

BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. FD 36627

306493

TGS CEDAR PORT RAILROAD LLC
—OPERATION EXEMPTION—
IN CHAMBERS COUNTY, TEX.

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**Reply of the American Chemistry Council
to Petition to Revoke Exemption**

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Union Pacific Railroad (UP) asks the Board to revoke the Verified Notice of Exemption by TGS Cedar Port Railroad LLC (TGSC) and declare TGSC's exemption void *ab initio* because, according to UP, the Notice contains a material false statement about BSNF Railway's access rights. The Board should decline this invitation to determine BNSF's access rights. Because the issues involving these rights are nonroutine and contentious, they are inappropriate for an exemption proceeding. Moreover, determining BNSF's access rights is unnecessary. The Board can, and should, grant UP's petition on the alternative basis that the Notice's statement about BNSF access is materially misleading.

I. Background

TGSC filed the Notice on July 7, 2022, so that it could commence common-carrier service over track connecting the TGS Cedar Port Industrial Park to an UP-owned industrial lead over which BNSF operates pursuant to *Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp. (Decision No. 44)*, 1 S.T.B. 233 (1996), and the 2002 Restated and Amended Settlement Agreement between BNSF and UP (the RASA). In the Notice, TGSC explained that “the Park has long enjoyed competitive railroad service, post-*UP/SP*, from both UP and BNSF, a service arrangement that will continue, albeit under different service circumstances within the Park going forward.”¹ TGSC also stated that its parent company had created it to provide common-carrier service within the Park because “the Park and its

¹ (Notice 4.)

various customers would benefit from the provision of railroad common carrier service via TGSC to and from its connecting interline carriers, BNSF and UP.”²

On April 4, 2023, UP filed its petition asking the Board to revoke the Notice and declare TGSC’s exemption void *ab initio*. UP contends that the statement in the Notice that BNSF would continue to have access to the Park after TGSC commences common-carrier operations is a material false statement.³ UP supports its position by examining BNSF’s rights under the RASA and the RASA’s overall purpose.⁴

II. The Board should revoke the Notice as void *ab initio* without deciding BNSF’s access rights.

The Board should decline UP’s invitation to decide whether the Notice’s statement about BNSF’s access rights is false and, instead, grant the petition on the basis that the statement is material and misleading. As UP’s petition indicates, TGSC’s exemption presents nonroutine and controversial issues of BNSF’s access rights under *Decision No. 44* and the RASA. Deciding these issues in response to UP’s petition is unnecessary because the Notice’s statement about BNSF access is a material misleading statement, which independently makes TGSC’s exemption void *ab initio*. Deciding these issues also is inappropriate because this is an exemption proceeding, which is reserved for routine and noncontroversial matters. Thus, the Board should award UP’s requested relief on the alternative basis that Notice’s statement about BNSF access is a material misleading statement.

² (Notice 4.)

³ (Pet. 2.)

⁴ (Pet. 4-6.)

A. The exemption is void *ab initio* because the Notice’s statement about BNSF access is material and misleading.

An exemption is void *ab initio* if the notice of exemption contains material false or misleading information.⁵ A notice may be misleading by assertion or omission,⁶ regardless of a party’s intentions.⁷ A misleading assertion is material if the transaction would not have otherwise qualified for an exemption.⁸ Thus, since the purpose of the class exemptions at 49 C.F.R. § 1150.31 is to permit “routine and uncontroversial transactions to proceed with minimal regulatory supervision,”⁹ a misleading assertion that masks nonroutine or controversial matters involving a notice of exemption is material.

The Notice’s statement that the transaction would not impact BNSF access to the Park is misleading. A “simple and straightforward” statement in a notice of exemption is misleading if the surrounding facts are not simple or straightforward.¹⁰ The Notice’s simple and straightforward statement that the transaction would not disturb BNSF access to the Park overlooks that the impact of the exemption on BNSF access to the Park under *Decision No. 44* and the RASA is a nonroutine and contentious matter. The statement stands in stark contrast with

⁵ 49 C.F.R. § 1150.32(c); *San Jacinto Transp. Co.--Operation Exemption--SJRE-Railroad Series*, FD 35995 et al., slip op. at 3 (STB served Feb. 2, 2022).

⁶ *Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY Inc.*, FD 35692 et al., slip op. at 4 (STB served Dec. 22, 2020).

⁷ *San Jacinto Transp.*, FD 35995 et al., slip op. at 4.

⁸ *Id.*

⁹ *Eastside Cmty. Rail*, FD 35692 et al., slip op. at 5.

¹⁰ *Id.* at 4.

UP's contentions that *Decision No. 44* and the RASA do not permit BNSF access to the Park if TGSC commences common-carrier service.

Not only is the Notice's statement about BNSF access misleading, but also it is material. The exemption process is intended for "routine and uncontroversial" matters,¹¹ not nonroutine and contentious issues of BNSF access that could result in BNSF losing existing access.¹² If the Notice's statement about BNSF access reflected that the exemption presents nonroutine and contentious issues of BNSF access, it would have been apparent that the Notice involves matters that were inappropriate for a § 1150.31 exemption.

B. The Board should not determine whether the Notice's statement about BNSF access is false.

Although UP contends that the Notice's statement about BNSF access is false, the Board should not, and does not need to, determine BNSF's access rights in response to UP's petition.

The Board can award UP its relief without determining BNSF access.

An exemption under § 1150.31 is void *ab initio* if the notice of exemption contains

¹¹ *Id.* at 5.

¹² Although the Board declined to reject a notice of exemption involving BNSF access issues in *Union Pacific R.R.—Operation Exemption—In Bexar & Wilson Counties, Tex.*, FD 35776, slip op. at 3-4 (STB served Dec. 24, 2013), that exemption did not involve potential loss of BNSF access. The exemption involved UP authority to operate on a line over which BNSF had not previously sought access. *Id.* at 2. The Board thus held that UP's right to seek authority was separate and distinct from BNSF's access rights, which BNSF could assert separately. *Id.* at 4. The Board also noted that the case differed from another proceeding where UP sought authority that would have precluded BNSF access. *Id.* at 4 n.5. Here, the Board's decision in *Union Pacific R.R.—Operation Exemption—In Bexar & Wilson Counties, Tex.* is not controlling because UP alleges that TGSC is seeking authority that would preclude BNSF access.

“false **or** misleading information.”¹³ The Board thus can revoke a notice of exemption and find that an exemption is void *ab initio* if the notice contained a misleading statement, regardless of whether the statement is false. As explained above, the Notice’s statement about BNSF access is material and misleading, which makes TGSC’s exemption void *ab initio*.

Also, exemption proceedings are not suited for transactions involving controversial matters like BNSF’s access rights. “[T]he agency has often stated that streamlined class exemption procedures are intended for routine and noncontroversial transactions.”¹⁴ The BNSF access issues raised by this proceeding are not routine or noncontroversial. They involve a unique issue of BNSF access where a shortline acquires an existing line.¹⁵ Also, loss of BNSF access would eliminate rail competition for shippers at the Park. Further, the resolution of these BNSF access issues could impact BNSF’s continued access to shippers in other locations when a shortline acquires an existing line. These are nonroutine and controversial matters that have broad implications and, thus, should not be decided in a streamlined exemption proceeding.

III. Conclusion

For these reasons, the Board should not decide whether the Notice’s statement about BNSF access is false. Instead, it should revoke the Notice and

¹³ 49 C.F.R. § 1150.32(c) (emphasis added).

¹⁴ *Eastside Cmty. Rail*, FD 35692 et al., slip op. at 4.

¹⁵ (See Pet. 4-6.) UP contends that the RASA and *Decision No. 44* do not envision BNSF access in this scenario despite allowing BNSF to interchange with shortlines in other scenarios where the shortline does not acquire an existing line. (*Id.*)

declare TGSC's exemption void *ab initio* because the Notice's statement about BNSF access is material and misleading.

Respectfully submitted,

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Dated: April 24, 2023

Certificate of Service

I certify that, on April 24, 2023, I served copies of this Reply to Union Pacific's Petition to Revoke Exemption upon all parties of record in this proceeding, by email or first-class mail.

/s/ Jason D. Tutrone
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