

**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**

**BNSF RAILWAY COMPANY'S RESPONSE TO
MISSION RAIL INDUSTRIAL PARK, LLC'S PETITION FOR LEAVE
TO FILE REBUTTAL STATEMENT**

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Dated: July 6, 2017

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BNSF hereby requests that the Board, in the interest of compiling a full record, exercise its discretion to grant MRIP’s “Petition for Leave to File Rebuttal Statement” (“MRIP Petition for Leave”) filed on June 16, 2017, and permit MRIP’s filing of the related Rebuttal Verified Statement of Richard Kinsel (“Kinsel Rebuttal Statement”).¹

Allowing the Kinsel Rebuttal Statement to be a part of the record of this proceeding would facilitate the Board’s consideration of several critical issues: (1) whether the Track at issue in this proceeding was a “line of railroad” subject to the Board’s licensing requirements under 49 U.S.C. § 10901 (“Section 10901”) at the time of construction; (2) whether the Track is currently a Section 10901 “line of railroad,” or ancillary track excepted from the Board’s licensing authority under 49 U.S.C. § 10906 (“Section 10906”); and (3) the competitive market issues disputed by the parties. *See, e.g., Petition of Union Pac. R.R. Co. for Declaratory Order*, FD-35960, slip op. at 5 (served Sept. 30, 2016) (concluding that a sur-reply filed by UP was

¹ The acronyms used herein are the same as those used in the Joint Petition for Enforcement and in Appendix B to Decision No. 44.

“needed to complete the record in this complicated proceeding”). As discussed in the Joint Petition for Enforcement, the first two issues are directly relevant to whether the Track is “on” a Trackage Rights Line or “at” a 2-to-1 point for RASA purposes.

The UP Reply to the Joint Petition (filed on May 25, 2017), the Kinsel Rebuttal Statement, and the UP Reply to the MRIP Petition for Leave (filed on June 30, 2017) present difficult factual questions regarding the parties’ intent and communications during the development of the Park, the proper jurisdictional classification of the Track, and the competitive market forces faced by the Park. At a minimum, the pleadings raise significant concerns about UP’s representations to the Board in Finance Docket No. 35776, UP’s notice of exemption proceeding that converted the Track to a “line of railroad” subject to Section 10901. The pleadings present disputes as to the Track’s intended use, physical characteristics, relationship to the rail system, and history. The pleadings also offer differing viewpoints on competitive issues related to the Park and whether the Park’s tenants can obtain the benefits of the UP/SP merger conditions absent direct BNSF access to the Park.

To resolve these issues, which may require detailed findings of fact, as well as credibility determinations, the Board needs a complete record.² Moreover, the resolution of these issues may ultimately be necessary in order to preserve the integrity of the Board’s processes and to determine whether (and when) the Track became a “line of railroad” subject to the Board’s licensing authority under Section 10901.³

² If the Board determines that it must resolve whether (and when) the Track became a “line of railroad” subject to the Board’s Section 10901 licensing authority in order to rule on the Joint Petition, BNSF requests that the Board order supplemental briefing on that limited subject, so that BNSF and MRIP may fully respond to the new arguments made in the UP Reply to the Joint Petition.

³ This would not be the first time that the Board has been called upon to address an effort by UP to change the legal status of operations over excepted trackage for its commercial purposes. In *Union Pac. R.R. Co.—Operation Exemption—In Yolo County, CA*, FD-34252 (served Dec. 5, 2002), the Board rejected a UP notice of exemption that sought to convert UP’s excepted industrial track operations to operations subject to the Board’s Section 10901 licensing authority. UP sought the change of status to preclude Yolo (which had obtained exclusive

It bears noting, however, that the Board can resolve the BNSF access issues raised in the Joint Petition for Enforcement without having to make such factual findings and credibility determinations. All parties seem to agree that the Track, upon construction, was not a “line of railroad” subject to the Board’s licensing authority under Section 10901, but rather was private track not subject to the Board’s jurisdiction or ancillary track excepted from the Board’s licensing authority pursuant to Section 10906.⁴ Therefore, the Board can and should rule that, under the RASA, BNSF’s right to access to the Track in order to serve the Park accrued *when the Track was constructed* as private or excepted track, and any *subsequent* change in the Track’s jurisdictional status would not divest BNSF of its right of access under the RASA.⁵

The Board acknowledged this issue in its first decision in the UP operation exemption proceeding, which allowed the UP operation exemption related to the Track to become effective and converted the track from private or Section 10906 excepted track to a “line of railroad” subject to the Board’s Section 10901 licensing authority. *Union Pac. R.R. Co.—Operation Exemption—In Bexar and Wilson Counties, Tex.*, FD-35776, slip op. at 4 (served Dec. 24, 2013). The Board specifically stated that BNSF was not precluded “from seeking . . . a determination

operating rights over portions of the trackage in 2001) from unilaterally terminating a 1951 agreement that authorized SP—UP’s predecessor—to serve industries from the Port trackage. Yolo contended that UP’s notice of exemption was an “abuse of the Board’s regulatory procedures simply to try to avoid termination of a contract pursuant to its terms.” *Id.*, slip op. at 2. The Board held that UP failed to show that its operations and use of the trackage fell within Section 10901 rather than Section 10906. In so doing, the Board stated that, because UP’s “operations continue to involve only services that are excepted under section 10906, **UP may not use Board procedures to frustrate the terms of a private contract.**” *Id.*, slip op. at 5 (emphasis added). UP seeks to do the same here – to frustrate the terms of the RASA in reliance on the 2013 operation exemption. Much of the testimony in the Kinsel Rebuttal Statement (*see paras. 32 et seq.*) is directly relevant to that issue and should be a part of the record. Such evidence is critical under Board precedent to a determination as to the jurisdictional nature of trackage. *See Tri-City R.R. Co., LLC—Petition for Declaratory Order*, FD-36037, slip op. at 4 (served June 1, 2017).

⁴ *See Union Pac. R.R. Co.—Operation Exemption—In Bexar and Wilson Counties, Tex.*, FD-35776, slip op. at 3 (served March 2, 2015) (“UP claimed that, at the time it purchased the [Track], the track was properly classified either as ancillary track excepted from the Board’s licensing pursuant to 49 U.S.C. § 10906 or private track outside the Board’s jurisdiction.”); *see also* Kinsel Rebuttal Statement at 10 (“I believe that Union Pacific created the fiction of treating this as Section 10901 track only after it realized that BNSF also wanted access to the Park.”).

⁵ *See* Joint Petition for Enforcement at 10, n. 9 (citing UP/SP Merger Decision No. 81 for the holding that UP’s post-merger changes to switching limits at San Antonio, TX could not alter BNSF’s right to access under the pre-merger switching limits).

that it also is entitled to access the [Track],” and that the decision **“shall not be construed as permitting UP to defeat any rights that BNSF may have had to serve shippers on the Line had the exemption not become effective.”** *Id.*, slip op. at 4. (Emphasis added.)⁶ That is, however, exactly what UP is seeking to do here.

In reliance on this assurance by the Board, BNSF determined that it was unnecessary at that time to seek revocation of the UP operation exemption. Instead, BNSF and MRIP sought, through the Joint Petition for Enforcement in this proceeding, to enforce BNSF’s and MRIP’s rights under the RASA for BNSF to serve the Park. The Board should now find that UP cannot subsequently strip BNSF and MRIP of the BNSF access rights that accrued upon the Track’s construction.⁷

Furthermore, nothing in the RASA precludes the Board from finding that, once BNSF’s right of access to certain track accrues by virtue of the connection of a New Shipper Facility to a Trackage Rights Line or a “2-to-1” point via an ancillary Section 10906 excepted track, such BNSF access rights will continue regardless of any subsequent changes in usage or other track characteristics that may convert the private track or Section 10906 excepted track to a “line of railroad” subject to the Board’s Section 10901 licensing authority. For example, in UP/SP Merger Decision No. 86, the Board went beyond the plain terms of the BNSF Settlement Agreement (a precursor to the RASA) in construing it to provide that a shipper facility is located

⁶ The Board recently reaffirmed this point in its decision denying UP’s motion to dismiss in this proceeding. UP/SP Merger Decision No. 108, slip op. at 2 (served May 3, 2017).

⁷ UP argues that BNSF’s right to serve a New Shipper Facility cannot accrue “before Union Pacific itself could serve the shipper.” UP Reply at 14-15. This argument conflates a right of access with actual operational readiness. BNSF’s right of access accrued upon construction of the Track as private track or excepted Section 10906 track, even if operations were not yet underway. Industry tracks and spurs similar to the Track at issue here are always planned, financed, and constructed well before operations begin. Indeed, if shippers and prospective shippers could not be assured that BNSF could access a New Shipper Facility connected to a Trackage Rights Line or a “2-to-1” point before operations begin on the connecting track, the competition-preserving purposes of the Board’s new facilities condition would be undermined. The history of the Park’s and the Track’s development serves as a prime example of this concern.

“on” a Trackage Rights Line by virtue of its location adjacent to a spur or industrial track connecting to a Trackage Rights Line.⁸ Just as nothing in the BNSF Settlement Agreement itself mandated that the Board reach the conclusion that it reached in Decision No. 86, nothing in the RASA now precludes the Board from embracing the equitable principle that BNSF and MRIP request.

A contrary decision by the Board would unduly restrict the scope of the new facilities condition, undercut the competitive balance obtained through BNSF access to a New Shipper Facility, and incentivize UP to continue to take advantage of the Board’s processes to try to stop BNSF access to other New Shipper Facilities across the country by converting other similarly-situated connecting tracks to Section 10901 “lines of railroad.”

The Board should grant the MRIP Petition for Leave and allow the Kinsel Rebuttal Statement to be a part of the record of this proceeding so that the Board can fully consider the jurisdictional and competitive market issues disputed by the parties. However, the Board can rule on the Joint Petition for Enforcement and find that BNSF’s right under the RASA to access the Track accrued at the time of the Track’s construction as private or excepted track without needing to make detailed findings of fact and credibility determinations.

⁸ UP and BNSF then updated the BNSF Settlement Agreement through the RASA to incorporate the Board’s interpretation in Decision No. 86 and other decisions in the UP/SP Merger proceeding.

Respectfully submitted,



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Dated: July 6, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2017, copies of the foregoing BNSF Railway Company's Reply to Union Pacific's Motion to Dismiss or Hold Proceeding in Abeyance have been served by e-mail or first class mail on the following parties of record in this proceeding:

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