

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. 109

Digest:¹ The Board grants the petition for enforcement by BNSF Railway Company and Mission Rail Industrial Park, LLC and directs Union Pacific Railroad Company to allow BNSF to provide rail service to Mission Rail Park.

Decided: January 30, 2018

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).² BNSF and MRIP (collectively, 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).³ (Pet. 1-5, Feb. 1, 2017.) Petitioners claim that BNSF is entitled to provide (and the Park to receive) service under the merger conditions imposed in Decision

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).

² UP filed its reply on May 25, 2017. Petitioner MRIP filed a rebuttal on June 16, 2017, and a revised rebuttal on June 19, 2016. UP filed a reply to the rebuttal on June 30, 2017. BNSF filed a statement in response to the rebuttal on July 6, 2016, and UP filed a reply to that response on July 12, 2017. In the interest of compiling a more complete record, the Board will accept the supplemental filings. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply "(i)n the interest of compiling a full record").

³ Petitioners request that the Board grant BNSF the right to access the Track and the approximately 580-foot extension of the Track known as Track 795 to serve the Park.

No. 44 and the terms of the March 1, 2002 Restated and Amended Settlement Agreement (RASA), which the Board approved in the context of its review of the UP/Southern Pacific Rail Corporation (SP) merger. See Decision No. 44, 1 S.T.B. at 246-47, 419-20; Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 5 S.T.B. 1173, 1174, 1178 (2001).

This joint petition for enforcement is related to an earlier Board proceeding (the Exemption Proceeding) in which UP filed a notice of exemption that would enable it to provide common carrier service over the Track. See Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Cty.s., Tex. (Exemption Decision), FD 35776 (STB served Dec. 24, 2013). In the Exemption Proceeding, BNSF raised similar issues, and the Board stated that BNSF could seek resolution of those issues (and, in particular, its right to access the Track) through a new, separate Board proceeding. See Exemption Decision, FD 35776, slip op. at 4.

BACKGROUND

The UP/SP Merger and the RASA

In August 1996, the Board approved the common control and merger of the rail carriers controlled by UP and the rail carriers controlled by SP, subject to various conditions designed to preserve direct and indirect competition that would be lost as a result of the consolidation of the two carriers. Decision No. 44, 1 S.T.B. at 233, 367-75, 418-21. Of significance here, the Board imposed as a condition of the merger the terms of a settlement agreement between UP and BNSF. Id. at 242-43, 246-47, 419. Under the UP/BNSF settlement agreement, BNSF received trackage rights over nearly 4,000 miles of the newly combined UP/SP system. Decision No. 44, 1 S.T.B. at 253. Moreover, the Board expanded the UP/BNSF settlement agreement by requiring UP to permit BNSF to serve any “new facility” located at any point on the UP/SP system over which BNSF had been granted trackage rights. See id. at 373, 392-93, 419-20.

The RASA is the 2001 update to the UP/BNSF settlement agreement and incorporates the conditions imposed by Decision No. 44 and the Board’s subsequent interpretations thereof.⁴ As such, the RASA includes language specifying BNSF’s right to access new facilities located post-merger on the trackage rights lines. Id. at 419-20; see also Pet. Ex. 2, RASA at 3-4. The RASA defines “New Shipper Facilities” to mean: “(i) existing Shipper Facilities constructing trackage for accessing rail service for the first time; and (ii) newly constructed rail-served Shipper Facilities.” (Pet. Ex. 2, RASA at 3.) As the Board has held, the intentionally “broad” new facilities condition was imposed “to preserve indirect competition and to enable BNSF to achieve sufficient traffic density on the trackage rights lines,” but the Board “never intended to

⁴ As contemplated by Decision No. 44, the original settlement agreement has been restated and amended in accordance with subsequent Board decisions and other more recent agreements between UP and BNSF. (See Pet. Ex. 2, RASA at 1-2.)

limit [the] condition to facilities served directly from a trackage rights line.” Union Pac. Corp. Control & Merger—S. Pac. Rail Corp. (Decision No. 86), 4 S.T.B. 303, 305-07 (STB served July 12, 1999). Thus, the RASA clarifies that new facilities are located “on” a trackage rights line, and therefore open to BNSF service, “if the facility is either: (1) adjacent to a Trackage Rights Line or (2) adjacent to a spur, an industrial track, or a yard that is itself served by such Trackage Rights Line.” Pet. Ex. 2, RASA at 4 (memorializing nearly identical language of Decision No. 86, 4 S.T.B. at 306).

The RASA also identifies and permits BNSF to access specified 2-to-1 points, which are generally defined as locations where service was provided by UP and SP but no other carrier prior to the merger. (Pet. Ex. 2, RASA at 3, 14-18, 49-50); see also 1 S.T.B. at 252, 390-91. One of the 2-to-1 points defined in the RASA is the Elmendorf switching district, and the UP line that traverses the Elmendorf switching district, the Rockport Industrial Lead, is a trackage rights line under the RASA. (See Pet. Ex. 2, RASA at 15-16, 49-50; UP Reply 3, 5, May 25, 2017 (UP May Reply); see also UP May Reply V.S. of Chris Sanford 3 n.2.)⁵ The Park that BNSF seeks to serve in this proceeding is located approximately 1.4 miles beyond UP milepost 16.1, which marks the southern boundary of the Elmendorf switching district. (See UP May Reply 3.) The Park is connected to the trackage rights line by the Track, which runs from milepost 16.1 to milepost 17.5. (See UP May Reply 3; Pet. 1-2, 9 n.8, & Ex. 1.)

The Park and Construction of the Track

The Park is a recently-constructed rail complex consisting of just over 1,000 acres.⁶ (Pet. 5.) Prior to construction of the Track, the Park had no connection to the general rail system, but was adjacent to a UP-owned right-of way (formerly used for a rail line) that UP acquired from SP in the UP/SP merger. (Pet. 2, 5; UP May Reply 6-7.)

In August 2012, one partner in the Park, ST One Logistics (ST One), and UP entered into a Memorandum of Understanding (MOU) for ST One to construct trackage to connect the Park to the Rockport Industrial Lead, UP’s mainline. (Pet. 5; UP May Reply 5; UP May Reply V.S. of Eric O. Watkins 1-2.) The MOU was provided to ST One “to outline the infrastructure that UP requires to efficiently and safely provide rail service to [the Park].” (Pet. V.S. of Richard Kinsel, Ex. 1 at 1.) The MOU specifically required that ST One comply with UP’s Guidelines

⁵ UP’s Elmendorf switching district is located along approximately 3.5 miles of track in Elmendorf, Tex., between milepost 12.6 and milepost 16.1. (Pet. 9 Ex. 1; UP May Reply 4.)

⁶ Within the Park property, at the southern end of the Track, is an approximately 580-foot extension of the Track referred to as Track 795. It is industry track built by the Park’s developers and used by UP trains to enter the Park. (See Pet. 3-4; UP May Reply V.S. of Steven L. Bybee 2-4.) Track 795 was sold to UP in 2016, (see Pet. 4), and was not at issue in the Exemption Proceeding discussed below.

for Rail Service and Industry Track Standards. It also established that: (1) Once the “private extension of the Rockport Industrial Lead [the Track]” was “completed, inspected and approved by UP, ownership will be transferred to UP, who will then take ownership and future maintenance of all track on the UP right-of-way”; and (2) “UP will provide service to the future customers that locate within the [Park] subject to the installation of required rail infrastructure needed to accommodate future rail tenants.” (*Id.*)

To pay for the construction, in March 2013, UP entered into a Confidential Rail Transportation Contract with FRAC Resources, L.P. (FRAC Resources) (now known as Mission Rail Holdings, LLC), a non-carrier and another partner in the Park. (Pet. V.S. of Richard Kinsel, Ex. 1 at 4.) Under the contract, UP would reimburse FRAC Resources for its construction of the Track by paying a refund for each loaded railcar moving from or to the Park over the course of three years (UP May Reply V.S. of Eric O. Watkins 2), after which, according to BNSF, the Track would be owned by UP (Pet. 5-6; see also Pet. 20 n.15).

The Track was ultimately constructed pursuant to a May 2013 Industry Track Agreement (ITA) between UP and FRAC Resources. The ITA⁷ states that upon completion of the Track by FRAC Resources and conveyance to UP, UP “shall operate the [Track] as common carrier track.” (UP May Reply Ex. 4 at 2, §§ 4.1, 4.2; see also id. at 11.) Pursuant to the ITA, FRAC Resources constructed the Track to connect the Park to UP’s Rockport Industrial Lead “at or near milepost 16” at the Elmendorf switching district. (Pet. 6; UP May Reply 5; UP May Reply Ex. 4 at 1, Recitals.) Construction of the Track was completed in September 2013. (UP May Reply 6.)

Just prior to the Track’s completion, BNSF sought “to implement its right under the [RASA] to serve the Park.” (Pet. 2.) By letter from BNSF to UP dated June 28, 2013, BNSF stated that it had elected “to initiate service to [the Park] at Elmendorf, TX. This is a new shipper facility inside the switch district of a 2 to 1 point and also on a Trackage Rights Line.” (Pet. Ex. 3 at 1.) On July 29, 2013, UP rejected BNSF’s request on grounds that the Park is “located approximately 1.4 miles beyond Mile Post 16.1 placing it outside the Elmendorf Switch district.” (Pet. Ex. 4 at 1.) UP also stated that, because “BNSF does not have trackage rights on the track from Mile Post 16.1 to the switch leading to the Mission Rail Park facility,” the Park was not located on a trackage rights line. (*Id.*; see also Pet. 7.)

⁷ UP designated the ITA as “highly confidential.” Although the Board attempts to avoid references to confidential or highly confidential information in its decisions, it reserves the right to rely on and disclose such information when necessary. Here, the Board concludes that this decision’s limited disclosure of information in the ITA is necessary to adequately explain the Board’s reasoning. In any event, the information disclosed here was largely disclosed previously, in Union Pacific Railroad—Operation Exemption—in Bexar & Wilson Counties, Tex., FD 35776, slip op. at 3-4 (STB served Mar. 2, 2015).

By letter to UP dated September 30, 2013, BNSF reasserted its right of access, stating that the Track (owned at that time by FRAC Resources) connected to the UP line at milepost 16.1, which is the southern end of the Elmendorf switching district. (Pet. Ex. 5 at 1.) BNSF thus argued that, because the new shipper facility was now connected directly to the Elmendorf switching district by industrial (“customer”) track, BNSF was entitled to access the new facility under the RASA. (*Id.*)

Shortly thereafter, pursuant to an October 17, 2013 supplement to the ITA, UP purchased the Track from FRAC Resources for a lump sum, rather than through refunds over a three-year period per the previous arrangement. (UP May Reply Ex. 4 at 28; see also UP May Reply V.S. of Eric O. Watkins 3.) Four days later, UP initiated the Exemption Proceeding (described below) by filing with the Board a notice of exemption to operate as a rail common carrier over the Track. UP Exemption Notice 1, Oct. 21, 2013, Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Ctys., Tex., FD 35776. On November 21, 2013, UP again rejected BNSF’s request to serve the Park, reasoning that the Track was a new 1.4-mile extension of its mainline outside the Elmendorf switching district and over which it planned to operate following the Board’s grant of authority. (Pet. Ex. 6 at 1.)

Before the Board here, Petitioners argue that UP attempted to prevent BNSF from serving the Park by purchasing the Track, and thereby attempting to extend UP’s mainline track beyond the Elmendorf switching district. (Pet. 7.) Petitioners assert that FRAC Resources was not aware that UP’s lump-sum purchase of the Track and subsequent request to reclassify the Track as mainline track in the related Exemption Proceeding “might be used as a pretext” to preclude BNSF’s service to the Park. (*Id.*) Petitioners assert that the Park’s investors believed that both UP and BNSF would have the right to provide competitive service to shippers located at the Park. (Pet. V.S. of Richard Kinsel ¶¶ 9, 16.)⁸

The Exemption Proceeding

As noted, on October 21, 2013—four days after purchasing the Track from FRAC Resources—UP filed a verified notice of exemption under 49 C.F.R. § 1150.31 to operate as a rail common carrier over the Track. See Exemption Decision, FD 35776, slip op. at 1-2. According to UP, as plans for rail service developed, the parties decided that UP should operate the Track as a common carrier due to the potential for additional customers. UP Exemption Notice 3, Oct. 21, 2013, Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Ctys., Tex., FD 35776.

⁸ In particular, Petitioners read the parties’ ITA as contemplating that railroads other than UP would have the right to provide service to the Park. (Pet. V.S. of Richard Kinsel ¶ 16.)

UP's notice of exemption also represented that FRAC Resources "did not intend to operate the [T]rack as a rail common carrier. Therefore, Board authority was not needed to construct the [T]rack." Id. at 3 n.3. UP also asserted that when it purchased the Track on October 17, 2013, it "was properly classified either as exempt track pursuant to 49 U.S.C. § 10906 or a private track outside the Board's jurisdiction. Thus, Board authority was not needed for UP to purchase the track." Id. at 3 n.4; UP Reply 2, Nov. 18, 2013, Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Ctys., Tex., FD 35776; see also Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Ctys., Tex. (Notice of Exemption), FD 35776, slip op. at 2 (STB served Nov. 6, 2013), published at 78 Fed. Reg. 66,802 ("According to UP, at the time of the purchase the Line was properly classified either as excepted track pursuant to 49 U.S.C. 10906 or a private track outside the Board's jurisdiction.").

BNSF filed a petition to reject the notice of exemption, arguing that the streamlined exemption procedures were not appropriate for the proposed transaction because it presented non-routine and potentially controversial issues relating to BNSF's right to serve customers over the Track pursuant to the UP/SP merger conditions and the RASA. Exemption Decision, FD 35776, slip op. at 2. In particular, BNSF was concerned that, upon converting the Track to a common carrier line through the Exemption Proceeding, UP could argue that BNSF may not access new shipper facilities on the Track because those new facilities would no longer connect to the Elmendorf switching district by spur or industrial track under the RASA. Id. During the Exemption Proceeding, FRAC Resources stated that when it entered into the agreement with UP, it anticipated that BNSF would be able to serve the Park. Id. at 3. However, FRAC Resources nonetheless requested that the Board allow UP's exemption to become effective so as to avoid a delay in the delivery of approximately 200 rail cars that were en route to (and badly needed by) FRAC Resources to service its customers. Id.

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 also stated that UP's right to operate over the Track is separate and distinct from BNSF's asserted right to access shippers on the Track pursuant to the RASA. Id. at 4. The Board emphasized that permitting UP common carrier service did not preclude "BNSF 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 made clear 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.

The Board further stated that "[t]he facts asserted by UP and FRAC [Resources] raise questions as to whether Board authority to construct the [Track] under § 10901 was required and whether the transaction between UP and [FRAC Resources] was structured purposefully to avoid seeking such authority." Id. at 3. The Board, therefore, kept the "docket open to investigate the circumstances under which the [Track] was built so that [it could] determine whether remedial

action is appropriate.” Id. In a March 2, 2015 decision, the Board explained that it was unable to reach a majority decision on whether remedial action was appropriate. Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Ctys., Tex., FD 35776 (STB served Mar. 2, 2015).

DISCUSSION AND CONCLUSIONS

Petitioners request enforcement of Decision No. 44 to allow BNSF to provide competitive rail service to the Park. They assert that, under the RASA and the UP/SP merger conditions, BNSF is entitled to access the Park because it is a “New Shipper Facility,” located post-merger (i) “at” a “2-to-1” point (Elmendorf, Tex.), and (ii) “on” a Trackage Rights Line (UP’s Rockport Industrial Lead, to which the Track connects). (Pet. 4.) Petitioners’ two claims to access are both premised on the notion that the Track should be treated as ancillary (spur or industrial) track under 49 U.S.C. § 10906.

First, Petitioners argue that a “New Shipper Facility that connects to a ‘2-to-1’ point through a spur or industrial track [i.e., the Track] should be considered to be located within the switching limits of that ‘2-to-1’ point, and, therefore, should be considered located ‘at’ that ‘2-to-1’ point for the purposes of BNSF’s access rights under the RASA.” (Id. at 10.) Second, Petitioners assert that the Park is “on” a trackage rights line because the Track, which connects the Park to a trackage rights line at Elmendorf, was spur or industrial track under 49 U.S.C. § 10906 (and not “a 49 U.S.C. 10901 ‘line of railroad’”) when construction of the Track was completed and BNSF’s right of access accrued. (Id. at 14-16.) In support of its right of access claims, Petitioners underscore UP’s own representation, in the Exemption Proceeding, that at the time of its construction, the Track was properly classified either as ancillary track excepted from Board licensing pursuant to 49 U.S.C. § 10906 or private track outside the Board’s jurisdiction. (Id. at 14.) Finally, Petitioners contend that the “denial of BNSF access frustrates one of the fundamental purposes of these RASA provisions and the new facilities condition by effectively eliminating the indirect siting competition at Elmendorf that would otherwise be available to the Park and its tenant shippers.” (Id. at 8-9; see also id. at 10.)

UP counters that BNSF is not entitled to serve the Park under the RASA’s “New Shipper Facility” provision because the Park is neither “at” a 2-to-1 point nor “on” a trackage rights line. UP argues that the Park is not located “at” a 2-to-1 point because it is located approximately 1.4 miles south of milepost 16.1, beyond the limits of the Elmendorf switching district. (UP May Reply 9.) UP asserts that accepting Petitioners’ argument that the Park is “at” a 2-to-1 point simply because it is located on track that connects to the switching district would “expand the boundaries of 2-to-1 points by transplanting language from the RASA’s definition of what it means to be ‘on’ a Trackage Rights Line to the RASA’s definition of ‘2-to-1’ Points.” (Id. at 10.) This “would impermissibly expand BNSF’s rights to serve new facilities beyond the limits established by the Board’s merger conditions.” (Id.) Finally, UP argues that the Park is not located “on” a trackage rights line under the RASA because the Track that connects the Park to

the trackage rights line at Elmendorf is, “by operation of law,” 49 U.S.C. § 10901 mainline track—not 49 U.S.C. § 10906 spur or industrial track. (*Id.* at 9, 11-19.)

Under the UP/SP merger conditions and the RASA, BNSF may access any “New Shipper Facility” located subsequent to the UP/SP merger at 2-to-1 points listed in the RASA and/or on “Trackage Rights Lines” also listed in the agreement. (Pet. Ex. 2, RASA at 1-2, § 4(b), Ex. A at 50.) The parties do not dispute that the Park is a new facility and that the portion of UP’s Rockport Industrial Lead between mileposts 12.6 and 16.1 is a 2-to-1 point and a trackage rights line under the RASA. (*See* UP May Reply 3-5.) They disagree only as to whether the Park is located “at” a 2-to-1 point or “on” a trackage rights line.

“At” A 2-to-1 Point

The Park is not “at” a 2-to-1 point under the UP/SP merger conditions and the RASA. The southern boundary of Elmendorf’s switching limits is milepost 16.1. The Park is located approximately 1.4 miles south of that limit, adjacent to milepost 17.5. (Pet. 9-10; UP May Reply 9.) The Board rejects Petitioners’ argument that the RASA should be read to allow BNSF to access a new facility located “just beyond” or “just outside” the stated switching limits of a 2-to-1 point if connected to the district by § 10906 ancillary track. (*See* Pet. 11, 18.) Although the Board did hold, during its oversight of the UP/SP merger, that a new facility may be deemed to be “on a trackage rights line” if it connects to such line only by spur or industrial track, *see* Decision No. 86, 4 S.T.B. at 306, the Board has not interpreted the “at a 2-to-1 point” provision in this manner, and Petitioners have not shown why it should do so here, more than 20 years after these conditions were imposed.

“On” A Trackage Rights Line

A more difficult question is whether the Park should be considered “on” a trackage rights line. As noted above, “New Shipper Facilities” are deemed to be “on” a “Trackage Rights Line” “if the facility is either (1) adjacent to a Trackage Rights Line or (2) adjacent to a spur, an industrial track, or a yard that is itself served by such Trackage Rights Line.” (Pet. Ex. 2, RASA at 4.) “New Shipper Facilities are not ‘on’ a Trackage Rights Line if they can be accessed only via a 49 U.S.C. 10901 ‘line of railroad’ which is not a Trackage Rights Line.” (Pet. Ex. 2, RASA at 2 (emphasis added).) Accordingly, the Board must determine whether the newly constructed Track connecting the Park to the trackage rights line at Elmendorf was—at the relevant point in time under the RASA and the UP/SP merger conditions—49 U.S.C. § 10901 track, sometimes referred to as “mainline” track, or 49 U.S.C. § 10906 track, generally referred to as “ancillary” or “excepted” track.⁹ If the Track was § 10901 mainline track at the relevant

⁹ Mainline track is within the Board’s exclusive jurisdiction and is subject to the entry and exit licensing requirements of 49 U.S.C. § 10901. Excepted track, such as spur, industrial,

(continued . . .)

time, BNSF would not be entitled to access the Park. If the Track was § 10906 excepted track at that time, BNSF would be entitled to access the Park. Considering the full record of this unique case—and particularly in view of UP’s initial representation that the Track was intended to be used as excepted or private track when it was constructed and at least until UP’s purchase, and the decisions not to seek construction authority prior to actual construction of the Track or acquisition authority prior to UP’s purchase—the Board finds that the Track was excepted track at the relevant time, and that BNSF may access the Park under the RASA and the UP/SP merger conditions.

Point At Which BNSF Obtained The Right To Assert Access To The New Facility

The threshold issue in determining BNSF’s right to access is establishing the relevant point in time to assess the nature of the Track and thereby determine whether the Park is on a trackage rights line. BNSF argues that its right to access the Park accrued upon completion of Track construction in September 2013. (See Pet. at 11-12, 14-15.) UP, on the other hand, contends that the Board must assess the Track’s classification “at the time [UP] commenced operations” over the Track in early 2014. (See UP May Reply at 15 & 15 n.21.) In light of both the RASA’s plain language and the Board’s prior interpretation of Decision No. 44’s new facilities condition, the Board agrees with BNSF that, here, the proper time to assess the nature of the Track is upon completion of Track construction.¹⁰

In Decision No. 44, the Board required, as a condition of the UP/SP merger, that “BNSF be granted the right to serve new facilities on both SP-owned and UP-owned track over which BNSF will receive trackage rights[.]” Decision No. 44, 1 S.T.B. at 420. The RASA memorialized that condition by providing that “BNSF shall receive access” to “any New Shipper

team, switching or side track, also falls within the Board’s exclusive jurisdiction, see 49 U.S.C. § 10501(b), but under § 10906, Board authorization is not required for its construction, acquisition, operation, abandonment, or discontinuance. Jersey Marine Rail—Pet. for Declaratory Order, FD 36063, slip op. at 2 n.3 (STB served Jan. 31, 2017); Brazos River Bottom Alliance—Pet. for Declaratory Order, FD 35781, slip op. at 4 (STB served Feb. 19, 2014). Track need not be built by a rail carrier to qualify as excepted track. See JGB Props. LLC—Pet. for Declaratory Order, FD 35817, slip op. at 8 n.11 (STB served Dec. 10, 2015) (rejecting the argument that excepted track can only be built by a rail carrier).

¹⁰ The Board has previously found it inappropriate, in some circumstances, to determine the precise parameters of the new facilities condition, see Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp., FD 32760 (Sub-No. 21), slip op. at 11 (STB served Oct. 27, 1997) (determining that the issue of whether a new facility is new or just upgraded is not susceptible to a bright line test). Here, however, the request for access requires the Board to rule on the issue of the appropriate time to assess whether the new facility is “on” a trackage rights line. Cf. Decision No. 86, 4 S.T.B. at 306.

Facility located subsequent to UP's acquisition of control of SP on the Trackage Rights Lines." (Pet. Ex. 2 at 16.) As applicable here, the RASA defines "New Shipper Facilities" as "(i) existing Shipper Facilities constructing trackage for accessing rail service for the first time; and (ii) newly constructed rail-served Shipper Facilities." (Pet. Ex. 2 at 3.)¹¹ Under these provisions, "new facilities" to which BNSF may obtain access include those that: (1) were newly constructed and/or not previously rail-served and (2) have connecting trackage for accessing rail service. Here, record evidence shows that the Park facility (which the parties agree was not previously rail-served) existed as early as 2012.¹² The record further shows that FRAC Resources completed construction of the Track connecting the Park to UP's mainline in September 2013.¹³ Thus, the Park became a "New Shipper Facility" under the RASA when it became rail-served/rail-accessible in September 2013. That is the point at which the Board must determine whether the Track was § 10901 mainline or § 10906 spur/industrial track for the purposes of assessing BNSF's right to access the Park under the "on-a-trackage-rights-line" provision of the RASA and Decision No. 44's merger conditions.

UP suggests that "BNSF never had a right to serve the Park" before the Board granted § 10901 operating authority over the Track, because "[n]othing in the RASA or the Board's decision approving the UP/SP merger remotely suggests that BNSF's right to serve a new shipper facility 'accrues' before Union Pacific itself could serve the shipper." (UP May Reply at 14-16.) The Board rejects that claim, which appears to be based on one of two premises: (1) that upon completion of Track construction, the Track was § 10901 mainline track, thus precluding both BNSF and UP service until Board operating authority was obtained, or (2) that even during the time when the Track was—by UP's own representations—still § 10906 excepted track, UP was not permitted to operate over it.

The first premise—that the Track was § 10901 track from the completion of its construction—directly conflicts with UP's representations to the Board in the Exemption Proceeding that the Track was excepted track when UP purchased it and, thus, that UP and FRAC Resources did not need to seek construction or acquisition authority for the Track. And the second premise—that UP could not "serve" the Park while it remained, according to UP's own representations, § 10906 track—is incorrect. Railroads can (and do) provide service to shippers from § 10906 spur or industrial track off a mainline, and facilities with such access

¹¹ The RASA also delineates other types of New Shipper Facility not applicable here. (See Pet. Ex. 2 at 3.)

¹² (See Pet. V.S. of Richard Kinsel 1-3 & Ex. 1 at 1); see also Reply of FRAC Resources and MRIP to BNSF Pet. to Reject, at 1, 3, Dec. 11, 2013, Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Ctys., Tex., FD 35776.

¹³ (See UP May Reply 6.)

would be considered “rail-served” within the meaning of the RASA and the merger conditions.¹⁴ UP has not demonstrated that it was not permitted on the Track—which sat on UP’s own property, and which had been constructed pursuant to UP’s own instructions—when UP considered it to be excepted or private track.

Moreover, UP’s position that BNSF has no right to access new facilities until UP actually operates trains to such facilities would contravene the intent and purpose of the new facilities condition. Truly new facilities, by definition, have had no rail service prior to their construction and/or connection to a trackage rights line, at which point both UP and BNSF could potentially serve such facilities. Decision No. 86, 4 S.T.B. at 307. As the Board explained in Decision No. 86, the deliberately “broad” new facilities condition was intended to replace indirect siting competition lost when SP was absorbed into UP, and to “creat[e] new options” for shippers to site facilities based on “the availability of two Class I rail carriers” Decision No. 86, 4 S.T.B. at 307. Had the merger never occurred, a new facility’s access to two carriers would not have been contingent upon one carrier’s actual initiation of service, and there is no reason the new facilities condition should be construed to give BNSF less access than a second carrier would have had absent the merger. In other words, because the point of preserving dual access was to give shippers access to either of the two operating carriers, BNSF’s right of access cannot turn on whether UP itself was operating trains over the Track. If that were the case, UP could seek to thwart BNSF’s access simply by delaying its own initiation of service.

Similarly, UP’s subsequent “reclassification” of connecting trackage (like the Track here) from § 10906 ancillary to § 10901 mainline track cannot determine whether BNSF obtained the right to access a new facility that locates on a trackage rights line. Because “[t]he new facilities condition was intended to be a permanent solution for both traffic density and competitive problems,” see Decision No. 86, 4 S.T.B. at 308, changes in UP’s service or use of connecting trackage after a new facility is established—changes that, here, were wholly within UP’s control—should not affect whether the new facility should have access to dual-carrier service under the UP/SP merger conditions.

For the foregoing reasons, the Board will assess BNSF’s right of access at the time the Park became a “New Shipper Facility” under the RASA and merger conditions (upon completion of Track construction)—not when UP actually started providing service or at any later point in time. As such, and as the Board has previously stated, the operating exemption granted to UP

¹⁴ See Decision No. 86, 4 S.T.B. at 306-307 (“As a practical matter, relatively few new facilities will be served directly from [] [trackage rights] lines, whereas a very large number of new facilities will be served directly from spurs, industrial tracks, and yards connected to these main lines. We never intended to limit our [new facilities] condition to facilities served directly from a trackage rights line.”).

under the Exemption Decision does not affect BNSF’s right of access here,¹⁵ and the Board’s Exemption Decision remains in effect as to UP.¹⁶ The only remaining question, then, is whether the Track was in fact, at the time of its completion, § 10901 track or § 10906 track.

Mainline vs. Spur/Industrial Track

The statute does not define what constitutes “spur” or “industrial” track under § 10906, and there is no single test for distinguishing mainline from excepted track. The Board has adopted a case-by-case approach that analyzes the disputed track’s intended use, physical characteristics, relationship to the rail system, and history. The Board’s decisions have examined various indicia, including: the length of the track; whether it serves more than one shipper; whether it is stub-ended; whether it was built to penetrate new markets; whether the shipper is located at the end of the track; whether there is regularly scheduled service; the volume of traffic moving over the track; who owns and maintains the track; whether the track was constructed with light-weight rail; what the track is used for (e.g., switching, loading, and unloading); and whether there are stations on the track. See Tri-City Railroad—Pet. for Declaratory Order, FD 36037, slip op. at 4 (STB served June 1, 2017); ParkSierra Corp.—Lease & Operation Exemption—S. Pac. Transp. Co., FD 34126 et al., slip op at 5 (STB served Dec. 26, 2001); Chi. Southshore & S. Bend R.R.—Pet. for Declaratory Order—Status of Track at Hammond, Ind., FD 33522, slip op. at 3 (STB served Dec. 17, 1998). The Board weighs the various indicia as appropriate in light of the particular history and circumstances of each case. See Norfolk S. Ry.—Pet. for Exemption—in Balt. City & Balt. Cty., Md., AB 290 (Sub.-No. 311X), slip op. at 10 (STB served Jan. 27, 2012) (discussing the Board’s discretion in weighing evidence submitted by the parties).

UP argues that the evidence in this proceeding plainly supports the conclusion that the Track was a § 10901 line of railroad. (UP May Reply 12-13.) However, UP’s arguments and evidence assume that the Board must determine the nature of the Track as of the time UP commenced operations in early 2014. (See id. at 15 n.21; see also id. at 12-13 (discussing characteristics of the Track after UP’s purchase thereof).) As discussed above—and consistent with the language and intent of the RASA, the merger conditions, and the Board’s prior

¹⁵ See Exemption Decision, slip op. at 4 (“UP’s right to seek authority to operate over the Line as a common carrier is separate and distinct from BNSF’s asserted right to access shippers on the [Track] under the terms of the RASA. . . . [O]ur 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.”).

¹⁶ Our decision here shall not be construed as altering UP’s rights and obligations pursuant to the operating authority granted to it by the Board under the Exemption Decision. UP’s rights and obligations to provide common carrier service over the Track may only be extinguished by obtaining abandonment authority from the Board.

interpretations of both—the Board will examine the Track’s character and intended use at the time its construction was completed and BNSF asserted a right to serve the Park (September 2013). UP’s contention that the nature and use of the Track subsequently changed is thus irrelevant.

The Track’s Intended Use. Here, it is appropriate for the Board to weigh heavily UP’s own representation in the Exemption Proceeding that the Track was properly classified either as excepted track pursuant to 49 U.S.C. § 10906 or as private track outside the Board’s jurisdiction “at the time of UP’s purchase” in mid-October 2013 (after Track construction was complete). See Notice of Exemption, FD 35776, at slip op. 2 n.1; UP Exemption Notice 3 n.3, Oct. 21, 2013, Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Ctys., Tex., FD 35776; UP May Reply Ex. 4 at 28; UP Reply 2, Nov. 18, 2013, Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Ctys., Tex., FD 35776. As the Board has observed, by making that representation, as well as the representation that FRAC Resources (not UP) constructed the Track as excepted or private track, UP avoided having to seek construction authority under 49 U.S.C. § 10901 and the associated requirements of the environmental laws.¹⁷ At the same time, only four days after purchasing what UP called excepted or private track, UP filed its notice of exemption seeking authority to operate the Track as § 10901 mainline, thereby allowing UP to argue that no access by a competitor was permissible. Given this history, UP’s original representation that the Track was § 10906 excepted track—on which the Board relied in allowing UP and FRAC Resources to avoid seeking construction or acquisition authority for the Track—carries significant weight, supporting a designation that the Track was § 10906 track upon completion of its construction.¹⁸

Physical Attributes of the Track. UP argues that the physical attributes of the Track—its good condition, construction of heavy 135-pound rail, mileposts, and station designation—support its assertion that the Track is § 10901 mainline. However, the Board has not generally accorded such attributes significant weight. See, e.g., Union Pac. R.R.—Operation Exemption—in Yolo Cty., Cal. (Yolo Cty.), FD 34252, slip op. at 4 (STB served Dec. 5, 2002). The good condition of the track is particularly insignificant here, given that the Track was only recently constructed. Given the circumstances and history involved here, the Board also does not give

¹⁷ See Notice of Exemption, at slip op. 2 n.1; UP Exemption Notice 3 n.3, Oct. 21, 2013, Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Ctys., Tex., FD 35776; see also Exemption Decision, FD 35776, slip op. at 3 (noting that the structure of the UP/FRAC Resources transaction allowed UP to avoid seeking construction authority). The Board notes that UP made that representation notwithstanding indications in the parties’ 2012 MOU and early 2013 ITA that the Track would eventually be used as mainline. (See UP May Reply Ex. 4 at 2, § 4.2.)

¹⁸ Significantly, UP does not specifically dispute that the Track was § 10906 excepted track when UP purchased it.

UP's more subjective station designation, milepost markers, and other signage evidence—which were largely within its control since prior to construction¹⁹—significant weight.

Other, current physical attributes of the Track that existed at the time of its completion more clearly reflect the Track's intended use and are consistent with a finding that the Track was excepted track. The Track at issue here is short (only 1.4 miles long), which in many cases has been found to be an indicium of excepted track. See, e.g., Tri-City, FD 36037, slip op. at 1, 5 (finding that 10,322 feet of track connecting rail park with mainline is excepted track); ParkSierra, FD 34126 et al., slip op. at 6 (finding that 1.7-mile track is excepted track). In addition, the Track is stub-ended (so there is no overhead, or “through,” service on it²⁰), which is another of the “classic indicia of excepted track.” Tri-City, FD 36037, slip op. at 5. Moreover, the Park is located at the end of the Track (see UP May Reply Ex. 2), which the Board has found indicative of § 10906 track, Chi. Southshore, FD 33522, slip op. at 6. These attributes are consistent with UP's initial representation and with record evidence showing that the Track was constructed as § 10906 track to connect a single customer, FRAC Resources, to UP's mainline. Notice of Exemption, FD 35776, slip op. at 1-2; (see also UP May Reply 6; Pet. V.S. of Richard Kinsel 5 & Ex. 1 at 1 (discussing “private extension” of track from UP mainline to Park property and customer's intent to receive dual-carrier service)). This evidence is more probative—and entitled to more weight—than the more subjective evidence regarding physical attributes that UP relies upon in arguing that the Track should be deemed mainline track.

Number of Shippers. UP has claimed that it sought operating authority in 2013 because, as plans for rail service developed, “new information” suggested that there was a “potential for additional customers.” UP Exemption Notice 3, Oct. 21, 2013, Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Ctys., Tex., FD 35776; Notice of Exemption, at slip op. 1-2; (see also UP May Reply 6). However, although the parties may have anticipated that multiple shippers might eventually locate in the Park, there was only a single potential customer at the time Track construction was completed—and even later, at the time of the Exemption Proceeding.²¹ This supports a finding that the Track was, upon its construction, § 10906 track.²²

¹⁹ (See UP May Reply Ex. 4 at 1-2, 11-17); Accord Yolo Cty., FD 34252, slip op. at 4 (concluding that trackage was § 10906 excepted track notwithstanding the existence of a station designation and heavier rail weight).

²⁰ The fact that a line may be used for service by “through trains” is an indicium of § 10901 mainline. See Yolo Cty., FD 34252, slip op. at 3-4 (citing Nicholson v. ICC, 711 F.2d 364, 367 (D.C. Cir. 1983)).

²¹ See UP Exemption Notice 3, Oct. 21, 2013, Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Ctys., Tex., FD 35776; UP Reply 3, Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Ctys., Tex., FD 35776. In fact, Petitioners claim that UP still “serves only a single customer in the Park.” (MRIP Rebuttal V.S. of Richard Kinsel ¶ 35, June 16, 2017.)

New Markets. The parties dispute whether the Track was built to extend into a new market, which is generally indicative of a § 10901 line. See Tri-City, FD 36037, slip op. at 4-5; Yolo Cty., FD 34252, slip op. at 3. UP states that, typically, new rail parks are considered new territory/markets, and the Track was an extension of its mainline without which UP could not serve the Park. (UP May Reply V.S. of Steven L. Bybee 1-2.) Petitioners counter that the Track “simply expands [UP’s] operations in the Elmendorf area.” (MRIP Rebuttal V.S. of Richard Kinsel ¶¶ 32.)

The evidence regarding whether the Track was built to extend into a new market is mixed. It appears that, upon the Track’s construction, the parties anticipated that the Track would allow rail service to at least one new customer, FRAC Resources, and potentially to other new customers. However, the record also indicates that UP has been serving customers in the Elmendorf area since before the UP/SP merger. (See UP May Reply 4 n.2.) Further, it is apparent that the Track was not constructed to invade the territory of another railroad. See N.Y.C. Econ. Dev. Corp.—Pet. for Declaratory Order, FD 34429, slip op. at 5-6 (STB served July 15, 2004) (citing Tex. & Pac. Ry. v. Gulf, Colo. & S.F. Ry., 270 U.S. 266, 278 (1926) (track often considered a line of railroad “where the proposed trackage extends into territory not theretofore served by the carrier . . . particularly where it extends into territory already served by another carrier.”)). Faced with a similar situation in Tri-City, the Board found that an almost-two-mile line (longer than the Track here) did not extend into a new market, where it was built to connect an industrial park to a mainline that had served the area for decades. FD 36037, slip op. at 4-5 (finding that the line was excepted track, “despite the fact that no loading, storage, and switching take place on the track”). Thus, UP’s evidence fails to show that the Track was not § 10906 excepted track at the time of its construction.

Traffic Volume and Scheduled Service. The Track’s design and good condition at the time of the Track’s completion made it capable of handling large volumes of traffic. However, for several months afterward, no rail service occurred over the Track. (See UP May Reply 15 & n.21.)²³ As such, there is no relevant volume or service information to assess. In these circumstances, the evidence regarding traffic volume and scheduled service is insufficient to cast

²² Even if multiple shippers were served (or were anticipated to be served) at the Park, that would not necessarily warrant a different outcome here. See, e.g., Tri-City, FD 36037, slip op. at 5 (citing JGB Props., FD 35817, slip op. at 8 n.12) (“[T]rack with multiple shippers can qualify as excepted track under § 10906 if it is ancillary to a mainline.”).

²³ UP’s contention that it could not operate over the Track until it obtained Board authority in the Exemption Proceeding is apparently based on UP’s inconsistent representations about when the Track was § 10906 track vs. § 10901 mainline. (See UP May Reply 6, 15; see also supra discussion of *Point At Which BNSF Obtained The Right To Assert Access To The New Facility*.)

doubt on the Board’s conclusion that, based on the totality of the relevant record evidence, the Track was not mainline upon its construction. Cf. Tri-City, FD 36037, slip op. at 5 (carload volume of 6,074 between January and May is insufficient, when considered with other factors, to alter the ancillary nature of the track).

Ownership and Maintenance of the Track. Although UP now owns and maintains the Track, at the time construction was completed in September 2013, FRAC Resources owned the Track and was responsible for maintaining it. (See UP May Reply Ex. 4 at 2, 28.) Although the parties appear to have contemplated as early as the 2012 MOU that UP would eventually purchase and maintain the Track (see Pet. V.S. of Richard Kinsel, Ex. 1, at 1), UP was aware of that arrangement when it represented to the Board that the Track was, nevertheless, excepted track when UP purchased it in October 2013 (and, thus, at the time of the Track’s completion). And the record shows that it was not until after BNSF asserted a right to access the Park that UP modified its arrangement with FRAC Resources to purchase the Track for a single lump-sum, rather than over a period of several years. (See Pet. 5-6; UP May Reply Ex. 4 at 28; see also UP May Reply V.S. of Eric O. Watkins 2-3.) Thus, the relevant facts regarding ownership and maintenance support the finding that the Track was § 10906 excepted track upon its completion.

Historical use. UP claims that the Track “essentially reactivates a portion of what historically had been a § 10901 line of railroad.” (UP May Reply 12.) UP explains that it was part of the mainline that SP operated between San Antonio and southern Texas before abandoning that line in 1994. (Id. at 6-7.) However, as Petitioners point out, the 1.4-mile segment of the former SP line that now constitutes the Track was only a small part of a significant line of railroad that once extended approximately 150 miles further south. (Pet. V.S. of Richard Kinsel ¶ 32.) Thus, the historical use of a much longer, pre-abandonment mainline cannot be read as a particularly important factor for assessing a short, post-abandonment segment. The Board does not grant this factor much weight in its determination of whether the Track is excepted or mainline track.

Considering the record as a whole, the critical indicia here—and particularly those relevant to intended use—weigh in favor of designating the Track as § 10906 excepted track at the time construction of the Track was completed and BNSF asserted a right to access the Park.²⁴ Therefore, the Board will grant BNSF’s petition for enforcement. BNSF must be permitted access to provide rail service to the Park via the Track and any track within Park property (including Track 795), to the extent necessary to serve the Park’s customers. The parties shall take all steps necessary to comply with the RASA’s terms regarding service to New Shipper

²⁴ Given this finding, the Board need not decide whether UP’s conduct here toward the Park and BNSF amounted to anticompetitive behavior sufficient to trigger the competitive access provisions of 49 U.S.C. § 11102.

Facilities, consistent with this decision. To allow the carriers time to make any changes necessary to implement this decision, the decision will become effective in 30 days.

It is ordered:

1. The petition for enforcement is granted. UP must permit BNSF to serve the Park via the Track and any track within Park property, to the extent necessary to serve the Park's customers.

2. This decision is effective on March 2, 2018.

By the Board, Board Members Begeman and Miller.