

SERVICE DATE – APRIL 28, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 32760 (Sub-No. 50)

BNSF RAILWAY COMPANY—PETITION FOR ENFORCEMENT—
INTERCHANGE WITH SAVAGE TOOEELE RAILROAD COMPANY

Digest:¹ The Board denies Union Pacific Railroad Company's request to dismiss BNSF Railway Company's petition for enforcement and sets a procedural schedule for this proceeding.

Decided: April 28, 2025

On June 20, 2024, BNSF Railway Company (BNSF) filed a petition (Petition) requesting that the Board enforce certain conditions imposed in its 1996 decision authorizing the merger of the Union Pacific Railroad Company (UP) and the Southern Pacific Rail Corporation (SP) by requiring UP to allow BNSF to interchange with Savage Tooele Railroad Company (STR), a short line railroad that plans to construct and operate a rail line to serve the Lakeview Business Park in Tooele County, Utah (the Park). In response, UP argues that the Board should dismiss the Petition because the dispute is subject to arbitration under the March 1, 2002 Restated and Amended Settlement Agreement between UP and the Burlington Northern and Santa Fe Railway Company (now known as BNSF) (the RASA), which the Board approved in its review of the UP/SP merger proceeding. As discussed below, the Board will (i) deny UP's request to dismiss the Petition and (ii) set a procedural schedule for this proceeding.

BACKGROUND

In 2024, the Board authorized STR to construct and operate approximately 11 miles of rail line in Tooele County, Utah (the Line), subject to certain environmental mitigation conditions. See Savage Tooele R.R.—Constr. & Operation Exemption—Line of R.R. in Tooele Cnty., Utah (STR Exemption Decision), FD 36616 (STB served Apr. 1, 2024). The Line will extend from the Park to an approximately 1.04-mile segment of track that is owned by UP and that connects to UP's Shafter Subdivision mainline near Burmester, Utah (the Connecting Track). Id. at 2.²

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. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² As further detailed in the STR Exemption Decision, the Line will partially consist of an approximately six-mile portion of the former Warner Branch—a line that was abandoned in the

When STR initially filed its petition for exemption, it indicated that either UP would retain ownership of the Connecting Track for use as ancillary track or STR would acquire the Connecting Track and reinstate common carrier service over it. See Savage Tooele R.R.—Constr. & Operation Exemption—Line of R.R. in Tooele Cnty., Utah, FD 36616, slip op. at 2 (STB served Aug. 24, 2022). The Board subsequently directed STR to clarify the plans for the Connecting Track—specifically, whether STR would (i) acquire the Connecting Track and reinstate common carrier service over it or (ii) obtain operating rights over the track and amend its petition to seek such authority, or alternatively, whether UP would obtain authority to operate over the Connecting Track such that it would become part of UP’s mainline. Id.

On November 21, 2023, UP filed a petition under 49 U.S.C. § 10502(a) for exemption from the prior approval requirements of 49 U.S.C. § 10901 to reinstitute common carrier service over the Connecting Track. See Union Pac. R.R.—Operation Exemption—in Tooele Cnty., Utah (UP Exemption Decision), FD 36741, slip op. at 1 (STB served Feb. 13, 2024). UP asserted that it did not want to sell the Connecting Track to STR because it had been using it as ancillary track to support operations on the Shafter Subdivision. Id. at 2 (citing UP Pet. 3, Nov. 21, 2023). On December 11, 2023, BNSF moved to institute a proceeding and set a procedural schedule for consideration of UP’s petition. See id. BNSF asserted that, as a condition of the Board’s 1996 approval of the UP/SP merger, BNSF was granted trackage rights to operate over the Shafter Subdivision and the right to interchange with any new short line railroad connecting to the Shafter Subdivision, and that UP structured the STR transaction in such a way as to establish a physical barrier—namely, the 1.04-mile Connecting Track—between the Shafter Subdivision and the Line, depriving BNSF of its right to interchange with STR. Id. (citing BNSF Mot. 1-2, Dec. 11, 2023). UP and STR both filed replies on January 10, 2024. See id.³

The Board granted UP’s petition for exemption and denied BNSF’s motion, reasoning that “UP’s effort to seek common carrier operating authority over the [Connecting Track] is separate and distinct from BNSF’s claimed right to access STR and its future shippers via the

1980s by UP’s predecessor, Western Pacific Railroad Company. STR Exemption Decision, FD 36616, slip op. at 2 (citing W. Pac. R.R.—Aban. Exemption—in Tooele Cnty., Utah, FD 30208 (ICC served Aug. 9, 1983)). The Warner Branch segment of the Line will extend between milepost 1.04 and milepost 6.94, and the other segment of the Line will consist of five miles of new track beyond milepost 6.94 that will extend the Warner Branch into the Park. Id. STR also intends to construct interchange and ancillary track within the Park, as well as approximately 2,500 feet of new interchange and ancillary track within the right-of-way near milepost 1.04. Id. The Board denied a petition for reconsideration of the STR Exemption Decision by decision served March 3, 2025. See Savage Tooele R.R.—Constr. & Operation Exemption—Line of R.R. in Tooele Cnty., Utah, FD 36616 (STB served Mar. 3, 2025).

³ On reply, UP disputed that it violated BNSF’s rights and stated that BNSF could demand arbitration under the RASA should it wish to pursue the issue further. UP Exemption Decision, FD 36741, slip op. at 2 (citing UP Reply 4-5, Jan. 10, 2024). Additionally, although STR did not take a position on the merits of BNSF’s argument in its reply, it asked the Board to deny BNSF’s motion because consideration of BNSF’s claim would significantly prolong the exemption proceeding, delay the rail construction project, and delay STR’s ability to meet the needs of rail shippers located in the Park. Id. (citing STR Reply 4, Jan. 10, 2024).

[Connecting Track] under the terms of the RASA.” UP Exemption Decision, FD 36741, slip op. at 2 (citing Union Pac. R.R.—Operation Exemption—in Bexar & Wilson Cntys., Tex., FD 35776, slip op. at 3-4 (STB served Dec. 24, 2013)). Additionally, allowing UP’s exemption to operate over the Connecting Track to become effective would “help avoid delay to STR’s project and ensure that its business park shippers are connected to the national rail network.” Id. at 3. The Board made clear, however, that “[g]ranting UP the authority to reinstitute common carrier service over the [Connecting Track] does not preclude BNSF from seeking, through either arbitration or a new, separate Board proceeding, a determination that BNSF is entitled to access STR via the [Connecting Track].” Id. The Board further stated that the UP Exemption Decision did “not affect BNSF’s rights under RASA Section 8(k) and the UP/SP merger conditions,” and reiterated that “in any future proceeding, whether before an arbitrator or the Board,” the decision “shall not be construed as permitting UP to defeat any rights that BNSF may have had to interchange with STR or serve shippers at Lakeview Business Park had the exemption not become effective.” Id. As noted above, the Board subsequently issued a decision authorizing STR to construct and operate over the Line, subject to certain environmental mitigation conditions. See generally STR Exemption Decision, FD 36616.

In the Petition, BNSF reasserts the position it took in the UP exemption proceeding—i.e., that UP should be required to allow BNSF to interchange with STR pursuant to the UP/SP merger conditions and in accordance with Section 8(k) of the RASA. (Pet. 1-4.) Although BNSF acknowledges that the RASA contemplates arbitration of disputes concerning the terms of the agreement, (id. at 5 (citing RASA § 15)), and further notes that UP recently initiated an arbitration proceeding concerning this dispute, (id. at 3, 9), BNSF nevertheless argues that the Board—not private arbitrators—should resolve the dispute, (id. at 3). BNSF asserts that a private arbitration “would prevent the Board from considering the broad policy implications for the UP/SP merger conditions” and “would also prevent customers at the Park, STR, and any other stakeholders from participating in the proceeding.” (Id.) Accordingly, BNSF asks the Board to set a procedural schedule in this proceeding that would provide a short discovery period followed by merits briefing.

On July 10, 2024, UP replied to the Petition. UP requests that the Board dismiss the Petition, arguing that the case should proceed in arbitration as contemplated in Section 15 of the RASA. UP states that it initiated arbitration before the American Arbitration Association (AAA) on April 15, 2024, to “remove the uncertainty created by BNSF’s STR interchange claim.” (UP Reply 4.) UP accuses BNSF of “[a]bandoning the arbitration process” and engaging in “obvious forum-shopping” by filing the Petition, (id. at 2, 5); according to UP, BNSF only filed the Petition after the AAA informed the parties that it had made an initial determination (subject to a final determination by the arbitrator) that the arbitration would be held in Omaha, Neb., as UP requested, (id. at 5).⁴ UP also claims that the Board “acknowledged this case was specifically

⁴ UP notes that after it filed the arbitration demand, the AAA “informed BNSF that it was entitled to file an Answering Statement, including any objection to the requested locale, within 14 days.” (UP Reply 4; see id., Ex. C (AAA letter).) In response, BNSF submitted a one-page letter to the AAA that (i) generally denied UP’s claims, (ii) requested that any arbitration be held in Fort Worth, Tex., rather than Omaha, Neb., and (iii) stated that “[t]his dispute is subject

suitable for arbitration” in the UP Exemption Decision when it stated that BNSF was not precluded “‘from seeking, through either arbitration or a new, separate Board proceeding, a determination that BNSF is entitled to access STR.’” (UP Reply 4-5 (quoting UP Exemption Decision, slip op. at 3).) UP also disputes that the Petition raises important issues and policy implications for the UP/SP merger conditions. (Id. at 6-7.)

On July 2, 2024, the Romney Group, LLC (the Romney Group)—an affiliate of RG Lakeview, LLC, the owner and developer of the Park—filed a letter (Letter) commenting on the Petition. Although the Romney Group “does not take a position on the merits of the legal arguments raised by BNSF,” the Letter states that “we are very much in favor of shippers within the [Park] being able to obtain railroad service from both UP and BNSF.” (Letter 2.) The Letter asserts that service from two railroads instead of one railroad is “highly preferable” because, “[i]n addition to the potential for lower rates, better service terms, and additional destinations and origins for commodities and/or raw materials, the presence of an alternative railroad service provider can alleviate harms to shippers from service breakdowns on the other carrier’s rail system.” (Id. at 1-2.) The Letter further asserts that the ability to receive service from more than one railroad “is often the deciding factor on where a particular business chooses to construct its rail-served facility.” (Id. at 2.)

On July 25, 2024, BNSF filed a reply to UP’s July 10, 2024 filing.⁵ BNSF states that its participation in the arbitration process was limited to following AAA protocols and meeting applicable deadlines to preserve BNSF’s rights, and that such limited participation does not preclude BNSF from asking the Board to resolve the dispute. (BNSF Reply 2.) BNSF also criticizes the UP Reply for quoting “a fragment of Section 15 of the RASA that conveniently omits an introductory clause that provides an exception to the general arbitration requirement.” (Id. at 3 (quoting RASA § 15 (“Except as otherwise provided by any decision of the STB . . .”))). BNSF reiterates that a Board proceeding will enable other interested parties like STR, the Romney Group, and Park tenants “to make their views known to the Board,” whereas a private arbitration would deny these parties “a public forum to assert their concerns.” (Id. at 5.)

to the Surface Transportation Board’s continuing jurisdiction over the [UP/SP] merger and related conditions,” and that “[t]he STB—and not an arbitrator—should resolve the dispute that is the subject of the UP [arbitration] Demand.” (UP Reply, Ex. D (BNSF Letter to AAA).)

⁵ BNSF states that its reply is permissible because UP’s reply to the Petition seeks affirmative relief by requesting dismissal. (BNSF Reply 1 n.2. (citing, inter alia, Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Decision No. 86), 4 S.T.B. 303, 304 n.4 (1999) (permitting a “reply to a reply” that sought affirmative relief)); see also UP Reply 2 (“The Board should dismiss the petition . . . and allow BNSF and Union Pacific to arbitrate their dispute.”), 7 (“For the foregoing reasons, the Board should dismiss BNSF’s petition for enforcement.”).) As a general matter, to promote the orderly and efficient administration of cases, the Board is more strictly enforcing the rule against a reply to a reply. See, e.g., Sunflower State Indus. Ry.—Pet. for Declaratory Ord., FD 36714 (Sub-No. 1), slip op. at 2 n.3 (STB served Mar. 28, 2025). However, under the circumstances presented here where UP’s filing, stylized as a “reply,” requests dismissal of the proceeding, the Board will accept BNSF’s reply into the record.

On April 17, 2025, BNSF filed a letter (BNSF Letter) to update the Board on the status of the AAA arbitration UP initiated in April 2024 (discussed above) and to request that the Board “rule expeditiously” on the Petition. (BNSF Letter 1-2.) BNSF states that on April 10, 2025, the AAA completed the arbitrator appointment process, and that on April 14, 2025, BNSF moved to stay the arbitration until the Board rules on the Petition. (See id. at 2.)

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).⁶ Motions to dismiss are generally disfavored. In 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).

Upon consideration of the parties’ arguments related to the proper forum for this dispute, the Board finds that a Board proceeding is the appropriate forum for the parties to be heard. Although the RASA includes an arbitration clause, that clause also contemplates that a Board decision may provide for a different forum:

Except 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.

(Pet., Ex. A (UP arbitration demand at Ex. 2, § 15) (emphasis added).) The Board also made clear in the UP exemption proceeding that BNSF could still seek a determination that it is entitled to access STR “through *either* arbitration *or* a new, separate Board proceeding.” UP Exemption Decision, FD 36741, slip op. at 3 (emphasis added). Accordingly, UP’s claim that the parties must resolve their dispute through arbitration is incorrect. See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Decision No. 108), FD 32760, slip op. at 3 (STB served May 5, 2017) (denying UP’s motion to dismiss BNSF’s petition for enforcement); see also Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 6 S.T.B. 210, 213 (2002) (denying UP’s motion to dismiss BNSF’s petition for clarification insofar as the motion was “premised on the argument that an arbitration proceeding would be preferable” and notwithstanding that UP had already submitted the dispute to arbitration).

Additionally, although UP cited previous cases where the Board has advised the parties to seek arbitration, (see UP Reply 5 (citing Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 3 S.T.B. 737, 742 (1998); Decision No. 86, 4 S.T.B. at 306)), the Board has also found that a Board proceeding may be a proper forum for a dispute with potentially broad implications concerning conditions imposed in the UP/SP merger. See Decision No. 86, 4 S.T.B. at 306. The

⁶ As indicated in note 5, although UP’s July 10, 2024 filing was styled as a “reply,” it requested dismissal of the Petition.

Board has further clarified that “[i]t 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.” Decision No. 108, FD 32760, slip op. at 3 (declining to refer dispute to arbitration where petition “raise[d] important issues related to the preservation of pre-merger rail competition”).

Here, the Petition presents questions about whether the merger conditions are being implemented in a way that is consistent with the policies underlying them. For example, BNSF claims that “UP appears to have structured its transaction with STR in order to artificially monopolize access to shippers at the Park, thereby avoiding UP’s competition-preserving UP/SP merger obligations,” and that “UP’s efforts here are the latest attempt to erode and undercut the rights that BNSF was granted under the UP/SP merger conditions to provide fully effective replacement competition.” (Pet. 2-3.) And while arbitration may sometimes be preferable for the resolution of disputed factual matters, Decision No. 86, 4 S.T.B. at 309, the presence of such disputed matters is not dispositive as to the appropriateness of arbitration as a forum.⁷ The more important consideration is the proceeding’s potential policy implications, which in this case concern appropriate implementation of BNSF’s right to interchange with short line railroads on newly constructed lines under Section 8(k) of the RASA. Accordingly, the Board will exercise its discretion to resolve this matter itself and will not refer this dispute to arbitration.

Finally, BNSF has requested that the Board adopt its proposed procedural schedule, which provides a 120-day discovery period followed by merits briefing. (Pet. 15.) UP has not provided any specific objection to BNSF’s proposed schedule, and the Board believes it is reasonable under the circumstances. Discovery shall conclude by August 26, 2025. BNSF’s opening submission on the merits is due by September 25, 2025. UP’s reply submission on the merits is due by October 27, 2025. BNSF’s rebuttal submission is due by November 24, 2025. BNSF’s motion for protective order to govern the exchange and submission of confidential material in this proceeding will be addressed in a separate decision.

It is ordered:

1. UP’s request to dismiss the Petition is denied.

⁷ BNSF asserts that “the material facts in this case were largely developed in prior STB proceedings and are not in dispute” but that “the facts pertaining to UP’s intent and purpose [in structuring the transaction] are still to be learned.” (BNSF Reply 4; see also Pet. 12 n.4.) Without prejudging what weight, if any, the Board will give such information, the Board believes that obtaining additional details about the structuring of the transaction may aid its decision-making later in this proceeding. Cf. Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760, slip op. at 6 (STB served Jan. 30, 2018) (noting that in an earlier related proceeding, the Board “investigate[d] the circumstances under which the [Track] was built” where the factual circumstances “raise[d] 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”). The Board, therefore, will grant BNSF’s request for a short period of discovery focused on the structuring of the transaction.

2. BNSF's request for entry of a procedural schedule is granted. Discovery shall conclude by August 26, 2025. BNSF's opening submission on the merits is due by September 25, 2025, UP's reply submission on the merits is due by October 27, 2025, and BNSF's rebuttal submission is due by November 24, 2025.

3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz.