

SERVICE DATE – JUNE 30, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 32760 (Sub-No. 49)

BNSF RAILWAY COMPANY—PETITION FOR CLARIFICATION—
SERVICE TO COLORADO MATERIALS

Digest:¹ The Board denies a request from BNSF Railway Company (BNSF) to issue an order clarifying that it has the right to serve a shipper named Colorado Materials pursuant to conditions imposed by the Board as part of the Union Pacific Corporation/Southern Pacific Rail Corporation merger approval. However, the Board grants BNSF the opportunity to take limited discovery from Union Pacific Railroad Company and, if supported, to file an amended petition based on any additional information obtained.

Decided: June 30, 2025

On February 15, 2024, BNSF Railway Company (BNSF) filed a petition seeking clarification of certain conditions imposed by the Board as part of its approval of the merger between Union Pacific Railroad Company (UP) and Southern Pacific Rail Corporation (SP) in 1996 (UP-SP Merger). Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Decision No. 44), 1 S.T.B. 233, 364 (1996). Specifically, BNSF requests that the Board issue an order clarifying that those conditions give BNSF the right to serve Colorado Materials (the Facility), a shipper facility located on a UP-owned line in Uvalde County, Tex., known as the Cline Mine Industrial Lead (the Lead). (Pet. 1.) As discussed further below, the Board will deny BNSF’s request based on the current record. However, the Board will provide BNSF an opportunity to seek discovery from UP to determine if there is evidence in support of BNSF’s request and, if so, allow it to renew its request in an amended petition.

BACKGROUND

The UP-SP Merger. 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. The settlement agreement was

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 Decision, EP 696 (STB served Sept. 2, 2010).

intended, along with certain other conditions, to ameliorate the competitive harms an unconditioned merger would present and to protect shippers that would be losing access to a second rail carrier (2-to-1 shippers) by allowing BNSF to replicate, to a large extent, the competitive service that was lost when SP was absorbed into UP. *Id.* at 368, 372-73. The Board explained that, among other things, the “BNSF agreement permits BNSF to serve all shippers who would otherwise go from two directly serving carriers to one.” *Id.* at 368.

In 2001, UP and BNSF updated the settlement agreement to incorporate additional conditions imposed by Decision No. 44 and the Board’s subsequent interpretations thereof. The updated settlement agreement, which was entered into on March 1, 2002, is titled the Restated and Amended Settlement Agreement (RASA). The Board approved the RASA in the context of its oversight of the implementation of the UP-SP Merger. See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Oversight Decision No. 21), 5 S.T.B. 1173, 1174, 1178 (2001). A copy of the RASA is provided as Exhibit B of BNSF’s petition.

BNSF’s Petition for Clarification. As BNSF explains, the RASA ensures that BNSF can access “New Shipper Facilities”² located after the UP-SP Merger: (1) at 2-to-1 points, and (2) on “Trackage Rights Lines”³. (Pet. 7, Ex. B, RASA at §§ 1(b), 3(c), 4(b), 5(b), 6(d), 8(i).) BNSF argues that it is entitled to serve the Facility because it is a New Shipper Facility located at a 2-to-1 point (BNSF does not claim that the Facility is on a Trackage Rights Line). (Pet. 9.)

BNSF states that Exhibit A of the RASA provides a non-exhaustive list of 2-to-1 points. (*Id.* at 8.) According to BNSF, that list includes specific stations and locations, as well as all points on certain rail lines on which both UP and SP could serve shippers prior to the UP-SP Merger. (*Id.* (citing *id.*, Ex. B, RASA, Ex. A at 49-50 (identifying the “Points on Sierra Blanca-El Paso line” and “Points on paired track from Weso NV to Alazon NV” as examples of dual-served UP-SP lines where all points are listed as 2-to-1 points).) BNSF states that, for reasons unknown, neither the Lead nor Blewett, Tex. (where Colorado Materials is located), were specifically listed in the RASA or mentioned in the UP-SP Merger conditions as 2-to-1 points. (*Id.* at 9.) BNSF argues that, nonetheless, Colorado Materials is located at a 2-to-1 point.⁴

Specifically, BNSF asserts that the Lead was owned by SP and that, prior to the UP-SP Merger, UP’s affiliate, Missouri Pacific Railroad Company (MP), had a trackage rights agreement with SP (SP-MP Agreement) that permitted MP to also provide service on the Lead.⁵

² The RASA defines “New Shipper Facilities” in relevant part as “newly constructed rail-served Shipper Facilities.” (BNSF Pet., Ex. B, RASA 3.) UP does not dispute that the Facility constitutes a New Shipper Facility under the RASA.

³ The RASA defines “Trackage Rights Lines” in relevant part as “lines over which BNSF has been granted trackage rights pursuant to this Agreement.” (BNSF Pet., Ex. B, RASA 3.)

⁴ BNSF notes that the definition of 2-to-1 points in the RASA states that “[s]uch points include, *without limitation*, the points listed in Section 8(i) of and on Exhibit A to this Agreement.” (*Id.* at 8 (citing *id.*, Ex. B, RASA 2) (emphasis added).)

⁵ A copy of the SP-MP Agreement is provided at Exhibit C of BNSF’s petition.

(*Id.* at 9 (citing *id.*, Ex. C, SP-MP Agreement § 2).) According to BNSF, because both MP and SP could have served shippers on the Lead prior to the UP-SP Merger, “[t]he Lead is analogous to the dual-served lines listed in . . . the RASA, where all points on those lines are deemed to be ‘2-to-1’ Points and all shippers at those points are deemed to be ‘2-to-1’ Shippers entitled to BNSF access.” (*Id.* at 9.) BNSF claims that it is immaterial whether there was a railroad station or shipper facility on the Lead at the time of the merger. (*Id.* at 9 n.3.) According to BNSF, all that is required to find that Colorado Materials is located at a 2-to-1 point is that both UP (through MP) and SP had the right to provide service on the Lead at the time of the UP-SP Merger, regardless of whether there was an existing shipper. (*Id.*) In support of its request, BNSF also notes that the RASA includes an “omnibus provision” at Section 8(i), which states that the RASA was intended to “result in the preservation of competition by two rail carriers for (a) all ‘2-to-1’ Shipper Facilities at points listed on Exhibit A [of the RASA] and (b) all other shippers who had direct competition or competition by means of siting, transload or build-in/build-out from only UP and SP pre-merger.” (*Id.* at 10.)

UP Reply. In a reply filed on March 6, 2024, UP argues that BNSF is not entitled to access Colorado Materials under the conditions of the UP-SP Merger because the Facility is not located at a 2-to-1 point, noting that neither the Lead nor Blewett are listed as a 2-to-1 point in the RASA.⁶ (*UP Reply* 2-4.) UP also disputes BNSF’s assertion that the Lead was a dual-served line at the time of the merger. Specifically, UP claims that the SP-MP Agreement provided MP only with overhead trackage rights on the Lead, meaning only SP had the right to serve shippers located on the Lead. (*Id.* at 4 n.5; see also *infra* n.12.) UP further argues that even if SP and MP both had the right to serve shippers on the Lead, the definition of 2-to-1 point still requires there to have been at least one existing shipper located on the Lead at the time of the merger that was open to both UP and SP and no other railroad. (*Id.* at 4.) UP argues that BNSF provides no evidence that such a shipper existed. (*Id.*)

UP disputes BNSF’s assertion that the Lead can be considered a 2-to-1 point even if there were no shippers on the Lead at the time of the merger. UP argues that BNSF is making essentially the same argument that the Board rejected in Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp. (Oversight Decision No. 20), 5 S.T.B. 1159 (2001). (*UP Reply* 5-6.) UP states that in that case, BNSF proposed to define 2-to-1 points to include all geographic locations served by both UP and SP before the UP-SP Merger, “without regard to whether any [particular] shippers or receivers at those locations were open to or served by both UP and SP.” (*Id.* at 6.) UP notes that the Board rejected that proposal and argues that BNSF’s petition provides no reason for the Board to revisit the conclusions it reached in Oversight Decision No. 20.⁷ (*Id.* at 6-7.)

⁶ As noted, BNSF does not claim it has access to Colorado Materials on the basis that the Lead is a Trackage Rights Line.

⁷ On March 26, 2024, BNSF filed a reply to UP’s reply. Replies to replies are prohibited under the Board’s regulations. 49 C.F.R. § 1104.13(c). Although replies to replies were often accepted in the past, the Board recently explained that its rule prohibiting them will be more strictly enforced going forward to promote the orderly and efficient administration of cases. Sunflower State Indus. Ry.—Pet. for Declaratory Ord., FD 36714 (Sub-No. 1), slip op.

PRELIMINARY MATTERS

BNSF claims that the Board has continuing jurisdiction to enforce the conditions of the UP-SP Merger under 49 U.S.C. § 11327, and authority to resolve disputes concerning the terms of the RASA under Section 15 of the RASA. (Pet. 10-11.) Section 15 of the RASA states that, “[e]xcept 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 . . . which shall be the exclusive remedy of the parties.” (See *id.*, Ex. B, RASA 47.) In other words, disputes under the RASA must be resolved through arbitration unless the parties agree on another method or if the Board decides to resolve the dispute through a Board proceeding. The Board has stated that “a Board proceeding may be proper for a dispute with potentially broad implications concerning conditions imposed in the UP/SP merger.” Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Oversight Decision No. 86), 4 S.T.B. 303, 306 (1999). The Board has also explained 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.” Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760, slip op. at 3 (STB served May 5, 2017).

BNSF’s petition raises questions about what constitutes a 2-to-1 point that BNSF has a right to access under the RASA, and thus resolution of those issues could have broad implications concerning the conditions of the merger. In addition, UP does not oppose BNSF’s decision to seek resolution of this dispute by the Board. In these circumstances, the Board finds that this proceeding is properly before the Board. As a general matter, the Board encourages BNSF and UP to arbitrate, in the first instance, future disputes over contested factual matters which otherwise do not have broad implications or raise policy questions regarding implementation of the Board’s conditions. To that end, the Board notes that once discovery has been completed, the parties still retain the ability to submit this matter to arbitration under Section 15 of the RASA

DISCUSSION AND CONCLUSIONS

The Board finds BNSF’s argument that the Facility is located at a 2-to-1 point unpersuasive. BNSF claims that, because both UP and SP had the right to provide service on the Lead at the time of the UP-SP Merger, all points on the Lead are 2-to-1 points. (Pet. 8-9.) However, even if the Lead were dual served in 1995—a dispute that the Board does not, at this time, resolve—BNSF’s position fails because it rests on a faulty interpretation of the RASA.

at 2 n.3 (STB served Mar. 28, 2025). Accordingly, BNSF’s reply to UP’s reply will be rejected. However, given the Board’s past acceptance of replies to replies despite the 49 C.F.R. § 1104.13(c) prohibition, the Board reviewed BNSF’s reply and concludes that, even if accepted into the record, it would not change the conclusion reached in today’s decision regarding proper interpretation of the RASA. (See BNSF Reply, Mar. 26, 2024 (using reply to distinguish BNSF’s proposal made in Oversight Decision No. 20 with the proposal made in this proceeding and present argument about the scope of the SP-MP Agreement, which this decision does not resolve).)

According to BNSF, in determining if a New Shipper Facility, such as the Facility, is located at a 2-to-1 point, “[i]t is immaterial . . . whether there was an existing railroad station or shipper facility on the Lead at the time of the merger.” (*Id.* at 9 n.3.) This claim, however, is inconsistent with the language of the RASA, which limits the definition of 2-to-1 points to locations with an existing shipper facility at the time of the UP-SP Merger that was open to both UP and SP (and no other railroad). The RASA defines 2-to-1 points as “geographic locations at which *at least one ‘2-to-1’ Shipper Facility is located.*” (*Id.*, Ex. B, RASA 2 (emphasis added).) The RASA also defines “‘2-to-1’ Shipper Facilities” as “all Shipper Facilities that were open to both UP and SP . . . and no other railroad *when the 1995 Agreement was executed.*”⁸ (*Id.*, Ex. B, RASA 3 (emphasis added).) These definitions cannot be squared with BNSF’s claim that a 2-to-1 point can exist on a line with no facility open to UP and SP at the time of the UP-SP Merger.⁹

The Board is also unpersuaded by BNSF’s argument that the Lead is analogous to the dual-served lines identified in Exhibit A of the RASA. BNSF notes that Exhibit A—the RASA’s list of party-identified 2-to-1 points—refers broadly to “Points on Sierra Blanca-El Paso line” and “Points on paired track from Weso NV to Alazon NV.” (Pet. 8.) From these references, BNSF implies that the parties intended to treat entire lines as 2-to-1 points if UP and SP could have served new shippers on those lines before the merger, and that the exclusion of the Lead here was an inadvertent oversight. (See *id.* at 8-9.) But BNSF’s own petition shows that there were numerous 2-to-1 shippers located on those dual-served lines, which indicates that there were in fact “points” on those lines open to only UP and SP at the time of their merger. (*Id.* (quoting BNSF’s July 2, 2001 Fifth Annual and Cumulative Progress Report 10, 32).) And Decision No. 44 (approving the UP-SP merger) indicates that BNSF’s access on those lines was limited to points where there were “industries served by UP and SP and no other railroad[.]” Decision No. 44, 1 S.T.B. at 562.

Moreover, BNSF presented no argument or evidence indicating that all “points” on Exhibit A’s listed lines were deemed 2-to-1 points regardless of whether any 2-to-1 shipper facility had existed there in 1995. Indeed, the Board has previously cautioned against relying on Exhibit A’s list of 2-to-1 points to extrapolate a definition that is contrary to what “all concerned parties at the time understood to be 2-to-1 points—locations where a shipper facility had been open to both UP and SP, and to no other railroad.” Oversight Decision No. 20, 5 S.T.B. at 1164

⁸ Likewise, RASA Section 8(i) explains that the agreement’s intended purpose was to preserve competition for “(a) all ‘2-to-1’ Shipper Facilities at points listed on Exhibit A and (b) all other *shippers who had* direct [or indirect] competition . . . from only UP and SP pre-merger.” (*Id.*, Ex. B, RASA 8 (emphasis added).)

⁹ BNSF’s argument that it is immaterial whether there was an existing shipper facility on the Lead at the time of the merger also conflicts with how the Board has consistently described 2-to-1 points. For example, in the decision approving the merger, the Board described 2-to-1 points as “all points at which service is provided by UP and by SP, but by no other railroad.” Decision No. 44, 1 S.T.B. at 252; see also *id.* (stating that the parties’ “basic purpose in entering into the BNSF [settlement] agreement was to preserve competitive rail service for all 2-to-1 customers of UP and SP”).

& n.10.¹⁰ As such, the Board cannot conclude, as BNSF contends, that Exhibit A’s reference to unspecified “points” on particular dual-served rail lines—in contrast to Exhibit A’s reference to specific actual “stations or locations”—necessarily means that BNSF should have access to new facilities at “all” locations on all dual-served lines.¹¹

Additionally, although the definition of 2-to-1 points proposed by BNSF in the Oversight Decision No. 20 proceeding was fundamentally different than what it proposes here, the Board’s language in Oversight Decision No. 20 nonetheless clearly undercuts BNSF’s current argument. In that decision, the Board addressed a proposal by BNSF that would have defined 2-to-1 points as including locations at which “there was at least one shipper/receiver open to UP and at least one shipper/receiver open to SP, even if no shipper/receiver was open to both merger applicants.” Oversight Decision No. 20, 5 S.T.B. at 1161. The Board rejected BNSF’s proposal and adopted UP’s position, which was to “retain . . . the definition of 2-to-1 points used in [the UP-SP Merger] proceeding and similar to that used in others—geographic locations at which at least one shipper/receiver had available to it, either directly or from reciprocal switching, service from both UP and SP but no other railroad.” Id. That definition of 2-to-1 points—locations where *at least one shipper/receiver had service from UP and SP available to it*—is inconsistent with BNSF’s current proposal, under which a location where no shippers or receivers existed at the time of the UP-SP merger could qualify as a 2-to-1 point. See also id. at 1164 (noting that “what all concerned parties at the time [of the UP-SP Merger] understood to be 2-to-1 points” were “locations where *a shipper facility had been open* to both UP and SP, and no other railroad”) (emphasis added).

For the reasons explained above, the Board concludes that BNSF has failed to demonstrate that the Facility is located at a 2-to-1 point. However, this conclusion does not necessarily resolve the question of whether BNSF has the right under the RASA to serve the Facility. Based on the above discussion, the Facility could be deemed to be located at a 2-to-1 point if there had been a shipper facility located on the Lead or in the vicinity of Blewett open to service from both UP (or MP) and SP at the time of the UP-SP merger.¹² UP argues that “BNSF

¹⁰ A 2-to-1 point is not limited geographically to the boundaries of a particular facility that existed at the time of the UP-SP Merger. The definition of 2-to-1 point states that “the boundaries for . . . ‘2-to-1’ Points shall be deemed to include all areas within the switching limits of the locations as described in Section 9(g) of this Agreement.” (BNSF Pet., Ex. B, RASA 2-3.) Section 9(g) of the RASA states in pertinent part, “All locations referenced herein shall be deemed to include all areas within the switching limits of the location designated by tariff, clarified to the extent necessary by publicly-available information, in effect as of September 25, 1995.”

¹¹ For this reason as well, the Board cannot conclude that the Lead should have been included in Exhibit A, regardless of whether a shipper was located on it at the time of the UP-SP merger, as BNSF suggests. (Pet. 9.)

¹² If such a facility existed, whether it actually shipped traffic on both UP and SP prior to the UP-SP Merger is not relevant to whether it is considered a 2-to-1 point under the RASA. The RASA states that a 2-to-1 point exists if the facility was open only to UP and SP, “regardless

provides no evidence such a shipper facility existed,” (UP Reply 4), and BNSF does not directly address the issue.

There is some indication in the record that a shipper facility that was open to both UP (via MP) and SP may have existed on the Lead the time of the merger. First, BNSF points to the following language from Section 2 of SP-MP Agreement:

[SP] hereby grants [MP] for the term of this agreement . . . the right to operate its trains, engines and cars with its own employees on and over the Joint Facility solely for bridge purposes. *Except with respect to the industrial lead trackage included in the Joint Facility*, as provided in Section 1 B. hereof, User shall not have the right to construct or operate any lead, side, spur, industrial or public freight track connected to the Joint Facility, nor shall User have the right to serve any industry or industries situated on the Joint Facility.

(Pet. at 4 (emphasis added).) The exclusion of the “industrial lead trackage” suggests that MP may have been given access to serve shipper facilities on the Lead. Indeed, if there were no shipper facilities on the Lead, as UP claims, it seems unlikely that the parties would have included this introductory clause.¹³ Moreover, BNSF notes that the notice of exemption filed by MP with the Board’s predecessor, the Interstate Commerce Commission (ICC), seeking trackage rights over the Lead appears to recognize that MP would serve shipper facilities on the Lead: “Operation over an industrial lead track of SP in the Blewett/Cline, Texas area is included in the trackage rights agreement in order to permit MP’s service in the Blewett area to Mile Post 6.39.” MP Notice 1-2, Nov. 14, 1985 Mo. Pac. R.R.—Trackage Rts.—S. Pac. Transp. Co., FD 30749 (ICC served Dec. 4, 1985); see also id. at 2 (explaining that, after the grant of trackage rights, “MP will no longer be required to operate over its Crystal City Subdivision, which is in poor

of . . . whether the shipper or receiver at that facility ever shipped or received, any traffic via either UP or SP.” (Pet., Ex. B, RASA 2-3.)

¹³ UP states that the trackage rights agreement permitted MP to “serve customers [MP] had been able to serve using its own line in Blewett, at one end of the Lead.” (UP Reply 4 n.5.) UP further asserts that the phrase in the MP-SP agreement excluding the Lead was meant to clarify that “the agreement’s boilerplate language prohibiting trackage rights tenants from operating over ‘any lead, side, spur, industrial or public freight track connected to the Joint Facility’ did not apply to the . . . Lead, which was itself part of the Joint Facility.” (Id. 4 n.5.) UP’s argument is not entirely clear, but it appears to be claiming that the language in the agreement limiting MP’s operations over SP’s mainline to “bridge purposes” applied to operations on the Lead, notwithstanding the agreement appearing to except the Lead from the prohibition on MP serving facilities and shippers “on the Joint Facility” (in addition to excepting it from the prohibition on service over lead, spur, industrial track, etc.) Thus, UP appears to contend that while the agreement allowed MP to access shipper facilities located at the end of the Lead, it could not access those located in the middle of the Lead, such as Colorado Materials. UP may supplement this argument on reply if, as discussed below, BNSF submits an amended petition.

condition, to serve the Blewett area”).¹⁴ Furthermore, a letter attached to BNSF’s petition suggests that there was a facility jointly served by UP and SP on the Lead or in the vicinity of Blewett prior to the UP-SP Merger. (Pet., Ex. D, Letter from Mike Martucci to Chris Sanford 2, May 18, 2023 (stating that the Lead was used by MP to serve the former Uvalde Rock Asphalt facility and the former R.L. White facility and that a letter dated April 25, 2013 from Daniel Hartmann of UP to Chris Bigoness of BNSF stated that the Uvalde Rock Asphalt facility “was jointly served by both SP and MP prior to the UP/SP merger”).)

If any additional information exists regarding (1) the existence of any facility located on the Lead or in the vicinity of Blewett at the time of the UP-SP Merger or (2) the scope of the trackage rights under the SP-MP Agreement, UP is the party most likely to possess such information. Accordingly, the Board will allow BNSF to seek discovery from UP regarding information relevant to whether any facility existed on the Lead or in the vicinity of Blewett at the time of the UP-SP Merger and whether the SP-MP Agreement granted MP the right to provide local service on the Lead or granted MP overhead rights only.¹⁵ BNSF will have until August 29, 2025, to obtain discovery and submit an amended petition with additional relevant information and argument to the Board for consideration. If the Board does not receive an amended petition from BNSF by August 29, 2025, or grant an extension of the deadline, this proceeding will be deemed closed without further Board action. If BNSF submits an amended petition, UP’s reply will be due by September 29, 2025.

It is ordered:

1. BNSF’s request for a Board order holding that the conditions imposed on the UP-SP Merger grant BNSF the right to serve the Facility is denied.
2. BNSF’s reply to UP’s reply is rejected.
3. BNSF may seek discovery from UP as explained above and submit an amended petition by August 29, 2025.
4. If BNSF files an amended petition, UP may file a reply by September 29, 2025.

¹⁴ A copy of MP’s notice of exemption is attached at Exhibit C to BNSF’s petition.

¹⁵ As explained above, this proceeding is appropriate for Board resolution because it raises questions regarding what constitutes a 2-to-1 point that could have broad implications concerning the conditions of the merger. The Board notes, however, that the issues on which the Board is permitting discovery here—whether certain facilities existed in the area at the time of the UP-SP merger and whether a party had the right to serve a particular facility at the time of the merger—are the type of issues that would be more appropriate for arbitration if they were to arise in isolation.

5. If BNSF does not file an amended petition by August 29, 2025, and if the Board does not extend that deadline, this proceeding will be deemed closed without further Board action.

6. This decision is effective on the date of service.

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