

SERVICE DATE – JUNE 30, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 32760 (Sub-No. 48)

BNSF RAILWAY COMPANY—PETITION FOR ENFORCEMENT—
SERVICE TO GRANITE MOUNTAIN QUARRIES

Digest:¹ The Board denies the petition for enforcement by BNSF Railway Company (BNSF) seeking enforcement of conditions. The Board finds that BNSF has failed to demonstrate, based on the current record, that it has the right to serve a facility known as Granite Mountain Quarries under the 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 discovery from Union Pacific Railroad Company and file an amended petition based on any additional information that is obtained.

Decided: June 30, 2025

On February 8, 2024, BNSF Railway Company (BNSF) filed a petition seeking enforcement of the Board’s 1996 decision approving the merger between Union Pacific Railroad Company (UP) and Southern Pacific Rail Corporation (SP) (UP-SP Merger). Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Decision No. 44), 1 S.T.B. 233, 364 (1996). BNSF asks the Board to issue an order stating that a facility known as Granite Mountain Quarries (Granite Mountain) is a “2-to-1 shipper facility” located at a “2-to-1 point” pursuant to the terms of the revised BNSF-UP settlement agreement that was imposed as a condition of approval of the UP-SP Merger. BNSF seeks such a determination so that it may invoke what it believes to be its right under the revised settlement agreement to serve Granite Mountain.

For the reasons discussed below, the Board finds that there is insufficient information in the record to determine if Granite Mountain is a 2-to-1 shipper facility. However, the Board finds that there is information in the record to suggest that Granite Mountain may have been served by UP and SP’s predecessor at the time of the UP-SP Merger and, therefore, the Board will provide BNSF an opportunity to take discovery from UP to determine if there is evidence that BNSF could use to supplement its petition.

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).

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 intended, along with certain other conditions, to ameliorate the competitive harms that 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 the 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 Enforcement. BNSF states that in April 2023, Granite Mountain’s owner, McGeorge Contracting Company (McGeorge), requested service from BNSF at Granite Mountain. (Pet. 3.) According to the petition, BNSF contacted UP to request access but UP denied the request, stating that Granite Mountain was not a 2-to-1 shipper under the RASA because it was served by a third carrier at the time of the merger, Little Rock and Western Railway (LRWN). (Id.) BNSF states that it made a second request for access which was also rejected by UP on the ground that SP’s pre-merger ability to access Granite Mountain was limited to certain stations not served by UP. (Id.) In response, BNSF revised its request to be consistent with SP’s pre-merger access rights (i.e., by limiting its request to serve traffic to and from stations not served by UP), but UP again denied the request, citing LRWN’s access. (Id. at 3-4; see also id., Ex. D, Letter from Martucci to Sanford (Aug. 18, 2023).)

BNSF argues that Granite Mountain was a 2-to-1 shipper facility at the time of the UP-SP Merger for two reasons. First, BNSF asserts that the RASA lists Little Rock, Ark., as a 2-to-1 point, and that Granite Mountain is technically located within the boundaries of the Little Rock switching district. (Pet. 5-6.) BNSF explains that although Granite Mountain is not physically within the boundaries of the switching district, a provision in UP’s tariff at the time of the merger (Tariff MP 8170-C) provides that “Granite Mountain Quarries, Drury Spur, AR, will be considered in the switching limits of Little Rock -- North Little Rock, AR” (Id. at 2 n. 2 & Ex. C, Item 2520-2525.) This tariff provision is herein referred to as Item 2525. Second, BNSF asserts that Granite Mountain was open to both UP and SP at the time of the UP-SP Merger; specifically, that the facility was physically served by UP and by SP via reciprocal switching with UP. (Pet. 7.)

In response to UP's assertion that Granite Mountain is not a 2-to-1 shipper because it was also served by LRWN, BNSF claims that LRWN was not, in fact, an option beyond UP and SP. (*Id.* at 7-8.) BNSF argues that, as LRWN could only interchange with UP and SP, LRWN imposed no real competitive discipline on either of the other two carriers. (*Id.*) BNSF also argues that the RASA does not bar BNSF from accessing shippers that SP was only able to partially serve prior to the merger, such as where SP pre-merger could only access a facility to move traffic to and from stations not competitive with MP. (*Id.* at 8-9.) For these reasons, BNSF requests the Board issue an order finding that Granite Mountain is a 2-to-1 shipper under the RASA.

UP's Reply. UP filed a reply to BNSF's petition for enforcement on March 13, 2024. On reply, UP provides a different reason for why Granite Mountain is not a 2-to-1 shipper than the reason UP provided in its last correspondence to BNSF. UP now disputes BNSF's assertion that Granite Mountain was open to both UP and SP. Specifically, UP claims that SP was not able to serve Granite Mountain via reciprocal switching at the time of the merger. (UP Reply 1-3.) UP states that Supplement 149 to Tariff MP 8170-C makes clear that reciprocal switching was available only to those shippers expressly listed in the tariff and that neither Granite Mountain nor McGeorge is on that list.² (*Id.* at 3-5.)

UP further argues that BNSF misunderstands the purpose of Item 2525, which declared that Granite Mountain would be treated as if it were located in the Little Rock switching district. (*Id.* at 3-5.) UP argues BNSF's claim that Item 2525 was intended to give SP reciprocal switching rights to access Granite Mountain is incorrect. (*Id.*) UP argues that, instead, the intent was to allow Granite Mountain the right to utilize "inter-terminal" switching. (*Id.*) According to UP, inter-terminal switching allows only for movements between points "within the switching limits of a station or industrial switching district." (*Id.* at 3 (citing Tariff MP 8170-C).) In support of its claim, UP states that its records show that it has performed over 100 inter-terminal switching moves with LRWN for Granite Mountain and that there are no records of UP having performed a reciprocal switching move for Granite Mountain. (*Id.* at 5.)

BNSF's Reply to UP's Reply (BNSF Rebuttal). On April 2, 2024, BNSF filed a reply to UP's reply.³ BNSF argues that UP's own understanding of its tariff originally was that the

² UP states that its original denial of BNSF's access request, in which it stated that both SP and LRWN had access via reciprocal switching, was incorrect. (*Id.* at 3-4 n.3.)

³ BNSF seeks leave to provide its reply to the UP reply. (BNSF Rebuttal 1 n.2.) UP replied on April 8, 2024, arguing that the Board should reject BNSF's filing as an impermissible reply to a reply. (UP Surrebuttal 1.) UP states, however, that if the Board accepts BNSF's filing, the Board should reject BNSF's proffered interpretation of the tariff. (*Id.*)

Replies to replies are prohibited under the Board's rules. *See* 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. at 2 n.3 (STB served Mar. 28, 2025). The

Granite Mountain facility was open to LRWN and SP for reciprocal switching before the UP-SP Merger. (BNSF Reb. 2.) BNSF further argues that UP's reading of Item 2525 is incorrect. BNSF argues that even though Granite Mountain is not specifically listed as a facility open to reciprocal switching in Tariff MP 8170-C, Item 2525 of the tariff still gave SP some form of access that would qualify the facility as a 2-to-1 shipper under the RASA. (*Id.* at 2 (citing Ex. B, RASA 3 (defining 2-to-1 shippers as facilities served by both UP and SP pursuant to reciprocal switching or "other arrangements"))).

In support of its reading of Item 2525, BNSF notes that that tariff provision only gave Granite Mountain access to stations within the Little Rock terminal that UP itself could not access. (*Id.*) BNSF points out that UP had access to all stations within the Little Rock terminal, meaning there were no receivers to whom Granite Mountain would have been able to ship using the inter-terminal switching rights. (*Id.*) BNSF asserts that Item 2525 would therefore have been meaningless—it would have provided Granite Mountain inter-terminal switching rights but simultaneously excluded all potential destinations. (*Id.*) As such, BNSF argues that Item 2525 must have been intended to give Granite Mountain something other than inter-terminal switching rights. BNSF argues that the more logical reading is that Item 2525 gave SP the right to transport Granite Mountain traffic to stations outside the Little Rock switching district, which is essentially reciprocal switching (even if it was not labeled as such). (*Id.*)

UP's Surrebuttal. In its brief surrebuttal, UP notes that Item 2525, which BNSF relies on for its claim, is in the switching portion of the tariff, suggesting it was indeed referring to inter-terminal switching. (UP Surrebuttal 1.) UP also argues that BNSF's Rebuttal ignores the fact that Granite Mountain was not included among the list of shippers open to reciprocal switching and that UP has no billing records of reciprocally switching Granite Mountain traffic. (*Id.*)

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. 9-11.) On reply, UP states that it agrees that the Board can resolve this dispute (but notes that it does not intend to waive its position that

Board may waive § 1104.13(c) when good cause is shown or when additional information is necessary to develop a more complete record. See S. Orient R.R.—Aban. & Discontinuance of Trackage Rts.—Between San Angelo & Presidio, Tex., 3 S.T.B. 743, 746 (1998); Ocean Logistics Mgmt., Inc. v. NPR, Inc., WCC 102, slip op. at 2-3 (STB served Jan. 14, 2000). Here, there is good cause for accepting BNSF's reply to a reply. In its petition for enforcement, BNSF addressed UP's reason for denying BNSF's access request as provided in UP's last correspondence, i.e., that LRWN also had access to Granite Mountain. (Pet. 1-2, 7-9.) However, in its reply to BNSF's petition, UP provided a different justification for denying BNSF's access, i.e., that SP could not serve Granite Mountain through reciprocal switching at the time of the UP-SP Merger. (UP Reply 2-5.) Because BNSF's reply to the reply responds to arguments raised by UP for the first time on reply, it will be accepted into the record. UP's response to BNSF's Rebuttal also addresses new BNSF arguments and therefore will also be accepted.

disputes such as this arising under RASA should be resolved through private arbitration). (UP Reply 6 n.7.)

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.” (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).

Viewed in isolation, the proper interpretation of Item 2525—including exploration of SP and UP’s historic course of performance under that tariff—is an issue the Board considers more appropriate for arbitration. See Oversight Decision No. 86, 4 S.T.B. at 306. However, given the potential LRWN access issues discussed below, this dispute also raises a question about what constitutes a 2-to-1 point that BNSF has a right to access under the RASA, and resolution of that issue could have broad implications regarding the conditions of the merger and whether they are being implemented in a manner consistent with underlying Board policy. Accordingly, the Board finds 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.

DISCUSSION AND CONCLUSIONS

The Board finds that there is insufficient information in the record to conclusively determine whether Granite Mountain was a 2-to-1 shipper at the time of the merger. UP is correct that the shippers that were open to reciprocal switching at the time of the merger are specifically listed in the tariff, and neither Granite Mountain nor McGeorge is included. However, the parties dispute whether Granite Mountain was open to SP through another tariff provision: Item 2525. UP and BNSF have different interpretations of Item 2525’s purpose. UP argues that this provision was intended to give Granite Mountain the ability to request inter-terminal switching with SP, while BNSF argues it was intended to give Granite Mountain the ability to switch traffic to SP for movement to points outside of the Little Rock terminal.

The Board finds that there is insufficient information to fully support either side’s interpretation. On the one hand, a plain reading of Supplement 149 to Tariff MP 8170-C supports UP’s interpretation. Supplement 149, Item 240-A to the tariff identifies five different types of switching: reciprocal, intermediate, inter-terminal, intra-terminal, and intraplant. Only

“reciprocal switching” is defined as permitting movement “*beyond* the switching limits of a station or industrial switching district.” (UP Reply, Ex. 3 at 5 (emphasis added).) Supplement 149 to Tariff MP 8170-C further limited reciprocal switching to those entities listed in the supplement. (*Id.*) Because Granite Mountain was not physically located within the Little Rock switching district, but also not included on the list of shippers open to reciprocal switching, it would be reasonable to assume that Item 2525 was included in the tariff to place Granite Mountain “within” the switching district and thereby allow it to utilize interterminal and other forms of switching available to shippers within the switching district other than reciprocal switching.⁴ BNSF’s assertion is that Item 2525 in fact granted SP some undefined form of reciprocal switching rights. (BNSF Rebuttal 2 (arguing that Item 2525 was an “other arrangement[]” granting SP access, as contemplated by the RASA).) But if that was UP and SP’s intent, they likely would (or should) have added Granite Mountain or McGeorge to the list of shippers open to reciprocal switching from SP. BNSF also has not presented any evidence to support its claim that its reading of Item 2525 is correct, only that UP’s argument regarding the purpose for Item 2525 must be incorrect.

On the other hand, UP’s reading does not appear to square with the operating limits imposed by Item 2525. By its terms, Item 2525 applies only to or from stations on LRWN and SP “not served by the MP.” (Pet., Ex. C., Item 2520-2525.) Because MP served the Little Rock/North Little Rock stations, BNSF claims that there are no receivers to which Granite Mountain could have shipped using the inter-terminal switching rights. (BNSF Rebuttal 3.) Assuming BNSF is correct, Item 2525 would indeed have been superfluous. Moreover, the fact that UP may have interchanged with LWRN only on inter-terminal moves for Granite Mountain is of little relevance, as the issue here is whether Granite Mountain actually received service *from SP* contemporaneous with approval of the merger.⁵

The Board finds that additional information regarding the nature of any service provided by SP to Granite Mountain at the time of the UP-SP merger could be helpful in determining the meaning of Item 2525. If any additional information exists regarding whether SP provided service to Granite Mountain at the time of the UP-SP Merger, UP is the party most likely to possess such information.⁶ Accordingly, the Board will allow BNSF to take discovery from UP

⁴ It does not appear that shippers receiving access to the other types of switching had to be specifically listed as they did for reciprocal switching. By definition, those other forms of switching applied to any shipper located within the switching district or station. (*See* UP Reply, Ex. 3 at 5 (defining the five types of switching referenced in Supplement 149 to Tariff MP 8170-C).)

⁵ Also, if BNSF’s assertion is correct that there were no stations in the Little Rock/North Little Rock switching district for which shippers could utilize the right to inter-terminal switching, the inter-terminal moves with LWRN would appear not to have been “consistent with the tariff,” as UP claims. (UP Reply 5.)

⁶ UP states that it has no records of reciprocal switching for Granite Mountain, (UP Reply 5), but as noted, under BNSF’s theory, service beyond the Little Rock switching district provided by SP may have been the result of an “other arrangement” that is not specifically

regarding any matter relevant to whether SP provided service to Granite Mountain at the time of the merger. BNSF will have from August 29, 2025, the service date of this decision to take 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 that deadline, or grant an extension of the deadline, this proceeding will be deemed closed without further Board action. If BNSF submits an amended petition, UP will be permitted to reply within 30 days of BNSF's filing.

Matters Requiring Additional Briefing

Even if BNSF is able to provide evidence that SP provided line-haul service to Granite Mountain at the time of the UP-SP Merger, that would not be the end of the Board's analysis. There are two additional matters that the Board would need to address in determining whether BNSF is entitled to access Granite Mountain under the RASA.

First, in its original request to UP seeking access to Granite Mountain, BNSF states that it "intends to serve this facility directly with unit train service planned to commence 45 days from the date of this letter (on or after May 27, 2023)." (Pet., Ex. D, Letter from Mike Martucci to Chris Sandford 1, April 12, 2023.) Item 2525 in Tariff MP 8170-C, however, states as follows: "Granite Mountain Quarries, Drury Spur, AR, will be considered in the switching limits of Little Rock -- North Little Rock, AR, on CL shipments of Sand, Gravel, Stone, including Rip Rap, and articles taking same rates or related thereto." (BNSF Pet., Ex. C.) The "CL" in Item 2525 presumably refers to carload shipments. If so, then BNSF's desire to provide unit train service to Granite Mountain may not be allowed. See Burlington N. Inc.—Control & Merger—Santa Fe Pac. Corp. (BN-SF), 10 I.C.C.2d 661, 729 (1995) (stating that the Board "will not impose a condition that would put its proponent in a better position than it occupied before the consolidation"). Accordingly, if BNSF returns to the Board with evidence that demonstrates that SP was providing line-haul service to Granite Mountain, it must address whether it is seeking greater access than SP was afforded at the time of the UP-SP Merger.

Second, in its original letter to BNSF denying access, UP stated that its "offer of reciprocal switching for Granite Mountain Quarries extended to [LRWN] and St. Louis and Southwestern Railway [SP's predecessor]." (See Pet., Ex. D, Letter from Sanford to Martucci (May 12, 2023).) UP's position appears to have been that Granite Mountain was a 3-to-2 point and therefore not covered by the RASA. As noted, however, UP changed its position once this proceeding was initiated and instead now argues that SP did not have reciprocal switching access to Granite Mountain. (UP Reply 2-5.) However, under Item 2525, it appears that SP and LWRN were given the same exact rights to serve Granite Mountain. Accordingly, if SP did have reciprocal switching access to Granite Mountain (as BNSF claims), it appears that LWRN had such access as well.

BNSF argues that even if LWRN had pre-merger access to Granite Mountain, LWRN had a single rail line extending approximately 80 miles from Little Rock into Central Arkansas,

identified as a reciprocal switching move. Allowing BNSF to take discovery of UP on this issue will ensure a complete review of UP's records is possible.

could interchange only with UP or SP, and thus had no route structure to compete with the combined UP-SP. (Pet. 7.) Therefore, according to BNSF, “LRWN imposed no real competitive discipline on UP or SP, even if LRWN could avail itself of UP reciprocal switch access to the Facility.” (Id. at 7-8.) It contends that for the “competition-preserving purposes of the RASA, the Facility was ‘open to UP and SP . . . and no other railroad.’” (Id. at 8 (citing id., Ex. B., RASA, Definition at 3).) In its reply, UP did not address this issue because, as noted, it provided a different basis for denying BNSF’s access claim.

Accordingly, if BNSF returns to the Board with evidence that demonstrates that SP was providing line-haul service to Granite Mountain, it must also address whether LRWN was afforded the same access and, if so, may supplement its arguments as to why this does not make the facility a 3-to-2 point. As noted, UP will be permitted to submit a reply to BNSF’s filing.

It is ordered:

1. BNSF’s petition seeking enforcement of the conditions imposed on the UP-SP Merger is denied.
2. BNSF’s Rebuttal and UP’s Surrebuttal are accepted into the record.
3. BNSF may take 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 within 30 days of BNSF’s filing.
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.