

SERVICE DATE – MAY 5, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 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

Decision No. 108

Digest:¹ The Board denies Union Pacific Railroad Company's (UP) motion to dismiss or hold in abeyance a joint petition filed by BNSF Railway Company and Mission Rail Industrial Park, LLC, seeking enforcement of conditions imposed by a previous Board decision approving the UP/Southern Pacific Rail Corporation (SP) merger.

Decided: May 3, 2017

On February 1, 2017, BNSF Railway Company (BNSF) and Mission Rail Industrial Park, LLC (MRIP) filed a joint petition for enforcement of the Board's decision in Union Pacific Corp. Control & Merger—Southern Pacific Rail Corp (Decision No. 44), 1 S.T.B. 233 (1996). BNSF and MRIP (jointly, Petitioners) ask the Board to direct Union Pacific Railroad Company (UP) to allow BNSF to provide rail service to Mission Rail Park (the Park) via Track 793 (the Track). Petitioners claim that BNSF is entitled to provide (and MRIP to receive) service because of the conditions imposed in Decision No. 44 and in accordance with the March 1, 2002 Restated and Amended Settlement Agreement (RASA), which the Board approved in its review of the UP/Southern Pacific Rail Corporation (SP) merger proceeding.

On February 21, 2017, UP filed a motion to dismiss or hold in abeyance the joint petition of BNSF and MRIP. UP asserts that the Petitioners' claim that they are entitled to access the Park is subject to a requirement to arbitrate under the RASA. Therefore, UP argues, the Board should dismiss this proceeding and require the parties to arbitrate their dispute. (UP Mot. at 4-8.) UP states that it consents to MRIP's participation in the arbitration but explains that if the Board

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language in Decisions, EP 696 (STB served Sept. 2, 2010).

is unwilling to require MRIP to participate, the Board should hold this proceeding in abeyance while UP and BNSF arbitrate their dispute. (Id. at 7-8.)

BNSF filed a reply to UP's motion on March 7, 2017. BNSF claims that, consistent with prior Board decisions, the joint petition presents a "general matter with broad implications" regarding the implementation of conditions of the UP/SP merger and should be resolved by the Board rather than by an arbitrator. (BNSF Reply at 1-2.) MRIP also filed a reply to UP's motion, stating that it agrees with BNSF that "this controversy raises matters of general application under the Board's merger conditions[,] that MRIP is not required to participate in arbitration, and that MRIP does not consent to resolve these matters through arbitration. (MRIP Reply at 1, 3-6.)

BACKGROUND

This joint petition for enforcement is related to an earlier Board proceeding in which UP filed a notice of exemption to provide common carrier service over the Track. Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Ctys., Tex., FD 35776 (STB served Dec. 24, 2013) (Exemption Decision). As explained in that decision, the Track was constructed by Frac Resources LP and MRIP (collectively, FRAC) on a right-of-way owned by UP pursuant to an Industry Track Agreement. The Track was purchased by UP after construction was completed. The purpose of the Track was to connect the Park to UP's Rockport Industrial Lead at the southern boundary of the Elmendorf switch district. BNSF filed a petition to reject the notice of exemption, arguing that the streamlined exemption procedures were not appropriate for the proposed transaction. BNSF argued that it had rights to serve customers over the Track pursuant to conditions imposed in the UP/SP merger proceeding and the terms of the RASA entered into by UP and BNSF. Exemption Decision, slip op. at 2. In particular, BNSF raised its concern that, upon converting the Track to a common carrier line through the exemption proceeding, UP could argue that BNSF may not access shippers over the Track under the conditions of the UP/SP merger and the terms of the RASA. Id. During the exemption proceeding, FRAC stated in a reply that, in entering into the agreement with UP, it anticipated that BNSF would be able to serve the Park. Id. at 3.

The Board allowed the exemption to become effective to permit UP service to begin and avoid immediate harm to Frac Resources. Id. However, the Board stated that BNSF was not precluded "from seeking, through either arbitration or a new, separate Board proceeding, a determination that it *also* is entitled to access the [Track]." Id. at 4 (emphasis in original) (citation omitted). The Board went on to state that "[i]n any such proceeding . . . our decision here shall not be construed as permitting UP to defeat any rights that BNSF may have had to serve shippers on the [Track] had the exemption not become effective." Id. Therefore, the Board denied BNSF's petition to reject the notice of exemption.

DISCUSSION AND CONCLUSIONS

The Board may dismiss a complaint if it “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). Motions to dismiss are generally disfavored. While reviewing a motion to dismiss, the Board will view the alleged facts in a light favorable to the complainant. Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 1 (STB served June 15, 2015); Montana v. BNSF Ry., NOR 42124, slip op. at 3 (STB served Feb. 16, 2011).

UP argues that the Board should require arbitration because this dispute concerns terms and provisions of the RASA where arbitration is the exclusive remedy. UP also cites to several previous Board decisions in the UP/SP merger proceeding where the Board advised the parties to seek arbitration regarding disputes arising under the settlement agreement. (UP Mot. 5-6 (citing Decision No. 81, 3 S.T.B. 737, 742 (1998); Decision No. 86, 4. S.T.B. 303, 306 (1999)).)

The Board finds UP’s grounds for dismissal to be unpersuasive. The RASA arbitration clause reads, “[e]xcept as otherwise provided by any decision of the STB or by separate agreement, unresolved disputes and controversies concerning any of the terms and provisions of this Agreement or the application of charges hereunder shall be submitted for binding arbitration under Commercial Arbitration Rules of the American Arbitration Association which shall be the exclusive remedy of the parties.” (RASA § 15 (emphasis added).) The Board’s Exemption Decision specifically stated that BNSF could seek a resolution of the issues here “through *either* arbitration *or* a new, separate Board proceeding[.]” See slip op. at 4 (emphasis added). Thus, UP’s argument that the parties must seek resolution of their dispute through arbitration is incorrect.

Additionally, although UP has cited previous cases where the Board has advised the parties to seek arbitration, the Board has also found that a Board proceeding may be proper for a dispute with potentially broad implications concerning conditions imposed in the UP/SP merger. Decision No. 86, 4. S.T.B. at 306. It is the Board’s responsibility to determine whether the conditions it has imposed in merger proceedings are being properly implemented in a manner consistent with the public policy underlying those conditions. Here, the joint petition raises important issues related to the preservation of pre-merger rail competition. In addition, no material facts appear to be in dispute. Given the particular facts and circumstances asserted in both the joint petition and the earlier, related exemption proceeding, the Board will exercise its discretion to resolve this matter itself and will not refer this dispute to arbitration. For these reasons, UP’s motion to dismiss or hold the proceeding in abeyance will be denied.

Finally, the parties have requested that the Board set a date for UP’s reply to the joint petition, if the Board declines to dismiss or hold the proceeding in abeyance. UP seeks 30 days from the service date of the Board’s decision (UP Mot. at 8); BNSF argues that UP should have no more than 10 days (BNSF Reply at 6). The Board will defer to its default rules for the timing

of a reply filing in this proceeding. See 49 C.F.R. § 1104.13(a). Therefore, UP's reply on the merits will be due by May 25, 2017.

It is ordered:

1. UP's motion to dismiss or hold in abeyance BNSF and MRIP's joint petition is denied.
2. UP's reply to the joint petition for enforcement is due May 25, 2017.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller.