

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 32760

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**UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
—CONTROL AND MERGER—
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY**

**BNSF RAILWAY COMPANY'S REPLY TO
UNION PACIFIC'S MOTION TO DISMISS
OR HOLD PROCEEDING IN ABEYANCE**

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Dated: March 7, 2017

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BNSF hereby requests that the Board deny “Union Pacific’s Motion to Dismiss or Hold Proceeding in Abeyance” (UP/SP-417) (“Motion”) and, instead, rule on the merits of the Joint Petition (BNSF-129/MRIP-1) filed by Petitioners (“Petition”).¹ BNSF also supports MRIP’s separate concurrently-filed reply to the Motion.

ARGUMENT

A. The Petition Presents A “General Matter With Broad Implications” That Should Be Resolved By The Board

The RASA arbitration clause expressly provides that a “decision of the [Board]” may nullify the general rule that “unresolved disputes and controversies concerning any of the terms and provisions of [the RASA]” must be arbitrated. RASA § 15. In fact, the Board has ruled multiple times in this proceeding, in response to prior attempts by UP to deprive the Board of its jurisdiction over enforcement and interpretation of the UP/SP merger conditions, that a “general matter[] with broad implications with respect to implementation of [the conditions we imposed

¹ The acronyms used herein are the same as those used in the Petition and in Appendix B to Decision No. 44.

on the UP/SP merger]’ . . . is better suited to resolution in an administrative proceeding than in an arbitration proceeding.” UP/SP Merger Decision No. 96, slip op. at 3-4 (quoting UP/SP Merger Decision No. 86, slip op. at 6). The Petition presents just such a case.

Petitioners request a Board order requiring UP to allow BNSF to access UP Track 793 and UP Track 795 in Bexar and Wilson Counties, Texas, in order to provide competitive rail service to Mission Rail Park. *See* Petition at 3-4. The Petition raises issues of first impression that involve novel and significant questions concerning the scope and applicability of RASA provisions granting BNSF access to all New Shipper Facilities located post-UP/SP merger at “2-to-1” points and on Trackage Rights Lines. *See* Petition at 8-9.

First, Petitioners argue that any New Shipper Facility that connects to a “2-to-1” point through a spur or industrial track should be considered to be located within the switching limits of that “2-to-1” point for the purposes of BNSF’s access rights under the RASA without regard to whether the Facility is located geographically beyond the stated switching limit. Petition at 10. Second, Petitioners argue that the Park is located “on” a Trackage Rights Line because the facility is adjacent to the Track, which, when it was constructed and BNSF’s right of access accrued, was a spur or industrial track that connected to a Trackage Rights Line for the purposes of the RASA. Petition at 14.

Contrary to UP’s assertion that the parties’ dispute “simply involves access to a particular facility,” Motion at 5, a Board decision resolving the issues raised by the Petition will have wide-ranging impacts on other similarly situated New Shipper Facilities – both those that have already been built post-UP/SP merger, and those that will be built during the 99-year term of the RASA.²

² UP cites Decision No. 81 for the proposition that “any further disputes between BNSF and UP arising under their settlement agreement should be arbitrated under the provisions of that agreement before bringing the matter to us to resolve.” Motion at 5. Notwithstanding the Board’s clarification of this position in Decision No. 86, discussed above, the dispute here is not entirely a dispute “between BNSF and UP arising under their settlement

Therefore, the Petition falls squarely within the types of “general matters with broad implications” that the Board has stated should be resolved at the Board rather than through an arbitrator.³ Indeed, the situation here where Petitioners seek a clarification of the meaning of “at” a “2-to1” Point and “on” a Trackage Rights Line is fundamentally indistinguishable from the situation presented in Decision No. 86 where BNSF sought a clarification of a different aspect of the meaning of “on” a Trackage Rights Line.⁴ UP all but ignores the controlling holding of that decision. If the dispute there involved matters of general application, the dispute here does as well.

B. The Petition Raises Significant Policy Issues That Must Be Resolved By The Board

The Board imposed the RASA in furtherance of the Board’s authority and responsibility to ensure that the proposed UP/SP merger was consistent with the public interest. *See* UP/SP Merger, General Oversight, Decision No. 20, slip op. at 2, 13-14. That responsibility requires that the Board retain and exercise the authority to determine whether the conditions it imposes on a merger or other control transaction are being properly implemented, consistent with the public policy supporting each such condition – here the preservation of pre-merger competition.

Requiring that the significant policy issues raised in the Petition be resolved through the private

agreement.” Indeed, as described above, one of the specific rights sought to be vindicated here – the right of New Shipper Facilities located on any Trackage Rights Line to receive BNSF service – was not a part of the BNSF Agreement, even as it was amended by the CMA Agreement, as it was submitted to the Board by UP/SP. Rather, that right was imposed by the Board itself as an additional condition to the UP/SP merger, and thus the condition provides rights to shippers (and, for that matter, to BNSF) independent of the RASA. *See* UP/SP Merger, General Oversight, Decision No. 20, slip op. at 2.

³ Furthermore, the Board stated in a decision allowing UP’s operating exemption on the Track to take effect that its decision did “not preclude BNSF from seeking, through arbitration or a new, separate Board proceeding, a determination that it *also* is entitled to access the line.” *Union Pac. R.R. Co.—Operation Exemption—In Bexar and Wilson Counties, Tex.*, STB Finance Docket No. 35776, slip op. at 4 (STB served Dec. 24, 2013) (emphasis added). This is that “new, separate Board proceeding” that the Board specifically invited BNSF to pursue.

⁴ More recently, the Board considered and ruled on a petition for enforcement of the Board’s Decision No. 44 filed jointly by BNSF and a shipper, which, like the Petition in this matter, raised RASA interpretation issues. *See* UP/SP Merger, Decision No. 106 (STB served Dec. 19, 2013). Neither UP nor the Board raised the RASA arbitration clause or questioned the Board’s jurisdiction to rule on the dispute.

arbitration process would not be consistent with the Board's responsibility and authority. The issues, therefore, should be resolved in this proceeding.

The Board has also indicated that its clarification of issues arising under the RASA may be appropriate to "provide guidance to the parties and to arbitrators in interpreting the intended scope" of the UP/SP merger conditions. UP/SP Merger Decision No. 86, slip op. at 3-4. Should the issues raised by the Petition be arbitrated rather than decided by the Board, any arbitration decision could be appealed to the Board. However, the scope of the Board's review of such a decision might be circumscribed, thus improperly limiting the Board's ability to make the kind of public interest decisions that it could make in the *de novo* proceeding sought by Petitioners here and that, under its governing statutes, the Board alone is authorized to make. Granting UP's Motion would implicitly delegate to an arbitrator the Board's exclusive and plenary authority under its governing statutes to determine whether the public interest would be served by the application of the condition urged by Petitioners. Even if an arbitrator's interpretation of the Board's intent in imposing the RASA conditions at issue here were reviewed *de novo* by the Board, it would be inefficient and wasteful for the Board to withhold its views on the public interest ramifications of the merger conditions until *after* the parties have litigated the issue in an arbitration.

C. The Parties Have Not Agreed To Arbitration And There Are No Material Factual Matters In Dispute

In this proceeding, the Board has held that "arbitration is preferable for the resolution of *disputed factual matters* where the parties *have agreed in advance to pursue this approach.*" UP/SP Merger Decision No. 86, slip op. at 6 (emphasis added). The Petitioners and UP have *not* agreed to arbitrate the issues raised by the Petition. Moreover, there are no material factual issues

in dispute here.⁵ The parties agree as to the geographical boundaries of the Elmendorf switching limits, and the construction of the Track and location of the Park is well documented in a prior Board proceeding. *See* Petition at 5-8; Motion at 3-4. Thus, this is a case that could be readily resolved by the Board as a matter of law without the need for detailed factual inquiries.

D. MRIP And Other Shippers Have An Independent Right To Board Enforcement

Furthermore, as discussed in further detail in the separate MRIP reply to the Motion, this dispute directly involves the rights of MRIP and its customers to receive competitive service under the UP/SP merger conditions. As the Board recognized in Decision No. 44 and in a number of decisions thereafter, the Board imposed the merger conditions to protect the public interest in preserving pre-merger competition, and, as beneficiaries of the conditions imposed, shippers have rights independent of any rights BNSF may have under the RASA to have the conditions implemented in a manner that will effectively preserve that competition. *See* UP/SP Merger Decision No. 44, 1 S.T.B. 233, 247, n. 15 (shippers at points opened up to BNSF under the BNSF Agreement have rights under the Agreement); *see also* UP/SP Merger Decision No. 72, slip op. at 8, n. 18 (“[S]hippers have rights under the BNSF agreement because we have imposed the terms thereof as a condition of the merger.”). Because MRIP and other similarly situated shippers may not be afforded the opportunity to participate as parties to any arbitration – and, because of the streamlined nature of arbitration proceedings, might not be afforded an

⁵ UP alleges that “Petitioners falsely claim the Board previously **found** that Frac Resources, L.P. (“FRAC”), the entity that sold the Line to Union Pacific, anticipated that BNSF would be able to serve the Park.” Motion at 4 (emphasis added). UP alleges that Petitioners “manipulate the Board’s language, deceptively substituting the phrase, ‘As the Board stated in its decision,’ for the Board’s original phrase, ‘FRAC states that.’” *Id.* Contrary to UP’s allegations, the Petition correctly characterizes the relevant passage in the Board decision. The Petition did not claim that the Board “found” anything, only that the Board **stated** what FRAC anticipated. Petition at 6. This is exactly what the Board did. *See Union Pac. R.R. Co.—Operation Exemption—In Bexar and Wilson Counties, Tex.*, STB Finance Docket No. 35776, slip op. at 3 (STB served Dec. 24, 2013).

opportunity to participate at all – arbitration is not an appropriate vehicle for determining and vindicating their rights.⁶

E. UP Previously Proposed Direct Board Review Of New Shipper Facilities Disputes

Notwithstanding its more recent protestations, UP has previously recognized the wisdom of bringing these types of disputes to the Board, rather than to an arbitrator. In a draft of a Third Supplemental Agreement that UP submitted to the Board on July 1, 1997 (UP/SP-303), UP proposed direct Board review for all disputes as to BNSF’s right to serve New Shipper Facilities. Specifically, UP proposed that:

Notwithstanding the requirement in Section 15 of this Agreement that unresolved disputes and controversies be submitted for binding arbitration, disputes as to the proper scope of BNSF’s rights to serve new shipper facilities or to establish and/or serve transload facilities can be presented by the parties to the Surface Transportation Board for resolution.

UP/SP-303, Exhibit B at 3. See relevant excerpt attached hereto as Exhibit 1, at 3.⁷

F. The Board Should Allow UP No More Than 10 Days To File A Reply On The Merits

Finally, UP requests that, if the Board denies the Motion, it should grant UP 30 days from the service date of such decision to file a reply on the merits. UP already has had ample time to consider its merits arguments – the Petition was filed on February 1, 2017, and UP has been aware of this dispute for a number of years. The Board should allow UP no more than 10 days to file a reply on the merits after the Board denies UP’s Motion.

⁶ To the extent the arbitration provision of the RASA would preclude direct Board adjudication of disputes concerning the rights of shippers to receive competitive two-carrier service under the merger conditions, the arbitration provision should be deemed overridden by the provisions of 49 U.S.C. § 11321(a). Such an override would be “necessary” to implement the rights granted by the Board to shippers to receive such service in a timely and efficient manner.

⁷ While the RASA did not ultimately include the UP-proposed language, the fact that UP expressed its belief in the appropriateness of, and was agreeable to, the direct submission of access disputes under the New Shipper Facilities condition to the Board, notwithstanding the RASA arbitration provision, undercuts any argument to the contrary that UP now makes.

CONCLUSION

The Petition clearly involves “general matters with broad implications” that the Board has stated should be resolved at the Board rather than through an arbitrator. The Board, not an arbitrator, should resolve the significant policy issues of first impression raised by the Petition, in furtherance of the Board’s authority and responsibility to ensure proper implementation of the UP/SP merger conditions. Moreover, because an arbitrator’s interpretation of the Board’s intent could (and likely would) be appealed to the Board, it would be inefficient and wasteful for the Board to defer judgment on the policy issues raised by the Petition until after an arbitration has concluded. The Board has expressed a preference for arbitration in this proceeding for the resolution of disputed factual matters where the parties have agreed in advance to arbitrate – neither is the case here. Finally, MRIP and shippers have independent rights to the Board’s enforcement of the UP/SP merger conditions, and private arbitration is not an appropriate mechanism to assert such rights. For the foregoing reasons, BNSF requests that the Board deny the Motion and rule on the merits of the Petition. BNSF also supports MRIP’s concurrently-filed reply to the Motion.

Respectfully submitted,

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Dated: March 7, 2017

[AMENDED AND RESTATED AS OF JUNE 30, 1997]

AGREEMENT

This Agreement ("Agreement") is entered into this 25th day of September, 1995, between Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company (collectively referred to as "UP"), and Southern Pacific Rail Corporation, Southern Pacific Transportation Company, The Denver & Rio Grande Western Railroad Company, St. Louis Southwestern Railway Company and SPCSL Corp. (collectively referred to as "SP", with both UP and SP also hereinafter referred to collectively as "UP/SP"), on the one hand, and Burlington Northern Railroad Company ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), hereinafter collectively referred to as "BNSF", on the other hand, concerning the proposed acquisition of Southern Pacific Rail Corporation by UP Acquisition Corporation, and the resulting common control of UP and SP pursuant to the application pending before the Interstate Commerce Commission ("ICC") in Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company.

NOW, THEREFORE, in consideration of their mutual promises, UP/SP and BNSF agree as follows:

1. **Western Trackage Rights**

- a) UP/SP shall grant to BNSF trackage rights on the following lines:
 - SP's line between Denver, Colorado and Salt Lake City, Utah;
 - UP's line between Salt Lake City, Utah and Ogden, Utah;
 - SP's line between Ogden, Utah and Little Mountain Utah;
 - UP's line between Salt Lake City, Utah and Alazon, Nevada;
 - UP's and SP's lines between Alazon and Weso, Nevada;

- SP's line between Weso, Nevada and Oakland, California via SP's line between Sacramento and Oakland referred to as the "Cal-P" (subject to traffic restrictions as set forth in Section 1g);
- SP's line between Elvas (Elvas Interlocking) and Stockton (subject to traffic restrictions as set forth in Section 1g and also excluding any trains moving over the line between Bieber and Keddie, CA to be purchased by BNSF pursuant to Section 2a of this Agreement);
- UP's line between Weso, Nevada and Stockton, California; and
- SP's line between Oakland and San Jose, California.

b) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (i) "2-to-1" shipper facilities at points listed on Exhibit A to this Agreement, (ii) any existing or future transloading facility at points listed on Exhibit A to this Agreement and at points other than those listed on Exhibit A on the lines (except the line between Elvas (Elvas Interlocking) and Stockton) listed in Section 1a, (iii) any new shipper facility located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement (including but not limited to situations where, when the Agreement was signed, a new shipper facility was being developed or land had been acquired for that purpose, with the contemplation of receiving rail service by both UP and SP), and (iv) any new shipper facility located subsequent to UP's acquisition of control of SP at points other than those listed on Exhibit A to this Agreement on the lines (except the line between Elvas (Elvas Interlocking) and Stockton) listed in Section 1a (including but not limited to situations where, when the Agreement was signed, a new shipper facility was being developed or land had been acquired for that purpose with the contemplation of reserving rail service by both UP and SP). BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement. BNSF shall also receive the right to interchange with the Nevada Northern at Shafter, NV; with the Utah Railway Company at the Utah Railway Junction, UT, Grand Junction, CO and Provo, UT; with the Utah Central Railway Company at Ogden, UT; and with the Salt Lake, Garfield and Western at Salt Lake City, UT. BNSF shall also receive the right to utilize

in common with UP/SP, for normal and customary charges, SP's soda ash transload facilities in Ogden and Salt Lake City. BNSF shall also have the right to access any shipper-owned soda ash transload facilities in Ogden and Salt Lake City and to establish its own soda ash transload facilities along the trackage rights granted under this section. For purposes of this Agreement, "2-to-1 shipper facilities" shall mean all industries that were open to both UP and SP, whether via direct service or via reciprocal switching, joint facility or other arrangements, and no other railroad when the Agreement was executed, regardless of how long ago a shipper may have shipped, or whether a shipper ever shipped, any traffic via either UP or SP. Also for purposes of this Agreement, "new shipper facility" does not include expansion of or addition to an existing facility but does include (1) transload facilities which, when the Agreement was signed, were being developed or land had been acquired for that purpose, (2) new transload facilities located after September 11, 1996, including those owned or operated by BNSF, and (3) existing facilities constructing trackage for accessing rail services for the first time. "Transload facilities" shall mean a rail transload facility as that term is used in the industry and shall include product transfers involving trucks, barges and intermodal containers and product transfers between rail cars as well as new transload technologies that may be developed in the future. Any such transload facility must have operating costs above and beyond the costs that would be incurred in providing direct rail service. By way of example, BNSF would not be able to construct a truck transload facility adjacent to an exclusively served coal mine and then truck the coal a short distance (say 100 feet) from the mine to the facility. Notwithstanding the requirement in Section 15 of this Agreement that unresolved disputes and controversies be submitted for binding arbitration, disputes as to the proper scope of BNSF's rights to serve new shipper facilities or to establish and/or serve transload facilities can be presented by the parties to the Surface Transportation Board for resolution.

c) Access to industries at points open to BNSF shall be direct or through reciprocal switch. New customers locating at points open to BNSF under this Agreement shall be open to both UP/SP and BNSF. The geographic limits within which (i) new shipper facilities and future transloading facilities shall be open to BNSF service at points listed on Exhibit A to this Agreement and (ii) BNSF shall have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement, shall generally correspond to the territory within which,

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2017, copies of the foregoing BNSF Railway Company's Reply to Union Pacific's Motion to Dismiss or Hold Proceeding in Abeyance have been served by e-mail or first class mail on the following parties of record in this proceeding:

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