

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. 58]²

Decided: November 15, 1996

In Decision No. 44 (served August 12, 1996), 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)³ 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

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; and 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.

³ Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) are referred to collectively as UP.

Company),⁴ subject to various conditions. Common control was consummated on September 11, 1996.⁵ See UP/SP-277 at 1.

The *Dow/Beaumont condition*, one of a number of conditions we imposed, requires that UP/SP grant trackage rights to a carrier to be named by Dow Chemical Company (Dow), subject to our approval, over UP's line from Texas City to Houston, TX, and over UP's or SP's line from Houston to connections with KCS⁶ and BNSF⁷ at Beaumont, TX, with the right to connect to the proposed Freeport-Texas City build-out line near Texas City to serve Dow at Freeport and any other shippers located on the build-out line. See Decision No. 44, slip op. at 64-66 and 188.

We address here the matters discussed by Dow in its DOW-27 petition for reconsideration filed September 3, 1996, and by UP/SP in its UP/SP-281 reply filed September 23, 1996.

BACKGROUND

The DOW-27 Petition. Prior to the UP/SP merger, Dow's chemical/plastics production facility at Freeport, TX, was rail-served exclusively by UP (via a 10-mile branch line that connects with the UP mainline at Angleton, TX), but had build-out/build-in options to both BNSF and SP, both of which operate rail lines near Texas City, TX. The BNSF option survived the merger; the SP option did not. To replace whatever competition may have been lost, we imposed the Dow/Beaumont condition.

The relief Dow had sought, however, was far broader than the relief we granted. Dow's *primary request* for relief sought trackage rights both for BNSF from Angleton to Texas City and for an SP substitute from Angleton to Houston, New Orleans, LA, and Memphis, TN. Decision No. 44, slip op. at 65. We denied this relief because, by moving the build-out point much closer to Dow, it would have greatly improved, and not merely preserved, the pre-merger status quo. Id. at 188. Dow's *alternative request* for relief sought trackage rights for an SP substitute (other than BNSF) from Texas City to Houston, New Orleans, and Memphis. Id. at 66. This kept the build-out point for the SP substitute

⁴ Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) are referred to collectively as SP.

⁵ Southern Pacific Rail Corporation (SPR) was merged with and into UP Holding Company, Inc., a direct wholly owned subsidiary of Union Pacific Corporation (UPC). UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

⁶ The Kansas City Southern Railway Company is referred to as KCS.

⁷ Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) are referred to collectively as BNSF. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement, which we also imposed as a condition in Decision No. 44).

near Texas City, but overreached by asking that the SP substitute be given trackage rights to New Orleans and Memphis. The preservation of Dow's SP build-out option, we indicated, required only trackage rights from the build-out point to a connection with an independent Class I carrier. We therefore imposed only the Dow/Beaumont condition. Id. at 188.

Dow now argues that the only carrier Dow will be able to choose will be KCS and the only Beaumont connection that carrier will have will likewise be KCS. Dow notes that BNSF can serve Dow via a Freeport-Texas City build-out without the trackage rights we granted for Dow; and that BNSF has shown little interest in its own build-out option.

Dow argues that a KCS connection at Beaumont will be inadequate because KCS' route structure is inferior to SP's. It notes that KCS does not directly reach the Chicago gateway; that KCS gets from Beaumont to the New Orleans gateway only very circuitously; that KCS terminates only a very small percentage of Dow's traffic; and that the additional lengths of haul and traffic volumes available to KCS as a result of a build-out would be less than those that were available pre-merger to SP.

Dow asks that we modify the Dow/Beaumont condition to preserve Dow's pre-merger SP build-out option. Dow offers two proposals. Dow would prefer that we grant trackage rights from Houston to New Orleans and Memphis. Alternatively, it asks that we extend the trackage rights remedy to include *both* connections at Beaumont with KCS and BNSF and connections at Baton Rouge, LA, with KCS and Illinois Central Railroad Company (IC). The Baton Rouge extension, Dow contends, will enhance Dow's ability to replace the SP build-out option by giving Dow access to IC; it will allow Dow's New Orleans gateway traffic to move over direct routes from Baton Rouge to New Orleans via KCS or IC; and it will preserve Dow's single-line access to Chicago, which is reached by IC but not by KCS. Dow adds that, because SP could have offered direct service to both New Orleans and Chicago, the addition of Baton Rouge as a connection point will improve the build-out carrier's incentive to construct the Freeport-Texas City build-out line.

The UP/SP-281 Reply. UP/SP urges denial of Dow's petition because the Dow/Beaumont condition we imposed provided Dow with more than was necessary to preserve Dow's pre-merger competitive position. UP/SP adds that Dow, in suggesting that BNSF is not a potential build-out partner and that the SP substitute will not have a route structure comparable to SP's, has ignored the new routes that BNSF obtained under the BNSF agreement.

DISCUSSION AND CONCLUSIONS

A proceeding may be reopened, and reconsideration may be granted, upon a showing of material error, new evidence, or substantially changed circumstances. 49 CFR 1115.3(b) (1995). 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. 27, 1995) (Decision No. 43, slip op. at 2). Dow has neither presented new evidence nor alleged substantially changed circumstances; its

petition therefore rests upon an assertion of material error. We did not err as claimed by Dow, and we are therefore denying its petition.

Dow, which argues that the Dow/Beaumont condition we imposed in Decision No. 44 does not effectively preserve its pre-merger SP build-out option, makes two proposals, each of which overreaches. As we indicated in Decision No. 44, "[t]he preservation of Dow's SP build-out option requires only that trackage rights run from the build-out point to a connection with an independent Class I carrier." Decision No. 44, slip op. at 188. We have already preserved Dow's SP build-out option by requiring that UP/SP grant trackage rights to a carrier to be named by Dow, subject to our approval, from Texas City to Houston and on to connections at Beaumont with KCS and BNSF, with the right to connect to the build-out line near Texas City. Because Beaumont is the nearest connection with an independent Class I carrier, Beaumont is the point to which the trackage rights should run. We are not persuaded otherwise by the various arguments advanced by Dow.

(1) Dow argues that, although the Dow/Beaumont condition we imposed indicates that the trackage rights carrier will be chosen by Dow, in reality the only carrier Dow will be able to choose will be KCS. This is not true. The condition we imposed permits Dow, either alone or in conjunction with other shippers located on the build-out line: (i) to choose KCS to operate over the build-out line and on to Beaumont; (ii) to make arrangements with an existing shortline railroad to operate over the build-out line and on to Beaumont; or (iii) to create a new shortline railroad to operate over the build-out line and on to Beaumont.

(2) Dow argues that the only realistic Beaumont connection that carrier will have will be KCS. This is incorrect. Dow's various arguments rest upon the notion that its two pre-merger build-out options (to BNSF and to SP) were entirely unrelated and independent; they were not. If the build-out line ever reaches the SP substitute near Texas City, it will first have to cross the BNSF line slightly south/southwest of Texas City; there is, as far as we can tell, no build-out route that can reach the SP line without also reaching the BNSF line. See DOW-11, Tab B, Tab WLG-7 (a map).⁸ If BNSF thereby obtains direct access to the build-out line, BNSF will prefer to use that connection near Texas City, rather than access at Beaumont. In either event, Dow will have a good BNSF connection.

(3) Dow acknowledges that BNSF can serve Dow via a Freeport-Texas City build-out without the trackage rights provided for by the Dow/Beaumont condition, but argues that BNSF has shown little interest in its own build-out option. We doubt that BNSF would have been less likely than an independent SP to build the build-out line. We can see no objective reason to believe that the pre-merger SP would have been any more inclined than was BNSF to build the line. Decisions to build a line of this nature tend

⁸ We are referencing this map, which was submitted under seal, because our observation respecting the build-out route respects a matter that should be obvious on any highly detailed local map.

to reflect hard financial calculations, and, in this instance, the financial calculations would appear to be much the same both for the pre-merger SP and for BNSF.

(4) Dow argues that a KCS connection at Beaumont will not effectively replace its pre-merger SP build-out option. We disagree. KCS can effectively replace the competitive alternative represented by the pre-merger SP build-out option, because it has either single-line or joint-line access to a sufficient range of destinations. Although KCS can only serve many destinations including New Orleans that were open to the pre-merger SP on a joint-line basis with BNSF, BNSF can reach these destinations on a single-line basis. BNSF is certain to play a role in connection with much of the traffic originating on the build-out line, either near Texas City (if it has direct access to the build-out line) or at Beaumont (if it does not).

(5) Finally, Dow argues that allowing it to name a trackage rights carrier all the way to Baton Rouge will enhance Dow's ability to replace the SP build-out option and give the build-out carrier additional incentive to construct the build-out line. But the extensive trackage rights remedy that Dow seeks here is not necessary to maintain the competitive status quo. Both before and after the merger, Dow was served by a single rail carrier. The merger resulted in a loss to it of one of two equally feasible build-out options, neither of which had ever been built. To the extent that a potential SP build-out option provided leverage beyond that supplied by the BNSF build-out option, that leverage was restored by our condition, and no more is required.

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

It is ordered:

1. The DOW-27 petition is denied.
2. This decision shall be effective on November 20, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary