

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. 104

Decided: January 21, 2009

In 1996, the Board authorized the merger of the Union Pacific Railroad Company (UP) system and the Southern Pacific Transportation Company (SP) system. The Board conditioned its authorization on UP and SP providing to BNSF Railway Company (BNSF) certain trackage rights over two UP/SP lines. In May 2008, we clarified that the Board had never approved a later agreement between UP and BNSF purporting to expand those trackage rights, and, accordingly, the restrictions on BNSF's trackage rights over those lines remained as originally authorized by the Board. We also explained that, although BNSF's rail operations would have to change as a result of our clarification, BNSF railroad employees were not entitled to employee protective conditions.

Both BNSF and the union representing certain of its employees ask us to revisit our May 2008 decision. Neither challenges the primary conclusion that the authorized trackage rights are those the Board had originally approved in 1996. Rather, BNSF requests that we clarify the statement that “[s]hould the parties mutually agree to broader trackage rights for BNSF intermodal trains, they would need to obtain Board authorization for such rights” Decision No. 103 at 7. In this decision, we clarify that, should a competent tribunal find that UP and BNSF reached a binding agreement to expand those trackage rights, BNSF may ask the Board to authorize that agreement.

Mr. Jay L. Schollmeyer, General Chairman of the United Transportation Union,¹ asks that we reconsider our decision not to impose employee protective conditions. We deny that request. Contrary to the Union's claim, the theory underlying our earlier decision does not constitute a changed circumstance justifying reconsideration. Nor did the Board materially err in

¹ Earlier in the proceeding, Mr. John D. Fitzgerald, Mr. Schollmeyer's predecessor, filed on behalf of United Transportation Union. For convenience, we will refer to them collectively as “the Union.”

declining to impose employee protective conditions because the May 2008 decision did not authorize the discontinuance of any trackage rights.

BACKGROUND

The facts concerning this proceeding are set forth more fully in earlier decisions in this proceeding.² The pertinent facts are set forth below.

The Original Trackage Rights Agreement. As a condition of approval of the merger between the UP and SP rail systems, the Board imposed the terms of a voluntary agreement reached by UP, SP, and BNSF (BNSF Agreement). That agreement provided for BNSF to have trackage rights over many rail lines throughout the UP/SP system. As pertinent here, Section 1(g) of the BNSF Agreement granted trackage rights allowing BNSF to operate over two former SP rail lines that converge on Sacramento, CA: the Cal-P and Elvas-Stockton lines. These trackage rights applied only to BNSF trains that had a prior or subsequent movement over either of two SP rail corridors—the Central Corridor main line (to the east via Weso, NV) or the I-5 Corridor (roughly north-south and parallel to Interstate 5 from Keddie, CA, to Bieber, CA). The Board explained that these trackage rights, as crafted, would ameliorate competitive harms that otherwise would be generated by the merger. UP/SP Merger, 1 S.T.B. at 419.

The Restated Agreement. In 2001, during the fifth year of the Board’s formal oversight of the effects of the UP/SP merger, UP and BNSF submitted for agency approval what they characterized as a “restated” version of the BNSF Agreement (Restated Agreement). According to the parties, the Restated Agreement: (1) implemented various post-merger Board decisions that had clarified and supplemented the BNSF Agreement, and (2) included certain voluntary amendments to the BNSF Agreement. UP and BNSF provided to the Board a list of the principal changes to the BNSF Agreement. The list indicated that the new agreement simply “restated” the language of the trackage rights on the Cal-P and Elvas-Stockton lines. But the actual wording of Section 1(g) of the Restated Agreement omitted the restriction that intermodal trains using these lines had to have a prior or subsequent movement over either the Central Corridor or the I-5 Corridor. Because no party made any mention of this substantive change, the Board believed that the Restated Agreement carried forward the initially approved, restricted trackage

² Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) (UP/SP Merger); 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, Finance Docket No. 32760, Decision No. 103, slip op. at 2-5 (STB served May 1, 2008).

rights for those lines. In approving the Restated Agreement, the Board specifically limited its approval insofar as the terms were consistent with the conditions imposed in UP/SP Merger.³

BNSF's Use of the Cal-P and Elvas-Stockton Lines for Intermodal Trains. Before 2002, BNSF offered only limited intermodal service to and from Oakland. BNSF routed these trains over its own track between Richmond and Stockton.⁴ After the completion of a new intermodal facility in Oakland in 2002, BNSF continued to move these trains on its Richmond-Stockton line. As this intermodal traffic increased, however, the City of Richmond began to complain about blocked streets, delayed traffic, and horn noise. These complaints and the limited speed at which rail traffic could move through Richmond prompted BNSF to look for another way to move its trains between Oakland and Stockton. The alternative route it found was over the Cal-P and Elvas-Stockton lines. Beginning in 2004, BNSF started moving over those lines intermodal trains that did not have a prior or subsequent movement over the Central Corridor or the I-5 Corridor.

UP's Petition for Reformation. In 2007, UP filed a Petition asking the Board to reform Section 1(g) of the Restated Agreement to reinstate the Central Corridor and I-5 Corridor restrictions for BNSF intermodal trains. UP contended that these movements interfered with UP's own freight operations, contributed to delays experienced by commuter and Amtrak trains on the Cal-P line, and, if allowed to continue, would impair UP's ability to compete for growing traffic to and from the Port of Oakland. UP argued that the parties had mistakenly omitted the restrictions when they reworded the Cal-P and Elvas-Stockton trackage rights in Section 1(g) of the Restated Agreement. BNSF opposed UP's request, disputing that the parties had made a mistake and contending instead that they had agreed to the removal of the corridor restrictions. Separately, claiming that its members would be affected by the requested contract reformation, the Union sought the imposition of protective conditions for the benefit of those employees should the Board rule in UP's favor.

Decision No. 103. In May 2008, the Board found that the authorized trackage rights over the Cal-P and Elvas-Stockton lines were as stated in the original BNSF Agreement rather than as provided in the Restated Agreement. The Board explained that it had approved the Restated Agreement in 2001 only to the extent it was consistent with the BNSF Agreement and subsequent Board interpretations. The Board reasoned that the original, restricted trackage rights

³ 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 (General Oversight), STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 21, slip op. at 6, 13 (STB served Dec. 20, 2001).

⁴ BNSF had previously obtained the right to operate over the short segment of the Cal-P line between Oakland and Richmond. UP does not dispute BNSF's right to use this small segment.

over these lines were designed to ameliorate a lessening of competition in the I-5 and Central corridors because of the merger of UP and SP. But the Board found that it did not need to ameliorate any loss of competition between Oakland and Stockton because, both before and after the UP/SP merger, BNSF had its own line connecting those points. The Board also explained that, if the parties should mutually agree to broader trackage rights for BNSF intermodal trains, they would need to obtain Board authorization for such rights. Decision No. 103 at 7.

In addressing the issue of employee protective provisions raised by the Union, the Board recognized that BNSF would have to cease using the Cal-P and Elvas-Stockton lines for trains whose routes did not comport with the corridor restrictions. But the Board found that the Interstate Commerce Act does not require employee protective conditions when, as here, the Board merely clarifies that certain existing operations were never authorized in the first place. In addition, the Board explained that the Union had not demonstrated any reason to expand the coverage of the employee protective conditions previously imposed on both the merger and the associated trackage rights.

DISCUSSION AND CONCLUSIONS

BNSF’s Petition for Clarification. BNSF does not dispute the Board’s conclusion in Decision No. 103 that the Board never approved the removal of the corridor restrictions on the trackage rights over the Cal-P and Elvas-Stockton lines. But BNSF points to the Board’s statement that “[s]hould the parties mutually agree to broader trackage rights for BNSF intermodal trains, they would need to obtain Board authorization for such rights, under 49 U.S.C. 11323(a)(6).” Decision No. 103 at 7. BNSF expresses concern that the Board may have foreclosed BNSF from seeking Board authorization for the expanded trackage rights under Section 1(g) of the Restated Agreement by means of an existing mutual agreement. According to BNSF, UP has already agreed voluntarily—and not as the result of a mistake—to removal of the corridor restrictions for BNSF intermodal trains on the Cal-P and Elvas-Stockton lines. BNSF states that it intends to seek an arbitral decision confirming that position. BNSF asks us to clarify that it may seek Board authorization under section 11323(a)(6) for the expanded trackage rights in Section 1(g) of the Restated Agreement if an arbitrator confirms BNSF’s position.

We will clarify Decision No. 103. If BNSF obtains a decision from a competent tribunal that the parties had mutually agreed to, or entered into a valid contract for, expanded trackage rights in Section 1(g) of the Restated Agreement, that finding would provide the basis for BNSF to pursue Board authorization for those trackage rights under section 11323(a)(6).⁵ The

⁵ Contrary to UP’s claim, in Decision No. 103, we did not resolve the dispute between it and BNSF over whether they had mutually agreed to the expanded trackage rights in Section 1(g) of the Restated Agreement or whether that expansion of BNSF’s trackage rights resulted from a mistake. This was consistent with our precedent. See Lackawanna County Railroad Authority—Acquisition Exemption—F&L Realty, Inc., STB Finance Docket No. 33905, et al.,

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possibility that UP made a mistake does not require, as UP argues, that we find some sort of mutuality of agreement that exceeds what is required to bind the parties under state law. The tribunal's determination would demonstrate that the parties had indeed entered into a written binding agreement for the expanded trackage rights, notwithstanding UP's claims.⁶ Should BNSF then file a request for authorization of the trackage rights, UP, and any other affected party, would have the opportunity to argue to the Board that authorizing the expanded trackage rights would disserve the public interest.⁷ And, of course, BNSF would be free to argue the contrary.

UP also argues that BNSF has waited too long to seek Board approval of these expanded trackage rights. But even though a party should obtain Board approval before it begins new trackage-rights operations, we have permitted carriers to remedy such oversights by seeking and getting approval after the fact.⁸

The Union's Petition for Reconsideration. The Board will grant a petition for reconsideration only if the petitioner shows that the prior action will be affected materially because of new evidence or changed circumstances or the prior action involves material error. See 49 U.S.C. 722(c); 49 CFR 1115.3(b). Here, the Union maintains that the Board committed material error in its earlier decision and claims that reconsideration is appropriate because of changed circumstances.

First, the Union contends that the theory underlying Decision No. 103 constitutes a materially changed circumstance because the Board's legal analysis differs from the legal arguments in both UP's request for reformation of the trackage rights in the Restated Agreement and BNSF's opposition to that request. The argument is unavailing. Reconsideration is available under 49 CFR 1115.3(b)(1) when "[t]he prior action will be affected materially by . . . changed circumstances." Thus, a changed circumstance justifying reconsideration necessarily concerns something extrinsic to, and usually occurring after, a Board decision. See, e.g., West Texas Utilities Company v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 41191, slip op. at 5-7 (STB served Sept. 10, 2007) (reopening proceeding and vacating rate prescription based on the cumulative impact of, among other things, major mergers

(. . . continued)

slip op. at 6 (STB served Oct. 22, 2001) (denying parties' requests to interpret contracts involving trackage and operating rights). We express no opinion on whether an arbitrator or a state court would be the appropriate tribunal for addressing that dispute.

⁶ See 49 U.S.C. 11323; 49 CFR 1180.2(d)(7).

⁷ See 49 U.S.C. 11324(c).

⁸ ParkSierra Corporation (Successor-in-Interest to California Northern Railroad Company Limited Partnership)—Lease and Operation Exemption—Southern Pacific Transportation Company, STB Finance Docket No. 34126, et al. (STB served Dec. 26, 2001).

and changes in traffic patterns). But the Union does not state that any extrinsic circumstance has changed since we issued Decision No. 103.

Alternatively, the Union claims that the Board committed material error because employee protection provisions are mandatory under the Interstate Commerce Act, as amended. But the relevant statutory provision, 49 U.S.C. 11326(a), requires the Board to impose employee protection provisions only when the Board grants approval for certain transactions, including mergers. The Union does not dispute that in UP/SP Merger the Board imposed all of the employee protection required for a merger.⁹ Instead, the Union appears to argue that Decision No. 103 effected a discontinuance of trackage rights, thus requiring the Board to impose the employee protections adopted in Oregon Short Line Railroad and the Union Pacific Railroad Company—Abandonment—Goshen, 360 I.C.C. 91 (1979).

The Union is incorrect. Decision No. 103 did not authorize the discontinuance of trackage rights. It merely clarified the extent of BNSF's existing trackage rights. In so doing, Decision No. 103 noted that BNSF had never obtained the necessary regulatory approval for expanding BNSF's trackage rights over the Cal-P and Elvas-Stockton lines. The Union does not challenge this determination.

In summary, the Union has not demonstrated either a materially changed circumstance or a material error. Consequently, the petition for reconsideration of Decision No. 103 is denied.

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

It is ordered:

1. BNSF's petition for clarification is granted as explained in this decision.
2. The Union's petition for reconsideration is denied.

⁹ These conditions included provisions for the benefit of employees affected by (1) the consolidation of the UP and SP rail systems and the trackage rights imposed as a condition of approval of that consolidation (both of which are required by 49 U.S.C. 11326(a)) and (2) the related discontinuances of rail service (as required by 49 U.S.C. 10903(b)(2)). UP/SP Merger, 1 S.T.B. at 452-54.

3. This decision is effective on February 21, 2009.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey. Vice Chairman Mulvey commented with a separate expression.

Anne K. Quinlan
Acting Secretary

VICE CHAIRMAN MULVEY, commenting:

As I explained in my dissent to Decision No. 103, I believe the majority wrongly decided UP's petition for reformation and request for clarification in the first instance, and I continue to hold that belief. I vote with the majority in this decision insofar as it guides UP and BNSF.

I am sympathetic to the union's concerns, but recognize that there is no statutory basis on which the Board may provide new protective conditions or expand conditions previously imposed in this proceeding. I also note that the majority found it unlikely that any BNSF employees would be adversely affected as a result of Decision No. 103 because of the nearby, alternative BNSF route for its trains that it may no longer route over UP's lines under that decision.