

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. 73]²

Decided: August 14, 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

(continued...)

conditions, including the terms of the BNSF agreement.⁴ The common control authorized in Decision No. 44 was consummated on September 11, 1996.

In this decision, we address the BNSF access issue presented in the joint petition (designated "BN/SF-80, LCRA-11" but referred to herein as BN/SF-80) filed August 6, 1997, by BNSF and LCRA/Austin,⁵ and in the reply thereto (designated UP/SP-309) filed August 12, 1997, by applicants.⁶

BACKGROUND

Decision No. 44. We noted, in Decision No. 44: that LCRA and the City of Austin were joint owners of the Fayette Power Project (FPP), a coal-fired station at Halsted, TX, that burns Powder River Basin (PRB) coal that, at the time Decision No. 44 was served, was transported by UP in a single-line haul; that, when it entered into its then present contract with UP, LCRA/Austin also entered into a separate trackage rights agreement with UP's Missouri-Kansas-Texas Railroad Company predecessor (hereinafter referred to as the MKT TRA) that provided future access over 18 miles of track between Halsted (the location of the FPP) and West Point, TX (the location of a nearby SP-UP junction); and that one of the purposes of the MKT TRA was to allow LCRA/Austin to receive coal from the PRB via a BN-SP routing. We further noted, in Decision No. 44: that LCRA/Austin's principal interest vis-à-vis the UP/SP merger arose from its concern that the merger might effectively nullify the trackage rights provided for in the MKT TRA; but that LCRA/Austin thought that the BNSF agreement would "effectively preserve these trackage rights (section 4b allows BNSF to serve FPP), assuming that BNSF is able to operate efficiently and economically over the trackage rights lines." See Decision No. 44, slip op. at 63. See also Decision No. 61 (served November 20, 1996), slip op. at 13, numbered paragraph 3 (where we observed that there was a missing period, but no missing text, in the last paragraph in Decision No. 44, slip op. at 63).⁷

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 Lower Colorado River Authority and the City of Austin, TX, are referred to collectively as LCRA/Austin.

⁶ Applicants indicate that, although the BNSF agreement's mandatory arbitration provision may require that this dispute be submitted to arbitration, they have waived that provision as respects this dispute. See UP/SP-309 at 1 n.2. We therefore have no occasion to address, in this decision, the scope of the BNSF agreement's mandatory arbitration provision.

⁷ See also UP/SP-303 (applicants' July 1, 1997, progress report), Exhibit B (the BNSF agreement, amended and restated as of June 30, 1997). Section 4a of the BNSF agreement provides that BNSF shall have trackage rights over certain UP lines in South Texas, including, among others, the UP line between Ajax, TX, and Sealy, TX (West Point and Halsted are on this line), although

(continued...)

Decision No. 57. In Decision No. 44, we imposed, among many other conditions, a 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). In Decision No. 57 (served November 20, 1997), we considered, among other things, whether LCRA/Austin was entitled to 2-to-1 status for the purposes of the contract modification condition. We held that LCRA/Austin was not entitled to 2-to-1 status for such purposes because, immediately prior to the consummation of the merger, it had been served only by UP, with access only to UP and no access to SP. We acknowledged that LCRA/Austin would have become a 2-to-1 shipper at that future date on which its MKT TRA trackage rights were to have become effective, but we indicated that, when we imposed the contract modification condition, we had in mind that this condition would apply only to those shippers that had 2-to-1 status immediately prior to the consummation of the merger. See Decision No. 57, slip op. at 6.

The BN/SF-80 Petition. In the BN/SF-80 petition, which was filed pursuant to Decision Nos. 44 and 72,⁸ BNSF and LCRA/Austin (hereinafter referred to collectively as petitioners) indicate: that LCRA/Austin has entered into a contract with BNSF for transportation of volumes of coal that (petitioners claim) are not subject to an existing contract between LCRA/Austin and UP; that BNSF, acting to fulfill its obligations under the new LCRA/Austin-BNSF contract, has scheduled a loaded coal train to depart from the PRB on or about August 15, 1997; but that UP, claiming that BNSF has no present right to use its trackage rights to access the Halsted plant, has advised that it will refuse to permit BNSF to use its trackage rights to handle traffic moving to that plant.⁹ Petitioners have therefore sought "an order of enforcement," BN/SF-80 at 1, directing UP to allow BNSF to use its trackage rights to provide rail service to the FPP at Halsted under any contract covering volumes not committed to UP under the existing contract between LCRA/Austin and UP.

DISCUSSION AND CONCLUSIONS

We agree with petitioners that, under the terms of the BNSF agreement, BNSF has the right to conduct trackage rights operations to/from LCRA/Austin's Halsted plant. We imposed the terms of the BNSF agreement as a condition to the merger, see Decision No. 44, slip op. at 226 & n.277; that condition became effective on September 11, 1996, see Decision No. 44, slip op. at 238 (ordering paragraph 64); and, as noted above in footnote 7, that condition clearly provides that BNSF shall have trackage rights access to LCRA/Austin's Halsted plant. We therefore expect UP to

⁷(...continued)

Section 4b also provides that such trackage rights "shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein." Section 4b further provides, however, that BNSF shall receive access on the Section 4a lines to, among other facilities, "'2-to-1' shipper facilities at points listed on Exhibit A to this Agreement." Finally, the referenced Exhibit A includes "Halsted TX (LCRA plant)" among the "Points Referred to in Section 4b."

⁸ "[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." See Decision No. 72 (served May 23, 1997), slip op. at 8 (footnotes omitted).

⁹ Petitioners also contend that BNSF service under the LCRA/Austin-BNSF contract is important: because it will help to alleviate the impact of very high recent UP cycle times; and because of its implications for BNSF's future ability to compete more effectively for the bulk of LCRA/Austin's coal traffic.

comply with our merger condition and allow BNSF to run its trains to/from the Halsted plant, over the trackage rights lines provided for in the BNSF agreement.¹⁰

(1) As noted above in footnote 7, the BNSF agreement provides that BNSF shall receive trackage rights access to, among other facilities, the LCRA/Austin plant at Halsted. Section 11 of the BNSF agreement provides that the rights granted in Sections 1 through 8 shall be effective "upon UP's acquisition of control of SP," and, when we imposed the BNSF agreement as a condition to the merger, we intended that this condition would be effective on September 11, 1996. Neither in the BNSF agreement nor in Decision No. 44 is there any indication that the effective date of BNSF's trackage rights access to Halsted was ever intended to be some date later than September 11, 1996.

(2) The related "Sealy, Texas to Waco and Eagle Pass, Texas Trackage Rights Agreement" (hereinafter referred to as the Sealy TRA) is one of the many definitive implementing agreements dated June 1, 1996, that were entered into by applicants and BNSF in order to implement the trackage rights provided for in the BNSF agreement.¹¹ The Sealy TRA covers various lines in Texas, including, as pertinent, the UP line between Smithville, TX, and Sealy, TX (West Point and Halsted are on this line). The Sealy TRA, much like the BNSF agreement itself, was intended to be effective upon the acquisition by UP of control of SP. See Exhibit B to the Sealy TRA (the Sealy TRA is the "agreement," see Exhibit B, Section 1.1; and this agreement is to be effective upon the acquisition by UP of control of SP, see Exhibit B, Section 9.1). Nothing in the Sealy TRA gives any indication that the effective date of BNSF's trackage rights access to Halsted was ever intended to be some date later than September 11, 1996. BNSF's trackage rights access to Halsted is explicitly limited in one other respect,¹² but there is no explicit limitation in terms of a delayed effective date.

(3) It is true that, in applicants' April 29, 1996, rebuttal filings, their witness Mr. Peterson stated that "it was never intended" that BNSF would access the Halsted traffic prior to the expiration of the then current UP contract. See UP/SP-231, Part B at 193 n.63.¹³ Mr. Peterson was explaining that a large share of the UP "2-to-1" traffic that BNSF would gain the right to handle upon consummation of the merger would be available to BNSF within no more than one year of consummation, despite rail transportation contracts. He added, in his footnote 63: that the Halsted traffic would not be "2-to-1" traffic until it became available to SP at the expiration of the then current UP contract; that "it was never intended" that BNSF would access the Halsted traffic prior to the expiration of the then current UP contract; and that this traffic "is thus not included in my figures." It does not appear that Mr. Peterson's footnote 63 was intended to express an opinion as to the scope of the BNSF trackage rights provided for in the BNSF agreement.¹⁴

(4) In any event, the implications of Mr. Peterson's footnote 63 must be balanced against the explicit deposition testimony of applicants' Mr. Rebensdorf. See BN/SF-80 at 8; see also LCRA-4 at 5-6 (filed September 23, 1996). At this deposition (taken January 23, 1996), Mr. Rebensdorf, upon being asked whether the Halsted trackage rights provided for in the BNSF agreement would be exercisable immediately upon consummation of the merger, advised that LCRA/Austin's counsel

¹⁰ We see no need to issue the injunctive-style "order of enforcement" requested by petitioners; clarification in the nature of a declaratory order should suffice.

¹¹ The Sealy TRA was filed in this proceeding on June 28, 1996, as one of numerous attachments to UP/SP-266.

¹² See Section 2(b) of the Sealy TRA, which provides that the rights granted to BNSF "on the line serving the LCRA plant at Halsted" shall be limited to the operation of loaded and empty unit coal trains destined to or returning from LCRA.

¹³ The UP/SP-231 rebuttal was filed prior to our issuance of Decision No. 44.

¹⁴ See also Decision No. 44, slip op. at 63 (in discussing LCRA/Austin's interests, we gave no indication that the scope of the BNSF trackage rights at Halsted had been raised as an issue).

was correct in the belief that such rights would indeed be exercisable immediately upon consummation of the merger. Applicants have suggested that Mr. Rebensdorf's statement was merely "a sincere attempt to allay the concerns of LCRA's counsel regarding whether BNSF would obtain trackage rights to serve LCRA," see UP/SP-288 at 5 (filed October 11, 1996). However, applicants must be held to the representations made by their witnesses in the course of this proceeding. See Decision No. 44, slip op. at 12 n.14.¹⁵ Applicants never explicitly disavowed Mr. Rebensdorf's deposition testimony, and Mr. Peterson, in his footnote 63, did not explicitly disavow (or even reference) Mr. Rebensdorf's deposition testimony. LCRA/Austin thus had a right to rely upon this testimony. If Mr. Peterson intended to disavow Mr. Rebensdorf's statement, Mr. Peterson's footnote 63 simply did not convey the message in a sufficiently explicit manner.¹⁶

(5) More importantly, applicants, in drawing up the BNSF agreement, could have made BNSF's Halsted trackage rights effective not immediately upon consummation of the merger but only at that future date at which SP's MKT TRA trackage rights would have become effective. Applicants, however, did not make BNSF's Halsted trackage rights subject to a delayed effective date. In their negotiations with BNSF, they made BNSF's Halsted trackage rights effective immediately upon consummation of the merger. As we noted in Decision No. 44, "the BNSF agreement includes, in addition to the rights which address competition at 2-to-1 points, an exchange of various other rights between UP/SP and BNSF." See Decision No. 44, slip op. at 17. Additional rights, such as BNSF's Halsted trackage rights for the period prior to the effective date of SP's MKT TRA trackage rights, have been granted and cannot now be withdrawn unilaterally.

(6) Our decision today neither rests upon, nor calls into question, the LCRA/Austin holding in Decision No. 57. Applicants' arguments to the contrary notwithstanding, see UP/SP-309 at 7-8, LCRA/Austin's lack of entitlement to the benefits of the contract modification condition has nothing at all to do with the issue addressed in today's decision.

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

¹⁵ Applicants insist, in essence, that Mr. Rebensdorf never intended to mislead anyone about the status of the Halsted facility. See UP/SP-309 at 4-5. Nothing said in this decision should be taken as an indication that we believe that Mr. Rebensdorf had any intention to mislead anyone. Indeed, we accept applicants' entirely plausible explanation that, at the time of his deposition, Mr. Rebensdorf was not aware that some LCRA/Austin traffic was not committed to UP under the then current LCRA/Austin-UP contract. See UP/SP-309 at 5-6.

¹⁶ Applicants insist that Mr. Peterson's footnote 63 was intended to eliminate any possible confusion that had been generated by Mr. Rebensdorf's deposition testimony. See UP/SP-309 at 6 n.5. There is, however, no explicit indication in Mr. Peterson's footnote 63 that such a result was intended.

It is ordered:

1. Treating the BN/SF-80 pleading as a petition for clarification, BNSF's Halsted trackage rights are clarified as indicated in this decision.
2. This decision shall be effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary