

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 32760

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Public Record

**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**

**MISSION RAIL INDUSTRIAL PARK, LLC'S REPLY TO UNION PACIFIC'S MOTION
TO DISMISS OR HOLD PROCEEDING IN ABEYANCE**

Mission Rail Industrial Park, LLC ("MRIP") submits this Reply to "Union Pacific's Motion to Dismiss or Hold Proceeding in Abeyance" (UP/SP 417) ("Motion").

Initially, MRIP agrees with the BNSF Railway Company ("BNSF") "Reply to Union Pacific's Motion to Dismiss or Hold Proceeding in Abeyance" (BNSF-130) ("BNSF Reply") that this controversy raises matters of general application under the Board's merger conditions and controlling Board precedent that are not subject to mandatory arbitration and will not reiterate those arguments here.¹ Rather, MRIP wants to make it clear that notwithstanding UP's contentions, MRIP (1) is a necessary party to this proceeding, (2) is not required to participate in any arbitration without its consent, (3) is not estopped from withholding its consent to any arbitration and (4) does not consent to resolve the issues in this proceeding through arbitration.

¹ Moreover, requiring arbitration would unnecessarily subject MRIP to substantial expense and delay.

I. PREFATORY STATEMENT

In its Motion, UP appears to focus on the notion that the line connecting MRIP with the trackage rights line is now a § 10901 “line of railroad.” MRIP assumes UP will contend that the provisions of the Restated and Amended Settlement Agreement, dated March 1, 2002, (the “RASA”) permitting BNSF competitive service are not applicable with respect to MRIP because the Park is not located on a trackage rights line.

In determining how best to go forward and whether arbitration would be appropriate in this case even if MRIP was not a party, the Board should keep in mind the history of the line as discussed in the Verified Statement of Richard Kinsel (the “Kinsel Statement”)² that accompanied the Joint Petition of BNSF and MRIP initiating this proceeding and the record in Docket No. FD-35776, *Union Pacific Railroad Company - - Operation Exemption - - In Bexar and Wilson Counties, TX (the “Exemption Proceeding”)*. The Kinsel Statement makes it clear that the track connecting MRIP with the trackage rights line was constructed as exempt industrial track and was later converted to § 10901 status when UP paid for the track and filed its Notice of Exemption.³ Although the Board raised questions about the propriety of UP’s actions in how it structured the transaction, the STB was unable to reach a majority decision as to whether any remedial action was appropriate.⁴ Nonetheless, the Board – not an arbitrator – should have the opportunity to further consider the implications of UP’s actions in order to determine whether the conversion of this 1 ½ mile track from industry to § 10901 status was intended to or otherwise should be permitted to negate the competitive service provisions of the RASA with respect to MRIP. The Board is the only entity that has the authority and expertise to properly interpret

² See, in particular, ¶¶8-15 and 25-26.

³ *Exemption Proceeding*, Notice of Exemption, filed October 21, 2013, at 3.

⁴ *Exemption Proceeding*, at 2.

whether, in the specific circumstances of this proceeding and particularly in view of unanswered questions in the Exemption Proceeding, the Park is located at a 2-to-1 point or is on a trackage rights line.

II. MRIP IS NOT REQUIRED TO ARBITRATE

Lost in the UP Motion is any consideration of the fact that the merger conditions imposed by the Board, including the merger conditions outlined in the RASA, were intended for the benefit of the shipping public in order to redress the competitive harms that would be generated by an unconditioned merger of the Union Pacific and Southern Pacific Railroads. (Decision No. 44, at 145.) The matter raised in the Joint Petition is not limited to a contractual dispute between UP and BNSF, but also requires consideration of MRIP's independent rights arising from the Board's merger conditions. In that regard, the Board made it clear that the RASA conditions do not solely affect the rights of BNSF and UP. Indeed, when terminating its formal oversight process and indicating its willingness to "consider and promptly resolve any disputes of general applicability relating to BNSF's access to shippers" under the various conditions that were imposed, the Board specifically observed

that shippers have a right (independent of any rights and interests BNSF may have under the BNSF Agreement) to seek Board intervention to ensure that the conditions we imposed on the merger are implemented in a manner that effectively preserves pre-merger competition.

UP/SP Merger General Oversight Decision No.21 (decision served Dec.20, 2001) at 6.

MRIP's right to seek enforcement of the RASA conditions in order to obtain the competitive rail service those conditions were intended to provide is accordingly not derivative of any contractual rights or obligations between UP and BNSF. Indeed, MRIP's rights to competitive service arise not from the RASA itself – which is an agreement between UP and

BNSF – but instead from the merger conditions the Board imposed and required to be included in the RASA. Thus, MRIP has a separate, independent and non-contractual right to seek Board assistance to obtain the public benefits provided by the RASA merger conditions, and MRIP would have that right even if BNSF was not a party to this proceeding. The Board made that point clear in its Merger Decision No. 72, stating:

We wish to clarify that shippers have rights under the BNSF agreement because we have imposed the terms thereof as a condition to the merger. *These shipper rights, however, are not contract rights enforceable in courts. Rather, shippers have recourse to the Board for enforcement of the merger conditions.*

UP/SP Merger Decision No. 72, decision served May 23, 1997 at 8 n. 18 (emphasis supplied);

UP/SP Merger Decision No. 89, 4 STB 879, 885 n. 21 (2000).

UP seeks to circumvent the Board’s plain and unambiguous statement conferring independent rights on shippers by suggesting that the Board really did not mean what it said. (Motion, at 6-7.) Specifically, UP contends that to read that language literally would mean that BNSF could initiate proceedings before the Board and avoid an arbitration that would otherwise be required by enlisting a shipper to join it in seeking relief. Although UP concedes that shippers could still have recourse to the Board, it appears to condition this by requiring shippers to first participate in an arbitration. Thereafter, according to UP, review by the Board would be available to shippers “only if necessary.” (*Id.*, at 6.)⁵

UP’s contention runs directly counter to the clear and unambiguous language in Merger Decisions 72 and 89. This proceeding is not just about a dispute between the BNSF and UP. MRIP is a real party in interest and has a clear and independent interest in obtaining competitive rail service under the Board’s merger conditions. And, the Board specifically found that

⁵ Not surprisingly, UP does not shed any light on when it might be “necessary” for a shipper to be able to seek such relief from the Board.

shippers' rights under the RASA conditions were not contract rights and that they would have recourse to the Board.

As the Joint Petition demonstrates, BNSF made several attempts to provide competitive rail access to the Mission Rail Industrial Park, each of which was rejected by UP.⁶ UP is apparently content to treat MRIP as a captive shipper subject to the level of service UP is willing to offer, even while acknowledging that it granted BNSF's access to Alamo Junction Rail Park (Motion, at 4) – MRIP's direct competitor located just a few miles away on the same trackage rights line in issue here. Thus, UP has created the very competitive disadvantage MRIP now faces.⁷

Accordingly, MRIP's participation in this case is not an "empty shell" (as UP puts it, Motion at 7) or a ruse by which BNSF can avoid arbitration of particular terms and conditions of service. Instead, MRIP's role in this proceeding is a matter of economic necessity for a shipper the RASA merger conditions were intended to protect.

In addition, submitting this issue to arbitration would significantly increase the cost of litigation to MRIP and the other parties. Unlike the relatively summary process involved in other proceedings where it was necessary to interpret, clarify or enforce the RASA conditions, an arbitration could well result in extended discovery, briefing, hearings and, of course, the payment of one or more arbitrators, not to mention the time that would be required to accomplish that process.

Moreover, the loser of any arbitration would undoubtedly seek Board review of the arbitral decision, resulting in further delay and costs. While arbitration may be acceptable when

⁶ Joint Petition, at 6-7.

⁷ See the discussion of the competitive problems being experienced by MRIP due to the lack of rail competition in the Kinsel Statement, at ¶¶27-34.

the only disputants are the railroads, compelling a shipper to go through this expensive and time consuming process – or to just sit silently and wait for the outcome – is both unreasonable and unfair. That is especially the case since the issue here – whether the Park is on a trackage rights line or at a 2-to-1 point – is a relatively straightforward legal issue requiring only that the Board interpret the RASA conditions. Thus, while the delay inherent in compelling arbitration at this point⁸ may be acceptable to UP, it would continue the adverse economic situation confronting MRIP and its tenants for an indefinite period. Such an unnecessary delay is neither reasonable nor acceptable to MRIP.

Finally, UP contends that MRIP is estopped from refusing to arbitrate this matter because it “seeks to enjoy the benefits of the conditions and the RASA.” (Motion, at 7.) In support of its argument, UP cites to *Int’l Paper Co. v. Scjwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000) and *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 352 (2d Cir. 1999). However, both cases involve situations where a third party sought to enforce terms of a private contract to which it was not a signatory and was compelled by the court to arbitrate. UP’s contention is a complete “red herring.” Neither case is apposite since they involved private commercial contracts made under state law, whereas MRIP is seeking enforcement of the public merger conditions imposed for the benefit of rail shippers by the Board.⁹

⁸ Interestingly, UP concedes it was willing, in 2013, to have the issue of BNSF’s competitive access to the Park determined by the Board, rather than through arbitration. (Motion, at 5 n. 6). UP does not explain why its position on this issue has changed.

⁹ Parenthetically, in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009), the Supreme Court found that third parties could be estopped from challenging mandatory arbitration “if a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law.” depending upon the state law governing the contract. In this case, however, the issues relate to the application of the Board’s federally imposed merger conditions, not a contract that is subject to state law.

III. CONCLUSION

MRIP accordingly requests that the Board deny UP Motion to Dismiss or Hold Proceeding in Abeyance and instead require UP to promptly respond to the merits of the Joint Petition.

Respectfully submitted,

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Dated: March 7, 2017

CERTIFICATE OF SERVICE

I hereby certify this 7th day of March, 2017, that I have caused the foregoing Mission Rail Industrial Park, LLC's Reply to Union Pacific's Motion to Dismiss or Hold Proceeding in Abeyance to be served by email or first-class mail on the following parties of record in this proceeding:

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