28758 SERVICE DATE - JANUARY 7, 1998
EB

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. 77]

Decided: January 2, 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

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[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

(continued...)

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: the petition for clarification filed November 14, 1997, by BNSF with respect to that carrier's access to New Orleans, LA; and the reply filed December 4, 1997, by UP.[3]

BACKGROUND

The UP/SP-BNSF settlement agreement gave BNSF trackage rights to serve 2-to-1 shippers in the New Orleans area. As part of the settlement agreement, BNSF also obtained an option to purchase the SP line between Iowa Junction and Avondale, LA, and related facilities. BNSF exercised this option, and purchased this line on December 11, 1996.[4] In addition, the settlement agreement gave BNSF trackage rights over SP's line between Houston, TX, and UP's Westwego intermodal facility, including a connection to lines serving New Orleans terminal facilities, permitting interchange with the other rail carriers serving New

[2](...continued) op. at 12 n.15 (description of the BNSF agreement).

[3] The petition for clarification is designated and referred to herein as BN/SF-83. The reply is designated UP/SP-330.

[4]After BNSF's purchase, UP retained trackage rights permitting it to serve all local industries on that line. See UP/SP-BNSF settlement agreement §5(g).

Orleans. Prior to the agreement and merger, BNSF did not have access to New Orleans or the shippers located on the Iowa Junction-Avondale line. UP indicates that, in September 1996, over two months prior to selling the Avondale line, it modified its switching arrangements for the New Orleans switching district so as not to include BNSF. UP states that this action was taken to ensure that it would continue to provide reciprocal switching only for those carriers with which it previously had a switching relationship in New Orleans, which did not include BNSF.[5]

BNSF now asks that we require UP to restore the language of its prior switching agreement, which would enable BNSF to access applicants' shippers in New Orleans pursuant to that switching agreement, which it was not able to do under the agreement before the merger. Specifically, petitioner requests that, with respect to traffic moving to or from western points, including Mexico, UP be directed to open via reciprocal switching any UP or SP shipper location in the New Orleans switching district that could have received service pre-merger from both UP and SP via direct service or reciprocal switching. BNSF argues that, although UP's New Orleans shippers could receive service from more than two carriers before the merger, BNSF's lack of access deprives these shippers of any effective competitive alternative to UP's service with respect to origins or destinations in the western United States or Mexico. BNSF contends that UP's switching amendments defeat these shippers' expectations that BNSF would have access to their facilities as SP had prior to its merger with UP.

UP maintains that BNSF's petition must be viewed either as an untimely, unjustified request to reopen the merger proceeding to impose a new condition, or as an attempt to place an issue before us that the parties' settlement agreement commits to arbitration.[6] UP indicates that, although more than a year has passed since it amended its switching arrangements to make clear that BNSF does not have access to UP shippers in the New Orleans area, BNSF has not presented any evidence that such shippers or

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[5] UP explains that the switching arrangements at issue reflect mutually beneficial agreements among all of the railroads serving New Orleans shippers to serve each others shippers.

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the area have suffered competitive harm as a result of the merger. UP contends that BNSF has not demonstrated any merger-related justification for obtaining access to UP's shippers.

DISCUSSION AND CONCLUSIONS

BNSF's petition will be denied to the extent it seeks clarification of Decision No. 44. There we conditioned our approval of the UP/SP merger on applicants' granting BNSF access to "2-to-1" shippers, by which we meant "shippers who [prior to the merger had] rail service from UP and SP and no other railroad." See Decision No. 44, slip op. at 16. As BNSF itself acknowledges (BN/SF-83, Rickershauser V.S. at 9), New Orleans-area shippers are "not technically . . . '2-to-1' customers as defined in the BNSF Settlement Agreement." A shipper is only a 2-to-1 shipper "[w]hen no third carrier is present . . .," which is clearly not the case here. Decision No. 44, slip op. at 121.

Nevertheless, BNSF relies on the fact that, in addition to conditioning merger approval on BNSF's access to 2-to-1 shippers, we required UP to grant BNSF access to Lake Charles-area shippers and interchange rights relating to the Martin Lake plant of Texas Utilities Electric Company near Henderson, TX. BNSF argues (BN/SF-83 at 7-8) that these other conditions show that we have granted relief to shippers where route circuity or other service impediments effectively limit their competitive opportunities, and that we should grant relief for New Orleans-area shippers for similar reasons, which allegedly would make them 2-to-1 shippers.

BNSF's argument is misplaced. Although we have granted relief for shippers other than 2-to-1 shippers in appropriate circumstances, that does not make them 2-to-1 shippers. Indeed, we specifically ruled that Lake Charles-area shippers are not 2-

to-1 shippers as that term is used in Decision No. 44. See Decision No. 74, served August 29, 1997, slip op. at 5.[7]

But moving beyond the specific issue of whether a shipper is a 2-to-1 shipper, we also find that the petition has not demonstrated that the merger has caused any competitive problem for New Orleans area shippers that requires corrective action. Thus, we will also deny BNSF's petition to the extent that it could be construed to request reopening of Decision No. 44 and imposition of a new condition on the merger. BNSF filed its petition for relief almost one year after UP amended its New Orleans switching arrangements. Yet no shipper has shown that the inability to reach BNSF through reciprocal switching has caused it competitive harm.

The shippers in New Orleans that are served by UP/SP and open to reciprocal switching are open to four other railroads. These shippers do not appear to have lost any significant rail competition as a result of the merger. BNSF submitted supporting statements from nine shippers, four of which have facilities in New Orleans.[8] But a review of these statements demonstrates that none of the nine shippers claims to have yet suffered any competitive harm as a result of the merger. No shipper indicates on this record that its rates have risen or that its service has suffered as a result of any merger-related market power exercised by UP/SP. Moreover, no shipper provides evidence of any delayed or time sensitive traffic discussed by BNSF in its petition. As

[7] We clarify that it was not our intent in Decision No. 44 that BNSF be given access to New Orleans shippers. In discussing the competitive benefits of the settlement agreement, we noted that, in addition to 2-to-1 shippers, the agreement had identified a number of 2-to-1 corridors, including the Houston-New Orleans corridor. "BNSF would be given overhead trackage rights over those corridors, but it would only have authority to serve shippers at 2-to-1 points." Id. at 122 (emphasis added). Thus, BNSF was given access to New Orleans to enable it to interchange with eastern carriers, but not to serve all New Orleans shippers served by UP/SP.

[8] Continental Grain Company filed a separate supporting statement on December 8, 1997. Applicants replied to Continental's statement on December 12, 1997.

mentioned by these shippers, many of the shipments at issue move to or from New Orleans by water; such shipments could be rerouted to other ports if rail rates to New Orleans do not remain competitive.

UP has shown that very little of its pre-transaction New Orleans traffic moved from or to points where UP or SP provided the only efficient routings. For most of this traffic, competitive routings can be still be constructed using BNSF connections with Kansas City Southern Railway Company (KCS), Illinois Central Railroad Company (IC), Norfolk Southern Railway Company, and CSX Transportation, Inc., which are all available to originate or terminate traffic of these shippers moving to or from New Orleans through direct service or reciprocal switching. There may be minor exceptions for routings to nearby Lake Charles and Houston, and the Mexican gateways, traffic that represents only about 370 total carloads a year.[9] BNSF, however, has not demonstrated that, given the very high switching fee of $495 that existed between UP and SP before the merger, service made possible by reciprocal switching was a meaningful competitive consideration for these relatively short movements.

In any event, in Decision No. 44 we imposed a coherent set of conditions that seems to be working well to date in preserving competition. One of those conditions was that we would exercise 5 years of oversight to ensure that merger-related competitive problems do not develop. At this point, we are disinclined to reopen the merger to impose an additional condition such as what is sought by BNSF in the absence of a showing of competitive harm. Although considerable time has passed since the merger was

[9] UP has demonstrated that only a small amount of traffic moves between its New Orleans shippers and points such as Lake Charles, LA, Houston, TX, or Mexican ports of entry — locations where, pre-merger, UP and SP provided the only efficient routing and where, post merger, BNSF interchange with IC or KCS might result in a circuitous routing. UP indicates that, although 33,936 cars of traffic moved in the year ending September 1997 to and from the New Orleans-area shippers served directly by UP (including SP) and open to reciprocal switching, only about 370 cars moved to or from points in western Louisiana and southern Texas that were served prior to the merger by both UP and SP. UP indicates that these traffic data have been verified by John H. Ransom, UP/SP's manager for interline marketing.

implemented, since UP modified its switching arrangements, and since BNSF exercised its purchase option, no New Orleans shipper has shown that its inability to reach BNSF through reciprocal switching has caused competitive harm. If a reciprocal switching arrangement would be beneficial to its operations, BNSF should negotiate with UP/SP and seek to obtain one in exchange for granting UP considerations, such as access to other BNSF shippers. We see no reason to interfere with that process under these circumstances. We will continue, however, to monitor this situation and others as part of our oversight program.

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

<u>It is ordered</u>:

1. The BN/SF-83 petition is denied.

2. This decision shall be effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

28758
EB

SERVICE DATE - JANUARY 7, 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

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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-83 petition is denied.

2. This decision shall be effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

28758
EB

SERVICE DATE - JANUARY 7, 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

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BNSF's argument is misplaced. Although we have granted relief for shippers other than 2-to-1 shippers in appropriate circumstances, that does not make them 2-to-1 shippers. Indeed, we specifically ruled that Lake Charles-area shippers are not 2-

to-1 shippers as that term is used in Decision No. 44. See Decision No. 74, served August 29, 1997, slip op. at 5.[7]

But moving beyond the specific issue of whether a shipper is a 2-to-1 shipper, we also find that the petition has not demonstrated that the merger has caused any competitive problem for New Orleans area shippers that requires corrective action. Thus, we will also deny BNSF's petition to the extent that it could be construed to request reopening of Decision No. 44 and imposition of a new condition on the merger. BNSF filed its petition for relief almost one year after UP amended its New Orleans switching arrangements. Yet no shipper has shown that the inability to reach BNSF through reciprocal switching has caused it competitive harm.

The shippers in New Orleans that are served by UP/SP and open to reciprocal switching are open to four other railroads. These shippers do not appear to have lost any significant rail competition as a result of the merger. BNSF submitted supporting statements from nine shippers, four of which have facilities in New Orleans.[8] But a review of these statements demonstrates that none of the nine shippers claims to have yet suffered any competitive harm as a result of the merger. No shipper indicates on this record that its rates have risen or that its service has suffered as a result of any merger-related market power exercised by UP/SP. Moreover, no shipper provides evidence of any delayed or time sensitive traffic discussed by BNSF in its petition. As

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[7] We clarify that it was not our intent in Decision No. 44 that BNSF be given access to New Orleans shippers. In discussing the competitive benefits of the settlement agreement, we noted that, in addition to 2-to-1 shippers, the agreement had identified a number of 2-to-1 corridors, including the Houston-New Orleans corridor. "BNSF would be given overhead trackage rights over those corridors, but it would only have authority to serve shippers at 2-to-1 points." Id. at 122 (emphasis added). Thus, BNSF was given access to New Orleans to enable it to interchange with eastern carriers, but not to serve all New Orleans shippers served by UP/SP.

[8] Continental Grain Company filed a separate supporting statement on December 8, 1997. Applicants replied to Continental's statement on December 12, 1997.

mentioned by these shippers, many of the shipments at issue move to or from New Orleans by water; such shipments could be rerouted to other ports if rail rates to New Orleans do not remain competitive.

UP has shown that very little of its pre-transaction New Orleans traffic moved from or to points where UP or SP provided the only efficient routings. For most of this traffic, competitive routings can be still be constructed using BNSF connections with Kansas City Southern Railway Company (KCS), Illinois Central Railroad Company (IC), Norfolk Southern Railway Company, and CSX Transportation, Inc., which are all available to originate or terminate traffic of these shippers moving to or from New Orleans through direct service or reciprocal switching. There may be minor exceptions for routings to nearby Lake Charles and Houston, and the Mexican gateways, traffic that represents only about 370 total carloads a year.[9] BNSF, however, has not demonstrated that, given the very high switching fee of $495 that existed between UP and SP before the merger, service made possible by reciprocal switching was a meaningful competitive consideration for these relatively short movements.

In any event, in Decision No. 44 we imposed a coherent set of conditions that seems to be working well to date in preserving competition. One of those conditions was that we would exercise 5 years of oversight to ensure that merger-related competitive problems do not develop. At this point, we are disinclined to reopen the merger to impose an additional condition such as what is sought by BNSF in the absence of a showing of competitive harm. Although considerable time has passed since the merger was

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[9] UP has demonstrated that only a small amount of traffic moves between its New Orleans shippers and points such as Lake Charles, LA, Houston, TX, or Mexican ports of entry — locations where, pre-merger, UP and SP provided the only efficient routing and where, post merger, BNSF interchange with IC or KCS might result in a circuitous routing. UP indicates that, although 33,936 cars of traffic moved in the year ending September 1997 to and from the New Orleans-area shippers served directly by UP (including SP) and open to reciprocal switching, only about 370 cars moved to or from points in western Louisiana and southern Texas that were served prior to the merger by both UP and SP. UP indicates that these traffic data have been verified by John H. Ransom, UP/SP's manager for interline marketing.

implemented, since UP modified its switching arrangements, and since BNSF exercised its purchase option, no New Orleans shipper has shown that its inability to reach BNSF through reciprocal switching has caused competitive harm. If a reciprocal switching arrangement would be beneficial to its operations, BNSF should negotiate with UP/SP and seek to obtain one in exchange for granting UP considerations, such as access to other BNSF shippers. We see no reason to interfere with that process under these circumstances. We will continue, however, to monitor this situation and others as part of our oversight program.

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-83 petition is denied.

2. This decision shall be effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary