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SERVICE DATE - OCTOBER 5, 1998

SURFACE TRANSPORTATION BOARD

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. 81]

Decided: September 30, 1998

In Decision No. 44, we approved, subject to various conditions, 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).¹ The conditions we imposed included, among many others, the terms of the UP/SP-BNSF settlement agreement.² With respect to the UP/SP-BNSF agreement, we concluded that the agreement was sufficient (with certain modifications) to address the competitive harms of an unconditioned UP/SP merger because “the BNSF agreement will permit BNSF to replace, to a large extent, the competitive service that is lost when SP is absorbed into UP.” See Decision No. 44, slip op. at 103. The common control authorized in Decision No. 44 was consummated on September 11, 1996.

In this decision, we address: BNSF’s petition, filed August 4, 1998, for enforcement of a merger condition with respect to that carrier’s access to a transloading facility at or near San

¹ We gave authority for merger and common control of all carriers controlled by Union Pacific Corporation and by Southern Pacific Rail Corporation. Where we are discussing pre-merger service, references to “UP” include only service by carriers controlled by Union Pacific Corporation. Otherwise, “UP” refers to all of the carriers to which we gave merger authority. “SP” refers to all of the railroads formerly controlled by Southern Pacific Rail Corporation.

² In Decision No. 44, Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) were 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. Accordingly, in this decision: with respect to the period ending December 31, 1996, the acronym “BNSF” has the meaning it had in Decision No. 44; and, with respect to the period beginning January 1, 1997, the acronym “BNSF” has reference to The Burlington Northern and Santa Fe Railway Company. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

Antonio, TX (designated as BN/SF-84); UP's reply thereto filed August 20, 1998 (designated as UP/SP-351); BNSF's petition for leave to file a reply to applicants' reply (designated as BN/SF-85); and UP's reply to BNSF's petition for leave (designated as UP/SP-354).³

BACKGROUND

As part of the UP/SP-BNSF settlement agreement, BNSF gained the right to serve all existing and future transload facilities at specified "2-to-1" points, including San Antonio, TX. See Second Supplemental Agreement section 3(b) (amending section 4(b) of the UP/SP-BNSF settlement agreement). The scope of BNSF's access was further defined by section 9(g) of the settlement agreement, which provides that the locations referenced in the settlement agreement "include all areas within the present designated switching limits of the location."⁴

At issue here is BNSF's access to South Texas Liquid Terminal, Inc. (STL Terminal), a transload facility located on a former Missouri-Kansas-Texas Railroad Company (MKT) line at MKT's Travis Yard that is used by shippers such as Archer Daniels Midland Company (ADM) to transfer corn syrup from rail cars to trucks. According to BNSF, STL Terminal is an existing transload facility that, pursuant to UP's tariff in effect on September 25, 1995, is within the San Antonio switching limits and is therefore open to access by BNSF. In May 1997, petitioner states that UP initially identified STL Terminal as accessible to BNSF as a 2-to-1 transload facility and that BNSF subsequently listed STL Terminal in its quarterly progress reports as a new customer accessible as a result of the merger. UP, however, did not list the facility in its July 1997 and January 1998 lists of customers to which BNSF gained access. After BNSF asked UP to include the facility in its lists, UP advised BNSF in April 1998 of its position that the facility was outside the San Antonio switching limits. By that time, BNSF had executed a contract to move freight to STL Terminal, and volumes had begun to move under that contract. UP also advised shipper ADM that BNSF did not have access to STL Terminal, that BNSF would be billed line haul charges for the movement to STL Terminal, and that ADM should discontinue shipping via BNSF to STL Terminal.

³ We grant BNSF's petition for leave in BN/SF-85. In the interest of a more complete record, we have included both BN/SF-85 and UP/SP-354 in our consideration of the matter before us.

⁴ The effective date for determining the relevant switching limits is the September 25, 1995 date of the UP/SP-BNSF settlement agreement.

BNSF maintains that a 1976 MKT timetable reveals that Travis Yard was within the San Antonio switching limits⁵ and that a UP switching tariff shows that the Travis Yard milepost was within the applicable range for the San Antonio switching district. UP's switching tariff, Supplement 149, Tariff MP 8170-C, issued October 17, 1994, Items 2649.10 and 2650, define the San Antonio switching limits on three UP lines as: (1) between mileposts 255.97 and 267.80 on the Palestine line of the Missouri Pacific Railroad Company (MP); (2) between San Antonio on the north and milepost 4.1 on the south on MP's Corpus Christi line; and (3) between milepost 1028.55 on the north and milepost 1038.5 on the south on the former MKT line. Under description (3), Travis Yard at milepost 1030.3 on the former MKT line would be situated within the San Antonio switching district. Petitioner argues that it is entitled to serve STL Terminal because references to the MKT milepost location of the facility remained in UP's tariff until well after the effective date of BNSF's settlement agreement with UP. BNSF maintains that its current access to a 2-to-1 shipper, Fite Distribution Services Company, located further from central San Antonio than STL Terminal provides additional support for its position.⁶ In addition to confirming its access to STL Terminal, BNSF asks us to require UP to provide a list of switching limits for all 2-to-1 points as set forth in UP tariffs, along with copies of those tariffs, and to impose a continuing duty on UP to provide BNSF with lists of any changes to mileposts defining the switching limits.

UP contends that the tariff item designating the San Antonio switching limits was obsolete on September 25, 1995, because the MKT mileposts referred to in the UP tariff item had been removed and new mileposts has been erected. UP indicates that at least 5 years before the parties entered into their settlement agreement, UP replaced and recalibrated the mileposts along the former MKT line on which the STL Terminal is located. UP states that new mileposts have been physically installed along the line, and these recalibrated mileposts were shown on UP's track charts then in effect. According to UP, under the milepost system as it existed at the time of the settlement agreement, and as it exists today, STL Terminal is located between mileposts 254.40 and 254.00, which places it outside San Antonio switching limits as defined by Item 2649.10 of Tariff MP 8170-C. UP maintains that BNSF's request to require UP to list all switching limits and keep BNSF informed of any milepost changes would confuse rather than clarify access issues and would unduly burden UP.

⁵ MKT System Timetable No. 3 (1976) shows the Travis Yard as located at milepost 1030.3 in the San Antonio Subdivision. We note that a 1988 edition of MKT's timetable shows the same mileage location for Travis Yard.

⁶ UP, however, has convincingly responded that BNSF gained access to Fite, not because it was situated within the San Antonio switching limits, but because Fite was a genuine 2-to-1 shipper specifically listed in UP's tariff as a customer open to reciprocal switching. In contrast, STL Terminal is not listed in UP's switching tariff.

DISCUSSION AND CONCLUSIONS

BNSF has shown to our satisfaction that STL Terminal was within the switching limits of San Antonio as of September 25, 1995. Under the parties' settlement agreement, the geographic limits within which BNSF may serve existing and new transload facilities at San Antonio and other 2-to-1 points are to be determined by reference to designated switching districts in effect on September 25, 1995, when the agreement was executed. See UP/SP-BNSF agreement, section 9(g), supra. As demonstrated by BNSF, an MKT timetable establishes the milepost corresponding to the Travis Yard where STL Terminal was located. BNSF has also shown that, according to UP's switching tariff, the Travis Yard milepost was in the applicable range for the San Antonio switching district. The fact that UP changed the MKT milepost designations before the effective date of the parties' settlement agreement does not undermine BNSF's showing. The San Antonio switching limits set forth in UP's Item 2650 of Supplement 149 were not obsolete on that date and were not canceled until June 1998, some 2.5 years after the execution of the settlement agreement.⁷ Applicable tariff regulations at the time of the parties' agreement mandated the application of tariffs on file with our predecessor, the Interstate Commerce Commission.⁸

If we were to adopt UP's position, BNSF and its potential customers would not be able to ascertain whether they were within a particular switching district by means of publicly available information, but instead would have to be privy to data readily accessible only to UP's operating personnel. The information UP adduces here to support its position that the former MKT milepost designation for San Antonio's switching limits was obsolete is a case in point. As BNSF points out, such track chart data are generally not available to UP's competing carriers, nor to UP's shippers. UP maintains, nonetheless, that BNSF should have known that the MKT mileage ranges were inapplicable because documents produced in negotiating access on behalf of another shipper on the very same MKT line revealed that the former mileposts had been reconfigured. See UP/SP-354, at 3-4. However, even if BNSF may have had a basis for determining that the mileposts had been changed, the process for identifying points accessible to BNSF should not depend on such a restricted source of information.

Although we agree with BNSF that STL Terminal was situated within San Antonio's switching limits at the relevant time for ascertaining BNSF's access, we will not require UP to list

⁷ Effective June 30, 1998, Supplement 271 to Freight Tariff UP 8005-D, Item 1357-A, canceled as "account obsolete" the San Antonio switching district described by the former MKT mileposts.

⁸ See former 49 U.S.C. 10761(a) ("A carrier subject to this subsection may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff . . ."). Although section 10761 was repealed and not reenacted by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), our Decision No. 44 was decided under the law in effect prior to the enactment of the ICCTA.

all of its switching limits and keep BNSF informed of any milepost change within the switching limits. These additional filing requirements would be unduly burdensome and unnecessary, and BNSF points to no other specific access dispute that would support its request. If a dispute about switching limits should arise in the future, UP has stated that it will provide BNSF access to the relevant UP tariffs. We believe that UP's assurances of cooperation are sufficient at this time to address BNSF's concerns. Also, while we have here resolved the issue of whether STL Terminal is within the San Antonio switching limits despite the fact that the issue had not been arbitrated by the parties, any further disputes between BNSF and UP arising under their settlement agreement should be arbitrated under the provisions of that agreement before bringing the matter to us to resolve.

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

It is ordered:

1. The BN/SF-85 petition for leave to file a reply is granted.
2. The BN/SF-84 petition for enforcement of merger condition is granted to the extent set forth in this decision.
3. This decision shall be effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary