

UP/SP-421
243943

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
July 12, 2017
Part of
Public Record

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

**UNION PACIFIC'S REPLY
TO BNSF'S REBUTTAL (BNSF-131)**

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BNSF and MRIP overreached in their Joint Petition when they asked the Board to expand the UP/SP merger’s new facilities condition beyond the terms of the RASA. They overreached again—this time procedurally—by filing improper rebuttal.

The Board should reject BNSF’s filing. It is nothing more than an improper rebuttal to Union Pacific’s Reply to BNSF’s and MRIP’s Joint Petition, and Union Pacific’s Reply to MRIP’s Petition for Leave, under the pretext of replying to the improper rebuttal of MRIP, BNSF’s own joint petitioner in this proceeding. BNSF’s attempt to have the last word in its effort to modify long-established merger conditions is a prohibited reply to a reply. *See* 49 C.F.R. § 1104.13(c). However, if the Board does not strike BNSF’s filing from the record, it should accept this reply to the new arguments contained in BNSF’s rebuttal.

I. BNSF invokes “equitable principles” because the undisputed law and undisputed facts require the Board to deny the Joint Petition.

After reviewing Union Pacific’s replies, BNSF effectively concedes that nothing in the RASA or the Board’s decision approving the UP/SP merger entitles BNSF to serve the Park. *See* BNSF Reb. at 4-5. It therefore urges the Board to disregard the plain terms of the RASA, the

Board’s decisions, and the evidence in the record, and grant BNSF access to the Park under “equitable principles.” *Id.* at 5.

BNSF seeks refuge in “equitable principles” because the evidence of record demonstrates conclusively that the Line is a § 10901 line of railroad.¹ The Line’s jurisdictional status is critical because, under the RASA, as well as under Petitioners’ own legal theory, if the Line is a § 10901 line of railroad, then the Park is neither “at” a 2-to-1 point nor “on” a Trackage Rights Line. *See* BNSF Reb. at 1-2. In sum, BNSF invokes equitable principles because it knows that if the Board simply applies the undisputed law to the undisputed facts, it must rule that BNSF is not entitled to serve the Park.

II. Application of “equitable principles” would not change the result.

The Joint Petition asked the Board to *enforce* Decision No. 44, not to reopen the UP/SP merger to impose new conditions. The Board could not enforce what it never ordered under the guise of applying “equitable principles.” *See* Union Pacific Reply at 19. It is also far too late to challenge the adequacy of the conditions the Board imposed to preserve pre-merger competition by invoking “equitable principles.” *See id.* at 20. Petitioners’ challenge here is especially flawed because the concern they raise involves what they admit are post-merger changes in “the nature of industrial development”—*i.e.*, changes *not* caused by the merger. *See id.* at 20-21; *see also* *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 364 (1996) (“We attempt to ameliorate harm that is caused by the merger with conditions.”).

¹ BNSF concedes this point by asking the Board to order “supplemental briefing” on the Line’s jurisdictional status. *Id.* at 2 n.2. BNSF says it relied on a prior Board decision in not seeking revocation of Union Pacific’s exemption to operate the Line. *See id.* at 4. That claim is a red herring. The issue is BNSF’s failure to offer any evidence on the Line’s jurisdictional status in *this proceeding*. Indeed, Petitioners *conceded* in their Joint Petition that the Line is a § 10901 line of railroad (*see* Joint Petition at 14), as discussed on reply, *see* Union Pacific Reply at 11.

“Equitable principles” also do not aid Petitioners because the evidence of record demonstrates conclusively that the merger conditions are working as intended: new facilities eligible to receive service from both Union Pacific and BNSF were established near the Park in the same period MRIP has been developing the Park. *See* Union Pacific Reply at 21. Indeed, MRIP’s own rebuttal shows competition from such facilities provides the *additional* competitive benefit of constraining Union Pacific rates to the Park. *See* Kinsel Reb. VS at 6-7; *see also* Union Pacific Reply to MRIP Petition for Leave at 4-5.

The evidence of record also demonstrates conclusively that neither BNSF nor MRIP has any specific “equitable” entitlement to BNSF access to the Park. Petitioners admit Union Pacific consistently rejected BNSF’s access claims. *See* Joint Petition at 6-7. MRIP’s witness confirms Union Pacific never told MRIP that BNSF would have access to the Park. *See* Kinsel Reb. VS at 8. In fact, Union Pacific expressly told the Park’s developers that BNSF would *not* have access to the Park. *See* Lueckenhoff RVS at 2. The evidence here suggests, at most, that MRIP might have been misled by *BNSF* (*see* Kinsel Reb. VS at 8-9), but such deception would not give MRIP or BNSF an equitable claim against Union Pacific.

The evidence also demonstrates conclusively that BNSF is wrong when it claims a new “accrual” condition is necessary to make the new facilities condition effective. *See* BNSF Reb. VS at 4 n.7.² Hundreds of shippers have gained access to BNSF under the UP/SP merger’s new

² We explained on reply that BNSF’s proposed “accrual” condition has no basis in the RASA or in the Board’s decision approving the UP/SP merger. *See* Union Pacific Reply at 14-15 & n.20. BNSF implies Decision No. 81 bears on the issue (BNSF Reb. at 3 n.5), but that decision held only that Union Pacific could not rely on a pre-merger change to switching limits because BNSF would not have known about that change from public information. *See* Decision No. 81, slip op. at 4 (“If we were to adopt UP’s position, BNSF and its potential customers . . . would have to be privy to data readily accessible only to UP’s operating personnel.”). Here, Petitioners seek to expand BNSF access beyond what Petitioners concede were the known pre-merger switching (continued...)

facilities condition. Shippers have always been able to obtain assurance they will be entitled to access by *asking* Union Pacific. If a shipper or BNSF disagrees with Union Pacific's response, either one or both can bring a claim to the Board—which has happened only twice since 2000.³ In fact, BNSF's proposed new rule that access rights “accrue[] upon the completion of [track] construction” (Joint Petition at 12) would *not* help shippers contemplating investments in new facilities. Shippers must plan, finance, and acquire land for new facilities long before completion of construction. BNSF's justification for its proposed accrual condition is a sham: the proposed condition does not address a real-world problem or provide a real-world solution.

BNSF's proposed accrual condition would make this dispute and others more difficult to resolve, not easier to resolve. The nature of railroad development projects can change over time. When a dispute does not reach the Board until after a track is being operated, the Board will find it difficult, if not impossible, to conduct a retrospective analysis of the track's jurisdictional status at an earlier time to determine whether some “right” previously “accrued.” This case highlights difficulties involved in even identifying the relevant parties, to the extent the parties may have competing recollections requiring the Board to make credibility determinations. Several entities were involved in developing the Park, including ST One Logistics, which signed Memoranda of Understanding; FRAC Resources, LP, which signed the Industry Track Agreement; and MRIP, which signed neither. By contrast, the Board can readily resolve the present dispute simply by applying the undisputed law to the undisputed facts.

BNSF's proposed accrual condition would also encourage gamesmanship. Rather than simply ask Union Pacific about access and immediately bring any dispute to the Board for timely

limits of Elmendorf (*see* Union Pacific Reply at 9-10), to a location in a different county (*see* Union Pacific Reply to MRIP Petition for Leave at 2-3).

³ The two cases are this one and *G3 Enterprises*, in which the Board agreed with Union Pacific.

resolution, a shipper might decide to invest in a new facility and take its chances later by raising fact-specific arguments, perhaps turning on competing recollections, about the project's timing and the parties' intent. Indeed, MRIP appears to have adopted that very approach here. It either learned Union Pacific informed ST One Logistics that BNSF would not have access to the Park,⁴ or it consciously avoided asking about access, yet it invested anyway. Equitable rules would not reward parties that adopt such tactics.⁵ Equitable rules would require parties desiring BNSF access to ask Union Pacific whether a particular location qualifies, and if they disagree with Union Pacific's assessment, to bring the matter promptly to the Board.

III. Conclusion

The Board should strike BNSF's rebuttal. If the Board accepts the rebuttal, however, it should also accept this reply. In any case, the Board should deny the petition for enforcement.

⁴ See p. 3, *supra* & Lueckenhoff RVS at 2.

⁵ It is hornbook law that "he who comes into equity must come with clean hands." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945); see also *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 244-45 (1933) ("The governing principle is 'that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.'" (quoting Pomeroy, *Equity Jurisprudence* (4th Ed.) § 397)).

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July 12, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2017, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery on the following counsel of record in Finance Docket No. 32760:

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