

SURFACE TRANSPORTATION BOARD

STB 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. 75]

Decided: October 24, 1997

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 BNSF agreement;² and a condition, referred to as the "new facilities condition," which requires that BNSF be granted the right to serve new facilities (including transload facilities, and specifically including transload facilities owned or operated by BNSF) on both SP-owned and UP-owned track over which BNSF has received trackage rights in the BNSF agreement. See Decision No. 44, slip op. at 106 (third paragraph) and 145-46 (the "new facilities and transloading facilities" requirement). Insofar as the new facilities condition concerns transload facilities, it is referred to as the "transload condition." See Decision No. 61, slip op. at 2.

In this decision, we address: the joint petition filed August 8, 1997, by BNSF and R.R. Donnelley & Sons Company (Donnelley) for enforcement of the transload condition; and the reply filed August 28, 1997, by applicants.³

BACKGROUND

THE TRANSLOAD CONDITION. In Decision No. 44, we imposed, as a component of the new facilities condition to this merger, the transload condition:

The BNSF agreement, as amended . . . , grants BNSF the right to serve any new facilities located post-merger on any SP-owned line over which BNSF receives trackage rights in the BNSF agreement. The BNSF agreement further provides, however, that the term "new

¹ We gave authority for merger and common control of all the 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).

³ The joint petition is designated "BN/SF-81, RRD-1" and is referred to herein as BN/SF-81. The reply is designated UP/SP-315.

facilities” does not include expansions of or additions to existing facilities or load-outs or transload facilities. We require as a condition that this provision be modified in two respects: first, by requiring that BNSF be granted the right to serve new facilities on both SP-owned and UP-owned track over which BNSF will receive trackage rights; second, by requiring that the term “new facilities” shall include transload facilities, including those owned or operated by BNSF.

Decision No. 44, slip op. at 145-46. We explained that we were imposing "a number of broad based conditions that augment the BNSF agreement to help ensure that the BNSF trackage rights will allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP." Decision No. 44, slip op. at 145.

In Decision No. 61 (STB Served November 20, 1996) slip op. at 12-13, we clarified that only certain types of transload facilities (i.e., only "legitimate transload operations") would qualify for the use of this condition.⁴ We further explained that we remained available to resolve controversies if UP believed that BNSF was attempting to expand the transload condition beyond its intended purpose. We have before us now just such a controversy.

Here, UP argues that only a strict, literal interpretation of the transload condition is warranted, and that such a literal interpretation must necessarily restrict BNSF transloading operations under this condition to facilities that are neither expansions of nor additions to existing facilities:

The Donnelley facility cannot be said to be a "new facility" without doing violence to the English language. This is not a new rail-served facility: the facility pre-dates the merger, and has received rail service in the past.

UP/SP-315 at 3. As explained below, BNSF argues that the proposed Donnelley facility is indeed a "new transloading facility" within the meaning and intent of the transload condition we have imposed.

Our clearly stated intent in imposing the transloading condition was to continue and replicate the indirect competition that would otherwise be lost as SP is absorbed into UP without giving BNSF direct rail access to shippers that only received direct and exclusive rail service from either UP or SP prior to the merger. This balancing requires that we grant BNSF a focused form of access to shippers that would otherwise now be exclusively served by UP along the BNSF trackage rights lines.

THE BN/SF-81 PETITION. BNSF and Donnelley claim: that BNSF has trackage rights over an SP line that passes through Sparks, NV; that, at Sparks, this line connects to a "dormant" spur that runs between the line and a certain facility; that, in the vicinity of this facility, this spur is adjacent to that facility; that Rubbermaid Cleaning Products, Inc. (RCP) previously used this facility to warehouse its products, which were transported to and from that facility solely by truck; and that the RCP facility, although it has physical access to the spur that connects with the SP line, has not received or shipped freight by rail for at least the past four or five years.⁵ BNSF further claims: that Sprint, Inc. (Sprint) has proposed to lease the RCP facility for use as a transload facility; that Sprint

⁴ "A legitimate transload operation will necessarily entail *both* the construction of a rail transload facility as that term is used in the industry *and* operating costs above and beyond the costs that would be incurred in providing direct rail service." Decision No. 61, slip op. at 12 (italics in original).

⁵ UP claims that, although the RCP facility has not been rail-served for several years, one other shipper located on the spur is presently rail-served. UP therefore insists that the spur is not "dormant."

proposes to convert the RCP facility to a transload facility; that this conversion will involve new construction to accommodate rail traffic directly into the facility;⁶ that Sprint intends to use the RCP facility to transfer, from rail to truck, rolled paper stock that will be brought to the facility by rail; and that such paper stock, after having been transferred from rail to truck, will be trucked 14 miles from the facility to Donnelley's commercial printing facility at Reno, NV.

BNSF and Donnelley ask that we "enforce" the transload condition by issuing an order stating that the RCP facility would be a new transload facility that could be served by BNSF under the auspices of the transload condition.⁷ BNSF and Donnelley contend: that the RCP facility will be used as a transload facility; and that, because the spur leading into the facility has been dormant for several years, and because the facility will require conversion to accommodate its use as a transload facility, the facility should be regarded as a "new" facility for purposes of the transload condition.

BNSF and Donnelley also assert that their plans meet the standard we set for a "legitimate transload operation" in Decision 61⁸: they intend to incur substantial construction costs (approximately \$50,000); these costs, once incurred, will transform the facility into a transload facility; and, once the facility is operational, its operating costs will be above and beyond (by about \$1,000,000 per year) the costs that would be incurred in providing direct rail service.

Finally, BNSF and Donnelley argue that, because an independent SP could have served the RCP facility (and could thereby have provided indirect competition to the direct UP rail service available at Donnelley's Reno plant), BNSF should now be allowed to serve that facility in place of SP.

DISCUSSION AND CONCLUSIONS

Based on this record, we find that the proposed Donnelley transloading facility can be served by BNSF under our transloading condition. First, we specifically considered the type of competitive harm BNSF is seeking to redress in the deliberations that led us to impose the transload condition. See, e.g., Decision No. 44, slip op. at 124: "[W]hen UP or SP lines run near the plant of an exclusively served shipper, the ability of that shipper to transload or build out to a second carrier can provide important leverage in rate and service negotiations with the carrier providing direct service to the plant. . . ." Here, absent the merger, SP would have been able to offer a transloading alternative in competition with a direct UP movement to the Donnelley plant.⁹

Second, the proposed operation cannot be viewed as a contrivance to obtain a competitive option that was not available to the shipper prior to the merger. Donnelley is not a successor in interest to the previous tenant of the facility. The transloading operation will be entirely different in nature and purpose from that of the facility's prior use. The particular facility has not been served by

⁶ BNSF and Donnelley indicate that conversion will involve construction of three new doors for unloading rail cars and the modification of three existing doors to accommodate the delivery of shipments by rail, at a cost of approximately \$50,000.

⁷ By letter filed October 3, 1997, Donnelley has advised: that the current lease of the RCP facility expires on October 31, 1997; and that the owner of the RCP facility has agreed to honor that option only until October 31, 1997.

⁸ See, footnote 4.

⁹ We do not find persuasive UP's claim that SP never has been a competitor for handling inbound paper to Donnelley's Reno plant. UP states that the plant now receives paper either via direct service from UP or via BNSF in conjunction with a truck transload from McCloud, CA, some 203 miles away. But BNSF's witness has explained that Donnelley is expanding its printing operations at Reno. The increased production will double Donnelley's inbound paper requirements, and the existing BNSF transload operation at McCloud is not capable of handling the additional paper (up to 1,000 rail cars per year) that is contemplated. See BN/SF-81, V.S. of F.E. Kalb, Jr., at 2-3.

rail for four to five years (although UP asserts that nearby facilities along a branch of the same rail spur are now receiving rail service). Finally, the proposed operation, which will entail construction and ongoing operational and maintenance costs over and above those that would be incurred for the resumption of rail service, including the costs of a 14-mile truck haul, qualifies as a "legitimate transload operation" as defined in Decision No. 61, slip op. at 12.¹⁰

The broader issue of what operations qualify as new facilities and new transloading facilities has arisen within the context of our ongoing oversight proceeding, Finance Docket No. 32760 (Sub-No. 21). In our oversight decision¹¹, issued concurrently with this decision, we decline to determine in advance the exact parameters of the transload condition. We will continue to resolve these issues on a case-by-case basis. Our resolution of this particular dispute should provide the parties with substantial guidance in settling disputes over the application of our new facilities and transload condition. Our finding that BNSF may serve the proposed Donnelley facility is based on the particular facts in this record, as explained in detail above. Most notably, absent the merger, SP would have been able to offer the same service in competition to UP; the facility has not received rail service for a number of years; and, the transloading operation will be entirely different in nature and purpose than the facility's prior use. We reiterate that our clearly stated intent in imposing the new facilities and transload condition was to continue and replicate the indirect competition that would otherwise be lost as SP is absorbed into UP, and to do so in a manner that would not result in direct BNSF access to what were UP's or SP's exclusively served shippers along the trackage rights lines.

It is ordered:

1. BNSF shall be permitted to serve the proposed transload facility.
2. This decision is effective on the service date of this decision.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹⁰ We are less sympathetic to the argument of BNSF and Donnelley that allowing BNSF to serve the RCP facility would help, to some unknown extent, "to enable BNSF to achieve sufficient traffic density on the trackage rights lines, not only in the near future but in the more distant future as well." Decision No. 61, slip op. at 10. BNSF could make exactly the same argument with respect to any facility, new or old, located anywhere on the trackage rights lines. Traffic density is irrelevant to the question of whether this is a "new facility." See Decision No. 57, slip op. at 7 (similar argument respecting the contract modification condition).

¹¹ UP/SP [Oversight] (STB served Oct. 27, 1997).