

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. 69]²

Decided: March 7, 1997

In Decision No. 44, 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) subject to various conditions, including the terms of the BNSF agreement and a condition (referred to as the CMTA condition) that requires that BNSF be granted the right to interchange traffic with the operator of the Giddings-Llano line either at Elgin, TX, or at Giddings, TX. With respect to the implementation of the CMTA condition, we directed the interested parties (CMTA, Longhorn,

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. 10), Responsive Application--Capital Metropolitan Transportation Authority; 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.

UP/SP, and BNSF) to submit, by December 10, 1996, either agreed-upon terms or separate proposals. See Decision No. 44, slip op. at 182-83 and 233 (ordering paragraph 31).³

In Decision No. 65, the December 10th deadline was extended to January 9, 1997. Prior to January 9th, interchange arrangements at Elgin were agreed to by CMTA and UP/SP. In view of this agreement, the interested parties filed, on or about January 9th, several pleadings: CMTA and BNSF filed a joint submission (designated "CMTA-14 and BN/SF-75," and referred to herein as CMTA-14); UP/SP filed its own submission (UP/SP-292); and Longhorn filed a request for an extension of time.

In Decision No. 67, Longhorn and BNSF were given additional time to submit evidence and arguments respecting certain alleged deficiencies in the arrangements agreed to by CMTA and UP/SP. It was ordered that submissions respecting these arrangements were to be filed by January 21, 1997. It was further ordered that any replies to such submissions were to be filed by January 28, 1997.

We address, in this decision, the issues raised in the following pleadings: the pleading filed on or about January 21, 1997, by Longhorn (not designated, but referred to herein as

³ Capital Metropolitan Transportation Authority, which held a mass transit easement over a segment of the Giddings-Llano line and which indicated that it intended to purchase the line by the end of 1996, is referred to as CMTA. The new operator of the line, Central of Tennessee Railway & Navigation Company Incorporated, d/b/a The Longhorn Railway Company, is referred to as Longhorn. See Decision No. 44, slip op. at 33-35.

Union Pacific Corporation is referred to as UPC. Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) were formerly referred to collectively as UP. On January 1, 1997, MPRR merged into UPRR, see Decision No. 67, slip op. at 1 n.3; and, for the period beginning January 1, 1997, the acronym "UP," as used in this decision, shall be understood to refer to UPRR.

Southern Pacific Rail Corporation is referred to as SPR. Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company are referred to collectively as SP.

UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3. Common control of UP and SP, as approved in Decision No. 44, was consummated on September 11, 1996.

Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) were formerly 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, see Decision No. 67, slip op. at 1 n.3; and, for the period beginning December 31, 1996, the acronym "BNSF," as used in this decision, shall be understood to refer to the surviving corporation. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

LHRR-3);⁴ the BN/SF-76 pleading filed by BNSF; and the UP/SP-298 pleading filed by UP/SP.

POSITIONS OF THE PARTIES

CMTA. CMTA has indicated: that UP/SP refused to approve CMTA's request for interchange at both Elgin and Giddings; that CMTA was therefore required to choose one or the other, see Decision No. 44, slip op. at 182 (final paragraph); that CMTA chose Elgin; and that CMTA's choice was influenced by several factors, including the level of service BNSF intends to provide through Elgin and the proximity of Elgin to the majority of shippers on the Giddings-Llano line. CMTA has also indicated that the parties will carry out the interchange under the terms provided for in the BNSF agreement, and, as between BNSF and the Giddings-Llano operator, under the terms provided for in the BNSF Operating Plan submitted to the Board on October 1, 1996, and an interchange agreement between those two parties. CMTA has further indicated that UP/SP has agreed, as an additional term of the interchange, (1) that the Giddings-Llano operator and BNSF may use the existing interchange facilities at Elgin, and (2) that BNSF trains can interchange Giddings-Llano cars by using a UP-owned siding located approximately a mile south of Elgin on the UP/SP mainline (hereinafter referred to as the UP siding), in coordination with UP/SP's dispatcher and as train operations permit, for running around the trains, so long as the siding is left free of cars and equipment except while a BNSF train is at Elgin. CMTA has also indicated that UP/SP has agreed to cooperate fully to facilitate use of both the existing interchange facilities at Elgin and the UP siding south of Elgin.⁵

Longhorn. Longhorn, which indicates that it has reopened the Giddings-Llano line to Elgin and that it is in the process of reopening the line to Giddings, insists that the Elgin interchange is inadequate, and will not allow Longhorn to provide 2-to-1 routing competition (UP/SP at McNeil vs. BNSF at Elgin). Longhorn insists that the interchanges at McNeil and Elgin are not similar: the McNeil interchange connects with the UP/SP mainline in two directions, whereas the Elgin interchange connects in one direction only; and the McNeil interchange has room for dozens of cars and has no road crossings inhibiting movements, whereas the Elgin interchange is such that, for various reasons (including several road crossings), Longhorn will be unable to interchange more than 10 to 14 cars at any given time. Longhorn maintains that, whereas the Elgin interchange will never be competitive with the McNeil interchange, the Giddings interchange would be competitive. With the Giddings interchange, Longhorn claims, Longhorn could interchange with

⁴ The cover letter that accompanies this pleading refers to it as "CMTA-13, BNSF-74, LHRR-1," but that designation was previously used to designate a joint extension request filed December 10, 1996, see Decision No. 65, slip op. at 2 (lines 1-2).

⁵ CMTA's position was presented in the CMTA-14 pleading filed January 9, 1997.

BNSF in volumes of several thousand carloads per year (primarily granite blocks and aggregates). These volumes, Longhorn adds, will not be possible with an Elgin interchange; Elgin, Longhorn insists, is currently handling all the traffic it can, and its configuration will not allow for any increase over present volumes. Longhorn therefore urges that Giddings, not Elgin, be the site of the Longhorn/BNSF interchange provided for by the CMTA condition.

BNSF. BNSF, which had previously expressed concern that the existing interchange facilities at Elgin, even when combined with the use of the UP siding south of Elgin, might not be adequate for a BNSF/Longhorn interchange, now indicates that it believes that the existing interchange facilities together with the UP siding are adequate for a BNSF/Longhorn interchange, provided that BNSF and Longhorn are able, consistent with standard industry practice and custom regarding the interchange of cars, to leave cars and equipment on the UP siding for a reasonable period of time and to use the UP/SP line in order to effect such interchange. BNSF maintains that, if UP/SP, BNSF, and Longhorn cooperate and coordinate their train operations with each other through UP/SP's dispatcher, the UP siding can be used for purposes of interchanging cars between Longhorn and BNSF, and that any use of the UP/SP line by Longhorn to reach the siding to pick up or deliver cars temporarily left on the siding will not interfere with through train operations on the UP/SP line. BNSF contends: that northbound interchanges can be effected by having the BNSF train pull north past the switch at Elgin and then back over the switch to connect to (or disconnect from) cars interchanged with Longhorn; that the UP siding will therefore be used primarily for southbound movements and then only if the number of cars to be interchanged exceeds the capacity of the existing facilities at Elgin; and that, given current projections, there should be only three southbound BNSF trains per week for which any use of the UP siding and the UP/SP line would be needed. BNSF adds, with respect to the potential for interference with train operations on the UP/SP line, that it does not matter whether it is BNSF or Longhorn that uses the line to effect the interchange; either way, BNSF notes, the interchange activities will need to be coordinated with UP/SP's dispatcher, and the carrier implementing the interchange will generally need to be on the UP/SP line the same amount of time; and, if it is Longhorn rather than BNSF that implements the interchange, any use of the UP/SP line may be lessened because Longhorn, unlike BNSF, will not need to run its locomotive around the BNSF train.

UP/SP. UP/SP asks that we implement the CMTA condition on the terms agreed to by CMTA and UP/SP.

DISCUSSION AND CONCLUSIONS

We are denying the requests embraced in LHRR-3 and BN/SF-76. Our denial of these requests will allow the implementation of the Elgin interchange on the terms agreed to by CMTA and UP/SP.

The CMTA Condition. Prior to the UP/SP merger, the operator of the Giddings-Llano line had one active Class I connection (UP at McNeil) and one potential Class I connection (SP at Giddings;

the SP connection was inactive because Longhorn's predecessor had discontinued operations over the Smoot-Giddings segment of the Giddings-Llano line). To preserve the potential competitive option at Giddings we imposed a requirement that the operator of the Giddings-Llano line was to be regarded as a 2-to-1 shortline for purposes of Section 8i of the BNSF agreement (which provides, among other things, that BNSF shall have the right to interchange with any shortline which, prior to September 25, 1995, could interchange with both UP and SP and no other railroad).

The CMTA condition, however, was complicated by the fact that in Section 4b of the BNSF agreement, as amended by Section 3b of the second supplemental agreement dated June 27, 1996, UP/SP and BNSF had agreed that BNSF was to have the right to interchange at Elgin with the operator of the Giddings-Llano line, should service be reinstated on that line to Elgin. We noted that, in view of this agreement, CMTA would have a right to a connection with BNSF either at Giddings (because we had decided to require such a connection) or at Elgin (because we intended to hold applicants to their representation that they would allow such a connection). We further noted that, because the potential competition that we sought to preserve was based upon a single connection, CMTA would have no right to insist upon connections at both Elgin and Giddings. We therefore required that CMTA choose between Elgin and Giddings, unless the parties agreed otherwise. We allowed the interested parties (CMTA, Longhorn, UP/SP, and BNSF) an opportunity to reach a negotiated settlement respecting the precise details of the CMTA condition, but we noted that one such detail (the choice between Elgin and Giddings) could be decided unilaterally by CMTA. See Decision No. 44, slip op. at 182-83.

CMTA ultimately chose Elgin over Giddings, and CMTA and UP/SP ultimately reached an agreement respecting the details of the Elgin interchange. In the pleadings filed in response to Decision No. 67, Longhorn contends that the interchange should be at Giddings, BNSF contends that the arrangements agreed to by CMTA and UP/SP should be modified in certain ways that concern the use of the UP siding south of Elgin, and UP/SP contends that neither Longhorn nor BNSF has provided any justification for implementing the CMTA condition on terms other than those agreed to by CMTA and UP/SP.

Elgin vs. Giddings. We need not decide whether an Elgin interchange is or is not superior to a Giddings interchange; it suffices simply to note that the choice of Elgin vs. Giddings was CMTA's, and that CMTA, which has an incentive to protect the long-term interests of Giddings-Llano shippers, had good reasons to prefer an Elgin interchange over a Giddings interchange. First, Elgin is 32 miles closer to Giddings-Llano shippers than is Giddings. An interchange at Giddings would have required the revival, and thereafter the subsequent maintenance, of 32 miles of heretofore out-of-service track east of Elgin. Second, there is good reason to believe that BNSF will be able to offer a much higher level of service at Elgin than at Giddings. CMTA had every reason to expect that, in terms of frequency and transit time, the level of service provided by a BNSF "branchline" operation over the 29-mile SP segment between Caldwell and Giddings, for the sole purpose of serving an interchange with

Longhorn, would likely be inferior to BNSF's planned mainline operations at Elgin.

Longhorn's arguments in favor of a Giddings interchange are not persuasive. (1) Longhorn insists that an Elgin interchange will be inferior to a McNeil interchange. We imposed the CMTA condition, however, to preserve the potential competition (McNeil vs. Giddings) that existed prior to the UP/SP merger, and, in view of the representations that had been made by applicants, we allowed CMTA to choose between Elgin and Giddings. McNeil, however attractive it might be, was not an option that CMTA could have chosen. The correct comparison, therefore, is Elgin vs. Giddings, and, as noted above, we think that CMTA had good reasons for choosing Elgin. (2) Longhorn, focusing on Elgin vs. Giddings, claims that "Giddings was good enough and superior to Elgin for the SP unmerged," LHRR-3 at 4. This argument, however, is misleading: Elgin was never the interchange point for "the SP unmerged" because the north-south line at Elgin was formerly a UP line (prior to 1988, an MKT line),⁶ not an SP line. Longhorn, recognizing this historical reality, adds that the MKT's Elgin interchange "was always known to be inferior" to the SP's Giddings interchange, LHRR-3 at 4. Even assuming that Longhorn's view is correct, the Elgin vs. Giddings issue before us now is not MKT at Elgin vs. SP at Giddings; it is BNSF at Elgin via agreed-upon trackage rights vs. BNSF at Giddings via extra trackage rights (presumably over the Caldwell-Giddings segment).

In any event, the choice between Elgin and Giddings was CMTA's, not Longhorn's. We explicitly stated, see Decision No. 44, slip op. at 183, that this choice could be made unilaterally by CMTA. Neither Longhorn nor any other party sought reconsideration of this aspect of Decision No. 44, and the time for seeking reconsideration has long since expired; and, for this reason, the Elgin vs. Giddings issue is no longer subject to administrative review. Longhorn claims that it had no standing to participate prior to May 6, 1996. See LHRR-3 at 1. This, however, is misleading; Longhorn in fact did participate in this proceeding both before and after May 6, 1996, although it did so in support of the responsive application filed by CMTA. See CMTA-10, Exhibit 5 (filed March 29, 1996) (verified statement of Donald T. Cheatham, Longhorn's chairman and general manager); CMTA-11, Exhibit 1 (filed May 14, 1996) (Mr. Cheatham's rebuttal verified statement). Furthermore, even if Longhorn lacked standing prior to May 6, 1996, it had standing after that date, and had standing to file a timely request for reconsideration of Decision No. 44, which was not served until August 12, 1996.

Arrangements Respecting Elgin. The arrangements agreed to by CMTA and UP/SP allow BNSF to use the UP siding and the UP/SP mainline to effect the Longhorn/BNSF interchange. These arrangements, however, do not allow BNSF to leave cars and equipment on the UP siding (except while the interchange is actually being carried out) and do not allow Longhorn to operate over the UP/SP mainline. BNSF requests that these arrangements be modified: (1) to allow Longhorn (and not only BNSF) also to use the UP/SP mainline in order to effect the Longhorn/BNSF

⁶ MKT is the acronym for the former Missouri-Kansas-Texas Railroad Company.

interchange; and (2) to allow both Longhorn and BNSF to leave cars and equipment on the UP siding for a reasonable period of time.

The arrangements agreed to by CMTA and UP/SP envision that, before being picked up by BNSF or after being delivered by BNSF, cars involved in the Longhorn/BNSF interchange will rest either on UP/SP interchange tracks at Elgin or on Giddings-Llano tracks approaching Elgin. These arrangements do not envision that such cars will rest on the UP siding; and, as a necessary consequence, these arrangements do not envision that Longhorn will operate over the UP/SP mainline to and from the UP siding. The modifications requested by BNSF would allow Longhorn to operate over the UP/SP mainline to reach the UP siding to pick up cars previously left on the siding by BNSF and/or to leave cars on the siding for later pick-up by BNSF. The modifications requested by BNSF would allow the UP siding to be used as a storage track for cars interchanged between BNSF and Longhorn, and would tie up the UP siding for any period during which such cars were located thereon.

UP/SP, by agreeing to the use of the UP siding by BNSF, has implicitly conceded that the existing track configuration at Elgin may be less than ideal, at least with respect to cars interchanged from or to southbound trains. For several reasons, however, we will deny BNSF's requested modifications of the Elgin interchange arrangements agreed to by CMTA and UP/SP.

(1) The choice between Elgin and Giddings was a choice between two locations, each of which has certain pluses and minuses. CMTA, in choosing Elgin over Giddings as the better overall alternative, was choosing the existing Elgin and not an idealized version thereof. CMTA's choice of Elgin should be taken to represent CMTA's view that the existing interchange facilities at Elgin, combined with the use by BNSF of the UP siding south of Elgin, are adequate to meet the needs of a Longhorn/BNSF interchange.

(2) The BNSF agreement and implementing trackage rights agreements provide BNSF the right to build any new facilities (including connections and sidings) it might need to facilitate an Elgin interchange. There appears to be no obstacle to the construction, at Elgin, of any new facilities that BNSF might deem necessary or desirable. See UP/SP-298 (verified statement of Steve Searle).

(3) CMTA and/or Longhorn presumably have the right to build any new Giddings-Llano facilities (including connections and sidings) that Longhorn might need to facilitate an Elgin interchange. There appears to be ample room for a lengthy new siding adjacent to the Giddings-Llano line a few hundred feet east of the UP crossing at Elgin. Such a siding could apparently accommodate cuts of almost a mile in length without blocking any grade crossings.

(4) The modifications requested by BNSF would interfere with operations on the UP/SP mainline through Elgin. Because that line only has a single track, it requires well-spaced passing sidings. If the UP siding south of Elgin were occupied, for hours (or even days) at a time, by BNSF-Longhorn interchange

cars, it would be unavailable for UP/SP (and/or BNSF) train meets, leaving a gap of 30 miles between sidings that would significantly impair the fluidity of train operations on the UP/SP mainline.

(5) We are not persuaded by BNSF's argument that, as to potential interference with train operations on the UP/SP line, it does not matter whether it is BNSF or Longhorn that uses the line to effect the interchange. In fact, it does matter. If BNSF effects the interchange, cars will not be left on the UP siding beyond the relatively brief amount of time necessary for the BNSF locomotive to move around the train, haul the interchange cars to/from Elgin, and move in the reverse direction. If, however, Longhorn effects the interchange, the interchange cars may be left sitting on the UP siding for a much longer time.

Related Matter. In its second quarterly progress report (BNSF-PR-2, filed January 2, 1997), BNSF noted that, since January 15, 1996, it has been operating between Temple and San Antonio under the terms of a BNSF-SP settlement negotiated in connection with the BN/SF merger. This service, BNSF added in its progress report, will continue to operate on SP's Caldwell-Giddings-Flatonia line until such time as the UP route via Elgin and Smithville is upgraded to allow multiple movements of 286,000 pounds. See BNSF-PR-2 at 6 (the next to the last indented item). BNSF now notes that, until such time as BNSF's operations move to the UP line through Elgin, any BNSF/Longhorn interchange will have to be at Giddings. See BN/SF-76 at 1 n.1. Because no party has addressed problems that may arise if there is a long delay in implementing BNSF's operations via Elgin, we will not address this matter either. Rather, we expect BNSF to commence operations via Elgin in the relatively near future.

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

It is ordered:

1. Longhorn's request that the Longhorn/BNSF interchange be located at Giddings is denied.
2. BNSF's request that the Elgin interchange arrangements agreed to by CMTA and UP/SP be modified in certain ways that concern the use of the UP siding south of Elgin is denied.
3. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary