

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. 74]²

Decided: August 25, 1997

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) 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)³ subject to various

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 In Decision No. 44: Union Pacific Corporation was referred to as UPC; Union Pacific Railroad Company was referred to as UPRR; Missouri Pacific Railroad Company was referred to as MPRR; UPRR and MPRR were referred to collectively as UP; Southern Pacific Rail Corporation was referred to as SPR; Southern Pacific Transportation Company was referred to as SPT; St. Louis Southwestern Railway Company was referred to as SSW; SPCSL Corp. was referred to as SPCSL; The Denver and Rio Grande Western Railroad Company was referred to as DRGW; SPT, SSW, SPCSL, and DRGW were referred to collectively as SP; and UPC, UP, SPR, and SP were referred to collectively as "applicants."

MPRR, SPCSL, and DRGW were recently merged into UPRR (MPRR, on January 1, 1997; SPCSL and DRGW, on June 30, 1997). Accordingly, in this decision: with respect to the period prior to January 1, 1997, the term "applicants" has the meaning it had in Decision No. 44; with

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conditions, including the terms of the BNSF agreement⁴ and a condition (referred to as the contract modification condition) that required UP/SP to modify, immediately upon consummation of the merger, any contracts with shippers at 2-to-1 points incorporated within the BNSF agreement to allow BNSF access to at least 50% of the volume. See Decision No. 44, slip op. at 106 (third paragraph, last clause) and 146 (the "opening contracts at 2-to-1 points" requirement). The common control authorized in Decision No. 44 was consummated on September 11, 1996. See also Decision No. 57 (served November 20, 1996) (clarifying the contract modification condition).

In this decision, we address the 2-to-1 status issue presented in the MONT-13 petition filed on July 24, 1997, by Montell USA, Inc. (Montell),⁵ and in the replies thereto filed by applicants (UP/SP-308, filed on August 11, 1997) and BNSF (BN/SF-82, filed on August 13, 1997).⁶

BACKGROUND

Decision No. 44: Montell's Interests. Montell, which operates a plant in the West Lake Charles, LA, area: produces primarily polypropylene and polyethylene; relies almost exclusively on rail to ship its products to market; relies on rail for the storage of its products; and relies on rail for the receipt of raw materials. Montell ships most of its outbound freight to points in the Eastern United States via four "Eastern Gateways" (Chicago, IL, St. Louis, MO, Memphis, TN, and New Orleans, LA). In addition, Montell ships some of its outbound freight to Houston, TX.

Prior to the UP/SP merger, Montell's plant was served by an SP single-line routing (to the Eastern Gateways and Houston) and a KCS-UP joint-line routing (via DeQuincy, LA, to Houston

³(...continued)

respect to the period beginning January 1, 1997, and ending June 30, 1997, the term "applicants" has reference to UPC, UPRR, SPR, SPT, SSW, SPCSL, and DRGW; with respect to the period beginning July 1, 1997, the term "applicants" has reference to UPC, UPRR, SPR, SPT, and SSW; and, with respect to the period beginning January 1, 1997, the acronym "UP" has reference to UPRR.

⁴ 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).

⁵ The MONT-13 petition, as initially filed on July 24, 1997, did not carry the "MONT-13" designation. That designation was supplied by a subsequent errata filing (MONT-14, filed on August 11, 1997).

⁶ Montell served the MONT-13 and -14 filings on: applicants; BNSF; ARCO Chemical (the new owner of the Lake Charles area plant formerly owned by Olin Corporation, see Decision No. 44, slip op. at 66-67); PPG Industries, Inc. (another shipper with a plant in the Lake Charles area, see Decision No. 44, slip op. at 69); The Kansas City Southern Railway Company (KCS); and the United States Departments of Justice and Transportation. Montell, which has promised that any other party that may be interested in the MONT-13 petition may secure a copy upon request, has asked us to waive any requirement that it serve the petition upon any parties other than those named in the preceding sentence. This request is reasonable (this decision will be served on all parties of record in Finance Docket No. 32760), and we will therefore grant it. See, e.g., Decision No. 45 (served August 23, 1996), slip op. at 1 (granting a request to limit the service requirement otherwise applicable to a pleading because "[t]he service list in this proceeding includes numerous persons who have no particular interest in" the matters discussed in that pleading).

and New Orleans, and via Texarkana, TX/AR, to Chicago, St. Louis, and Memphis).⁷ Montell was concerned that the UP vs. SP competition that existed prior to the merger for traffic moving from, to, or via the four Eastern Gateways and Houston would cease to exist post-merger, leaving Montell captive to UP/SP. Montell argued that the KCS-BNSF joint-line routings that existed pre-merger were too circuitous to provide effective competition to the single-line routings of a merged UP/SP; and Montell observed that the BNSF agreement, as originally drafted, simply did not provide for BNSF interchange line haul rights at West Lake Charles. Montell acknowledged that the CMA agreement⁸ purported to address competitive problems in the Lake Charles area of Louisiana, but Montell insisted that the CMA solution was deficient in four respects: (a) BNSF was granted access to shippers at Lake Charles and Westlake,⁹ but not to Montell at West Lake Charles; (b) BNSF was granted access only to facilities then open to three carriers (UP, SP, and KCS), whereas Montell's facility was then open only to two carriers (SP and KCS); (c) BNSF was allowed to handle traffic moving between the covered points, on the one hand, and, on the other, New Orleans or the Mexican border, but was not allowed to handle traffic that prior to the merger moved KCS-UP from/to Houston, Chicago, St. Louis, or Memphis; and (d) for some traffic, BNSF was subject to an "access fee" that amounted to a "phantom" charge that would apply even if BNSF were to provide direct service. See Decision No. 44, slip op. at 66-67.

Decision No. 44: Our Lake Charles Solution. We noted, in Decision No. 44, that the UP/SP merger, if not properly conditioned, was likely to have an anticompetitive impact vis-à-vis plastic and chemical shippers (such as Montell) that operated plants located at any of the three rail stations (Lake Charles, Westlake, and West Lake Charles) in the Lake Charles area. We noted: that, prior to the merger, these plants had access to SP and KCS, and some had access to UP as well via haulage or reciprocal switching; that, however, KCS had to interline with UP or SP to provide efficient routings to the New Orleans, Houston, and St. Louis gateways; and that, for these reasons, prior to the merger these shippers benefitted from direct rail competition, and unconditioned merger would place all their efficient rail routings under applicants' control.

We further noted, in Decision No. 44: that Paragraph 8 of the CMA agreement amended the original BNSF agreement to give BNSF the right to handle traffic of Lake Charles and Westlake shippers open to all of UP, SP, and KCS for traffic moving (a) from, to, and via New Orleans and (b) to or from points in Mexico via the Texas border crossings at Eagle Pass, Laredo, or Brownsville; and that, on brief, applicants had extended this relief to incorporate West Lake Charles traffic open to SP and KCS. We concluded, however, that the relief provided in CMA Paragraph 8, even as extended on brief, would be inadequate, primarily because any KCS routing from/to Chicago or St. Louis would still include a connection with applicants at Shreveport or Texarkana, thus giving applicants control of a "bottleneck" for these movements. We also noted that the key role of storage-in-transit facilities for plastics shippers further complicated this situation.

Accordingly, to preserve existing competitive alternatives for shippers in the Lake Charles area, we required applicants to modify the BNSF agreement: (1) to allow BNSF to use its Houston-to-Memphis trackage rights to interline with KCS at Shreveport, LA, and Texarkana, TX/AR (this was intended to permit the substitution of a post-merger KCS-BNSF joint-line routing via Texarkana and Shreveport for the pre-merger KCS-UP joint-line routing via Texarkana; (2) to remove the geographic restrictions on direct BNSF service to Lake Charles, Westlake, and West

⁷ KCS itself could have provided single-line service to New Orleans, but the KCS single-line routing was too circuitous to be competitive with the SP single-line routing.

⁸ The "CMA agreement" is the settlement agreement that applicants entered into on April 18, 1996, with BNSF and the Chemical Manufacturers Association (CMA). See Decision No. 44, slip op. at 18 (description of the CMA agreement).

⁹ The point referred to in Decision No. 44 as "West Lake" (two words) is actually known as "Westlake" (one word). See Decision No. 63 (served December 4, 1996), slip op. at 2 n.8.

Lake Charles shippers (this was intended to permit BNSF to serve all destinations from these points); and (3) to eliminate the "phantom haulage fee" that applicants apparently intended to charge BNSF to access traffic at Westlake and West Lake Charles. See Decision No. 44, slip op. at 152-54.

Decision No. 44: The Contract Modification Condition. Paragraph 3 of the CMA agreement provided that, immediately upon consummation of the merger, applicants would have to modify any contracts with shippers at 2-to-1 points in Texas and Louisiana to allow BNSF access to at least 50% of the volume. In Decision No. 44, we ordered that this provision be extended to shippers at all 2-to-1 points incorporated within the BNSF agreement, not just 2-to-1 points in Texas and Louisiana. The extension of this provision to all 2-to-1 points, we noted, "will help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations." See Decision No. 44, slip op. at 146.

Montell's Petition For 2-to-1 Status. In the MONT-13 petition, which was filed pursuant to Decision No. 57,¹⁰ Montell asks that we determine that Montell's West Lake Charles facility is a 2-to-1 point for purposes of the contract modification condition.¹¹

DISCUSSION AND CONCLUSIONS

We hold that, because Montell (at West Lake Charles)¹² was not a 2-to-1 shipper immediately prior to the consummation of the merger, it will not be regarded as a 2-to-1 shipper for the purposes of the contract modification condition.¹³

We have previously made 2-to-1 shipper status determinations in several situations. See Decision No. 44, slip op. at 186 (first full paragraph) (held, CPSB is not a 2-to-1 shipper for

¹⁰ See Decision No. 57, slip op. at 13-14 (although we suggested that disputes respecting implementation of the contract modification condition might best be resolved in arbitration, we affirmed that we were prepared to resolve such disputes if they were brought before us). See also Decision No. 72 (served May 23, 1997), slip op. at 8 (footnote omitted) ("[A]ny beneficiary of the Decision No. 44 conditions has the right to seek relief from the Board if it believes that these conditions have not been implemented in a manner that achieves their competition-preserving objectives."). Because Montell seeks only a determination that its West Lake Charles facility is a 2-to-1 point for purposes of the contract modification condition, we reject applicants' suggestion, see UP/SP-308 at 4-6, that the MONT-13 petition amounts to a late-filed reconsideration request.

¹¹ The MONT-13 request is a shipper-specific version of a broader request previously made by BNSF in its BNSF-PR#1 "Progress Report and Operating Plan" filed October 1, 1996, wherein BNSF asked that we clarify the 2-to-1 status of Lake Charles, Westlake, and West Lake Charles. See BNSF-PR#1 at 13 n.8. In Decision No. 57, we declined, on procedural grounds, to address this matter, which had been "included in [a] footnote[] in a lengthy pleading the title of which gives no indication that it contains a clarification request." See Decision No. 57, slip op. at 14.

¹² The UP letter attached to the MONT-13 petition as Exhibit A references two Montell locations: Bayport, TX, and West Lake Charles, LA. The MONT-13 petition itself, however, seeks clarification only with respect to the West Lake Charles facility. For this reason, this decision addresses the status of the West Lake Charles facility only.

¹³ To avoid any confusion, we wish to make clear that, in denying the MONT-13 petition for a declaration of 2-to-1 status for the purposes of the Decision No. 44 contract modification condition, we are also denying this petition insofar as it seeks a declaration of 2-to-1 status for the purposes of CMA Paragraph 3. See Decision No. 57, slip op. at 7 n.31.

purposes of the conditions imposed in Decision No. 44);¹⁴ Decision No. 57, slip op. at 6-7 (held, LCRA/Austin is not a 2-to-1 shipper for purposes of the contract modification condition);¹⁵ Decision No. 57, slip op. at 7-8 (held, Entergy is not a 2-to-1 shipper for purposes of the contract modification condition).¹⁶ In each of these situations, we have interpreted our contract modification condition according to the plain language used in, and clear intent expressed for, imposing the condition. Requiring that UP's and SP's contracts at 2-to-1 points be reopened was an extraordinary condition we imposed to assure that UP/SP would not have so much of this traffic tied up in contracts as to prevent BNSF from obtaining sufficient traffic density to be an effective competitor in these markets.¹⁷

The fact patterns respecting CPSB, LCRA/Austin, and Entergy are not precisely the same as the fact pattern respecting Montell. But the principle established in making these prior 2-to-1 status determinations is applicable in the present context. For purposes of the contract modification condition (and also for purposes of CMA Paragraph 3), a shipper is entitled to 2-to-1 status only if, immediately prior to the merger, that shipper had access both to UP and to SP, and to no other railroad. Because Montell fails this test, it is not entitled to 2-to-1 status for purposes of the contract modification condition.

Montell and BNSF urge a "2-to-1 shipper" definition broader than the one we adopted in Decision No. 44 and adhered to in Decision No. 57. Their definition would encompass any shipper that would have lost competitive rail service had the merger not been conditioned. See MONT-13 at 3. See also BN/SF-82 at 5-6 (the definition urged by BNSF would encompass any shipper that was "functionally" 2-to-1, or that was 2-to-1 "for all practical purposes"). The arguments made by Montell and BNSF confuse anticompetitive impact with 2-to-1 status. We agree that a shipper like Montell at West Lake Charles would have suffered an anticompetitive impact had the merger not been conditioned in the manner in which we conditioned it; that is precisely the reason we conditioned it in that manner; but that does not make such a shipper a "2-to-1" shipper for purposes of the contract modification condition.

When we imposed the contract modification condition, we intended that this condition would apply only to those shippers that had 2-to-1 status immediately prior to the consummation of the

¹⁴ The City Public Service Board of San Antonio is referred to as CPSB. CPSB's relevant plants are located in Elmendorf, TX, and therefore come within the geographical coverage of *both* the Decision No. 44 contract modification condition *and* CMA Paragraph 3. As noted in Decision No. 57, however, aside from the difference in geographical scope (our contract modification condition applies across the entire UP/SP system, whereas CMA Paragraph 3 applies only in Texas and Louisiana), we have insisted upon a uniform application of our contract modification condition and CMA Paragraph 3. See Decision No. 57, slip op. at 7 n.31.

¹⁵ The Lower Colorado River Authority and the City of Austin, TX, are referred to collectively as LCRA/Austin. LCRA/Austin's relevant plant is located in Halsted, TX.

¹⁶ Entergy Services, Inc., and two of its affiliates are referred to collectively as Entergy. Entergy's relevant plant is located at White Bluff, AR.

¹⁷ We imposed the contract modification condition in order to assure BNSF's traffic density. We therefore think it appropriate to note that neither BNSF nor Montell has given any meaningful indication that extension of the contract modification condition to Montell at West Lake Charles is necessary to "help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations." See Decision No. 44, slip op. at 146. In fact, as applicants note, there is reason to believe that the "BNSF trackage rights operations in the areas that would be impacted if Montell were able to exercise the contract modification condition -- the Houston-New Orleans and Houston-Memphis corridors -- are firmly established and providing highly competitive service today." UP/SP-308 at 8.

merger.¹⁸ And, as we said in Decision No. 57, "[w]e think it appropriate to note that, in taking this approach, we are not depriving any shipper of any right to which it is entitled; rather, we are merely denying a few shippers the windfall that a more elastic approach would have allowed." See Decision No. 57, slip op. at 6.¹⁹

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

It is ordered:

1. Montell's request regarding limited service of its MONT-13 and -14 filings is granted, subject to the condition that Montell serve copies of these filings upon any additional party requesting such service.
2. The MONT-13 petition is denied.
3. This decision shall be effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹⁸ In approving the UP/SP merger, we imposed, among other conditions, an oversight condition to allow us to examine whether the conditions we imposed have effectively addressed the competitive problems they were intended to remedy, see Decision No. 44, slip op. at 107 and 146. We expressly reserved jurisdiction over the merger proceeding and all embraced proceedings in order to implement the oversight condition and, if necessary, to impose further conditions or to take such other action as might be warranted, see Decision No. 44, slip op. at 231 (ordering paragraph 6). In 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 (Oversight), Finance Docket No. 32760 (Sub-No. 21) (STB served May 7, 1997), we instituted a proceeding to implement the oversight condition, and we have received comments from interested parties. One of the issues raised involves the functioning of the contract modification condition that we imposed in Decision No. 44 and clarified in Decision No. 57, and we will address that issue as part of our oversight proceeding. That is the appropriate forum now for considering fundamental changes in conditions imposed to remedy competitive harms.

¹⁹ While such a shipper may be a 2-to-1 shipper, that shipper's traffic already has been committed either to UP or to SP under a contract that was formed when two-carrier competition was available." See Decision No. 57, slip op. at 6.