

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. 103¹

Decided: April 30, 2008

In 1996, the Board approved the merger of the Union Pacific Railroad Company (UP) system and the Southern Pacific Transportation Company (SP) system, in Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) (UP/SP Merger). As a condition of approval, the Board imposed the terms of an agreement between UP, SP, and The Burlington Northern and Santa Fe Railway Company (BNSF)² that provided trackage rights for BNSF over certain rail lines of the merged UP/SP system. During the 5-year formal Board oversight period, BNSF and UP entered into a restated and amended agreement, which was submitted for Board approval in 2002. That agreement ostensibly broadened the trackage rights previously accorded to BNSF under the original agreement in ways that were not apparent to the Board when it authorized the amendments. UP has now filed a petition asking us to reform the restated and amended agreement to restore the original restrictions on those trackage rights.

In this decision, we address UP's petition for reformation and treat it as a request for clarification of the extent of trackage rights imposed as a condition to the Board's approval in UP/SP Merger and authorized during the subsequent oversight period. We find that the trackage rights accorded in the merger for certain BNSF intermodal trains to operate on two UP lines in Northern California are as stated in the original agreement rather than as provided in the restated agreement, and that we did not intend to approve any change to those rights in the course of our review of the restated agreement. In particular, with regard to the present dispute between UP and BNSF, we find that BNSF lacks Board authorization to move intermodal trains between Oakland and BNSF's southern transcontinental route or the Los Angeles Basin via the two UP lines in question.

¹ To clarify previous decisions, we note that the decision served on May 7, 2007 is Decision No. 101; the decision served on June 8, 2007 is Decision No. 102.

² BNSF has since changed its name to BNSF Railway Company. In this decision, "BNSF" refers to both entities.

BACKGROUND

In 1995, two large rail carriers merged to form BNSF.³ That merger left UP, SP, and BNSF as the largest railroads competing in the western United States. Both UP and SP faced increasing competitive pressure from BNSF due to its improved efficiency. SP, in particular, faced difficulties, as it had long been unable to raise sufficient capital to improve rail service. As a result, its competitive position had been eroding for a decade. In late 1995, UP and SP sought Board authorization to merge, contending that the merged corporation would be more efficient and better able to compete with BNSF.

Both SP and BNSF had lines in or leading to the Oakland area. SP's lines included two that converged on Sacramento. One of these was the Cal-P line,⁴ which runs northeast from Oakland to Sacramento. The other was the Elvas-Stockton line, which runs south from Elvas (just east of Sacramento) to Stockton. Another of SP's lines was the Central Corridor main line, which runs east from Elvas to Weso, NV, and points further east. BNSF had (and continues to have) a line that runs east between Richmond, CA (near Oakland), and Stockton. BNSF's Richmond-Stockton line is about 50 miles shorter than the UP/SP route via Sacramento. From Stockton, BNSF's line continues to Southern California, where at Barstow it connects with BNSF's southern transcontinental route.

In support of the merger, UP and SP argued, among other things, that the merger would result in intensified rail competition in the West. They acknowledged, however, that, without proper conditions, the merger would result in a loss of rail competition for certain shippers who had previously been served by UP and SP only. To preserve competition for shippers, UP and SP proposed that the Board impose numerous conditions on the merger, including the terms of an agreement with BNSF that was submitted with the merger application. Among other things, the agreement provided that UP/SP would sell to BNSF three rail lines, including one in Northern California that runs north-south (and roughly parallel to Interstate 5) from Keddie to Bieber (the I-5 Corridor).

In a further effort to preserve competition, the merging carriers proposed to give BNSF trackage rights over some 4,000 miles of UP/SP track. As relevant here, under Section 1(g) of the agreement, BNSF would be afforded trackage rights to use SP's line between Weso, NV, and Oakland via the Cal-P line for intermodal trains moving between Oakland and either (1) Weso and points east (over the Central Corridor) or (2) Keddie and points north (over the I-5 Corridor).⁵ In other words, BNSF could move intermodal trains over the Cal-P line only if those

³ Burlington Northern et al.—Merger—Santa Fe Pacific et al., 10 I.C.C.2d 661 (1995).

⁴ "Cal-P" refers to the California Pacific Railroad, which originally constructed the line.

⁵ Specifically, Section 1(g) of the original 1995 agreement provides:

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trains had a prior or subsequent movement over either the Central Corridor or I-5 Corridor.⁶ Under a June 1996 supplement to the original 1995 agreement, BNSF would also have trackage rights, with certain restrictions, over the Elvas-Stockton line.⁷

In approving the merger of UP and SP, to mitigate specific harm to rail competition, the Board imposed various conditions, including the terms of the agreement between UP/SP and BNSF, as supplemented (BNSF Agreement). UP/SP Merger, 1 S.T.B. at 419, 546. The Board also conditioned the transaction on a 5-year formal oversight period during which the Board would examine whether the conditions imposed effectively addressed the competitive issues they were intended to remedy. Id. at 373, 522.

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On SP's line between Weso and Oakland via the "Cal-P," BNSF shall be entitled to move only (i) intermodal trains moving between (x) Weso and points east or Keddie and points north and (y) Oakland and (ii) one manifest train/day in each direction. Intermodal trains are comprised of over ninety percent (90%) multi-level automobile equipment and/or flat cars carrying trailers and containers in single or double stack configuration. Manifest trains shall be carload business and shall be (a) operated without the use of helpers and (b) equipped with adequate motive power to achieve the same horsepower per trailing ton as comparable UP/SP trains. If UP/SP operates manifest trains requiring the use of helpers then BNSF's manifest trains may be operated in the same fashion provided that BNSF furnishes the necessary helper service. BNSF may also utilize the "Cal-P" for one manifest train per day moving to or from Oakland via Keddie and Bieber; provided, however, that BNSF may only operate one manifest train/day in each direction via the "Cal-P" regardless of where the train originates or terminates. The requirement to use helpers, does not apply to movement over the "Cal-P."

⁶ The agreement also accorded BNSF trackage rights on a UP line from Haggin (near Sacramento) to Keddie, thus enabling BNSF to access the I-5 Corridor trackage that it was acquiring in the agreement.

⁷ Specifically, Paragraph 1(a) of the June 1996 supplement provides:

Section 1(a) [of the original 1995 agreement] is amended by inserting after the sixth paragraph the following additional subparagraph: "SP's line between Elvas (Elvas Interlocking) and Stockton (subject to traffic restrictions as set forth in Section 1g) and also excluding any trains moving over the line between Bieber and Keddie, CA to be purchased by BNSF pursuant to Section 2a of this Agreement)."

UP does not dispute that, under this provision, BNSF has the right to use the Elvas-Stockton line for intermodal trains when those trains have a prior or subsequent movement over either the Central Corridor or the I-5 Corridor. UP Petition at 6; UP Initial Brief at 12.

During the fifth round of formal oversight, UP and BNSF jointly submitted a proposed restated agreement, which they stated simplified certain language and incorporated the Board’s clarification and supplementation of the BNSF Agreement in decisions issued subsequent to UP/SP Merger. The parties submitted a list of the principal amendments to the BNSF Agreement. This list indicated that the revised Section 1(g) “restates traffic restrictions” on the Cal-P and Central Corridor lines. After resolving matters on which BNSF and UP could not agree,⁸ the Board approved the proposed restated agreement “insofar as its terms are consistent with the conditions imposed in [UP/SP Merger],” and directed the parties to submit the final Restated Agreement in accordance with the Board’s various decisions,⁹ which they did in March 2002.

In the Restated Agreement, the wording of Section 1(g) omitted the language requiring intermodal trains that operate over UP’s Cal-P line between Sacramento and Oakland to have a prior or subsequent movement over the Central Corridor or I-5 Corridor.¹⁰ Rather, under the

⁸ See 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) (STB served Nov. 8 and Dec. 20, 2001) (General Oversight Dec. No. 19 and Dec. No. 20).

⁹ 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), slip op. at 6, 13 (STB served Dec. 20, 2001) (General Oversight Dec. No. 21).

¹⁰ Section 1(g) of the Restated Agreement reads:

BNSF may operate only the following trains on SP’s “Cal-P” line between Sacramento and Oakland: (i) intermodal and automotive trains composed of over ninety percent (90%) multi-level automobile equipment and/or flat cars carrying trailers and containers in single or double stack configuration and (ii) one overhead through manifest train of carload business per day in each direction. These manifest trains may be either I-5 Corridor or Central Corridor trains. On the Donner Pass line between Sacramento and Weso, BNSF may operate only intermodal and automotive trains as described in clause (i) and one overhead through manifest train of carload business per day in each direction. The manifest trains must be equipped with adequate motive power to achieve the same horsepower per trailing ton as comparable UP/SP manifest trains. BNSF may use helpers on these trains only if comparable UP/SP manifest trains use helpers; BNSF must provide the helper service. The restrictions set forth in this section do not apply to local trains serving Shipper Facilities to which BNSF has access on the identified lines, and such

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new wording, only manifest trains moving over the Cal-P line would appear to be subject to the Central Corridor and I-5 Corridor restrictions.¹¹

At about this time, a new intermodal terminal in Oakland—the Oakland International Gateway (OIG)—opened. Before the OIG opened, BNSF offered only limited intermodal service to and from the Port of Oakland. And for some time after the opening, BNSF did not need to operate full trains in and out of the OIG because there was not sufficient demand or density, so BNSF continued to use its Richmond-Stockton line for intermodal traffic. But as BNSF’s intermodal traffic to and from the OIG increased, the City of Richmond began to complain that BNSF’s trains blocked streets, delayed traffic, and created horn noise. And from BNSF’s perspective, the route was not ideal for intermodal traffic. Trains moved slowly through Richmond, where the line could accommodate traffic at no more than 10 miles per hour and contained multiple grade crossings. Looking for a solution to these problems, BNSF turned to UP’s Cal-P and Elvas-Stockton lines. Beginning in 2004, and increasingly from 2005 to the present, BNSF has operated over the Cal-P and Elvas-Stockton lines intermodal trains that do not have a prior or subsequent movement over the Central Corridor or I-5 Corridor. Many of these trains operate between Oakland and points east of Barstow via BNSF’s southern transcontinental route.¹²

THIS PETITION

In a petition filed on February 16, 2007, UP asks 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 moving over both lines. UP contends that the parties mistakenly removed those restrictions when they negotiated the terms of the Restated Agreement. According to UP, BNSF’s movement of non-Central Corridor and non-I-5 Corridor intermodal trains on the Cal-P line is interfering with UP’s own freight operations and contributing to delays experienced by

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trains shall not be considered in determining whether BNSF is in compliance with such restrictions. If UP grants its prior concurrence, BNSF’s overhead through manifest trains shall be allowed to set out and pick up traffic to or from intermediate points on the identified lines.

¹¹ This rewording of Section 1(g) also affected the scope of the trackage rights over the Elvas-Stockton line because those rights are defined with reference to the traffic restrictions set forth in Section 1(g). See *supra* note 7.

¹² BNSF also moved “bare table” trains from Oakland to the Los Angeles Basin via the Cal-P and Elvas-Stockton lines, but ceased doing so in February 2007. (Bare table trains are composed of empty flatcars that, after loading, would carry intermodal containers.) BNSF does not contest UP’s claim that BNSF lacks authority to transport bare table trains over these lines.

commuter and Amtrak trains on that line. BNSF opposes the request in a response filed on March 8, 2007, to which UP filed a reply on March 28, 2007.

After the Board set a briefing schedule, UP and BNSF submitted opening and final briefs on August 20 and October 4, 2007, respectively. In addition, John D. Fitzgerald filed a brief on behalf of United Transportation Union, General Committee of Adjustment, generally supporting BNSF's position and seeking, if the change in operations is allowed, the imposition of certain conditions for the protection of employees whose work would be affected.¹³

DISCUSSION AND CONCLUSIONS

1. Trackage Rights Imposed in the Merger. In asking us to reform the Restated Agreement to restore the corridor restrictions, UP contends that the rewording of Section 1(g) was either a mutual mistake by the parties or a unilateral mistake on the part of UP of which BNSF took advantage. BNSF maintains that the parties agreed to the removal of the corridor restrictions when negotiating various aspects of the Restated Agreement, and it argues that the language of Section 1(g) should therefore remain as written.

We need not resolve the issue of the parties' intent. Rather, we resolve this dispute by determining that the Board has not approved the removal of the Central Corridor and I-5 Corridor restrictions set forth in Section 1(g) of the BNSF Agreement, and that, accordingly, those corridor restrictions remain on BNSF intermodal trains operating on the Cal-P line.

Railroads need Board authorization to merge, 49 U.S.C. 11323(a), and the Board may impose conditions on its authorization. 49 U.S.C. 11324(c). Under the merger rules in effect at the time of the UP/SP merger, the Board's policy was to use its conditioning power only to "address an effect of the transaction." UP/SP Merger, 1 S.T.B. at 418. The Board would not impose a condition that was not related, either directly or indirectly, to the merger. Id. In addition to being merger-related, a condition had to be narrowly tailored to address adverse effects of the merger. Id. at 419. The Board would not ordinarily impose a condition that would put the proponent of a condition in a better position than before the merger. Id. Conditions were not imposed to ameliorate longstanding problems not caused by the merger. Id. at 418.

Under the terms of the BNSF Agreement, the only trackage rights that were accorded to BNSF for intermodal trains moving over the Cal-P line were for such trains having a prior or subsequent movement over either the Central Corridor or the I-5 Corridor. Because BNSF

¹³ Mr. Fitzgerald seeks imposition of the conditions set forth in New York Dock Ry. – Control – Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979), as clarified in Wilmington Term. RR, Inc. – Pur. & Lease – CSX Transp., Inc., 6 I.C.C.2d 799, 814-826 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991).

already had a direct route between Oakland and Stockton over its Richmond-Stockton line,¹⁴ there was no merger-related reason for it to obtain trackage rights to move intermodal trains between Oakland and Stockton via the Cal-P and Elvas-Stockton lines. Although BNSF faced certain problems moving intermodal trains on its Richmond-Stockton line, those problems were unrelated to the merger. In imposing the BNSF Agreement as a condition of the merger, the Board was not attempting to ameliorate those problems by providing BNSF with an alternative to its existing Richmond-Stockton route for moving intermodal trains between Oakland and BNSF's southern transcontinental route. In short, nothing in UP/SP Merger required that UP/SP give BNSF trackage rights for intermodal trains moving over the Cal-P line where those trains lacked a prior or subsequent movement over the Central Corridor or I-5 Corridor.

That the Board later approved the Restated Agreement does not reflect the Board's intent to approve the omission of the corridor restrictions. The parties did not alert the Board to any such substantive change to the trackage rights in the original Section 1(g). Rather, the Board was led to believe that the Restated Agreement made no substantive change to that section. The parties provided a list of the principal changes to the original agreement, and that list indicated that the revised Section 1(g) merely restated the traffic restrictions included in the original Section 1(g). This was in contrast to certain other changes, which were described as adding or expanding BNSF rights or removing restrictions on BNSF rights.

In any event, the Board approved the Restated Agreement "only insofar as its terms are consistent with the conditions imposed in [UP/SP Merger], as such conditions have been interpreted, clarified, and/or supplemented in subsequent decisions." Gen. Oversight Dec. No. 21, slip op. at 6, 13. Omission of the corridor restrictions is not consistent with the conditions imposed in UP/SP Merger. And there has been no other Board decision authorizing broader trackage rights.¹⁵ Thus, BNSF does not currently have Board authorization to use the Cal-P line for intermodal trains that lack a prior or subsequent movement over the Central Corridor or I-5 Corridor.

Should 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). Unless and until the Board decides to authorize such broader rights, BNSF's trackage rights for intermodal trains over the Cal-P and Elvas-Stockton lines remain limited by the corridor restrictions set forth in the BNSF Agreement imposed as a condition in UP/SP Merger. What this means for the present dispute is that BNSF does not currently have Board authorization to move intermodal trains between Oakland and BNSF's southern transcontinental route or the Los

¹⁴ UP concedes that BNSF had previously obtained the right to operate over the short segment of the Cal-P line between Oakland and Richmond.

¹⁵ Since issuing UP/SP Merger, the Board has resolved a related, but different issue: BNSF's right to serve, under its trackage rights in Section 1(g), "new facilities" located on the Elvas-Stockton line. See Gen. Oversight Dec. No. 20, slip op. at 2, 10-12.

Angeles Basin via its competitor's Cal-P and Elvas-Stockton lines. In light of this clarification of the continuing restricted nature of BNSF's existing trackage rights, UP's petition for reformation of the Restated Agreement will be denied as moot.

2. Request for Labor Protection. Mr. Fitzgerald asks us to impose conditions for the protection of railroad employees affected by our decision here. The Board has an obligation to impose such conditions when authorizing mergers, where the process of combining two or more carriers' work forces will likely cause some employees to have to transfer to different positions or different work locations and other employees to lose their jobs.

In this case, we recognize that BNSF has been operating certain intermodal trains over the Cal-P and Elvas-Stockton lines in the mistaken belief that it has Board authorization to do so and those operations must change given the clarification contained in this decision. But there is no requirement that the Board impose conditions here to protect BNSF employees whose jobs may be affected by BNSF now having to cease operations that were not authorized by the Board in the first place. Further, no other basis has been shown for imposing new employee protective conditions as a result of our decision here, and there is no basis for expanding the coverage of employee protective conditions previously imposed in this proceeding. In any event, BNSF has a nearby, alternative route over its own lines for the trains that it no longer will be able to route over UP's rail lines. Consequently, it is unlikely that any BNSF employees would be adversely affected as a result of the route change.

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

It is ordered:

1. The extent of the trackage rights authorized by the Board is clarified as set forth in this decision.
2. Mr. Fitzgerald's request for labor protection conditions is denied.
3. UP's petition to reform the Restated Agreement is denied as moot.

4. This decision is effective May 31, 2008.

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

Anne K. Quinlan
Acting Secretary

VICE CHAIRMAN MULVEY, dissenting:

I regard this case differently from the majority. First, procedurally, I would have preferred that UP and BNSF undertake arbitration to resolve their dispute, in accordance with the arbitration provision of the BNSF Agreement.¹⁶ I find nothing in the American Arbitration Association's Commercial Arbitration Rules¹⁷ referred to in the arbitration provision that would prevent an arbitrator from awarding the relief that UP seeks here. Nor did UP support its contention that contract reformation would be unavailable to it through arbitration. See UP Petition at 8-9 n.3.

Second, substantively, I view this case as contract-driven rather than condition-driven, as the majority finds. UP and BNSF entered into an amended contract in continuance of the purpose of mitigating competitive harms that might have otherwise resulted from the merger of UP and SP. They presented that contract to the Board for approval, and the Board approved it "insofar as its terms are consistent with the conditions imposed in Merger Dec. No. 44, as such conditions have been interpreted, clarified, and/or supplemented in subsequent decisions." General Oversight Decision No. 21, slip op. at 13. UP now claims it made a mistake in signing the amended contract. But UP and BNSF are of equal sophistication, business acumen, and bargaining strength. I would hold them to the contract they signed.

¹⁶ See Restated and Amended Agreement at 47, attached to Joint Submission of Restated and Amended BNSF Settlement Agreement, UP/SP-393/BNSF-100, filed in STB Finance Docket No. 32760 (Mar. 4, 2002); see also Union Pac. Corp.—Control & Merger—Southern Pac. Rail Corp., STB Finance Docket No. 32760 (STB served Oct. 5, 1998), slip op. at 5 (Board directed that UP and BNSF arbitrate disputes arising under their settlement agreement before bringing matters to Board for resolution); Union Pac. Corp.—Control & Merger—Southern Pac. Rail Corp., 1 S.T.B. 233, 432 (Board encouraged parties to resolve disputes privately before resorting to Board).

¹⁷ See Commercial Arbitration Rules and Mediation Procedures, R-43. Scope of Award, available at <http://www.adr.org/sp.asp?id=22440>.

Further, even considering this case through the “merger condition” lens, the revised Section 1(g) is not “inconsistent” with the conditions imposed in earlier UP/SP Merger decisions. The revised section 1(g) does not weaken the protections afforded shippers or diminish the competitive situation between UP and BNSF — if anything, it augments those protections and increases competition between the carriers.¹⁸ I do not believe the revised Section 1(g) runs counter to the purpose of the BNSF Agreement.

I respectfully dissent.

¹⁸ I note that since the time it approved the UP/SP Merger, the Board has adopted a policy that requires applicants in major rail consolidations to “demonstrate that the transaction would enhance competition where necessary to offset negative effects of the merger, such as competitive harm or service disruptions.” Major Rail Consolidation Procedures, 5 S.T.B. 539 (2001) (rules codified at 49 CFR Part 1180).