

SERVICE DATE - MARCH 10, 1997

SURFACE TRANSPORTATION BOARD¹

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY--CONTROL AND MERGER--SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[Decision No. 68]²

Decided: March 5, 1997

In Decision No. 44, we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) subject to various conditions, including the terms of the BNSF agreement and the build-in/build-out condition. Common control was consummated on September 11, 1996.³

¹ Proceedings before the Interstate Commerce Commission (ICC) that remained pending on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

² This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company; and STB Finance Docket No. 32760 (Sub-No. 20), The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Southern Pacific Transportation Company.

³ Union Pacific Corporation is referred to as UPC. Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) were formerly referred to collectively as UP. On
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In this decision, we address the matters discussed in the following pleadings: the petition filed December 19, 1996, by Enterprise Products Company (EPC); the UP/SP-291 reply filed January 8, 1997, by applicants; and the pleading styled "petition and reply" (hereinafter referred to as the P&R pleading) filed January 13, 1997, by EPC.⁴

BACKGROUND

In the earlier phase of this proceeding, EPC, which operates hydrocarbon production facilities at Mont Belvieu, TX, opposed the UP/SP merger on the grounds that the merger would have an anticompetitive impact at these facilities. EPC conceded that these facilities were rail-served, prior to the merger, solely by

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January 1, 1997, MPRR merged into UPRR, see Decision No. 67, slip op. at 1 n.3; and, for the period beginning January 1, 1997, the acronym "UP," as used in this decision, shall be understood to refer to UPRR.

Southern Pacific Rail Corporation is referred to as SPR. Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company are referred to collectively as SP.

UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) were formerly referred to collectively as BNSF. On December 31, 1996, SF merged into BN, and the surviving corporation was renamed The Burlington Northern and Santa Fe Railway Company, see Decision No. 67, slip op. at 1 n.3; and, for the period beginning December 31, 1996, the acronym "BNSF," as used in this decision, shall be understood to refer to the surviving corporation. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

⁴ EPC asks, in its petition filed December 19, 1996, that we entertain that petition and by procedural order afford interested parties 30 days to comment and EPC 15 days to reply. We reject EPC's request, and will adhere to the procedural schedule provided by 49 CFR 1104.13(a), as recently amended in Expedited Procedures For Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527, 61 FR 52710, 52711 (Oct. 8, 1996) (a party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided).

EPC, recognizing that its P&R pleading is subject to being stricken as a reply to a reply, see 49 CFR 1104.13(c) (a reply to a reply is not permitted), asks that this pleading be entertained because, in EPC's view, the UP/SP-291 reply "so egregiously distorts the truth." EPC's P&R pleading at 1. The UP/SP-291 reply, in our view, does not distort the truth, egregiously or otherwise; but, because EPC's P&R pleading sheds light on the nature of the relief sought by EPC, we will not strike it, despite the UP/SP-294 filing on January 17, 1997, that urges rejection of the P&R pleading as a reply to a reply.

SP (via its Baytown Branch), but claimed that the merger would eliminate the potential competition promised by UP's previously announced plans to construct a new Mont Belvieu Branch, which would have extended 10½ miles from the UP line at McNair and which would have directly served several major plastics and petrochemicals plants on SP's Baytown Branch. EPC acknowledged that the Mont Belvieu Branch was not proposed to serve EPC initially, but maintained that, because the Exxon plant that the Mont Belvieu Branch would serve was less than a mile from EPC's facilities, the short extension that would be needed to reach EPC could be justified on economic grounds at an early date. EPC therefore urged the denial of the merger, and added that, if the merger were to be approved, it would have to be conditioned by requiring that UP/SP either (1) build the Mont Belvieu Branch as proposed and grant trackage rights upon it to a competing carrier (BNSF) with no limitations on providing service to additional customers at Mont Belvieu, or (2) authorize a shortline to operate the Baytown Branch and grant trackage rights for multiple railroads to access it at Dayton along the SP Houston-New Orleans mainline and through the interchange point with the UP line at the southern terminus. See Decision No. 44, slip op. at 68.

Despite the opposition expressed by EPC and others, we approved the UP/SP merger because we believed that the merger, subject to the mitigating conditions that we imposed, would be in the public interest, and that any competitive harm would be heavily outweighed by the positive effects and benefits of the merger as conditioned. See, generally, Decision No. 44. The mitigating conditions we imposed included, among many others, the build-in/build-out condition. See Decision No. 44, slip op. at 106 and 146.

We did not impose, however, the two conditions requested by EPC. (1) We denied EPC's condition #1 because a requirement that UP/SP build the Mont Belvieu Branch that had been proposed by UP would have exceeded by far the relief theretofore afforded in the build-in/build-out context; and the excess, we noted, was underscored by the fact that the Mont Belvieu Branch, as initially proposed by UP, would not even have reached EPC. We added, however, that our denial of EPC's condition #1 was without prejudice to EPC's right to invoke the build-in/build-out condition we had imposed on the merger. (2) We also denied EPC's condition #2 because the insertion of a second carrier on SP's Baytown Branch was not necessary to alleviate merger-caused competitive harms and would have vastly improved EPC's competitive options. We noted that, prior to the merger, EPC was rail-served solely by SP, and that, after the merger, EPC would be rail-served solely by UP/SP; and we therefore concluded that the merger would not result in a reduction in EPC's competitive alternatives.

Now, in its petition filed December 19, 1996, EPC argues that it should have access to service by BNSF. EPC claims that it previously had a feasible build-in/build-out option for service by UP, that the UP/SP merger deprived it of that option,

and that, for this reason, BNSF should be authorized to serve EPC as a 2-to-1 shipper.⁵

DISCUSSION AND CONCLUSIONS

EPC contends that the relief it seeks should be provided under the build-in/build-out condition, and insists that its petition does not seek reconsideration or reopening of Decision No. 44. See EPC's P&R pleading at 1-2. We are of the opinion, however, that EPC's petition filed December 19, 1996, should be denied whether it is properly characterized as seeking clarification of our build-in/build-out relief or reopening relief.

Build-In/Build-Out Relief. The CMA settlement agreement, which was entered into by UP/SP, BNSF, and the Chemical Manufacturers Association (CMA), provides a post-merger procedure by which a CMA member may raise a claim that the merger has deprived it of a build-in/build-out option. See Decision No. 44, slip op. at 18 (general description of the CMA agreement) and 146 (description of CMA Paragraph 13, the CMA build-in/build-out procedure). CMA Paragraph 13, from which our build-in/build-out condition is derived, applies to any situation in which a shipper has a facility that, pre-merger, was solely served by SP but could have had a build-in/build-out to a point on UP (and vice versa). The build-in/build-out condition that we imposed in Decision No. 44 expands upon CMA Paragraph 13: by making it applicable to all shippers, not just CMA members; by removing the time limit previously agreed to by UP/SP and CMA; and by clarifying that a shipper invoking this condition need not demonstrate economic feasibility. See Decision No. 44, slip op. at 146; Decision No. 61, slip op. at 13-14 (¶ 5); Decision No. 66, slip op. at 12-13. Both CMA Paragraph 13 and our build-in/build-out condition, however, require that a build-in/build-out line actually be built, either by the shipper or by BNSF, or by any entity other than UP/SP.⁶

⁵ BNSF states that it agrees with EPC's position and is prepared to provide direct service to EPC, provided that we grant EPC the relief it seeks. See BN/SF-79, filed Jan. 24, 1997 (verified statement of a General Director in BNSF's Merchandise Business Unit). See also UP/SP-297, filed Jan. 28, 1997 (UP/SP's reply).

⁶ CMA Paragraph 13 provides, among other things, that the standard for determining whether a shipper asserting a build-in/build-out right "shall be entitled to relief shall be the principles with regard to build-ins articulated by the Interstate Commerce Commission in Finance Docket No. 32549, Decision served Aug. 23, 1995, or, if more favorable to the Shipper, any principles with regard to build-ins articulated by the STB in [its decision in the UP/SP proceeding]." In the Finance Docket No. 32549 proceeding (the BN/SF merger proceeding), the ICC clearly indicated that a build-in/build-out line could be constructed either by the shipper or by the trackage rights carrier, or by any entity other than the merging carrier. See Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The

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Prior to the merger, EPC was solely served by SP but could have had a build-in/build-out to a point on UP. EPC may therefore invoke the build-in/build-out condition, but it can invoke that condition only if either EPC, or BNSF, or any entity other than UP/SP, actually intends to construct a connection between the EPC facilities and a UP line. EPC's pleadings make clear, however, that neither EPC nor BNSF nor any other entity actually intends to construct any such connection. For this reason, insofar as EPC's petition filed December 19, 1996, can be properly characterized as seeking relief under our build-in/build-out condition, that petition must be denied.

EPC claims that, because applicants have not granted BNSF trackage rights to McNair (the point at which a build-in/build-out line would connect to the nearby UP line), it has had no choice but to seek direct service by BNSF at Mont Belvieu. See EPC's P&R pleading at 4. As we have previously noted, however, see Decision No. 61, slip op. at 14 n.35, CMA Paragraph 13 provides that BNSF will be granted any trackage rights that may be necessary for BNSF to reach the build-in/build-out point. EPC is therefore wrong in suggesting that a build-in/build-out cannot run to a line over which BNSF does not already have trackage rights.⁷

Reopening Relief. A proceeding may be reopened upon a showing of material error, new evidence, or substantially changed circumstances. See 49 CFR 1115.3(b), as recently amended in Expedited Procedures For Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527, 61 FR 52710, 52714 (Oct. 8, 1996). See also Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and

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Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Aug. 23, 1995) (Decision No. 38, slip op. at 98). See also Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Nov. 16, 1995) (Decision No. 42, slip op. at 3).

⁷ EPC is also wrong in suggesting that we did not impose any other forms of relief for shippers such as itself. The new facilities condition, one of the several broad-based conditions we imposed in Decision No. 44, requires that BNSF be granted the right to serve new facilities (including transload facilities, and specifically including transload facilities owned or operated by BNSF) on both UP-owned and SP-owned track (including SP's Baytown Branch) over which BNSF will be operating pursuant to trackage rights provided for in the BNSF agreement. See Decision No. 44, slip op. at 106 (third paragraph) and 145-46 (the "new facilities and transloading facilities" requirement). We have also explained that BNSF has been granted access to many 2-1 plastics and chemicals shippers. Thus, the pre-merger level of source and geographic competition has been preserved. That geographic competition provides substantial competitive leverage to exclusively served shippers such as EPC. See Decision No. 44, slip op. at 124-26.

Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Nov. 27, 1995) (Decision No. 43, slip op. at 2).

EPC's characterization to the contrary notwithstanding, its petition amounts to an allegation of material error in Decision No. 44, and the relief EPC seeks would necessarily require the reopening of Decision No. 44 and a change in its result. Furthermore, the relief EPC seeks now could have been sought in the prior phase of this proceeding and, indeed, similar relief (EPC's condition #2) was sought in the prior phase of this proceeding. We will therefore treat EPC's petition filed December 19, 1996, as if it explicitly sought, in addition to the build-in/build-out relief urged by EPC, reopening of Decision No. 44. As so construed, however, that petition must be denied.⁸

EPC claims, in essence, that, as a 2-to-1 shipper, it was adversely affected by the merger. EPC, however, was not a 2-to-1 shipper; it was a 1-to-1 shipper. Prior to the merger, it was rail-served solely by SP; since the merger, it has been rail-served solely by UP/SP; the merger did not result in a reduction in EPC's competitive alternatives. If anything, EPC's competitive alternatives have been expanded by the prospect that new transloading facilities will be established that can be served by BNSF. As applicants have explained:

EPC's situation, however, is no different from that facing any other non-"2-to-1" shipper along UP or SP lines over which BNSF received overhead trackage rights. Those shippers, like EPC, may be able to take advantage of the build-in or transloading conditions the Board imposed, but they are not entitled to direct BNSF service.

UP/SP-294 at 3-4.

EPC has also raised a discriminatory treatment allegation. EPC notes, among other things, that other shippers on the SP Baytown Branch, that are located in or near Mont Belvieu and that would have been served by UP's proposed Mont Belvieu Branch, have been treated as 2-to-1 shippers and, as such, have been given access to BNSF. EPC also notes that other shippers at other locations, that would have lost build-in/build-out opportunities as a result of the merger, have also been identified as 2-to-1 shippers and, as such, have also been given access to BNSF. EPC, demanding equality of treatment, asks that it too be given access to BNSF. However, with respect to at least some of the comparison shippers (those located in or near Mont Belvieu), EPC can not claim to be similarly situated; these shippers would have been served directly by the proposed Mont Belvieu Branch. Moreover, with respect to all of the comparison shippers, we reiterate that the harm sustained by a shipper that has not

⁸ Petitions seeking reconsideration of Decision No. 44 were due by September 3, 1996, see 49 CFR 1115.3(e). The recent revisions to 49 CFR 1115.3 did not change the deadlines applicable to petitions seeking reconsideration. Compare 49 CFR 1115.3(e) (1995) and 61 FR at 52714. Thus, the time period in which EPC could file a petition for reconsideration has long expired.

benefitted from pro-competitive conditions provided for others in settlement agreements is not the kind of harm that should be rectified under the 49 U.S.C. 11344(c) conditioning power. EPC is not concerned that it is losing a transportation option, but only that some of its competitors, and other shippers generally, are gaining one. Given this context, we will not require that a settlement agreement be changed to improve the competitive situation of a particular shipper. See Decision No. 44, slip op. at 183 (Montana Wheat and Barley Committee, Montana Farmers Union, and Governor Racicot), 189-90 (Formosa Plastics Corporation), 191 (International Paper Company and United States Gypsum Company), and 193 (Weyerhaeuser Company). See also Decision No. 66, slip op. at 14 (Railco, Inc.); and Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Aug. 23, 1995) (Decision No. 38, slip op. at 99) (Bunge Corporation).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition filed December 19, 1996, by EPC is denied.
2. This decision shall be effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary