

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB 33 (Sub-No. 277X)

UNION PACIFIC RAILROAD COMPANY
– ABANDONMENT EXEMPTION –
IN LAFOURCHE PARISH, LA

and

STB Finance Docket No. 35601

BNSF RAILWAY COMPANY
– TRACKAGE RIGHTS EXEMPTION –
UNION PACIFIC RAILROAD COMPANY

233206
233207
ENTERED
Office of Proceedings
October 16, 2012
Part of
Public Record

**UNION PACIFIC RAILROAD COMPANY'S REPLY
TO BNSF RAILWAY COMPANY'S REQUEST FOR RELIEF**

MACK H. SHUMATE, JR.
Union Pacific Railroad Company
101 North Wacker Drive, #1920
Chicago, IL 60606

MICHAEL L. ROSENTHAL
SPENCER F. WALTERS
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 662-6000

Attorneys for Union Pacific Railroad Company

October 17, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB 33 (Sub-No. 277X)

UNION PACIFIC RAILROAD COMPANY
– ABANDONMENT EXEMPTION –
IN LAFOURCHE PARISH, LA

and

STB Finance Docket No. 35601

BNSF RAILWAY COMPANY
– TRACKAGE RIGHTS EXEMPTION –
UNION PACIFIC RAILROAD COMPANY

**UNION PACIFIC RAILROAD COMPANY’S REPLY
TO BNSF RAILWAY COMPANY’S REQUEST FOR RELIEF**

In a document styled as a “Reply” to motion in which Union Pacific Railroad Company (“UP”) asked the Board to modify its notice of exemption in Docket No. AB 33 (Sub-No. 277X), BNSF Railway Company (“BNSF”) asks the Board to “affirmatively confirm that BNSF has the right to direct access to present and future customers along the Lockport Branch pursuant to the terms and conditions of the governing agreements.” (BNSF Reply at 9.) To the extent BNSF is asking the Board to interpret the terms of agreements between BNSF and UP, the Board should follow its precedent and refrain from asserting jurisdiction over private contract disputes.¹ BNSF obtained its rights with respect to the Lockport Branch in what the Board correctly described as a “private-sector arrangement,” and the parties expressly provided for arbitration of any disputes.

¹ Because BNSF did not simply reply to UP’s motion, but instead asked the Board to grant relief, UP believes it is entitled to file a reply. If UP is incorrect, then it seeks leave to file this reply to permit the Board to address BNSF’s request based on a more complete record.

The Burlington Northern & Santa Fe Railway Company and Union Pacific Railroad Company – Acquisition Exemption – Lines Between Dawes, TX, and Avondale, LA, FD 33630, slip op. at 3 (STB served Sept. 29, 1998). To the extent, however, that BNSF is asking the Board to confirm simply that BNSF has rights to serve existing and future customers on the Lockport Branch and that those rights are governed by agreements with UP, UP has no objection.

UP's motion asked the Board to modify the notice of exemption that authorized UP to abandon the portion of UP's Lockport Branch from milepost 1.7 near Raceland, Louisiana, to milepost 14.2 near Jay, Louisiana (the "Line"). The proposed modification would permit only UP's discontinuance of service over the Line, and UP's discontinuance would be subject to the condition that UP could not salvage track material on the Line without further authorization from the Board. UP explained that it had re-evaluated its decision to abandon the Line and determined that it wanted to preserve the Line for potential future use, including future service to shippers that may be interested in locating new facilities on the Line.²

UP also explained that the proposed modification would address concerns BNSF and Valentine LLC had raised that consummation of an abandonment would remove the Board's jurisdiction over the Line and allow UP to engage in salvage activities.³ UP stated that, if the Board modified the notice of exemption, UP would not object if the Board published the notice of exemption for trackage rights over the Lockport Branch that BNSF had requested in Finance

² In these proceedings, BNSF and Rail Solutions LLC have asserted that Rail Solutions has been considering locating a facility on the Line. This type of development opportunity illustrates why UP concluded that it would be better served by discontinuing service over the Line rather than abandoning the Line. If the Board allows UP to discontinue service on the Line, UP would continue to be open to business development opportunities with potential shippers.

³ BNSF does not dispute that UP's proposal would resolve the concerns that BNSF and Valentine raised in Docket No. AB 33 (Sub-No. 277X). In a letter filed September 24, 2012, Valentine informed the Board that it is not opposed to UP's motion.

Docket No. 35601. UP simply asked the Board to make clear, in accordance with well-established precedent, that issuance of a notice of exemption in Finance Docket No. 35601 would not constitute a ruling one way or another on BNSF's contractual rights to operate over the Line. The Board has made similar statements in comparable circumstances at BNSF's behest. *See Sioux Valley Reg'l R.R. Auth. – Trackage Rights Exemption – Lines of the State of South Dakota*, FD 34646 (STB served Jan. 19, 2005); *MRC Reg'l R.R. Auth. – Trackage Rights Exemption – Lines of the State of South Dakota*, FD 34630 (STB served Dec. 29, 2004).

In its "Reply," BNSF objected to UP's motion because it believed UP's motion contained a "categorical statement that BNSF has no right to operate the [Lockport Branch], regardless of the Board's actions in Finance Docket No. 35601 or any additional actions that it may take in Finance Docket No. 33630." (BNSF Reply at 5.) UP's motion contained no such "categorical statement." UP noted that the parties' agreement would not allow BNSF to operate over the Line simply by virtue of the fact that the Board publishes a notice of exemption for trackage rights, and it asked the Board to confirm that fact. (UP Motion at 7.) In fact, BNSF itself acknowledges that there are contractual restrictions affecting its rights to serve customers on the Line. (BNSF Motion at 5 n.3.) Therefore, if the Board grants UP's motion and confirms that publication of BNSF's notice of exemption does not in and of itself allow BNSF to operate over the Line, UP would not object if the Board also confirms that BNSF has rights to serve present and future shippers on the Line "pursuant to the terms and conditions of the governing agreements."

To the extent BNSF is asking the Board to do more than confirm in a general way that BNSF has some contractual rights to operate over the Line, the Board should deny that request. The law is clear that "[t]he Board is not the proper forum to resolve such disputes." *Gen. Ry. d/b/a Iowa N.W.R.R. – Exemption for Acquisition of Railroad Line – In Osceola & Dickinson*

Counties, IA, FD 34867, slip op. at 4 (STB served June 15, 2007) (declining to address “questions of state contract and property law”); *see also V&S Ry. – Petition for Declaratory Order – Railroad Operations in Hutchinson, Kan.*, FD 35459, slip op. at 5 (STB served July 12, 2012) (declining to address the “interpretation of the parties’ Operating Rights Agreement” because “such state law contract interpretation generally should be conducted by the district court and not the Board”); *Ohio Valley R.R. – Petition to Restore Switching Connection & Other Relief*, FD 34608, slip op. at 6 (STB served Feb. 23, 2005) (declining to “confirm” a railroad’s contractual rights to interchange traffic directly with another railroad because the Board “usually defer[s] to courts in matters of contract interpretation”); *CSX Corp. & CSX Transp., Inc. Norfolk S. Corp. & Norfolk S. Ry. – Control & Operating Leases/Agreements – Conrail Inc. & Consol. Rail Corp.*, FD 33388 (Sub-No. 91), slip op. at 23 (STB served Feb. 2, 2001) (declining to interpret interchange commitment because the Board “lack[s] the authority to issue a definitive ruling as to the meaning of this contractual language. That would be a matter of contract interpretation that ought to be decided in a court of general jurisdiction.”); *Township of Woodbridge, NJ v. Consol. Rail Corp.*, NOR 42053, slip op. at 5 (STB served Dec. 1, 2000) (“It would be inappropriate for us to rule on the merits of the contract dispute in this case. Such matters are best addressed by the courts.”); *Kansas City Terminal Ry. & The Atchison, Topeka & Santa Fe Ry. – Contract to Operate Exemption – In Kansas City, MO*, FD 32896, slip op. at 4 (STB served Nov. 20, 1996) (“A court that applies Missouri law is better able than this agency to interpret the terms of the operating agreement.”).⁴ In fact, BNSF and UP have expressly agreed

⁴ Moreover, a dispute over BNSF’s contractual rights could not be resolved based on the present record. If a concrete dispute were to materialize and the Board were to conclude that it had jurisdiction over such a dispute, further proceedings would be required to allow the parties to (continued...)

to arbitrate any such disputes. *See* Joint Operating Agreement, § 10.1 (“If at any time a question or controversy shall arise between the parties hereto touching the construction of any part of this Agreement ... such question or controversy shall be submitted for arbitration”).⁵

Moreover, there is no merit to BNSF’s claim that the Board could exercise jurisdiction over a dispute regarding BNSF’s rights because they implement conditions imposed in *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996). BNSF obtained the rights at issue *two years after* the UP/SP merger, as a part of a transaction that the Board correctly described as a “private-sector arrangement.” *The Burlington Northern & Santa Fe Railway Company and Union Pacific Railroad Company – Acquisition Exemption – Lines Between Dawes, TX, and Avondale, LA*, slip op. at 3. Indeed, BNSF’s witness specifically testified that the customer access provisions *increased* the rights BNSF obtained in the UP/SP merger. *See* Petition for Exemption, Verified Statement of Peter J. Rickershauser at 4 (July 1, 1998).⁶ Accordingly, the Board would have no basis for exercising jurisdiction over the parties’ agreements based on some supposed connection to conditions imposed in the UP/SP merger.⁷

UP’s motion reflected its re-evaluation of its plans for the Line, while also addressing the concerns raised by BNSF and Valentine in Docket No. AB-33 (Sub-No. 277X) and allowing the

conduct discovery and submit argument and evidence regarding the proper interpretation of any disputed contract provisions.

⁵ The September 1, 2000, Joint Operating Agreement is Exhibit E to UP’s Evidence and Argument filed February 9, 2012, in Docket No. AB 33 (Sub-No. 277X).

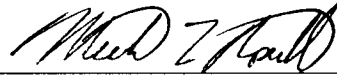
⁶ The Petition for Exemption is Exhibit D to UP’s Evidence and Argument filed February 9, 2012, in Docket No. AB 33 (Sub-No. 277X).

⁷ Even if the Board did have jurisdiction, its policy favoring the private resolution of disputes applies to disputes arising under merger-related conditions. *See Union Pacific/Southern Pacific Merger*, 3 S.T.B. 737, 742 (1998) (“[A]ny 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.”).

Board to lift its housekeeping stay in Finance Docket No. 35601. UP simply asked the Board to make clear, in accordance with the Board's well-established precedent, that issuance of a notice of exemption in Finance Docket No. 35601 would not constitute a ruling one way or the other on BNSF's contractual rights to operate over the Line.

Accordingly, UP respectfully requests that the Board issue an order (1) granting UP's motion to modify the notice of exemption in Docket No. AB-33 (Sub-No. 277X), to permit UP's discontinuance of service over the Line, subject to the condition that it may not salvage track material on the Line without further authorization from the Board, and (2) denying BNSF's request to the extent it would require the Board to exercise jurisdiction over the parties' agreements.

Respectfully submitted,



MICHAEL L. ROSENTHAL
SPENCER F. WALTERS
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 662-6000

MACK H. SHUMATE, JR.
Union Pacific Railroad Company
101 North Wacker Drive, #1920
Chicago, IL 60606

Attorneys for Union Pacific Railroad Company

October 17, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2012, I caused a copy of Union Pacific Railroad Company's Reply to BNSF's Request for Relief to be served by e-mail or first-class mail, postage prepaid on all parties of record in these proceedings.

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal", written over a horizontal line.

Michael L. Rosenthal