

SURFACE TRANSPORTATION BOARD<sup>1</sup>

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. 60]<sup>2</sup>

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)<sup>3</sup> 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

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<sup>1</sup> Proceedings pending before the Interstate Commerce Commission (ICC) 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.

<sup>2</sup> 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.

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

Company),<sup>4</sup> subject to various conditions. Common control was consummated on September 11, 1996.<sup>5</sup>

In this decision, we address the matters discussed: (i) by Mr. Charles W. Downey in his CWD-3 petition to reopen filed September 3, 1996; and (ii) by UP/SP in its UP/SP-282 reply filed September 23, 1996.

#### BACKGROUND

We noted, in Decision No. 44, that the settlement agreements entered into by UP/SP included one entered into with Gateway Western Railway Company (GWWR). Decision No. 44, slip op. at 9 & n.8. We also noted that Mr. Downey, a general chairman of the United Transportation Union (UTU) for lines of GWWR and SPCSL, had argued: that the agreement entered into with GWWR would alter the work arrangements applicable to GWWR and SPCSL operations, and impair the rights of persons employed by GWWR and SPCSL in the Chicago-St. Louis territory of the former Chicago, Missouri & Western Railway Company (CMW); and that fairness to employees of both GWWR and SPCSL required that an implementing agreement be arrived at for the GWWR agreement prior to consummation of the UP/SP merger, and that the GWWR agreement be subject to the full reach of the New York Dock conditions.<sup>6</sup> Decision No. 44, slip op. at 88. In denying Mr. Downey's requests, we explained: that the arrangements provided for in the GWWR agreement did not require our approval, which necessarily meant that there was no basis for imposing labor protection with respect to GWWR employees; and that the New York Dock conditions we had imposed upon the UP/SP merger itself would adequately protect SPCSL employees from any merger-related adverse impacts. Decision No. 44, slip op. at 175.

**The CWD-3 Petition.** Mr. Downey advances two arguments in his CWD-3 petition.<sup>7</sup>

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<sup>4</sup> 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.

<sup>5</sup> Southern Pacific Rail Corporation (SPR) was merged with and into UP Holding Company, Inc., a direct wholly owned subsidiary of Union Pacific Corporation (UPC). See UP/SP-277 at 1. UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

<sup>6</sup> New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock).

<sup>7</sup> Mr. Downey also contends that the Board's Secretary has denied him access to the transcript of the oral argument we held on July 1, 1996, and has advised him that the transcript can be purchased from the reporter. He maintains that this practice is contrary to the availability mandated by the Administrative Procedure Act and has prejudiced him in the preparation of his petition. CWD-3 at 3 n.3. Mr. Downey, however, has not been denied access to the oral argument paper transcript. In fact,

(continued...)

(1) Mr. Downey contends that all employees affected by the transaction, including those employed by carriers that entered into settlement agreements with applicants, should be protected. CWD-3 at 2. Mr. Downey concedes that the GWWR agreement, standing alone, may be non-jurisdictional; he notes, however, that the GWWR agreement was intended to facilitate the UP/SP merger, and that accordingly we should impose the New York Dock conditions to protect any employees affected by the settlement between UP/SP and GWWR.

(2) Mr. Downey contends that our approval of the merger rests partially upon our "finding" that railroad competition has thrived despite the mergers of the past decade and a half, "with the average rate per ton declining more than 37% from 1981 through 1993." CWD-3 at 2, citing Decision No. 44, slip op. at 104 & n.99, 119, and 245. Mr. Downey argues that the 1995 staff study we cited in Decision No. 44<sup>8</sup> has never been formally "announced" either by the ICC or by the Board. Furthermore, Mr. Downey insists that rail rates have not declined over the past decade and a half. Mr. Downey argues that rail rates have increased 44% between 1980 and 1991. Mr. Downey therefore urges

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<sup>7</sup>(...continued)

the Secretary's Office has allowed Mr. Downey's counsel, Mr. Gordon MacDougall, to inspect the paper transcript. As we explained in Expedited Procedures For Processing Rail Rate Reasonableness, Exemption And Revocation Proceedings, STB Ex Parte No. 527 (STB served Nov. 15, 1996), slip op. at 4,

the Board's contract with the court reporter prohibits the copying of the draft or final paper transcript. . . . The individual can inspect, but not copy, the transcript at the Board; alternatively, the individual can purchase the transcript from the court reporter. Finally, individuals may obtain for free a copy of the microfilm version of the transcript when it becomes available.

The transcript referred to by Mr. Downey is the "raw" version, not the final official transcript. When the Board receives the final official transcript from the reporter, that document will be placed in the public docket and be available on microfilm. See also 49 CFR 1001.1 (1995) (transcripts and other files and records in the custody of the Secretary are available to the public and may be inspected at our Washington office upon reasonable request during business hours); 49 CFR 1002.1(h) (1995) (transcript of testimony and of oral argument, or extracts therefrom, may be purchased by the public from the official reporter); 49 CFR 1113.17(d) (1995) (free copies of the transcript will not be furnished to any party to any proceeding); and Expedited Procedures For Processing Rail Rate Reasonableness, Exemption And Revocation Proceedings, STB Ex Parte No. 527 (STB served Oct. 1, 1996), slip op. at 2 n.3.

<sup>8</sup> ICC, Office of Economic and Environmental Analysis, Rail Rates Continue Multi-Year Decline, 1995 (herein referred to as the 1995 staff study). See Decision No. 44, slip op. at 104 n.99. See also CWD-3, Appendix 1 (a copy of this 2-page study).

that we find the 1995 staff study to be invalid and that we disclaim reliance upon declining rail rates.

**The UP/SP-282 Reply.** UP/SP insists that Mr. Downey has offered no basis for imposing either mandatory or discretionary labor protective conditions on the GWWR agreement. The fact that the GWWR agreement might have "facilitated" the UP/SP merger, UP/SP contends, is not enough; our merger jurisdiction does not extend to a settlement that merely "facilitates" a merger; and this particular settlement, UP/SP adds, does not come within our pooling jurisdiction (see 49 U.S.C. 11342). The general rule, UP/SP notes, is that labor protection is not provided to employees of a non-applicant carrier. UP/SP concedes that an exception to this rule applies where the non-applicant employees qualify as "joint employees" of an applicant carrier and a non-applicant carrier, which they argue is not the situation here. With respect to Mr. Downey's claim that rail rates have increased over the past decade and a half, UP/SP contends, first, that our rejection of Mr. Downey's request for labor protection had nothing at all to do with that issue. And UP/SP insists that, in any event, our finding that rail rates have fallen since 1980 is correct and is confirmed by all reliable studies. See UP/SP-282 at 5-8.<sup>9</sup>

#### DISCUSSION AND CONCLUSIONS

*Applicable Standards.* A proceeding may be reopened, and reconsideration 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). Mr. Downey has neither presented new evidence nor alleged substantially changed circumstances; and his petition therefore rests upon an assertion of material error. We did not err as claimed by Mr. Downey, and we are therefore denying his CWD-3 petition.

*Protective Conditions.* We addressed this aspect of Mr. Downey's argument in our prior decision. See Decision

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<sup>9</sup> We will deny Mr. Downey's CWD-4 motion to strike portions of the UP/SP-282 reply. Mr. Downey contends that UP/SP has mischaracterized his arguments, but this contention, whether true or false, is of no consequence because our denial of the CWD-3 petition does not turn upon the alleged mischaracterizations; rather, we are denying the CWD-3 petition because the arrangements provided for in the GWWR agreement are non-jurisdictional, and because the employees of GWWR are employees of a non-applicant carrier. Mr. Downey further contends that a 1994 Association of American Railroads (AAR) study cited by UP/SP rests primarily upon an earlier version of our own discredited (in Mr. Downey's view) 1995 staff study; and, Mr. Downey adds, the 1994 AAR study is not only "new evidence," it is new evidence that was privately produced and is largely unavailable. Our denial of the CWD-3 petition, however, does not turn upon the merits and availability, or lack thereof, of the AAR study.

No. 44, slip op. at 175 (footnote omitted): "The arrangements provided for in the GWWR agreement are non-jurisdictional, which necessarily means that there is no basis for imposing labor protection with respect to GWWR employees; and the New York Dock conditions will adequately protect SPCSL employees from any merger-related adverse impacts." See also Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133, Decision No. 25 (ICC served Mar. 7, 1995) (UP/CNW) (slip op. at 96) ("Protection for employees of carriers other than the primary applicants is unwarranted, because labor protective conditions are designed to protect only employees of railroads participating in transactions."). See also Rio Grande Industries, et al.--Control--SPT Co., et al., 4 I.C.C.2d 834, 955 (1988) (DRGW/SP) ("Labor protection conditions are designed to protect only employees of railroads participating in transactions.").

We are not persuaded by the various arguments advanced by Mr. Downey in support of an extension of labor protection to GWWR employees.

(i) Mr. Downey notes that the UP/SP merger itself requires our approval (i.e., is "jurisdictional"), and he insists that the GWWR agreement has facilitated the UP/SP merger. We may assume, for present purposes, that the GWWR agreement did facilitate the merger. The fact remains, however, that the arrangements provided for in the GWWR agreement are still non-jurisdictional. We cannot assert jurisdiction over a settlement merely because it satisfies the concerns of a carrier that might otherwise have been a merger opponent.

(ii) Mr. Downey cites various cases, including Kansas City Southern Industries, Inc., The Kansas City Southern Railway Company and K&M Newco, Inc.--Control--MidSouth Corporation, MidSouth Rail Corporation, MidLouisiana Rail Corporation, SouthRail Corporation and TennRail Corporation, Finance Docket No. 32167 (ICC served May 4, 1994) (KCS/MidSouth), for the proposition that employees of a non-applicant carrier can receive labor protection in certain situations. This, however, "has typically involved a situation where the non-applicant employees became joint or common employees of the applicant and non-applicant carriers." KCS/MidSouth, slip op. at 3 (footnote omitted). See also DRGW/SP, 4 I.C.C.2d at 956-57 (certain employees were "joint employees" of an applicant carrier and two non-applicant carriers). There is, however, no evidence of record in the present proceeding that GWWR employees are "joint or common employees" of GWWR and SPCSL.

(iii) Mr. Downey cites Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 618 (1982) (UP/MP/WP) for the proposition that, where a settlement agreement is involved, labor protective conditions may be imposed in favor of employees of a non-applicant carrier. The UP/MP/WP settlement agreement referenced by Mr. Downey, however, involved a pooling arrangement, which was subject to ICC jurisdiction under 49 U.S.C. 11342. "Because the pooling arrangement [was] intended as a substitute for the trackage rights originally sought," the applicants voluntarily accepted the labor protective conditions

applicable to trackage rights. UP/MP/WP, 366 I.C.C. at 618. In the present case, however, the arrangements provided for in the GWWR agreement are not subject to our jurisdiction, under either 49 U.S.C. 11342 or 49 U.S.C. 11343.

*Rate Studies.* Mr. Downey has, at best, offered only a tenuous nexus between the relief he seeks and our use of the most recent in a series of ICC studies of rail freight rates. He states:

The Board's use of the "Rate Decline" report for February 1995 impacts the tenor of Decision 44 in all its phases, including employee conditions and oversight to commence October 1.

CWD-3 at 7. Nonetheless, we will address his arguments with respect to our use of this study.

ICC staff had prepared five studies showing a continuing decline in rail rates since passage of the Staggers Rail Act of 1980, as measured by inflation-adjusted revenue per ton.<sup>10</sup> Each was issued with a press release and noted in the ICC's annual reports to Congress and in ICC Congressional testimony.<sup>11</sup>

A sixth ICC staff study (the 1995 staff study) found that the average rail rate per ton had declined more than 37% on an inflation adjusted basis from its peak in 1981 through 1993, as compared to the 33% decline through 1991 found in the next most recent study. While not accompanied by a press release, this study was made available to any party who inquired about its availability, and was referenced approvingly by the United States Department of Transportation in its brief. See DOT-4 at 23. In Decision No. 44, it is referred to twice (at 104 and 119) to show that rail rates have continued to decline since 1980 even as the number of Class I railroads has decreased, primarily through numerous mergers, from 26 to 10.

Mr. Downey's concern that it is somehow improper to adjust rail revenues using the GDP implicit price deflator is misplaced, and his cite of the use by the Federal Energy Regulatory Commission (FERC) of another deflator in an entirely different context is misleading. See CWD-3 at 7. In fact, using data from electric utilities regulated by FERC, and applying, as the ICC did, implicit GDP price deflators to adjust for the effects of inflation, the Energy Information Administration of the United States Department of Energy (DOE) found that "the average

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<sup>10</sup> The average rate was calculated using a "Tornqvist" index. Rate changes for nine (inclusive) rail commodity groups were aggregated by weighting each by its annual share of rail revenue. The underlying data came from the annual railroad Freight Commodity Statistics.

<sup>11</sup> As noted by applicants, these ICC studies have been accepted and/or corroborated, in whole or for important rail commodities such as coal and grain, by the Association of American Railroads, the Energy Information Administration of the United States Department of Energy, the United States General Accounting Office, and the Economic Research Service of the United States Department of Agriculture. See UP/SP-282 at 5-8.

transportation cost for contract coal shipped by railroads fell by 19 percent, from \$11.08 per ton in 1988 to \$8.93 in 1993," and that, due to increases in lengths of haul, "the average rate per ton-mile (i.e., the average rate per ton, per mile shipped) fell by 28 percent between 1988 and 1993."<sup>12</sup>

Finally, the data Mr. Downey presents in an attempt to discredit an AAR rate study referenced by applicants<sup>13</sup> (to corroborate our assessment that rail rates have declined) only emphasizes how conservative the series of ICC studies was in measuring the competitive gains to rail shippers since enactment of the Staggers Rail Act of 1980. Mr. Downey notes that the average rail length of haul increased by almost one-third from 1980 to 1994 (from 615.8 to 816.8 miles) and that rail rates often taper with distance. Mr. Downey asserts that this means the AAR study is flawed, because it tracks rail revenues per ton-mile over time. He believes that a part of the decrease it measures must be related to the distance taper. But the ICC studies are based on a scientifically weighted index of rail revenues per ton, and these indices have actually understated the post-Staggers decline in rail rates to the extent they have not taken into account the increase in rail revenues per ton brought about by increases in the average length of haul. This effect can be seen in the DOE study noted above because it provided measures of both revenue per ton and per ton-mile.

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

It is ordered:

1. The CWD-4 motion to strike is denied.
2. The CWD-3 petition is denied.
3. This decision shall be effective on November 20, 1996.

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

Vernon A. Williams  
Secretary

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<sup>12</sup> Energy Policy Act Transportation Rate Study: Interim Report on Coal Transportation, October 1995, at ix.

<sup>13</sup> The 1994 AAR study, Railroad Freight Rates Since Deregulation, is discussed by applicants in UP/SP-282 at 5, and by Mr. Downey in CWD-4 at 3-4.