52052 SERVICE DATE – APRIL 1, 2024
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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36627

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

Digest:[1] The Board denies requests to revoke an exemption that took effect in August 2022 and finds that the statement at issue in the verified notice of exemption filed by TGS Cedar Port Railroad was not false or misleading.

Decided: April 1, 2024

TGS Cedar Port Railroad LLC (TGSC) filed a verified notice of exemption to operate private track located in an industrial park as a common carrier, which took effect on August 6, 2022. Two requests to revoke the exemption were thereafter filed, challenging (on different grounds) the notice's statement that shippers in the park would continue to have competitive access to the two Class I carriers that serve the park following the change from private to common carrier operations within the park. As discussed below, this decision denies the requests to revoke and finds that the statement at issue in the verified notice was neither false nor misleading.

BACKGROUND

On July 7, 2022, TGSC, a noncarrier, filed a verified notice of exemption under 49 C.F.R. part 1150 subpart D to operate on approximately 1.28 miles of track located in the TGS Cedar Port Industrial Park (the Park) in Chambers County, Tex. (the Line). The Line begins at a point of connection at milepost 5.22 with the Cedar Bayou Industrial Lead (the Lead)—a rail line owned by Union Pacific Railroad Company (UP), over which UP and BNSF Railway Company (BNSF) operate—and extends southward approximately 1.28 miles to milepost 6.5 (as measured from the southern end of the Lead). (Verified Notice 4.)[2] According to the verified notice, the Line, which connects to ancillary track within the Park, is owned by a noncarrier TGSC affiliate (TGS Cedar Port Partners LP) and was being operated in non-common carrier private switching service by TGSC's parent company, Trans-Global Solutions, Inc.

[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] The pages of the verified notice are unnumbered; citations here are to the pages of the .pdf document beginning with the cover page.

(TGSI). (Id. at 2, 4.) Notice of the exemption was served and published in the Federal Register on July 22, 2022 (87 Fed. Reg. 43,929), and the exemption became effective on August 6, 2022. See TGS Cedar Port R.R.—Operation Exemption—in Chambers Cnty., Tex., FD 36627 (STB served July 22, 2022).

The verified notice states that the Park "has long enjoyed competitive rail service . . . from both UP and BNSF, a service arrangement that will continue, albeit under different service circumstances within the Park going forward." (Verified Notice 4.)

On April 4, 2023, UP filed a petition to revoke TGSC's exemption, contending that this statement is materially false. (UP Pet. 2, 4.) UP argues that TGSC, as a new common carrier, does not have the right to interchange traffic with BNSF at the Park under the conditions imposed in Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp., 1 S.T.B. 233 (1996) (UP/SP Decision No. 44 and, together with other decisions in the merger docket, UP/SP), and the terms of the March 1, 2002 Restated and Amended Settlement Agreement (the RASA) approved in connection with the Board's review and oversight of the merger. UP argues that the exemption is therefore void ab initio. (UP Pet. 2-3.)

Three replies to UP's petition were filed on April 24, 2023. TGSC replied in opposition, claiming that under the conditions imposed in UP/SP Decision No. 44 and the RASA, UP is not entitled to block direct BNSF access to the Park simply because rail service within the Park has changed from private switching to common carriage, and that the statement in the verified notice challenged by UP is neither false nor misleading. (TGSC Opp. 1-3, 14, Apr. 24, 2023.) TGSC notes that UP "does not challenge TGSC's common carrier *bona fides* or the Park's enduring 2-to-1 status," (id. at 11), and asserts that "[t]here is nothing in the UP/SP record suggesting that BNSF or this Board ever intended the outcome that UP seeks here." (Id. at 15.) TGSC further argues that UP's petition "glosses over" the "competition-protecting measures adopted in UP/SP." (Id. at 17-18 (quoting passages from UP/SP Decision No. 44 and early oversight decisions and also noting "the non-existent Board discussion" of circumstances under which railroad customers at a 2-to-1 location could forfeit their protected status).)

BNSF opposes the petition on the same grounds, arguing that the result sought by UP "run[s] counter to the basic competition-preserving premise of the UP/SP merger conditions." (BNSF Reply 1-2, Apr. 24, 2023.) BNSF notes that it accesses shippers at the Park to fulfill its competition-preserving role under the UP/SP merger conditions, and maintains that the RASA does not restrict these access rights. (Id. at 2-3, 6-8.)[3]

[3] BNSF also argues that it accesses Park shippers pursuant to operating rights, obtained through agreements relating to BNSF's and UP's acquisitions of equal one-half ownership interests in the former SP Lafayette Subdivision (the 50/50 Line), that permit BNSF to interchange traffic "with any other common carrier connected to the 50/50 Line or any former SP branches or spurs connected to the 50/50 Line." (BNSF Reply 3-4, Apr. 24, 2023; see also id. at 9.) In light of the determinations made below, it is not necessary to consider BNSF's claims about the 50/50 Line and related agreements (which, the Board notes, are opposed by UP and which TGSC does not address).

The American Chemistry Council (ACC) asserts that the Board should grant UP's petition to revoke the exemption on the alternative basis that the statement about BNSF access in the verified notice is materially misleading, without deciding the question of falsity or BNSF's access rights. (ACC Reply 1, Apr. 24, 2023.)

UP responded to TGSC's and BNSF's replies on May 3, 2023, and BNSF and TGSC responded to UP's surreply on May 15 and May 23, 2023, respectively.[4]

TGSC also responded to ACC's submission on May 5, 2023. TGSC maintains that ACC has failed to explain why or how ACC or any of its members have been misled by any statement in the verified notice, (TGSC Reply 4-5, May 5, 2023); that UP's interpretation of the RASA, which ACC does not even appear to endorse, does not show that a significant controversy exists, (id. at 5-7); and that this revocation proceeding is an appropriate forum to consider and resolve any controversy that may exist, (id. at 7-9).

On July 3, 2023, the Board instituted a proceeding under 49 U.S.C. § 10502(d) to consider the revocation requests sought by UP and ACC. For the reasons discussed below, the requests to revoke will be denied, and the Board concludes that the change from private to common carrier operations within the Park does not impact BNSF's right to provide competitive line-haul service to the Park under the merger conditions adopted in UP/SP.

DISCUSSION AND CONCLUSIONS

"A party seeking revocation or rejection of a notice of exemption has the burden of demonstrating that the notice contains false or misleading information, or that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. [§] 10101." Gen. Ry.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Cntys., Iowa, FD 34867, slip op. at 4 (STB served June 15, 2007); see 49 U.S.C. § 10502(d). An exemption under 49 C.F.R. part 1150 subpart D is void ab initio if the verified notice contains false or misleading information that is material to the authorization process. 49 C.F.R. § 1150.32(c); Berkshire Scenic Ry. Museum, Inc. v. ICC, 52 F.3d 378, 381 (1st Cir. 1995). Information is material if the transaction would not otherwise have qualified for an exemption. Berkshire, 52 F.3d at 381. The failure to disclose material information can render a verified notice misleading by omission. Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP Rly Inc., FD 35692 et al., slip op. at 3-4 (STB served Dec. 22, 2020). Although the Board may revoke exemptions in cases that require additional scrutiny and a more detailed record than is produced through a class exemption process, see, e.g., Riffin—Acquis. & Operation Exemption—in York Cnty., Pa. &

[4] UP states that it made the May 3, 2023 filing to address errors in TGSC's and BNSF's April 24, 2023 pleadings (including errors relating to "new issues") and TGSC's request for confirmation regarding UP's hypothetical liability for damages. (UP Surreply 2, May 3, 2023.) In the interest of compiling a complete record, the Board will accept UP's May 3, 2023 filing into the record, as well as TGSC's and BNSF's responses thereto. See, e.g., City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

Balt. Cnty., Md., FD 34484, slip op. at 3 (STB served Apr. 20, 2004),[5] a party seeking revocation must first provide reasonable, specific concerns to demonstrate that revocation is warranted. Gen. Ry., FD 34867, slip op. at 4 (citing I&M Rail Link LLC—Acquis. & Operation Exemption—Certain Lines of Soo Line R.R., FD 33326 et al., slip op. at 7 (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998)).

Here, neither UP nor ACC has shown that the verified notice is false or misleading, or that the transaction described in TGSC's verified notice requires additional scrutiny such that approval under the class exemption process is inappropriate. Therefore, for the reasons set forth below, the requests to revoke will be denied.

UP's Petition to Revoke

Central to this dispute is that the Park is located at Baytown, Tex., a 2-to-1 point acknowledged by the merging parties in the UP/SP proceeding. (Verified Notice 4; UP Pet. 3.) In August 1996, the Board approved the common control and merger of the rail carriers controlled by UP and the rail carriers controlled by Southern Pacific Rail Corporation (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. UP/SP 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 RASA is the 2001 update to the UP/BNSF settlement agreement and incorporates the conditions imposed by UP/SP Decision No. 44 and the Board's subsequent interpretations thereof.[6] To alleviate future harm to shippers resulting from the consolidation of the rail network and the associated reduction in competitive options, certain protections were afforded at 2-to-1 points as conditions of the UP/SP merger authorization. Under the RASA, BNSF received trackage rights over approximately 4,000 miles of UP/SP's lines to serve all 2-to-1 shippers, i.e., those who would otherwise have their options reduced from two rail carriers (UP and SP) to only one rail carrier (the merged UP/SP entity) after the merger, at a fee designed to allow BNSF to garner sufficient traffic and compete effectively with the newly merged UP/SP. UP/SP Decision No. 44, 1 S.T.B. at 368, 413-17. The RASA defines 2-to-1 points as "geographic locations at which at least one '2-to-1' Shipper Facility is located," and includes "all areas within the switching limits of the locations." (UP Pet., Ex. A at 2-3). Baytown, Texas is an enumerated 2-to-1 point. (Id. at 52).

UP acknowledges that Baytown is a 2-to-1 point under UP/SP Decision No. 44 and the RASA. (UP Pet. 3). Nonetheless, UP contends that if TGSC provides common carrier service on the Line, shipper facilities in the Park will lose direct access to BNSF per the terms of the RASA that refer to BNSF's ability to interchange with short line railroads. (UP Pet. 4-5.) UP,

[5] Cf. Eighteen Thirty Group, LLC—Acquis. Exemption—in Allegany Cnty, Md., FD 35438 et al., slip op. at 19 (STB served Apr. 5, 2012) (noting that the mere fact petitioners may find numerous ways to misread materials does not establish the presence of issues that require "considerable scrutiny").

[6] As contemplated by UP/SP Decision No. 44, the original settlement agreement has been restated and amended in accordance with subsequent Board decisions and other more recent agreements between UP and BNSF. (See UP Pet., Ex. A at 1-2.)

therefore, argues that TGSC's verified notice of exemption is void ab initio "because it contains the materially false statement that if TGSC institutes common carrier operations over the Line, shippers would enjoy essentially the same competitive service from Union Pacific and BNSF that currently exists in the Park." (Id. at 6.)

UP bases this contention on the premise that "BNSF obtained limited rights under the RASA to establish new interchange with short lines" and that those rights do not provide BNSF the ability to interchange with TGSC as a new common carrier. (Id.) According to UP, under the conditions imposed in UP/SP Decision No. 44 and the terms of the RASA, "BNSF cannot interchange with any new short line railroad that, like TGSC, would connect to a merger-related trackage rights line via existing track." (UP Pet. 2-3.) UP cites three passages in the RASA (but nothing from UP/SP Decision No. 44) as support for its position:

- RASA § 5(b), which, among other rights granted to BNSF in the Eastern Texas-Louisiana geographic area, states that "BNSF shall also have the right to interchange with: the Acadiana Railway Company at Crowley, LA; and the Louisiana & Delta Railroad, Inc. at Lafayette, Raceland and Schreiver, LA. BNSF shall also have the right to interchange with and have access over the New Orleans Public Belt Railroad at West Bridge Junction, LA." (Id., Ex. A at 21.)

  UP argues that "TGSC could not qualify under this provision because it is not one of the named short lines in the Eastern Texas-Louisiana area." (UP Pet. 4-5.)

- RASA § 8(j), which states that "BNSF shall have the right to interchange with any short-line railroad which, prior to the Effective Date of this Agreement [September 25, 1995], could interchange with both UP and SP and no other railroad." (Id., Ex. A at 31.)

  UP asserts that "TGSC could not qualify under this provision because it did not exist in 1995." (UP Pet. 5.)

- RASA § 8(k), which states that "BNSF shall also have the right to interchange with any short-line railroad that constructs a new line to and establishes an interchange on a Trackage Rights Line subsequent to UP's acquisition of control of SP" (subject to restrictions that UP acknowledges are not relevant here). (Id., Ex. A at 31; UP Pet. 5 n.11.)

  UP argues that "TGSC could not qualify under this provision because it would not 'construct[] a new line' to a Trackage Rights Line." (UP Pet. 5.)

Based on these provisions, UP maintains that, under the conditions imposed in UP/SP, BNSF's "limited rights with respect to new short lines" foreclose BNSF from access to a 2-to-1 point when terminal switching service is provided by a new Class III common carrier that replaces a private switching railroad such as TGSC here. (Id. at 4-5.) Therefore, UP argues, if TGSC begins common carrier rail service as contemplated, "current and future shippers in the

Park will lose the benefit of existing head-to-head competition between BNSF and Union Pacific." (Id. at 4.)[7]

UP's argument is wrong. There is no question that Baytown is a 2-to-1 point under the RASA. (Id., Ex. A at 52.) As such, under the UP/SP merger conditions and the RASA, BNSF received access to (i) all 2-to-1 shipper facilities located at Baytown, meaning all shipper facilities open to both UP and SP and no other railroad as of September 25, 1995; and (ii) any new shipper facility located at Baytown, meaning (in relevant part) newly constructed rail-served shipper facilities and previously-served shipper facilities that began to ship by rail again where (a) there has been a change of owner or lessee and (b) the use of the facility is different in nature and purpose from the facility's prior use. (UP Pet., Ex. A at 2-3, § 5(b).)[8] The Board has interpreted its merger conditions and the RASA to mean that UP is required to provide BNSF with access to both existing and future facilities within the limits of a named 2-to-1 point. See UP/SP Decision No. 81, FD 32760, slip op. at 2 (stating that "[a]s part of the UP/SP-BNSF settlement agreement, BNSF gained the right to serve all existing and future transload facilities" located within the 2-to-1 point at San Antonio); id. at 4 (reiterating that principle applied at "San Antonio and other 2-to-1 points"). Accord UP/SP Decision No. 109, FD 32760, slip op. at 8 (STB served Jan. 31, 2018) ("Under the UP/SP merger conditions and the RASA, BNSF may access any 'New Shipper Facility' located subsequent to the UP/SP merger at 2-to-1 points listed in the RASA").[9] Citing these same provisions of the RASA, UP's petition itself acknowledges that BNSF currently has access to shipper facilities open to both BNSF and UP at the time of the merger, "as well as new shipper facilities in the Park." (Pet. at 3).

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[7] TGSC asserts that the situation described by UP would effectively transform UP into a bottleneck carrier. (TGSC Opp. 9-10 & n.12 (citing UP Pet. 6).) UP characterizes TGSC's claims as "erroneous," but does not specifically address or refute its contentions. (UP Surreply 3, May 3, 2023.)

UP instead asserts that, "[b]y authorizing TGSC's operation as a common carrier, *the Board made TGSC a bottleneck carrier*" and "substantially changed the competitive status quo by reducing the number of common carrier railroads serving shippers in the Park from two [UP and BNSF] to one [TGSC]." (Id. (emphasis in original).) UP's assertion lacks merit. A rail carrier that provides only switching or other terminal services is not considered a bottleneck carrier under the longstanding principles that govern the agency's assessment of bottleneck issues. See generally Pol'y Alts. to Increase Competition in the Rail Indus., EP 688, slip op. at 2 (STB served Apr. 14, 2009) (explaining that bottleneck issues arise in the context of through movements provided by the bottleneck carrier).

[8] The relevant time for making the 2-to-1 point determination was on September 25, 1995. See UP/SP General Oversight Decision No. 20, FD 32760 (Sub-No. 21), slip op. at 3 n.5 (STB served Dec. 20, 2001); UP/SP Decision No. 81, FD 32760, slip op. at 4 (STB served Oct. 5, 1998).

[9] In its surreply, UP seems to argue that none of the shippers currently in the Park were there at the time of the UP/SP merger. (UP Surreply 8-10.) However, this distinction does not make a difference when discussing 2-to-1 points. The RASA and precedent cited above explain that UP was required to provide BNSF with access to existing and future facilities at 2-to-1 points.

Nowhere does UP/SP Decision No. 44, the RASA, or any subsequent Board decision regarding the UP/SP merger endorse UP's argument that the conversion of private terminal switching operations to common carriage at an established 2-to-1 point would permit UP to block BNSF's ability to access that point. Rather, as the Board discussed in its decision authorizing the merger and reiterated in subsequent decisions, the preservation of competition at points that would otherwise become captive to UP was a foundational premise of the UP/SP merger conditions: "[T]he BNSF agreement[10] will permit BNSF effectively to replace the competition that will be lost when SP is absorbed into UP, and thus protect shippers at 2-to-1 points from facing higher prices or deteriorated service." UP/SP Decision No. 44, 1 S.T.B. at 423;[11] accord UP/SP Decision No. 61, FD 32760, slip op. at 10 (STB served Nov. 20, 1996) (BNSF agreement was "intended to allow BNSF to replicate the competition provided by an independent SP at 2-to-1 points and with respect to 2-to-1 shippers").[12] Here, Baytown shipping facilities have been served by UP and BNSF "picking up and setting out traffic on ancillary track in the Park," and switching service within the Park has been provided by a non-common carrier, TGSI. (UP Pet. 3.) Absent the merger, a change from private to common carriage for terminal operations within a 2-to-1 point such as Baytown would not have impacted "the competition provided by an independent SP."

UP's petition side-steps these critical precepts, which underlie and inform the merger conditions, and have been applied in past decisions to reject similar attempts by UP to interpret the RASA in a manner that would undermine the conditions imposed in UP/SP Decision No. 44. See, e.g., UP/SP General Oversight Decision No. 19, FD 32760 (Sub-No. 21), slip op. at 4-6 (STB served Nov. 8, 2001) (rejecting UP's interpretation of the exit/entry and Texas/Louisiana restrictions because it would prevent BNSF from replicating competitive options for traffic that would have existed absent the merger). As the Board emphasized in UP/SP General Oversight Decision No. 19, the agency imposed competitive conditions on its approval of the UP/SP rail

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[10] The BNSF agreement is the precursor to the RASA, as described more fully in the preamble of the RASA, (UP Pet., Ex. A at 1-2), and subsequent Board decisions. See, e.g., UP/SP Decision No. 109, FD 32760, slip op. at 2.

[11] See also, e.g., UP/SP Decision No. 44, 1 S.T.B. at 384 ("The BNSF agreement is intended to permit BNSF to replace the competition that will be lost when SP is absorbed into UP."); id. at 390-91 (explaining, in section titled "Competition at 2-to-1 points not Diminished," that "applicants have identified 2-to-1 points as those that can be served directly, or through reciprocal switching, by UP *and* SP but by no other Class I railroad" and granted BNSF access to those points "as a replacement carrier for SP"); id. at 419 (reiterating objective to "ensure that the BNSF trackage rights will allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP"); id. at 420 (expanding build-in/build-out condition to "allow BNSF to replicate the competitive options now provided by the independent operations of UP and SP").

[12] The Board focused on competition between the Class I railroads providing line-haul service. The applicants "identified 2-to-1 points as those that can be served directly, or through reciprocal switching, by UP *and* SP but by no other *Class I railroad*." UP/SP Decision No. 44, 1 S.T.B. at 390-91 (second emphasis added). These include "points on shortline railroads reachable by connections to UP *and* SP, but by no other Class I railroad." Id. at 391 n.127.

consolidation "in order to replicate, insofar as possible, competition that would otherwise have been lost as a result of the transaction." Id. at 4. The Board also explained that the "new facilities" condition was imposed to preserve the ability of a shipper "to play UP and SP against each other in deciding where to locate new facilities" and "to enable BNSF to achieve sufficient traffic density on the trackage rights lines," [citations and internal quotations omitted], and that "to deny BNSF similar routings to those that would have been available to UP or SP . . . would undermine those purposes." Id. at 5.[13] Similarly, here, absent the merger, if the terminal railroad serving the Baytown 2-to-1 point had changed from a private to a common carrier, SP could have continued to exchange cars in first-mile last-mile service with the new terminal common carrier, and to provide line-haul service as a competitive alternative to UP. Under UP's suggested interpretation of the RASA, BNSF would be prevented from doing this when UP has proffered no evidence that the three provisions cited by UP were intended to address, apply to, or restrict the nature of terminal switching operations within a designated 2-to-1 point.

The RASA passages cited by UP referencing interchange with short lines do not undermine a determination that BNSF retains access to Baytown as a 2-to-1 point. As a primary matter, those provisions state *additional* rights afforded to BNSF *beyond* the rights afforded in other parts of the Agreement and UP/SP conditions. The RASA provisions relied on by UP do not refer to BNSF's rights to access 2-to-1 points, which are geographic locations that are independently specified in other sections of the RASA not referenced by UP. One of the provisions referencing interchange cited by UP (RASA § 5(b)) serves simply to memorialize the short lines in the Eastern Texas-Louisiana region with which UP and SP alone could interchange prior to the merger.[14] The other two are found in Section 8 of the RASA, which specifies "Additional Rights" the parties (in some instances, UP; in others, BNSF) received, apart from rights specified elsewhere in the Agreement. In other words, RASA sections 8(j) and 8(k)—which grant BNSF the right to interchange with short lines in certain circumstances—are rights that BNSF received in addition to the access rights to 2-to-1 points that underpin the competitive policy of the UP/SP conditions. Even though these short line provisions may limit interchange with short line carriers in certain circumstances not presented here, there is no basis for concluding that they would supersede and undermine the RASA provisions providing interchange access at 2-to-1 points. Not only is this conclusion supported by the text of the RASA, but it is also consistent with the stated competitive policy in setting the UP/SP conditions, and the Board's consistent enforcement of that policy.

UP's surreply reprises the argument that, based on the three RASA passages cited in its petition, UP would be entitled to prevent BNSF from serving the Park if TGSC conducts

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[13] Accord UP/SP General Oversight Decision No. 19, slip op. at 5 (explaining that "application of the entry/exit and Texas/Louisiana restrictions as to build-in/build-out traffic would prevent BNSF from replicating the competitive role that UP or SP provided in these circumstances and would improperly undercut this condition as well").

[14] See UP/SP Decision No. 44, 1 S.T.B. at 390-91 & n.127 (explaining that "[t]o identify points to be covered by corrective trackage rights, applicants have identified 2-to-1 points as those that can be served . . . by UP *and* SP but by no other Class I railroad," and noting that "Applicants contend that they carefully checked actual accessibility. They added points on short line railroads reachable by connections to UP *and* SP, but by no other Class I railroad.").

operations within the Park as a common carrier. (UP Surreply 4-5.) The Surreply offers nothing in the way of factual evidence or legal authorities to support UP's claim that the RASA should be so construed. UP instead simply claims that "TGSC erroneously says there is no reason [UP] would allow BNSF to interchange with a short line that constructs a new line to a Trackage Rights Line but not a private carrier operating in an industrial park that decides to become a regulated short line." (Id. at 6.)

But even the explanation of the "reason" given by UP does not withstand scrutiny: UP states that "[g]ranting BNSF rights to interchange with a short line in TGSC's position would require [UP] to bear the potential burdens associated with new short line-BNSF interchanges on its lines." (Id. at 6-7.) UP overlooks, however, that, under RASA § 8(k), TGSC could construct a new line of rail within the Park that connects to the Cedar Bayou Industrial Lead (the line owned by UP adjacent to the Park, and over which UP and BNSF operate (see Verified Notice 4, July 7, 2022)) and establish an interchange with BNSF on that Trackage Rights Line—creating the same type of "potential burdens" cited by UP. In any event, according to UP itself, Baytown shipping facilities are served by UP and BNSF "picking up and setting out traffic on ancillary track *in the Park*," and switching service within the Park is provided by another carrier. (UP Pet. 3 (emphasis added).) Relatedly, UP acknowledges that "TGSC says [UP] would bear no additional burdens *in this case* because TGSC plans to conduct all interchange operations on its own lines," but speculates that the interchange might later be moved "to a location that would impose operational burdens on [UP]." (UP Surreply 7.) TGSC's Verified Notice of Exemption, however, represents that TGSC will "provide common carrier service *within* the Park in place of TGSI's current private switching," (Verified Notice 4-5, July 7, 2022 (emphasis added)); if this representation were (or were to become) false, UP could seek appropriate relief at that time.

In sum, UP has not shown that the RASA—which was adopted by the Board as a competition-preserving condition to the UP/SP merger—authorizes UP to block BNSF's access to an established 2-to-1 point, rendering Park shippers captive to UP, if TGSC provides terminal services within the Park as a common carrier.[15] The Board also notes that TGSC commenced common carrier operations on April 1, 2023, (see TGSC Opp. 3), and there have been no claims or contentions by UP or shippers that those operations have adversely impacted head-to-head competition between UP and BNSF at Baytown. Accordingly, UP has not met its burden to prove that TGSC's verified notice contained a false statement, and UP's petition to revoke the notice of exemption as void ab initio on that basis will be denied.[16]

[15] However, the Board will decline TGSC's request to provide "additional clarification" relating to the preemptive effect of ICCTA on liability UP might otherwise incur for "business disruptions stemming from" future "unprotected anticompetitive and abusive behavior" by UP, (TGSC Opp. 22), inasmuch as there is no live or concrete controversy to address.

[16] UP's belated suggestion that the verified notice was also "both misleadingly incomplete and incompatible with a summary notice proceeding" because it did not "squarely acknowledge the competition issue," (UP Surreply 2-3), also lacks merit—as does ACC's request to revoke on a similar basis—for the reasons discussed below.

ACC's Alternative Basis for Revocation

On April 24, 2023, ACC filed a reply to UP's petition to revoke. ACC asserts that the Board should decline UP's request to revoke the verified notice on the ground that it contains a false statement about BNSF's access rights "and, instead, grant the petition on the basis that the statement is material and misleading." (ACC Reply 2.) ACC argues that deciding the merits of UP's petition would be inappropriate "because this is an exemption proceeding, which is reserved for routine and noncontroversial matters," and UP's petition indicates that the issues raised are "nonroutine and controversial." (Id.) ACC further contends that the exemption should be revoked as void ab initio on the alternative basis that "[the] Notice's statement about BNSF access is a material misleading statement." (Id.)

ACC's arguments are misplaced. If adopted, ACC's first contention—that because UP has challenged the veracity of the statement in the verified notice about BNSF's access rights, the transaction has become inherently controversial and inappropriate for an exemption proceeding—would constrain the Board from rejecting challenges that lack merit (as does UP's here) and foster unnecessary regulation. As TGSC points out, revocation proceedings naturally encompass some controversy, and under well-settled principles embodied in the legislative history of Section 10502 and agency precedent, the revocation process of 49 U.S.C. § 10502(d) is an appropriate forum for the Board to consider the claims and contentions of interested parties in the first instance. (TGSC Reply 8, May 5, 2023); see, e.g., Class Exemption for the Acquis. & Operation of Rail Lines under 49 U.S.C. § 10901 (Acquisition Exemption), EP 392 (Sub-No. 1), 1 I.C.C.2d 810, 812 (1985), reviewed sub nom. Ill. Commerce Comm'n v. I.C.C., 817 F.2d 145 (D.C. Cir. 1987) (explaining that under the new rule, class exemptions may still be reviewed by the agency and that any affected party can file a petition to revoke); GWI Switching Servs.—Operation Exemption—Lines of S. Pac. Transp. Co., FD 32481, slip op. at 6 (STB served Aug. 7, 2001) (stating that the class exemption was adopted to comply with the legislative directive to grant exemptions and rely on "after the fact" remedies, including revocation, to correct any abuses).

Here, ACC does not dispute the veracity of the statement in the verified notice that UP has challenged or make any independent showing that a genuine controversy exists, and fails to explain why UP's petition to revoke the exemption cannot be decided based on the record before the Board.[17] Nor does ACC show that revocation is necessary under 49 U.S.C. § 10502(d) to

[17] To be sure, in some circumstances, petitions to revoke may raise substantial factual and legal issues that merit a more searching process—either through a petition for an individual exemption under 49 CFR part 1121, or a full application under subpart A of 49 CFR part 1150—designed to elicit a more complete record. See, e.g., Jefferson Terminal R.R. —Acquis. & Operation Exemption—Crown Enters., FD 33950, slip op. at 4-5 (STB served Mar. 19, 2001) (granting petition to reopen and revoke a notice of exemption); Riverview Trenton R.R.—Acquis. & Operation Exemption—Crown Enters., FD 33980, slip op. at 6 (STB served Feb. 15, 2002) (revoking a class exemption because the proposal "warrants more detailed scrutiny than is afforded by the existing record"). But here, no further information is necessary in order for the Board to carefully consider the contentions that the challenged statement is false or misleading. Moreover, neither UP nor ACC requested discovery, despite their ability to do so under the

carry out the national rail transportation policy under 49 U.S.C. § 10101.[18] As the Board observed in Iowa Chi. & E. R.R.—Acquis. & Operation Exemption—Lines of I&M Rail Link, LLC, FD 34177, slip op. at 9 (STB served July 22, 2002), Acquisition Exemption contemplates that generally transactions may be consummated prior to regulatory review, with concerns raised by petitioners addressed through the revocation process of 49 U.S.C. § 10502(d). Contrary to ACC's suggestion, that process is the proper forum in which to resolve the issue presented in UP's petition to revoke, where UP has failed to substantiate its claim that the notice of exemption misrepresented the competitive impact of the transaction, and that determination can be made without the need for additional or protracted proceedings.

ACC's other argument—that "the Notice's statement about BNSF access is a material misleading statement, which independently makes TGSC's exemption void *ab initio*," (ACC Reply 2)—is likewise misplaced. When analyzing a claim that a statement is misleading, the relevant question is whether the Board itself has been materially misled. See Snohomish Cnty., Wash. v. Surface Transp. Bd., 954 F.3d 290, 303 (D.C. Cir. 2020). Applicants have an obligation to present information in a way that is not misleading. Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY Inc. (Eastside), FD 35692 et al., slip op. at 6 (STB served Dec. 22, 2020). And failure to disclose material information can render a verified notice misleading by omission. Id.; San Jacinto Transp. Co.—Operation Exemption—SJRE-R.R. Series—Pet. for Declaratory Ord., FD 35996 et al., slip op. at 4 (STB served Feb. 2, 2022).

The Board's regulations require a notice of exemption to include a brief summary of the proposed transaction. 49 C.F.R. § 1150.33(e). The summary here explains that TGSC would "provide common carrier service within the Park in place of TGSI's current private switching." (Verified Notice 5.) And even though the regulation does not explicitly require the applicant to describe the competitive effects on shippers as a result of the proposed transaction, TGSC provided a concise explanation of the history of the Park and the Board's regulatory oversight of competition at the Park. Specifically, the Verified Notice alerted the Board that the Park was located at Baytown, Texas, which "was an acknowledged 2-to-1 point by the merging parties in the *UP/SP* [merger]," and as such, "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." (Id. at 4.)

TGSC's disclosures explicitly told the Board that the transaction involved the following: conversion of the Park's switching services from private to common carrier, conditions imposed in the UP/SP merger, Baytown's status as a 2-to-1 point, and the concept that shippers in the Park would continue to receive competitive rail service from both UP and BNSF. Although the claims made by ACC (and by UP) relate to these issues, TGSC's disclosures were sufficient to

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Board's regulations. 49 C.F.R. § 1121.2. There is no need or justification for another proceeding, or additional information from TGSC, to enable the Board to resolve the claims made by UP and ACC.

[18] As noted above, the burden of proof is on the party seeking revocation, who must articulate reasonable, specific concerns under the revocation criteria. See supra, page 4; Iowa Chi. & E. R.R.—Acquis. & Operation Exemption—Lines of I&M Rail Link, LLC, FD 34177, slip op. at 4 (STB served Jan. 21, 2003). ACC has made no such showing.

provide the Board (and any interested entities) with appropriate notice of the competitive access implications of the proposed transaction and the relationship between the Verified Notice and the Board's prior merger decision. Neither UP nor ACC contends that it was misled in any way by information contained in the verified notice—or by information that was not provided. Under ACC's mistaken view of the term "misleading," a notice of exemption could be deemed void ab initio simply because it did not disclose that another entity might disagree with its interpretation of Board precedent. The notice of exemption process allows an entity that disagrees with a proposed transaction to express its view and obtain a determination by the agency as to whether revocation is warranted. That is precisely what happened here. Therefore, the Verified Notice was not misleading.

ACC maintains that the statement that the transaction would not impact BNSF access to the Park is misleading because it is "simple and straightforward," when UP's petition indicates the issue of BNSF access is "nonroutine and contentious," (id. at 3). ACC relies on a passage in Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY Inc. (Eastside), FD 35692 et al. (STB served Dec. 22, 2020), which remarked that the verified notice found misleading in that proceeding made a "simple and straightforward assertion" when "the facts surrounding the assertion were hardly simple or straightforward," slip op. at 4, to support its assertion that the statement here should be found "misleading" on a similar rationale. (ACC Reply 3.) But the question of whether an omission or statement rises to the level of being materially misleading is a fact-specific inquiry. In Eastside, the omissions were such that the Board was entirely unaware of underlying property ownership issues and, moreover, they appeared to be part of a pattern of conduct that "flouted the regulatory process" and "undermined the notice-of-exemption process" in that case. Eastside, FD 35692, slip op. at 5-6. In light of the entirety of the circumstances, the Board found that the notice's omission of a series of unauthorized ownership transfers that placed the ownership of the line in question was materially misleading. Id. at 4-6. As the Board explained in Eastside, the applicant had an obligation to present information in a way that was not misleading, and had the Board known the extent of the issues in that docket, the exemption would not have been allowed to go forward. Id. at 6. Likewise, the Board has found that a notice of exemption was materially misleading where the applicant's description of the relevant rail line failed to disclose that the line had yet to be constructed. San Jacinto, FD 35996 et al., slip op. at 4. The omission was materially misleading because had the Board known that the line did not exist, the Board would not have permitted the exemption to go forward. Id. at 5.

Here, by contrast, TGSC's verified notice disclosed that the transaction would result in a change from private to common carriage switching service; that the transaction implicated the terms of the UP/SP merger because the Park is located at a 2-to-1 point; and that the Park had been served by both UP and BNSF. (Verified Notice 4.) The Board enforces the merger conditions and these issues are directly within the Board's purview; and ACC does not challenge the accuracy of these statements. The Board also notes that the class exemption process prescribed at 49 C.F.R. § 1150.31 was used in a prior proceeding involving BNSF interchange

with a newly-formed Class III carrier conducting switching operations at a 2-to-1 point in UP/SP, without comment or controversy.[19]

In sum, ACC's assertion that the verified notice impermissibly "mask[ed] nonroutine or controversial matters involving [the notice]" that rendered use of the class exemption process inappropriate, (ACC Reply 3), is unfounded. Accordingly, the Board finds that TGSC's verified notice was not materially misleading, and ACC's request for revocation on that basis will be denied.

It is ordered:

1. UP's filing of May 3, 2023, BNSF's filing of May 15, 2023, and TGSC's filing of May 23, 2023, are accepted into the record.

2. UP's petition to revoke the exemption is denied.

3. ACC's request to revoke the exemption is denied.

4. This decision is effective on its service date.

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

[19] See San Antonio Cent. R.R.—Lease Exemption—Port Auth. of San Antonio, Docket No. FD 35603 (class exemption proceeding authorizing San Antonio Central Railroad (SAC), a noncarrier, to lease and operate approximately four miles of rail line owned by the Port Authority of San Antonio in San Antonio, Tex.). San Antonio (like Baytown) is a 2-to-1 point, (see UP Pet., Ex. A at 52 (listing San Antonio as a 2-to-1 point)), and the verified notice in Docket No. FD 35603 stated that the newly-formed Class III carrier (SAC) would be able to interchange traffic with both BNSF and UP. See Verified Notice 4, San Antonio Cent. R.R., FD 35603, June 1, 2012.