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BEFORE THE
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
—CONTROL AND MERGER—
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

**UNION PACIFIC'S MOTION TO DISMISS
OR HOLD PROCEEDING IN ABEYANCE**

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The Board should dismiss the Petition filed by BNSF Railway Company (“BNSF”) and Mission Rail Industrial Park, LLC (“MRIP”), or hold this proceeding in abeyance, to allow petitioners and Union Pacific to arbitrate their dispute in accordance with the Restated and Amended BNSF Settlement Agreement (“RASA”).¹

I. BACKGROUND

This dispute involves application of the “new facilities” provisions of the RASA to a particular facility—Mission Rail Park (“Park”). The Park is adjacent to Union Pacific’s mainline, approximately 1.42 miles beyond the southern end of the switching limits of Elmendorf, Texas, at a station named Purcell. Union Pacific commenced operations on the 1.42-mile line of railroad

¹ The RASA is a revised version of the BNSF Settlement Agreement, which the Board imposed as a condition to the UP/SP merger. *See Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 419 (1996). The RASA incorporates conditions the Board imposed in approving the merger, as interpreted, clarified, and supplemented in subsequent Board decisions and through agreements between the parties. *See Union Pacific/Southern Pacific Merger, General Oversight*, Decision No. 21, 5 S.T.B. 1173, 1178 (2001).

(the “Line”) to the Park after obtaining the necessary authority from the Board pursuant to 49 U.S.C. § 10901.²

The RASA designates Elmendorf as a 2-to-1 point. One consequence of this designation is that BNSF is entitled to access any “New Shipper Facility” located in Elmendorf. *See* RASA § 4(b). The boundaries of 2-to-1 points are “deemed to include all areas within the switching limits” of the location at issue—in this case, Elmendorf—“designated by tariff, clarified to the extent necessary by publicly-available information, in effect as of September 22, 1995.” *Id.*, Definitions (“2-to-1 Points”); *id.* § 9(g).³

The RASA also grants BNSF trackage rights over “SP’s line between SP Junction (Tower 112) and Elmendorf, TX.” RASA § 4(a). Under the RASA, BNSF is entitled to access a “New Shipper Facility” if the facility is “(1) adjacent to a Trackage Rights Line or (2) adjacent to a spur, an industrial track, or a yard itself served by such Trackage Rights Line.” *Id.*, Definitions (“Trackage Rights Lines”); *see also id.* (“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.”).

Petitioners concede that the Park is located beyond the switching limits of Elmendorf. *See* Petition at 7 (“Thereafter, UP consummated its purchase of the [Line], thereby extending the mainline track beyond the Elmendorf switching district . . .”). They also concede that the Line

² Union Pacific did not construct the Line. It acquired the track from Frac Resources, L.P., and obtained an exemption under § 10901 to operate the Line. The Board subsequently investigated whether § 10901 authority was required to construct the Line, but it did not reach a majority decision. *See Union Pac. R.R.—Operation Exemption—In Bexar & Wilson Counties, TX*, FD 35776 (STB served Mar. 2, 2015).

³ The southern boundary of Elmendorf switching district, as defined by Southern Pacific Transportation Company’s tariff effective as of September 22, 1995, is at approximately Milepost 16.1.

is not itself a “Trackage Rights Line.” *See id.* at 13 (“[T]he [Line] connects to the Trackage Rights Line at MP 16.1.”). They further concede that the Line is a § 10901 “line of railroad.” *See id.* at 14 (“[T]he Park today can be accessed only via a 49 U.S.C. § 10901 ‘line of railroad.’”).

Petitioners falsely claim the Board previously found that Frac Resources, L.P. (“FRAC”), the entity that sold the Line to Union Pacific, anticipated that BNSF would be able to serve the Park. They manipulate the Board’s language, deceptively substituting the phrase, “As the Board stated in its decision,” for the Board’s original phrase, “FRAC states that.” *Compare* Petition at 6 (“*As the Board stated in its decision*, ‘in entering into the [ITA], [FRAC] anticipated that other railroads (specifically BNSF) would be able to serve Mission Rail Park.’”) (emphasis added), *with Union Pac. R.R.—Operation Exemption—In Bexar & Wilson Counties, TX*, FD 35776, slip op. at 3 (STB served Dec. 24, 2013) (“*FRAC states that*, in entering into the agreement, it anticipated that other railroads (specifically BNSF) would be able to serve Mission Rail Park.” (emphasis added)).

Petitioners also falsely claim that BNSF access to the Park is necessary to ensure rail-to-rail siting competition in the Elmendorf area. *See* Petition at 4, 17-19. Less than a month after Union Pacific denied BNSF’s request to access the Park, it granted BNSF’s request to access Alamo Junction Rail Park, a new industrial park located on a trackage rights line approximately four miles north of the Park, near Milepost 13.6. *See id.* at 9 n.8.

II. THE BOARD SHOULD REQUIRE ARBITRATION THIS DISPUTE.

Petitioners’ claim that BNSF is entitled to access the Park is subject to a requirement to arbitrate under the RASA. The RASA includes an arbitration clause. The arbitration clause states that “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).⁴ Because this access dispute concerns the terms and provisions of the RASA, arbitration is the “exclusive” remedy.

The Board should decline to consider a dispute subject to arbitration under the RASA,⁵ especially when the dispute simply involves access to a particular facility.⁶ In Decision No. 81 in the UP/SP merger docket, the Board resolved a dispute about whether a facility was within the switching limits of a 2-to-1 point. However, the Board warned that “any 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.” *Union Pacific/Southern Pacific Merger*, Decision No. 81, 3 S.T.B. 737, 742 (1998). Subsequently, in Decision No. 86, the Board was presented with a dispute about whether a new facility was “on” a trackage rights line. The Board clarified what it means for a facility to be “on” a trackage rights line, but stated that “[t]o the extent that BNSF seeks a ruling as to whether [the] particular facility [at issue] qualifies, . . . it must seek arbitration.” *Union Pacific/Southern Pacific Merger*, Decision No. 86, 4 S.T.B. 303, 306 (1999). The Board reinforced its intent to enforce the RASA’s arbitration clause when it

⁴ Section 15 of the RASA states in full:

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.

⁵ See Petition at 9 (“The RASA entitles BNSF to serve the Park via the [Line] because the Park is a ‘New Shipper Facility’ located after the UP/SP merger at a ‘2-to-1’ point.”); *id.* at 13 (“The RASA also entitles BNSF to serve the Park via the [Line] because the Park is a ‘New Shipper Facility’ located ‘on’ a Trackage Rights Line, within the meaning of the RASA.”).

⁶ In November 2013, when BNSF tried to advance its access claims by impeding Union Pacific’s ability to obtain authority to operate over the Line pursuant to § 10901, Union Pacific said it was willing to address BNSF’s access claims in arbitration, as provided in the RASA, or to waive its right to arbitrate and have the dispute resolved by the Board. However, BNSF did not seek arbitration or a ruling from the Board at that time. Union Pacific is not willing to waive the RASA’s arbitration clause in this proceeding.

ended formal UP/SP merger oversight, explaining that it would remain available to resolve disputes “subject to any applicable requirement to arbitrate.” *Union Pacific/Southern Pacific Merger, General Oversight*, Decision No. 21, 5 S.T.B. at 1178. Union Pacific asks the Board to require petitioners to pursue their access claim under the RASA’s arbitration clause, consistent with the Board’s precedent.

If the Board’s precedent requiring arbitration under the RASA applies to any case, it applies to this case. The Board does not require arbitration of every dispute under the RASA. It has continued to resolve disputes when they “involve a ‘general matter[] with broad implications with respect to implementation of [the conditions we imposed on the UP/SP merger].’” *Union Pacific/Southern Pacific Merger*, Decision No. 96, 6 S.T.B. 210, 213 (2002) (quoting Decision No. 86, 4 S.T.B. at 309).⁷ Here, however, petitioners seek a determination as to whether a particular facility—the Park—qualifies for access under the RASA. This is precisely the type of case that the Board held should be arbitrated in Decision Nos. 81 and 86.

MRIP’s presence in this case does not change the result. The Board has acknowledged that shippers *may* need recourse to the Board to enforce conditions to the UP/SP merger because they lack contract rights to enforce the RASA’s arbitration clause. *See Union Pacific/Southern Pacific Merger*, Decision No. 89, 4 S.T.B. 879, 885 n.21 (2000).⁸ But the Board plainly intended that in disputes regarding access to particular facilities, the parties would arbitrate under the RASA, with shippers having recourse to the Board only if necessary. Otherwise, the Board’s rulings in Decision Nos. 81 and 86 requiring arbitration of disputes involving access to particular

⁷ The Board has also addressed access disputes where neither Union Pacific nor BNSF insisted on arbitration under the RASA. *See, e.g., Union Pacific/Southern Pacific Merger*, Decision No. 106, FD 32760 (STB served Dec. 20, 2013).

⁸ Neither Union Pacific nor BNSF insisted on arbitration in the dispute that led to Decision No. 89.

facilities would be empty shells, because BNSF could always defeat the requirement to arbitrate simply by soliciting the owners or users of particular facilities to join BNSF in seeking relief at the Board.

In this case, Union Pacific will consent to MRIP's participation with BNSF in arbitration under the RASA, so recourse to the Board will not be necessary. MRIP has no valid objection to participating in arbitration, since any right MRIP has to BNSF service derives from the Board's imposition of conditions to the UP/SP merger. Because MRIP seeks to enjoy the benefits of the conditions and the RASA, fairness and estoppel principles require holding MRIP to the related obligations, especially where its interests are so perfectly aligned with BNSF's interests that they filed a joint Petition. *See, e.g., Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000) ("Well-established common law principles dictate that in an appropriate case a nonsignatory can . . . be bound by, an arbitration provision within a contract executed by other parties."); *accord Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 352 (2d Cir. 1999) ("A party is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause.").

Finally, requiring the parties to arbitrate would be consistent with well-established Board policy. Board policy strongly favors use of arbitration and other private methods of dispute resolution "in lieu of formal Board proceedings whenever possible." *Assessment of Mediation and Arbitration Procedures*, EP 699, slip op. at 2 (STB served May 13, 2013); *see also, e.g., Mo. Pac. R.R.—Abandonment in Douglas, Champaign & Vermilion Counties, IL (Westville & Jamaica Branches)*, 9 I.C.C.2d 875, 882 (1993) ("We strongly urge the parties to make every effort to settle any disputes that may arise and, where necessary, to agree to arbitration of disputes that they cannot settle.").

Accordingly, the Board should dismiss this proceeding and require BNSF and MRIP to arbitrate their dispute with Union Pacific under the RASA. In light of Union Pacific's consent to MRIP's participation in arbitration, MRIP should have no need for further recourse at the Board. However, if the Board is unwilling to require MRIP to participate in arbitration, it should hold this proceeding in abeyance while Union Pacific and BNSF arbitrate their dispute. The Board would then have the benefit of the arbitrator's decision in addressing any remaining claims by MRIP.

III. CONCLUSION

The Board should dismiss this proceeding or hold it in abeyance to allow petitioners to pursue arbitration. If the Board does not dismiss this proceeding or hold it in abeyance, it should grant Union Pacific 30 days from the service date of its decision declining to terminate or suspend this proceeding to file a reply on the merits.

Respectfully submitted,

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February 21, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2017, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760.

/s/ Michael L. Rosenthal
Michael L. Rosenthal