

## 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. 52]

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*Decided September 9, 1996*

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This decision concerns the conditions respecting the City Public Service Board of San Antonio (CPSB) that we imposed in *Decision No. 44*.

BY THE BOARD:<sup>1</sup>

*Decision No. 44*. In *Union Pacific/Southern Pacific Merger (Decision No. 44)*, 1 S.T.B. 233 (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)<sup>2</sup> and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL

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<sup>1</sup> Proceedings pending before the Interstate Commerce Commission (ICC) 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.

<sup>2</sup> Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) are referred to collectively as UP.

Corp., and The Denver and Rio Grande Western Railroad Company),<sup>3</sup> subject to various conditions. Among other things, we imposed certain conditions respecting CPSB. *See, Decision No. 44*, 1 S.T.B. at 305-07 (relief requested by CPSB) and at 469-71 (relief granted to CPSB). With respect to the precise details of the CPSB conditions, we directed UP/SP, CPSB, and BNSF<sup>4</sup> to submit, by August 22, 1996, either agreed-upon terms or separate proposals. *See, Decision No. 44*, 1 S.T.B. at 548 (ordering paragraph 30).<sup>5</sup>

*Pleadings Submitted.* UP/SP, CPSB, and BNSF have now submitted several pleadings: one by UP/SP and CPSB jointly (designated "UP/SP-273/CPSB-9," but hereinafter referred to for convenience as "UP/SP-273"); one by BNSF separately (designated BN/SF-63); one by UP/SP separately (designated UP/SP-276); and one by CPSB separately (designated CPSB-11).<sup>6</sup>

### DISCUSSION AND CONCLUSIONS

*Amendments Related to CPSB Conditions.* CPSB's two coal-burning plants at Elmendorf, TX, are served by a single rail line (SP's Elmendorf Line) that runs approximately 12 miles between a UP-SP junction known as "SP Junction (Tower 112)" and Elmendorf. *See, Decision No. 44*, 1 S.T.B. at 305. In *Decision No. 44*, we imposed two conditions respecting CPSB's Elmendorf plants. *See, Decision No. 44*, 1 S.T.B. at 469-71. In Paragraph (i), we indicated that we would hold UP/SP to its representation that the BNSF agreement<sup>7</sup> would be amended to clarify that Elmendorf is a covered point. We noted that Section 4a of the BNSF agreement, as amended by Section 3a of the second

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<sup>3</sup> Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) are referred to collectively as SP.

<sup>4</sup> UP and SP are referred to collectively as UP/SP. Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) are referred to collectively as BNSF.

<sup>5</sup> The submission deadline was subsequently extended to August 30, 1996. *See Decision No. 45* (served August 23, 1996) and *Decision No. 46* (served August 26, 1996).

<sup>6</sup> We will grant: UP/SP's unopposed UP/SP-276 motion for leave to file UP/SP-276; and CPSB's unopposed CPSB-10 motion for leave to file CPSB-11.

<sup>7</sup> The contents of the BNSF agreement are described in *Decision No. 44*, 1 S.T.B. at 247 n.15.

supplemental agreement dated June 27, 1996, already provided that BNSF could operate on SP's Elmendorf Line between MP 0 and MP 12.6 for the sole purpose of serving the CPSB plants at Elmendorf;<sup>8</sup> but we further noted that we were unable to ascertain whether BNSF had also received trackage rights over the appropriate UP line between San Antonio and Ajax. In Paragraph (iii), we indicated that we would impose a condition that would have the effect of allowing BNSF to operate over SP's Elmendorf Line, at CPSB's option, pursuant to trackage rights derived from an existing CPSB-SP trackage rights agreement.<sup>9</sup>

Section 4a of the BNSF agreement dated September 25, 1995, as amended by the supplemental agreement dated November 18, 1995, and as further amended by the second supplemental agreement dated June 27, 1996, provides, among other things, that BNSF shall receive trackage rights on UP's line between San Antonio and Ajax.<sup>10</sup> Section 4a of the BNSF agreement dated September 25, 1995, as amended by the second supplemental agreement dated June 27, 1996, further provides that BNSF shall receive trackage rights over SP's Elmendorf Line. Because UP has two lines between San Antonio and Craig Junction (a point west/southwest of Ajax),<sup>11</sup> and the maps provided by UP/SP suggested *both* that BNSF was to receive trackage rights over only one

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<sup>8</sup> MP 0 is located at SP Junction (Tower 112). MP 12.6 is located at Elmendorf.

<sup>9</sup> As a practical matter, the conditions we imposed in *Decision No. 44* will allow BNSF to operate via trackage rights over UP/SP lines from connections with BNSF's own lines to CPSB's Elmendorf plants. From the connections with BNSF's own lines to SP Junction (Tower 112), the trackage rights will be those provided for in the BNSF agreement. But, over the Elmendorf Line--*i.e.*, from SP Junction (Tower 112) to CPSB's Elmendorf plants--the trackage rights will be those provided for *both* in the BNSF agreement *and* in the existing CPSB-SP trackage rights agreement. BNSF, that is to say, will be able to operate over the Elmendorf Line using *either* the trackage rights provided for in the BNSF agreement *or* (at CPSB's option) the trackage rights provided for in the CPSB-SP trackage rights agreement.

<sup>10</sup> Ajax appears to be located at or immediately adjacent to San Marcos.

<sup>11</sup> We will refer to the two lines as Track No. 1 and Track No. 2. Track No. 1 is the western line; it runs through Adams; it was and is operated by MPRR; and it is sometimes referred to as the MPRR line. Track No. 2 is the eastern line; it runs through Fratt; it is now operated by MPRR but was formerly operated by the Missouri-Kansas-Texas Railroad Company (MKT); and it is sometimes referred to as the MKT line.

of these lines<sup>12</sup> and that SP Junction (Tower 112) was located on the line over which BNSF would not be receiving trackage rights,<sup>13</sup> we noted in *Decision No. 44* that we were unable to ascertain whether BNSF had received trackage rights over the appropriate line between San Antonio and Ajax.

UP/SP and CPSB have now agreed on amendments to the BNSF agreement that, in their opinion, satisfy the CPSB conditions imposed in *Decision No. 44*. See, UP/SP-273, Exhibit A at 1. The amendments include: an amendment to Section 4a to the effect that BNSF will receive trackage rights between Craig Junction and SP Junction (Tower 112) via Track No. 2, as an alternative route, "for the sole purpose" of handling CPSB traffic via SP Junction (Tower 112), but provided that "such rights do not include the right to serve new industries or transloading facilities on this line;" an amendment to Section 4a to the effect that BNSF will receive trackage rights over SP's line between SP Junction (Tower 112) and Elmendorf; various conforming amendments; and an amendment to Section 9l to the effect that BNSF shall also have the right, at CPSB's option, to operate over the Elmendorf Line using the trackage rights provided for in the CPSB-SP trackage rights agreement.

UP/SP and CPSB have also agreed on corresponding amendments to the related "Sealy, Texas to Waco and Eagle Pass, Texas" trackage rights agreement (hereinafter referred to as the Sealy TRA) dated June 1, 1996. See, UP/SP-273, Exhibit A at 2.<sup>14</sup>

We accept CPSB's judgment that the amendments agreed to by UP/SP and CPSB (both the amendments to the BNSF agreement and the corresponding amendments to the Sealy TRA) satisfy the CPSB conditions imposed in *Decision No. 44*.<sup>15</sup>

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<sup>12</sup> The maps suggested that BNSF was to receive trackage rights over Track No. 1 only.

<sup>13</sup> SP Junction (Tower 112) is located on, or immediately adjacent to, Track No. 2.

<sup>14</sup> The Sealy TRA was filed in this proceeding on June 28, 1996, as one of numerous attachments to UP/SP-266.

<sup>15</sup> The Sealy TRA, as initially drafted, did not include the segment of track that runs between: (i) SP Tower 105, which is located in San Antonio adjacent to Track No. 1; and (ii) SP Junction (Tower 112), which is located in San Antonio at the junction of the Elmendorf Line and Track No. 2. See, the Sealy TRA, at 1-2 (the material following the colon in the final subparagraph of the first "whereas" clause). Without this segment, BNSF could not have provided service to CPSB because Track No. 1 (over which BNSF received trackage rights) does not have  
(continued...)

*Certain Restrictions.* BNSF concedes, in essence, that the amendments agreed to by UP/SP and CPSB satisfy the CPSB conditions we imposed in *Decision No. 44*. BNSF notes, however, that the amendments to the BNSF agreement agreed to by UP/SP and CPSB include a restriction to the effect that BNSF, although it can operate over Track No. 2, cannot serve "new industries or transloading facilities" on that line. BNSF insists that this restriction (hereinafter referred to as the Track No. 2 facilities restriction) is inconsistent with the condition we imposed in *Decision No. 44* that requires that BNSF be granted the right to serve new facilities (including transload facilities) on all UP/SP lines over which BNSF receives trackage rights in the BNSF agreement. *See, Decision No. 44*, 1 S.T.B. at 419-20.<sup>15</sup>

BNSF, CPSB, and UP/SP all agree that, for various operational reasons, the Track No. 2 routing (which happens to be the routing currently used by UP) is preferable to the Track No. 1 routing as respects traffic moving to CPSB's Elmendorf facilities. These parties, however, differ in their assessments of just how preferable the Track No. 2 routing really is.

BNSF contends that the Track No. 2 routing is absolutely essential. The Track No. 1 routing, BNSF claims, requires complex switching, multiple railroad clearances, and the backing of trains several miles on mainlines through an urban area of San Antonio. These Track No. 1 operational problems, BNSF adds, prompted UP and CPSB to develop a Track No. 2 routing that would enable UP to deliver unit coal trains to Elmendorf. The Track No. 2 routing, BNSF contends, is the only viable routing to Elmendorf.

CPSB agrees with BNSF's assessment of the relative merits of the Track No. 1 routing vis-à-vis the Track No. 2 routing. *See, CPSB-11* at 3. UP, CPSB argues, had extensive operating problems in moving CPSB coal trains via the Track No. 1 routing, and, CPSB claims, it was these problems that led UP to develop the Track No. 2 routing (and, CPSB adds, UP developed the Track No. 2 routing with substantial financial assistance from CPSB). The Track No. 2 routing, CPSB notes, is now used by UP to deliver virtually all of CPSB's unit

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<sup>15</sup>(...continued)

a direct connection with the Elmendorf Line. The inadvertent omission of this segment has now been corrected. *See, UP/SP-273*, Exhibit A at 2 (the second amendment).

<sup>16</sup> BNSF indicates that it agrees with all of the other amendments agreed to by UP/SP and CPSB. *See, BN/SF-63* at 3 n.4.

train coal traffic to Elmendorf, although an occasional empty train may still use the Track No. 1 routing.

UP/SP concedes that the Track No. 2 routing is operationally preferable to the Track No. 1 routing as the Track No. 1 routing is presently configured, *see*, UP/SP-276, V.S. Searle at 2-3, but maintains that the Track No. 1 routing is nevertheless a viable routing for Elmendorf traffic. UP/SP notes: that the Track No. 1 routing was in fact used by UP to deliver unit coal trains to Elmendorf from the time UP won the CPSB contract in 1985 until it obtained trackage rights over the Track No. 2 routing (then owned by MKT) in 1987; and that the original terms of the Sealy TRA dated June 1, 1996, anticipated that BNSF would use the Track No. 1 routing to serve Elmendorf.<sup>17</sup> UP/SP adds that, merely as a courtesy to CPSB, it agreed to allow BNSF to use the Track No. 2 routing purely for operating convenience, as a second, alternative route to reach CPSB's Elmendorf facilities.

BNSF and UP/SP differ in their views as to the action we should take with respect to the Track No. 2 facilities restriction agreed to by UP/SP and CPSB.<sup>18</sup>

BNSF argues that, because the Track No. 2 facilities restriction is inconsistent with the *Decision No. 44* facilities condition, the Track No. 2 facilities restriction must be eliminated. The Track No. 2 routing is (in BNSF's view) the only viable routing, which necessarily means (again, in BNSF's view) that the trackage rights we granted to BNSF must run via the Track No. 2 routing. There is, BNSF insists, no reason why it should not receive (and there is similarly no reason why shippers along the Track No. 2 routing should not benefit from) the right to serve new facilities (including transload facilities) that accompanies all other trackage rights provided for in the BNSF agreement.<sup>19</sup>

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<sup>17</sup> As noted above, however, the lines included in the original terms of the Sealy TRA did not include the line between Tower 105 and SP Junction (Tower 112) that connects Track No. 1 with the Elmendorf Line.

<sup>18</sup> CPSB indicates that it has no objection to the relief sought by BNSF.

<sup>19</sup> BNSF adds that, in Paragraph (ii) of our discussion of the relief sought by CPSB, we specifically noted that one of the conditions "we have imposed in this decision confirms that BNSF will be allowed to serve all new facilities (not including expansions of or additions to existing facilities) located along the SP (and UP) lines over which BNSF receives trackage rights." *See, Decision No. 44*, 1 S.T.B. at 469-71.

UP/SP, which contends that BNSF has been granted access over two viable routes to reach CPSB's Elmendorf facilities, argues that BNSF's claim that it should be entitled to serve new industries and new transloading facilities on both routes is a case of pure overreaching. The *Decision No. 44* facilities condition, UP/SP contends, is designed to preserve competition, and has no relevance to a facilities restriction on an alternative routing that has been provided for operating convenience only.

Our Analysis. We think that the amendments agreed to by UP/SP and CPSB should be allowed to take effect on September 11, 1996 (the effective date of *Decision No. 44*). These amendments are acceptable to UP/SP and CPSB, of course, and, aside from the Track No. 2 facilities restriction, these amendments are likewise acceptable to BNSF. We will therefore direct BNSF to accept these amendments, although its acceptance will not be taken to compromise its continuing objection to the Track No. 2 facilities restriction.

We will reserve judgment on the Track No. 2 facilities restriction to which UP/SP has agreed but to which BNSF has objected. We think that this issue would be better examined in the context of the UP/SP-275 petition for clarification filed August 29, 1996, which asks, among other things, that we clarify that the *Decision No. 44* facilities condition does not apply to certain UP lines, including the line referred to herein as Track No. 2. See, UP/SP-275 at 6-7. We think it would be best to defer judgment on the Track No. 2 facilities restriction pending our consideration of the replies to the UP/SP-275 petition (replies are due no later than September 23, 1996). Given the lead time involved in providing service to new facilities (including transload facilities), the brief delay we envision in reaching a decision with respect to the Track No. 2 facilities restriction should not impose serious burdens either on BNSF or on any shipper.

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

*It is ordered:*

1. UP/SP-276 and CPSB-11 are accepted for filing and made part of the record in this proceeding.
2. BNSF is directed to accept the UP/SP-273 amendments agreed to by UP/SP and CPSB. Such acceptance will be without prejudice to BNSF's right to continue to object to the Track No. 2 facilities restriction.

3. UP/SP, CPSB, and BNSF may at any time vary, upon agreement of all three parties, the UP/SP-273 amendments agreed to by UP/SP and CPSB.

4. Except insofar as UP/SP, CPSB, and BNSF mutually agree otherwise, the CPSB conditions imposed in *Decision No. 44* and reflected in the UP/SP-273 amendments agreed to by UP/SP and CPSB will become effective on September 11, 1996.

5. This decision shall be effective on September 11, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.