to pursue state and federal infrastructure grants, compared to TGSI, aiding with the continued development and improvement of the Park's railroad assets and offerings, oftentimes in partnership with specific Park customers.
- TGSC, as a common carrier, will also be a "covered employer" under the Railroad Retirement and Railroad Unemployment Insurance Acts ("RRA/RUIA"), which is a critical employment benefits consideration for the type of railroad operating personnel that TGSC hopes to attract. Specifically, TGSI encountered problems attracting and retaining individuals already possessing railroad operating experience, as most such well-qualified candidates hail from railroad common carrier backgrounds, and those candidates commonly consider continued coverage under the RRA/RUIA as essential of any prospective employer. Recruiting and retaining good railroad operating talent is a primary focus for TGSC.

- When originally considered and presented, the Park’s railroad-service-dependent customers responded positively to the proposed transition to TGSC common carrier service at the Park. Many have shared that they perceive increased fluidity in intra-Park railroad switching services (from interchange to customer delivery and vice-versa) as a major plus that could improve customer freight car fleet utilization.

The truth behind UP’s allegedly “good faith” efforts to reach terms with TGSC to avoid the current dispute.

For reasons not entirely clear, UP has for several months resisted the idea that railroad operations in the Park would be converted from private switching to common carriage. As best TGSC can ascertain, UP considers the shift from private to common carriage within the Park to be commercially disadvantageous and otherwise contrary to UP’s business interests. Accordingly, UP has endeavored to discourage TGSC from taking over Park railroad operations, dropping hints shortly after TGSC filed the Notice that UP might, in response, take steps to block BNSF-TGSC interchange. However, UP has repeatedly conveyed to TGSC that it would forego adverse legal action as long as TGSC and its affiliated companies agreed to UP’s specified commercial terms for traffic movements to and from the Park. UP had explained that, as long as TGSC accepted UP’s proposed commercial terms (terms comparatively more favorable to UP than the switching allowances that TGSi had been receiving from UP when TGSi had in the past conducted private carriage at the Park), TGSC could expect no trouble.

TGSC has been willing to explore a commercial resolution to the matter, but was unwilling to accept UP’s proffered terms, and, at the same time, advised UP that a negotiated resolution of the matter would also include, among other things, negotiation of an appropriate interchange agreement to replace the industry track agreement (“ITA”) that had governed the exchange of railroad traffic between TGSi and UP. UP rejected such a multi-agreement negotiation. And, as the previously-announced transition to TGSC operations on April 1, 2023

approached, and it became more likely that UP and TGSC would not reach commercial terms by that date, UP turned up the commercial rhetoric, offering in detail when and how UP would cut off BNSF access. UP also upped the ante by notifying TGSi of UP's decision to terminate the current ITA, which would deprive TGSC of certain UP infrastructure long used to facilitate efficient TGSi-UP car exchange, and later by sharing an advance draft of the Petition several days before it was revised and then filed.

This is what UP means, evidently, when it claims that "it has been engaged in good faith efforts to resolve this issue with TGSC."⁸ But it is clear that UP would be willing to forego its asserted RASA attack if TGSC will but accede to UP's commercial terms.

The substance of UP's Petition, and what it would mean for service and competition for traffic to and from the Park if UP's position were deemed to be correct.

As a starting point, the disputants agree that the Park is a 2-to-1 location, and that, under UP's interpretation of the RASA, existing and future customers making use of the Park's railroad logistics offerings are entitled to direct access to BNSF and UP line-haul service (via intermediate non-common carrier switching service that, until recently, TGSi had provided).⁹ In UP's apparent view, *but for* the recent emergence of TGSC as a common carrier operator at the Park, present and future railroad-service-dependent customers at the Park would not be at risk of losing access to BNSF service.¹⁰ As TGSC understands UP's position, if Park ownership and its

⁸ Petition, 2 at n.1.

⁹ Petition, 3 ("Baytown was identified as a '2-to-1' point in the Union Pacific/Southern Pacific merger. Consequently, BNSF currently has access to all shipper facilities in the Park that were open to both Union Pacific and Southern Pacific at the time of the merger, as well as new shipper facilities in the Park, to which Union Pacific could grant BNSF access that is 'direct or through reciprocal switch, or . . . through a third party contractor.') (footnotes omitted).

¹⁰ *Id.*, 6 ("However, Union Pacific would not be required to . . . replicate the head-to-head competition that exists today or could otherwise have developed as new shippers locate in the

tenants and customers wish to continue to enjoy direct access to BNSF service, Park ownership should stick to private carriage. The same competition-preserving result could be achieved by Board revocation of TGSC's exemption as void *ab initio*. Under either situation, it seems the disputants would agree that the pre-TGSC competitive *status quo* at the Park would be upheld.

The problem—according to UP's 9-month-after-the-fact Petition—is not that the Park would itself no longer be a 2-to-1 facility under TGSC operations, but rather that – (1) the Park's ownership has arranged for the creation of a new short line railroad common carrier in TGSC to provide common carrier service to and from (what the Park ownership had expected would be) direct interchanges with both UP and BNSF; and (2) under the allegedly-relevant terms of the 2001 RASA, the then-non-existent TGSC is not identified as a railroad with which BNSF is entitled to interchange, such that UP legally could block BNSF-TGSC interchange if it wanted to, *notwithstanding the Park's* ongoing 2-to-1 status. UP has not argued to eliminate the Park's 2-to-1 status *per se*, only opportunistically to block TGSC-BNSF interchange to UP's clear commercial benefit.

Setting aside for the moment that UP's threatened TGSC-BNSF interchange blockade would be an anticompetitive choice by UP and not a legal obligation, UP's Petition posits that, with the commencement of TGSC common carrier operations, UP could and would usher in a new competitive scenario for the Park, with UP emerging as a bottleneck carrier,¹¹

Park.”) (footnote omitted). *But see, General Oversight*, Decision No. 20, 5 S.T.B. 1159, 1160 (2001) (“These conditions were designed to replicate other, more indirect competitive opportunities that would otherwise have been lost upon SP's absorption into UP, and to aid BNSF in obtaining sufficient traffic to compete effectively with the merged carriers.”) (internal citation omitted).

¹¹ “A rail bottleneck rate issue arises when more than one railroad can provide service over at least a portion of the movement from an origin to a destination, but where either the origin or destination is served by only one carrier, i.e. the bottleneck carrier.” *Policy Alternatives to Increase Competition in the Rail Industry*, EP 688 (STB served Apr. 14, 2009), 2.

reducing Park customer rail service options; forcibly inserting UP into previously BNSF-single-line traffic flows; disrupting BNSF-shipper transportation contracts; and eliminating BNSF-UP competition to off-site traffic origins and destinations served by both carriers. With respect to BNSF exclusively-served origins and destinations, UP would gain access to BNSF customer and traffic data, thereby diminishing BNSF's ability to compete with UP for commodity flows and expanding UP's market share.¹²

Those anticompetitive consequences—UP's threatened blockade of direct TGSC-BNSF interchange—are the centerpiece of UP's Petition. According to UP, "TGSC's verified notice contains false information because it misrepresents the competitive consequences of the proposed transaction for current and future shippers in the Park . . . [T]he Board would not have acted without considering the consequences—especially the loss of existing and future competition for railroad service to the Park—and whether the consequences would be consistent with the 'public convenience and necessity' standard of 49 U.S.C. § 10901(c), the underlying regulatory provision from which TGSC sought an exemption."¹³

UP's Petition claims that the RASA contemplates (and that the Board actually intended to allow for) the anticompetitive outcome that UP seeks here under one of two legal theories. Per UP, either – (1) the RASA *perfectly* forecasts the future so as to dictate that third-party carrier interchange restriction provisions override the specifically-applicable 2-to-1 protections for the Park *also* contained in the RASA; or (2) the RASA is indeterminate, but the

¹² Petition, 6 ("If TGSC were to institute common carrier operations, Union Pacific *would necessarily* have to act as a bridge carrier between TGSC and BNSF for traffic moving between the Park *and points served exclusively by BNSF*. Also, Union Pacific might be obliged to provide access in specific circumstances defined by the 1998 Railroad Industry Agreement. However, Union Pacific would not be required to short haul itself . . . ") (citing to 49 U.S.C. § 10705) (emphasis added).

¹³ *Id.*, 7.

Board's *UP/SP* decision means the RASA should be interpreted so as to decrease competition at acknowledged 2-to-1 points on future short lines. Either way, UP has offered no evidence—parol or otherwise—of a UP-BNSF meeting of the minds on the issue at that time or anytime thereafter. That is UP's burden under the petition to revoke.¹⁴

UP offers no reason to infer that BNSF would have acceded to UP's current position were such a scenario addressed during RASA negotiations, and has offered nothing to show that the Board considered and dispensed with the competitive implications of a recognized 2-to-1 facility opting for common carrier service in place of private switching.

Ultimately, the Petition seeks to nullify TGSC's common carrier status. If the Board grants the Petition, TGSC understands that it would have never actually had the authority to conduct common carrier operations—the essence of voiding regulatory authorization *ab initio*. And if, by Board fiat, TGSC *never actually became* a rail common carrier due to revocation, then, again, as TGSC understands UP's position, there would be no new short line carrier at the Park for UP to block from BNSF interchange. Service to and from the Park would revert to the competitive *status quo* pre-TGSC, evidently an outcome that is commercially to UP's benefit.

ARGUMENT

Overview – The Issue

UP's Petition does not challenge TGSC's common carrier *bona fides* or the Park's enduring 2-to-1 status. Rather, the Petition implicitly accepts that the scope and nature of TGSC operations are consistent with those of a Board-authorized common carrier. For example, UP

¹⁴ “The party seeking revocation has the burden of proof” *Delaware & Hudson Railway Co., Inc. — Discontinuance of Trackage Rights. Exemption — In Broome County, N.Y.; Middlesex, Essex, Union, Somerset, Hunterdon, & Warren Ctys., N.J., et al.*, AB 156 (Sub-No. 27X) (STB served Oct. 18, 2016), 2.

does not disclaim any obligation to interchange with TGSC if indeed it is a Board-authorized carrier. Additionally, UP appears not to question whether TGSC possesses the requisite contractual rights from the Park's affiliated owner. Instead, while accepting that TGSC has the wherewithal to undertake common carriage, UP argues that the commencement of such service to customers that have long enjoyed competitive UP and BNSF access via TGSI's private switching services should deprive those customers of competitive access to BNSF going forward, because TGSC is not a listed 2-to-1 short line in the RASA.

The Petition presents the question of whether competition-preserving measures adopted in the UP/SP merger nevertheless may be undone at UP's discretion by a forced construction of an inter-carrier agreement (the RASA)—completed later and to which neither TGSC nor any of its affiliates is a party—that nowhere contemplates, much less addresses definitively, a scenario where a 2-to-1 facility's railroad service arrangement changes from private to common carriage. TGSC submits that UP's predatory maneuver offends the competition-protecting intent of *UP/SP*; that the Board would never have intended (and should not sanction) the loss of competitive service to a mutually-acknowledged 2-to-1 facility under any circumstances; and that the RASA should be interpreted and applied to effectuate the overarching competition-preserving intent of *UP/SP*, and not the other way around. If the Board agrees that the RASA must be interpreted to advance the competition-protecting conditions the Board laid out in *UP/SP* in keeping with TCSC's position here, then TGSC's Notice contains no materially false or misleading content, and TGSC's exemption must stand.

The void *ab initio* revocation standard

The class exemption procedures at 49 C.F.R. part 1150, subpart D provide that if the entity invoking the class exemption procedures supplies false or misleading information, the

exemption is void *ab initio* (from the beginning). 49 C.F.R. § 1150.32(c). Agency precedent further establishes that, for a statement to warrant voiding a given class exemption, that false or misleading statement must be material to the authorization process, adding that the revocation-seeking party has the burden to prove that the existence of materially false or misleading content.¹⁵ The parties do not appear to dispute the standard or its application here.

Additionally, the parties do not dispute the materiality of the statement in question—namely, the accuracy of the italicized portion of the following passage from the Notice:

The station at which the Park is located—Baytown, Texas—was an acknowledged 2-to-1 point by the merging parties in the *UP/SP* proceeding. Accordingly, the Park has long enjoyed competitive railroad service, post-*UP/SP*, from both UP and BNSF, *a service arrangement that will continue, albeit under different service circumstances within the Park going forward.*

¹⁵ See, e.g., *San Jacinto Transportation Company, Inc. — Operation Exemption — SJRE-Railroad Series*, FD 35996, *et al.* (STB served Feb. 22, 2022), 3-4 (“An exemption under 49 C.F.R. pt. 1150 subpart D is void *ab initio* if the verified notice contains false or misleading information and the false or misleading information is material. See 49 C.F.R. § 1150.32(c); *Berkshire Scenic Ry. Museum, Inc. v. ICC*, 52 F.3d 378, 381 (1st Cir. 1995). The ‘void *ab initio*’ language was designed to be interpreted literally, without regard to a party’s intentions. *St. Louis Sw. Ry. — Aban. Exemption — in Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass, & Jackson Cntys., Mo.*, AB 39 (Sub-No. 18X) *et al.*, slip op. at 2 (ICC served Apr. 1, 1994). Information is material if the transaction would not have otherwise qualified for an exemption. *Berkshire Scenic Ry. Museum, Inc.*, 52 F.3d at 381; see *Ohio River Partners LLC — Acquis. & Operation Exemption — Hannibal Dev., LLC*, FD 35984, slip op. at 3 (STB served Apr. 1, 2016). Failure to disclose material information can render a verified notice misleading by omission. *Ohio River Partners*, FD 35984, slip op. at 3; see *Eastside Cmty. Rail, LLC — Acquis. & Operation Exemption — GNP Rly Inc.*, FD 35692 *et al.* (STB served Dec. 22, 2020)] slip op. at 4. The party seeking revocation of a notice of exemption has the burden of demonstrating that the verified notice contains false or misleading information. See *Gen. Ry. — Exemption for Acquis. of R.R. Line — in Osceola & Dickinson Cntys, Iowa*, FD 34867, slip op. at 4 (STB served June 15, 2007).”).

Notice at unnumbered page 3 (emphasis added).¹⁶ As such, if indeed UP is entitled under past Board orders to cut off the Park from direct access to BNSF line-haul service via a direct TGSC-BNSF interchange, then TGSC concedes that this critical impact to competition would be material to the exemption (similar to the way that failure to disclose the existence of an interchange-restricting commitment in similar transactions falling under 49 C.F.R. Part 1150 would be material), and that the exemption should be revoked as void *ab initio*. More to the point, if TGSC believed that UP was legally entitled to act as it is threatening to do now, TGSC would not have filed the Notice in the first place.

But the contested statement, although decidedly material, is neither false nor misleading. In fact, the statement was advanced in good faith on the expectation and belief that the Park's long-recognized 2-to-1 status controlled, and not the technical, legal status of the Park's first mile/last mile service provider as set forth in UP's opportunistic and predatory interpretation of the RASA. TGSC believed then, and continues to believe now, that TGSC's common carrier status has no bearing on intra-modal competition at the Park.

UP/SP, the RASA, and the Board order approving the RASA contemplate enduring effective competition at recognized 2-to-1 facilities, not the eventual, progressive diminution of competition at such locations in favor of UP as circumstances evolve over time.

UP/SP, the RASA, and the Board's order approving the RASA as a condition of UP/SP merger approval do not appear anywhere to address squarely the particular set of facts present here. The RASA, the only document of the three upon which UP relies (and the only one it appears to want the Board to consider), is certainly not definitive on the subject. Neither the

¹⁶ The Petition may also vaguely suggest that TGSC's exemption is materially false and misleading where the Notice indicates that the change in the legal status of the Park's rail service provider would not result in material operational changes. Petition, 5-6. If so, UP's allegation is beyond baseless and is purposely misleading, as is discussed below.

RASA nor *UP/SP* sets forth any categorical prohibition on the creation of new short lines at identified 2-to-1 locations, such as the Park, where common carrier service could take place but was not as of the UP/SP merger or at the time that the RASA was framed and presented to the Board. If anything, the closest analogue in the RASA would actually protect the TGSC-BNSF interchange. Specifically, “[t]he RASA grants BNSF ‘rights to interchange with any short-line railroad that constructs a new line to and establishes an interchange on a Trackage Rights Line subsequent to UP’s acquisition of control of SP.’”¹⁷ The Park is on a Trackage Rights Line (as defined in the RASA), so the only question is whether new line construction under 49 U.S.C. § 10901 is truly contractually distinct from a new operation not involving construction (also a transaction subject to Section 10901 authorization) to warrant an entirely different outcome. TGSC respectfully sees no practical distinction, and submits that RASA §8(k) militates in its favor.

The RASA, ultimately, is a document negotiated as between two vigorous Class I competitors, and TGSC understands that BNSF has steadfastly asserted its competitive access rights under that agreement in the face of UP’s consistent efforts to limit competition where it believes that it can. There is nothing in the RASA to indicate that BNSF was willing, or would have agreed, to relinquish its newly-earned competitive presence at any location (such as Baytown, generally, and the Cedar Port facility, specifically) where UP and SP had been competitors as of the approval of the UP/SP merger for any reason aside from BNSF’s voluntary, Board-authorized exit from a particular market via discontinuance of service or abandonment (if applicable). And there is nothing in the *UP/SP* record suggesting that BNSF or this Board ever intended the outcome that UP seeks here.

¹⁷ Petition, 5 (citing RASA § 8(k)).

Quite the opposite in fact. *UP itself* asserted the precise identity of shippers and short lines would always be a “moving target” and assured the Board the 2-to-1 protections would *always* accrue to pre-existing shipper facilities no matter the future, unanticipated circumstances:

[T]here may never be a 100%-perfect “2-to-1” facility list, and such a . . . list is simply not necessary. First such a list is a *moving target* . . . Second, among the *universe of “2-to-1” facilities are all shipper facilities located on “2-to-1” shortlines* . . . all present and future shippers at these geographic locations are by definition “2-to-1.” *Third, since the definition of “2-to-1” includes any existing facility that had direct access at the time of the merger, whether or not it had shipped via either railroad for many years or ever, it is very difficult—and of not practical value—to catalogue these facilities exhaustively with 100% perfection.*”¹⁸

So, according to UP, the supposed “2-to-1” facility universe includes any facility on “2-to-1” short lines, and that list of protected facilities would be a “moving target.” Qualifying locations (short line served or otherwise) would always be entitled to relief, no matter the circumstances. Or, as one UP witness put it: “*whenever* a customer was served by the two railroads [UP and SP] and only the two railroads *and a shortline that was connected to the two railroads* we opened that up to the competitive alternative.”¹⁹ This is precisely one of those times.

UP’s contemporaneous comments show that the parties did not intend in identifying protected short lines in the RASA to make a restrictive list frozen by a moment in time or based on the regulatory character of the first mile/last mile service. According to UP, the

¹⁸ “Applicants’ Reply to Comments” [UP/SP-311] (emphasis filed Aug. 21, 1997 in *General Oversight*, 25-26 supplied). Consider that by UP’s logic, Shipper Facility Blackacre on Short Line A that discontinues common carrier service and sells its line to Shortline B (which reactivates service to Blackacre) could not have BNSF interchange because Short Line B was not on the RASA.

¹⁹ “Union Pacific’s Reply to Comments on the Restated and Amended BNSF Settlement Agreement” [UP/SP -389] filed Sep 20, 2001 in *General Oversight*, 6 at n. 5 (emphasis supplied).

purpose behind such a list was to clarify all places where competitive line-haul service was provided, pre-merger by only UP and SP and “no other *Class I* railroad.”²⁰ The dispositive factor was *Class I* service by UP, SP and no one else—meaning the list of short lines was to confirm BNSF’s ability to have access to all such 2-to-1 points.²¹ Under the logic of UP’s contemporaneous representations to the Board, only the presence of another Class I (other than UP and SP) would prevent BNSF access rights to a location, a circumstance that does not exist here.

These basic principles in the RASA can only be understood as a manifestation of the competition-protecting measures adopted in *UP/SP*. *UP/SP*—which UP assiduously glosses over in its Petition—reinforces the proposition that competitively-served locations and facilities that would otherwise become “captive” to the merged UP/SP system (otherwise known as 2-to-1 shippers and facilities) should be afforded protection against the loss of direct access to a competing carrier. Consider the following, selected Board pronouncements on the subject:

- “BNSF will now be able to serve every plastic and chemical shipper [Ed. i.e., such as those at the Park] *currently* served by UP and SP and no other railroad. For those 2-to-1 shippers competition will be expanded . . . [BNSF] can provide *direct*, single-line service to much of the West . . . ”²²
- We have imposed competitive conditions upon our approval of a rail consolidation in order to protect, insofar as possible, competition that would otherwise have been lost as a result of the transaction. Here, we imposed as conditions the terms of the BNSF Agreement, as supplemented by the CMA Agreement, so that, among other things, BNSF could offer a competitive alternative for 2-to-1 shippers, and over 2-to-1

²⁰ *UP/SP*, 1 S.T.B. at 391 (“To identify points to be covered by corrective trackage rights, applicants have identified 2-to-1 points as those that can be served directly . . . by UP *and* SP but by no other Class I railroad.¹²⁷”) (emphasis supplied).

²¹ *Id.* at n. 127 (“Applicants [UP] contend that they carefully checked actual accessibility. They added points on short line railroads reachable by connections to UP and SP, but by no other Class I railroad”).

²² *UP/SP*, 1 S.T.B. at 394-95 (1996) (emphasis supplied).

corridors. *But, as we have observed, we also expanded upon those agreements to impose conditions that would preserve other pre-merger competitive options.*²³

- These conditions were designed to replicate other, more indirect competitive opportunities that would otherwise have been lost upon SP's absorption into UP, and to aid BNSF in obtaining sufficient traffic to compete effectively with the merged carriers."²⁴
- . . . [W]e offer the following guidance that BNSF and UP may use to resolve their dispute concerning access by BNSF to Ajax-San Antonio segment. UP cannot unilaterally take action that impairs BNSF's ability to provide service on a trackage rights line."²⁵

Further, such passages should be measured against the non-existent Board discussion of circumstances under which railroad customers in a longstanding 2-to-1 facility like the Park could forfeit their protected 2-to-1 status.

In short and as the above passages clearly reflect, *UP/SP* envisions the enduring protected status of 2-to-1 locations such as the Park, entitling them to the ameliorative benefits of direct BNSF access as a competitive alternative to UP, and nothing in that decision or in the Board's subsequent approval of the RASA hints even vaguely at the type of downstream elimination of direct competitive access or the corresponding competition erosion that UP hopes to effectuate here under its hyper-technical RASA "gotcha."

The Board is vested with the authority to construe the RASA in the context of *UP/SP*, and it is being called upon to exercise that discretion here.

This proceeding clearly depends upon the outcome of the Board's interpretation of the RASA. Indeed by clumsily depositing the entire 70 pages of the RASA into the record as an attachment to its roughly six-page Petition, rather than offering selected passages that UP

²³ *General Oversight*, Decision No. 19 (STB served Nov. 8, 2001), 4 (internal citations and quotations omitted) (emphasis supplied).

²⁴ *General Oversight*, Decision No. 20, 5 S.T.B. 1159, 1160 (2001).

²⁵ *General Oversight*, Decision No. 21, 5 S.T.B. 1173, 1184 (2001).

considers to be relevant here, UP has made it clear that its Petition hinges on the Board's agreement with UP's RASA-based argument. TGSC agrees with UP that the Board must examine the applicable RASA terms to reach a decision on the merits of UP's revocation request.

Ordinarily, the Board would resist the invitation to review a contract, a point Board decisions frequently highlight.²⁶ But, in this case, the contract in question, the RASA, is an integral part of *UP/SP*—it is itself a condition of approval of the subject Class I merger, and the RASA's final terms are themselves a product of Board-imposed modification after the agency determined that the agreement proffered by UP and BNSF fell somewhat short of the Board's competition-preserving expectations.²⁷ Indeed, this proceeding may impel the Board to reopen *UP/SP* or Decision No. 44 for further modification of the RASA to curb UP's anticompetitive opportunism, and to protect against future such UP abuse.

Upon careful examination, UP's Petition contains false and misleading passages, not TGSC's Notice.

UP's Petition presses for such an anticompetitive outcome—possibly intended to deter any other competitively-served industrial park in the region doing the same as TGSC—that it is hard not to be amazed at the chutzpah demonstrated by UP's maneuver. In fact, given TGSI's longstanding productive commercial relationship with UP, TGSC is inclined to believe that the Petition is merely a reflection of an unrestrained aggressive few at UP, and that it is not a reflection of UP in general. The terse Petition itself suggests that UP's "heart is not in it."

²⁶ *E.g., Port of Benton, Wash. — Petition for Declaratory Order*, FD 36426 (STB served July 15, 2021), 5; *Canadian Pacific Railway Company, et al. — Control — Dakota, Minnesota & Eastern Railroad. Corp., et al.*, FD 35081, Decision No. 14 (STB served May 7, 2009), 7. *Tacoma Eastern Railway Company — Adverse Discontinuance — A Line of City of Tacoma*, AB 548 (STB served Feb. 26, 1999), 4.

²⁷ *General Oversight*, Decision No. 19 (STB served Nov. 8, 2001).

Worse, while UP accuses TGSC of being false and misleading, perhaps UP should look in the mirror.

To begin with, UP misleadingly states that “BNSF’s ability to serve shippers in the Park would change significantly if TGSC institutes common carrier service,”²⁸ failing to point out that such a “significant change” is not self-executing, but rather entails UP’s invocation of its asserted rights to cut off competition to a 2-to-1 facility. Indeed, as TGSC has explained in the Background section of this reply, UP has offered to forego any BNSF interchange blockade (but not to disclaim its rights to do so at a later date) if only TGSC would accept UP’s commercial terms.

UP also misleadingly suggests that TGSC’s commencement of common carrier operations would subject UP and BNSF to operational hardship in and around Baytown, stating that, “The RASA’s limitation on BNSF’s rights also benefitted the post-merger Union Pacific and shippers by reducing potential operational burdens. Specifically, the RASA eliminated the prospect that additional short line-to-BNSF interchanges could occur on the Trackage Rights Lines and thus consume line capacity.”²⁹ In fact, UP well knows that TGSC’s common carrier operations within the Park will have no such adverse impact on local railroad capacity. Service under the TGSC regime will be no different, functionally, from the private switching operations previously undertaken by TGSi, and the exchange of traffic among TGSC, BNSF and UP should take place in the same way as had occurred under TGSi operation, albeit under the nominal distinction of interchange. Worse yet, if there were to be any adverse operational impact, it would be the result of UP’s spiteful termination of an existing industry track agreement that

²⁸ Petition, 4 (“As a result, current and future shippers in the Park will lose the benefit of existing head-to-head competition between BNSF and Union Pacific.”).

²⁹ Petition, 5-6.

allows for the shared TGSC and UP use of UP-owned tracks that have been used to facilitate UP-TGSI traffic exchanges in the past, and that could be used going forward to support efficient TGSC-UP interchange.

If necessary to avert a reduction in competition at Baytown, the Board may reopen *UP/SP* for further action to amend the RASA

As TGSC has shown, neither *UP/SP* nor the RASA contemplate that the Park should forfeit access to BNSF service if TGSC's common carrier status is upheld, but the Board conceivably could hold that the RASA does not speak to the facts of this case. Alternatively, the Board could hold that UP's interpretation of the RASA is correct, but only as an unintentional anti-competitive consequence of the RASA's current language. In either event, the Board may—and indeed should—on its own motion reopen *UP/SP* to take appropriate clarification of, or correction to, the RASA to remedy the harmful consequences to intramodal competition stemming from a Board understanding of the RASA that does not embrace TGSC's position.

To be sure, TGSC does not believe that UP is faithfully applying and interpreting the RASA, and TGSC expects that the Board can and will find that UP's threatened interchange blockade is not sanctioned under *UP/SP* or the RASA. But, if the Board were to conclude that reopening the *UP/SP* proceeding would be appropriate to protect against future proceedings such as this, and against other such potentially unintended anticompetitive consequences (and UP's unwarranted, avarice-driven opportunism), TGSC would welcome such a development.

If UP is not entitled under the RASA to block TGSC-BNSF interchange, then TGSC seeks additional clarification from the Board that UP would not be immune under ICCTA preemption for liability associated with business disruptions stemming from UP's unprotected anticompetitive and abusive behavior.

UP has thus far committed not to disturb the operational *status quo*, TGSC's commencement of operations notwithstanding.³⁰ That is a welcome gesture, as far as it goes. And, indeed, as prior discussion indicates, TGSC and BNSF have been actively interchanging considerable traffic with one another since TGSC's April 1, 2023 commencement of common carrier service. UP has not indicated that it would rescind its commitment to forego a TGSC-BNSF interchange blockage during the pendency of this proceeding.

However, UP's Petition and the threat of an interchange blockade are disruptive of TGSC's relationship with its customers and is likely to have had concomitant impacts on shipper-BNSF commercial relationships. As such, TGSC asks the Board to confirm that, if it were to uphold TGSC's exemption on the basis that UP is not legally entitled to block TGSC-BNSF interchange going forward, UP is not immune under *UP/SP* from liability under potentially-applicable state and federal laws for any commercial injury to TGSC, BNSF or third parties with which BNSF and/or TGSC may have contractual relationships, where such injury stems from UP's efforts to block TGSC-BNSF interchange going forward.

³⁰ Petition, 8 n.19.

CONCLUSION

Wherefore, TGSC respectfully requests that the Board deny UP's Petition forthwith on the basis that the elements of the Notice at issue here—which the parties agree are material to the subject class exemption—are neither false nor misleading.

Respectfully submitted,

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Dated: April 24, 2023

CERTIFICATE OF SERVICE

I certify that on April 24, 2023 I caused this document to be electronically filed with the Surface Transportation Board and served via electronic mail on the following persons:

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