

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (SUB-NO. 50)

BNSF RAILWAY COMPANY
—PETITION FOR ENFORCEMENT—
INTERCHANGE WITH SAVAGE TOOEELE RAILROAD COMPANY

**BNSF’S REPLY TO
UP’S REQUEST FOR DISMISSAL**

Tammy R. Middleton
Courtney B. Estes
Tyler R. White
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Peter W. Denton
Molly B. Fox
Onika K. Williams
Steptoe LLP
1330 Connecticut Ave. NW
Washington, DC 20036
(202) 429-3000

Adrian L. Steel, Jr.
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3237

Counsel for BNSF Railway Company

Dated: July 25, 2024

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On June 20, 2024, BNSF¹ filed a Petition for Enforcement (“Petition”) in this proceeding requesting that the Board enforce the UP/SP merger conditions by requiring UP to allow BNSF to interchange with STR near Burmester, UT to provide shippers located at the Lakeview Business Park (“Park”) with competitive two-carrier service. *See* BNSF Pet. at 1. On July 11, 2024, UP filed a reply to BNSF’s Petition. UP did not reply to the merits of BNSF’s Petition but instead requested that the Board provide affirmative relief by dismissing the Petition, in order to allow the parties to arbitrate the dispute behind closed doors.

Consistent with Board precedent, BNSF hereby replies to the UP request for dismissal of the Petition.² As stated in its Petition, BNSF believes that the Board –

¹ The acronyms and defined terms used herein are the same as those used in the BNSF Petition for Enforcement filed in this proceeding on June 20, 2024.

² This BNSF reply to UP’s request for dismissal is permissible because UP’s reply sought affirmative relief. *See, e.g., Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Decision No. 86)*, 4 S.T.B. 303, 304 n.4 (1999) (The Board permitted a response to a reply because the reply sought affirmative relief); *S. Pac. Transp. Co.—Trackage Rts. Exemption—The Hous. Belt & Terminal R.R.*, FD 33461 et al., slip op. at 3 n.7 (STB served Dec. 21, 1998) (The Board permitted a response to a

not private arbitrators – should resolve the issue. This would enable the Board to consider the broad policy and public interest implications of the dispute and enable interested parties to participate. For the reasons set forth below, the Board should reject UP’s request to dismiss the Petition and should establish a procedural schedule allowing for a period of discovery as proposed by BNSF.

1. BNSF’s limited engagement with UP’s submission of this dispute to an arbitration administrator does not preclude BNSF from asking the Board to resolve this dispute.

UP first argues that BNSF engaged in improper “forum-shopping” by filing its Petition with the Board after UP sought to privately arbitrate the dispute, thereby “[a]bandoning the arbitration process in which it had participated.” UP Reply at 5. In fact, BNSF has made it clear throughout its limited engagement in UP’s arbitration efforts that the dispute is subject to the Board’s jurisdiction, as UP itself acknowledged. *See* UP Reply at 5 n.2. UP filed its arbitration demand with the American Arbitration Association (“AAA”). BNSF has followed AAA protocols and met applicable deadlines in order to preserve BNSF’s rights, including the AAA’s requirement that the parties submit their views about the appropriate location to hold the arbitration hearing. The timing of this limited participation is irrelevant to BNSF’s request through its Petition that the Board resolve this dispute. Should UP continue to press its arbitration demand, BNSF will seek to dismiss that proceeding in favor of the Board’s resolution of BNSF’s Petition.

2. The RASA does not require that the parties arbitrate this dispute.

Next, UP makes a surprising claim that the Board is unable to hear disputes over application of UP/SP merger conditions. UP states that “if any party has the

reply that sought affirmative relief to dismiss a petition to revoke several exemptions).

option to arbitrate, it is *required* to arbitrate.” UP Reply at 6 (emphasis in original). In support, UP provides a fragment of Section 15 of the RASA that conveniently omits an introductory clause that provides an exception to the general arbitration requirement. In its Petition at 5, BNSF provided the *entire* Section 15, and explained that the introductory clause allows the Board itself to determine that an unresolved dispute or controversy should be resolved by the Board, rather than by arbitrators. *See* RASA § 15 (“Except as otherwise provided by any decision of the STB . . .”). Indeed, UP’s misleading characterization of Section 15 makes no sense, given that the Board has a well-developed standard for determining whether to assert jurisdiction over disputes arising under the RASA, and has repeatedly done so. *See* BNSF Pet. at 5-6.

3. UP wrongly characterizes BNSF’s Petition as a narrow, private dispute with no broader implications.

UP next engages with the Board’s ample precedent regarding the proper forum for disputes regarding UP/SP merger conditions. *See* UP Reply at 6-7.

First, UP wrongly asserts that “[t]his case has neither broad implications nor raises important issues.” UP Reply at 6. BNSF established in its Petition at 12-14 that this case is exactly the type of dispute that the Board has previously decided to resolve, and that the Board should do so again here. The question of whether UP can structure transactions with short line railroads to preclude BNSF from serving shippers or areas that BNSF gained access to as a result of the UP/SP merger conditions is an important principle with broad implications regarding the UP/SP merger conditions. If UP is allowed to prevail here, it will be able to similarly manipulate the structure of industrial development across its network to preclude competition from BNSF, contrary to UP’s obligations under the UP/SP merger conditions.

Second, UP incorrectly asserts that “[t]here is no pre-merger rail competition at stake in this matter.” UP Reply at 7. As UP well knows, before the UP/SP merger, the developers of the Park would have enjoyed the extensive siting competition that existed across the western U.S. between UP and SP. *See* BNSF Pet. at 13 n.5 (“They would have been able to negotiate separately with UP and SP and play them off of each other to secure the lowest rates and most favorable service terms for the Park’s tenants.”). As Thane Smith, the Chief Development Officer of The Romney Group, LLC, the owner and developer of the Park, said in a letter to the Board on July 2, 2024, the ability to receive service from two rail carriers “is often the deciding factor on where a particular business chooses to construct its rail-served facility.” The Romney Grp. Comment at 2.

Third, UP claims that BNSF’s stated intention to seek discovery in this proceeding is inconsistent with the Board’s prior holding that “arbitration is preferable for the resolution of disputed factual matters.” *Decision No. 86*, 4 S.T.B. at 309. As BNSF explained in its Petition at 12, n.4, the material facts in this case were largely developed in prior STB proceedings and are not in dispute. However, the facts pertaining to UP’s intent and purpose are still to be learned.³ BNSF believes that the Board would benefit from understanding such facts when deciding this case, especially where the UP’s conduct here can be judged by the Board in light of the other recent activities of UP aimed at minimizing BNSF access under the UP/SP merger conditions. *See* BNSF Pet. at 9-11. The Board is well accustomed to conducting proceedings with party-directed discovery.

³ For example, in its Reply, UP does not respond to BNSF’s assertion that UP structured the transaction with STR with the intent, purpose, and desired effect to preclude BNSF access to the Park under RASA Section 8(k). What UP failed to say is as important, if not more important, as what it did say.

Finally, UP does not deny that a proceeding before the Board would allow other interested parties, such as STR, the Park, and its tenants, to make their views known to the Board. In fact, the owner and developer of the Park submitted a letter to the Board in this proceeding, describing the importance of two-carrier competition to the Park in the July 2 letter referenced above.⁴ If UP prevailed in its efforts to resolve this matter through private arbitration, Mr. Smith and The Romney Group and other stakeholders would be denied a public forum to assert their concerns. They, and other stakeholders, will have such an opportunity if the Board proceeds to resolve the parties' dispute.

Absent Board action, UP will continue its efforts to limit pre-merger rail competition when it sees an opportunity to do so. Relegating the resolution of disputes stemming from UP's efforts to limit competition to private arbitration is not a viable or effective approach to restrain those efforts. The Board should reject UP's request to dismiss the Petition and should establish a procedural schedule allowing for a period of discovery as proposed by BNSF.

⁴ See The Romney Grp. Letter at 1-2 ("In addition to the potential for lower rates, better service terms, and additional destinations and origins for commodities and/or raw materials, the presence of an alternative railroad service provider can alleviate harms to shippers from service breakdowns on the other carrier's rail system.")

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton

Molly B. Fox

Onika K. Williams

Steptoe LLP

1330 Connecticut Ave. NW

Washington, DC 20036

(202) 429-3000

Adrian L. Steel, Jr.

Mayer Brown LLP

1999 K Street, NW

Washington, DC 20006

(202) 263-3237

Counsel for BNSF Railway Company

Dated: July 25, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2024, I have caused the foregoing to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams

Attorney for BNSF Railway Company