NO. 41242[1]

CENTRAL POWER & LIGHT COMPANY
v.
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided April 28, 1997

The Board grants, in part, a petition for clarification of its previous decision, and denies a petition for reconsideration.

BY THE BOARD:[2]

In *Central Power & Light Co. v. Southern Pacific et al.*, 1059 (1996) *(Bottleneck)*, we granted motions to dismiss, in whole or in part, the complaints of the above-named electric utilities seeking the prescription of certain rates for the unit-train or trainload transportation of coal. In each case, the utility's generating station is served by only one rail carrier over a "bottleneck" segment, a segment for which no alternative rail route is available. Central Power & Light Company (CP&L) and Pennsylvania Power & Light Company (PP&L) seek coal from sources that the bottleneck carriers in their respective cases cannot serve directly; instead, those carriers can only deliver the coal to the generating station after receiving it at a point along the bottleneck segment from

[1] This decision embraces Docket No. 41295, *Pennsylvania Power & Light Company v. Consolidated Rail Corporation,* and Docket No. 41626, *Midamerican Energy Company v. Union Pacific Railroad Company and Chicago and North Western Railway Company.*

[2] The *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (1995) (*the ICCTA*), abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board), effective January 1, 1996. Section 204(b)(1) of *the ICCTA* provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by *the ICCTA*. The captioned proceedings were pending with the ICC prior to January 1, 1996, and concern functions which are now under this Board's jurisdiction. Accordingly, references in this decision are to the old law (West Ed. 1995) unless otherwise indicated.

originating the transportation. MidAmerican Energy Company (MidAmerican), in contrast, obtains its coal from sources that are served directly by the bottleneck carrier. Instead of continuing with that carrier's single-line service, however, MidAmerican wants to use another railroad that serves its sources to pick up the coal and interchange it with the bottleneck carrier for delivery at a point close to the generating station.

While origin-to-destination service requiring more than one rail carrier typically moves under joint or proportional rates, each utility, through its complaint, sought to break its desired multi-carrier coal transportation into separate components by first having the Board prescribe a unit-train or trainload "local" rate over the bottleneck segment from an interchange point of the shipper's choosing relatively close to the generating station. Once they had a bottleneck-segment rate in hand, the utilities then planned to obtain from the origin "non-bottleneck" carrier a separate, unrelated rate for service from the mine to the interchange point, likely under an unregulated shipper-carrier rail transportation contract. The utilities claimed that the railroads' obligations to transport traffic upon request, and to interchange traffic with other railroads if necessary to complete the transportation, entitled the shippers to obtain local service (and separately challengeable local rates) from each carrier that participates in their coal shipments.[3]

The bottleneck carriers in each case moved to dismiss the complaints on the ground that they could not be forced to artificially sever what is clearly "through" traffic and provide separately priced "local" service over the bottleneck segments. The bottleneck carriers in *CP&L* and *MidAmerican* also

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[3] The utilities sought to avoid joint and proportional through rates because a shipper may challenge the reasonableness of those rates only in their entirety, not simply the portion of the rates attributable to the bottleneck segment of the through movement. *Louisville & N.R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 231-34 (1925) *(L&N); Great Northern Ry. v. Sullivan*, 294 U.S. 458, 462-63 (1935) (*Great Northern*); *see also, Western Resources, Inc. v. STB*, No. 95-1435 at 13 (D.C. Cir. March 28, 1997). Pursuing local service, the utilities apparently concluded, would enable them to obtain a discrete Board rate reasonableness analysis and rate prescription for each relatively short bottleneck segment, measured by the stand-alone costs (SAC) of providing service over that segment, rather than the SAC over the entire through route as would be required if joint or proportional rates were being charged. A "local-rate" prescription would also, they apparently concluded, free them in turn to secure separate and competitively priced contract rates for the non-bottleneck portion of their transportation, which would produce lower freight rates overall. The shippers claim that, absent a local-rate prescription for the bottleneck segment, they will be unable to obtain contracts over the non-bottleneck segments.

argued that, because they now provide either single-line service *(MidAmerican)* or have designated an interchange point for interline service *(CP&L)* for the utilities' respective coal traffic, they are not required to "open" another route via a different interchange simply on the utility's request, particularly where that would force them to accept a shorter haul over their own lines than they otherwise would enjoy.[4]

Because the three complaints raised common issues that would likely affect, on an industrywide basis, the way in which railroad rates are set and challenged in the future, we concluded that the efficient way to deal with all three would be to combine them for handling, seek public comment, and hold oral argument. Having considered the pleadings in the individual cases, the more recent written comments, and testimony by the parties and other members of the public at the October 31, 1996 oral argument, we issued the *Bottleneck* decision, in which we resolved the issues raised, applied our determination to the complaints before us, and provided guidance for future cases.

In our decision, we reviewed both the types of service that shippers may demand and the types of rate challenges that they may bring. We held that a shipper may not insist that a bottleneck carrier provide only short-haul service under separately challengeable local rates if the carrier also provides, alone or in conjunction with other carriers, origin-to-destination service. We found that, under current law, so long as the bottleneck carrier provides the origin-to-destination service that the shipper seeks -- by single-line rates or through rates with other carriers (generally joint or proportional rates) -- it is not required to additionally hold out local rates for transportation that clearly is not local to the bottleneck segment. We concluded that giving shippers the rate control that they sought would not withstand legal scrutiny, as it would defeat a railroad's right to determine, at the outset, the rates that it will use to respond to requests for through service. *Bottleneck* at 1 S.T.B. 1064-65, citing 49 U.S.C. 10701a(a) (now 49 U.S.C. 10701(c)).

We further held that a shipper is not entitled, upon request, to an alternative routing from an origin from which it is now served by a bottleneck carrier, either directly or in interline service. That, we found, would defeat the carrier's initial

[4] Although it too sought local service over a bottleneck segment, unlike CP&L and MidAmerican, PP&L did not seek a route that was different from that which the bottleneck carrier stood ready to provide.

discretion to choose its routes and protect its long-hauls. Instead, we determined, if a shipper wants a route other than the one currently provided by the bottleneck carrier, it must invoke our "competitive access" regulations and demonstrate that the bottleneck carrier's refusal to establish such a route would foreclose more efficient service. We concluded that, while a shipper-carrier contract for service over the non-bottleneck segment of its desired route could be useful as a factor in a competitive access case, it would not by itself relieve the shipper of its obligation to satisfy the competitive access regulations to obtain an alternative route. *Bottleneck*, 1 S.T.B. at 1065-68, 1068-72, citing 49 U.S.C. 10705(a)(1), (a)(2); 49 CFR 1144.5.

At the same time, we reaffirmed that a railroad's common carrier obligation requires it to provide rates and routes to move traffic from any origin to any destination, and that a carrier therefore could not refuse a shipper's request for service from a new origin. Thus, we found, if a shipper seeks service from an origin that is not currently served by a bottleneck carrier, either directly or in interline service, that carrier cannot refuse service, but instead must accept the traffic from the origin carrier at a reasonable interchange point and provide a rate to complete the transportation. *Bottleneck*, 1 S.T.B. at 1063-64, citing 49 U.S.C. 11101(a), 10742.

Lastly, we addressed how we would examine rate reasonableness issues in cases involving bottleneck carriers. We reaffirmed the principles of *L&N* and *Great Northern* that, when railroads establish common carriage through rates, shippers must challenge the reasonableness of the entire rate from origin to destination, and may not challenge the bottleneck segment separately. When, however, the rate for the non-bottleneck segment has been separately set through a shipper-carrier rail transportation contract, we found that we could not address the reasonableness of the entire origin-to-destination rate without exercising regulatory authority over the contract. Because we lack jurisdiction to regulate railroad-shipper contracts, we concluded that, under such circumstances, we must assess the reasonableness of the rates over the bottleneck segment alone. *Bottleneck*, 1 S.T.B. 1072-75 citing 49 U.S.C. 10709(c)(1) (formerly 49 U.S.C. 10713(i)(1)).

Applying these principles to the three complaints before us, we dismissed *CP&L* and *MidAmerican*, and in part *PP&L*, on the common ground that the utilities could not insist that the bottleneck carriers establish local rates for what

is really a through service. *Bottleneck,* 1 S.T.B. at 1063-68, 1075-79.[5] In the face of the discretion afforded railroads initially to select their rates and routes and to protect their long-hauls, we determined that the law simply does not provide these utilities the right, upon request, to segmented origin-to-destination service in the manner sought in these cases. *Id.* 1 S.T.B. at 1063-68.[6] We found that, although we are directed to permit -- indeed, even encourage -- competition, the shippers' approach would go further and artificially force competition by impermissibly depriving the bottleneck carriers of their initial rate and route discretion. *Id.* 1 S.T.B. at 1068.

On January 21, 1997, MidAmerican filed a petition for clarification of our December 31st decision, and Western Resources, Inc. (WRI) filed a petition for reconsideration. We address these petitions in turn.

PETITION FOR CLARIFICATION

MidAmerican, supported by the Western Coal Traffic League (WCTL), asks us to clarify the *Bottleneck* decision by explaining more fully the availability of bottleneck-segment rate relief where, unlike the circumstances in the dismissed complaints, a shipper has first secured a separate rate for service over a non-bottleneck segment through a shipper-carrier rail transportation contract. *Bottleneck,* 1 S.T.B. at 1073-75. The Association of American Railroads (AAR) opposes this request, arguing that such a determination should be made in actual cases, not through the hypothetical examples presented in MidAmerican's petition. AAR also argues that the clarifications sought by the utility, if granted, would effectively and improperly compel what we found that railroads were not required to provide -- segment rates for through service.

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[5] To the extent that PP&L's amended complaint also involved a challenge to the reasonableness of the joint and proportional rates established for the origin-to-destination service, we permitted that portion of the complaint to proceed. *Bottleneck,* 1 S.T.B. at 1078.

[6] In *CP&L,* we determined that the utility also did not establish, under our competitive access regulations, its right to an alternative through route for its Powder River Basin coal traffic via Victoria, TX, in addition to the through route via Ft. Worth, TX, that Southern Pacific (SP), the involved bottleneck carrier, was prepared to provide for that coal traffic. *Bottleneck,* 1 S.T.B. at 1076. Further, because MidAmerican's present rail transportation contract with Union Pacific (UP) will not expire until December 31, 1997, we determined that its complaint had to be dismissed on ripeness grounds as well. *Id.* at 17, citing *Burlington N. R.R. v. Surface Transp. Bd.,* 75 F.3d 685, 692-96 (D.C. Cir. 1996) (Board may not prematurely require a common carrier rate be established for post-contract shipments).

We share AAR's concern that, because any particular bottleneck rate case is likely to be distinct, the Board should not prejudge a railroad's rate and routing obligations or predetermine remedies in every conceivable set of circumstances, and we will not do so here.[7] AAR Opposition at 6, 8. However, recognizing the impact our decision would likely have on future bottleneck-rate complaints, we have sought public comment and conducted oral argument to air thoroughly the common legal and policy issues involved in these matters so that we could set forth, as completely as possible, our approach to these cases. To that end, MidAmerican's petition raises questions that we conclude should not await future cases, but instead should be addressed now.

Accordingly, we grant the petition and clarify our *Bottleneck* decision to the extent set forth below. We address MidAmerican's questions in two different settings: (1) those situations where the bottleneck carrier serves both the origin and destination at issue and provides single-line service; and (2) those situations where the bottleneck carrier does not serve the origin at issue, but can deliver traffic to destination only after interchanging it with another carrier.[8]

Alternative Service From Origin Now Served By Bottleneck Carrier

In the first situation, the shipper seeks to forgo the bottleneck carrier's single-line service by separately contracting with a second rail carrier that also serves the origin for transportation to an interchange point on the bottleneck segment. If the shipper already has a contract with the second carrier in hand, MidAmerican asks whether the bottleneck carrier would then be required to establish, upon the shipper's request, a rate from that interchange point to destination that would operate in combination with the contract to complete the transportation, and whether we would separately adjudicate the reasonableness of that rate if separately challenged on rate reasonableness grounds. Clf. Pet. at 4-6.

In this situation, our prior decision is clear. As we stated there, where a bottleneck carrier already serves the origin, either directly or in interline service, it need not provide, on request, an additional rate for transportation over the

[7] We do, however, draw on the specific facts of the three complaints before us to help illustrate and explain our decision here. *See* notes 13 and 14, *infra*.

[8] Our analysis has equal relevance if the bottleneck exists on the origin, rather than the destination, segment. Clarification Petition (Clf. Pet.) at 4 n.2.

bottleneck segment of an alternative interline route from that origin. Instead, the shipper must first proceed under our competitive access regulations to obtain an order requiring the opening of that route. *Bottleneck,* 1 S.T.B. at 1065-72; 49 CFR 1144.5. We stated that, where it is shown, pursuant to the rules, that a carrier's refusal to establish an alternative through route would foreclose more efficient service, we will prescribe that route. We also explained that a contract obtained for service over a non-bottleneck segment of the shipper's preferred route may be useful in making a successful access case. *Id.* 1 S.T.B. at 1068-72.

We determined, however, that a shipper-carrier contract entered into under 49 U.S.C. 10709 for rail service over the non-bottleneck segment, though itself insulated from further regulatory oversight, would not relieve the shipper from having to make an access case, because the contract:

> does not override the routing and long-haul protections afforded under section 10705 to the non-contracting, connecting rail carrier for service over its route segment; section 10709 was not intended to impose new regulatory obligations on non-contracting parties.

Bottleneck, 1 S.T.B. at 1069-70 n.17. The routing protections provided to rail carriers by section 10705 are longstanding and, as we explained, confer on each railroad the initial discretion to choose the routes it will use to respond to requests for service. *Id.* 1 S.T.B. at 1065. In particular, the right of a rail carrier not to be short-hauled, 49 U.S.C. 10705(a)(2), originated in the Mann-Elkins Act of 1910, Pub. L. No. 218, 36 Stat. 539, 552 (1910), and protects a railroad, at the outset, from the precise result posed by MidAmerican's hypothetical: "hav[ing] to carry over its lines traffic originating on, or destined to, another line when the entire carriage could as well have taken place on its own line." *Chicago, M., S.P. & P. R.R. v. United States*, 366 U.S. 745, 750-51, 757 (1961). Because the competitive access regulations can override the application of the protections afforded by section 10705, we found that they must be satisfied before a shipper can gain an additional route that a rail carrier, pursuant to that provision, is not willing and, at the outset, not required to provide. *Id.* 1 S.T.B. at 1065-68.[9]

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[9] That there may be more than one point along the bottleneck segment for traffic to be interchanged would not change this result. Clf. Pet. at 9 (first diagram). Where a bottleneck carrier serves the origin, the shipper must invoke the competitive access rules to obtain an alternative interline routing over any particular interchange that it may designate.

MidAmerican asserts, but without elaboration, that if a bottleneck carrier is not required to respond immediately to a request for separate bottleneck-segment service in these circumstances, Western coal shippers will be largely unable to obtain a separately challengeable bottleneck-segment rate over an alternative interline route for Powder River Basin coal shipments moving from mines that are served both by UP and Burlington Northern (BN). Clf. Pet. at 6 n.5. What MidAmerican seems to suggest, however, is that it is unwilling to test the competitive access regulations to attempt to gain the Board's prescription of an alternative through route that might yield that result. For the reasons stated in our *Bottleneck* decision and restated here, under the current statute it must pursue recourse under the competitive access regulations.

Service From Origin Not Served By Bottleneck Carrier

In contrast, we found in our *Bottleneck* decision that, for traffic from an origin *not* currently served by the bottleneck carrier, either directly or in interline service, but destined to a point on its line, the carrier cannot refuse a shipper's request for service. Instead, the bottleneck carrier must interchange this traffic with the origin carrier and provide a route and rate to complete the transportation. *Bottleneck,* 1 S.T.B. at 1063-64. Where, in that situation, a shipper first contracts with the origin railroad to carry this "new-origin" traffic to an interchange point on the bottleneck segment, MidAmerican asks which of three results would prevail: (1) must the bottleneck carrier provide, upon request, a separately challengeable rate from that interchange point to destination that would operate in combination with the contract to complete the transportation; (2) can the bottleneck carrier refuse to establish such a rate by insisting on an interchange point different from the one selected in the contract, Clf. Pet. at 9 (second diagram); or (3) can the bottleneck carrier refuse to establish such a rate, even where there is agreement on the interchange, by offering only joint rate service? Clf. Pet. at 7-8.

We clarify our *Bottleneck* decision to explain in more detail the bottleneck carrier's rights and obligations to interchange in these circumstances, and to outline our approach for resolving interchange disputes, like that posed in MidAmerican's hypothetical, which may arise in subsequent bottleneck rate

cases.[10] Unlike the situation where the bottleneck carrier serves the origin, for service from an origin that it does not serve, the bottleneck carrier's initial routing discretion, including its right to maximize its long-haul -- *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 276-82 (1929), *Pennsylvania R.R. v. United States*, 323 U.S. 588, 591-92 (1945) -- is no greater than that of the origin carrier that must also participate in the transportation. As a result, the choice of an interchange for the required two-carrier service in these circumstances cannot be dictated unilaterally by either the bottleneck carrier or, through its contract with the shipper, the origin carrier. Instead, under 49 U.S.C. 10742, the determination of an interchange point for the required through movement is, in the first instance, "a matter of mutual consultation and agreement" between the two carriers. *New York, C. & St. L. R.R. v. New York Cent. R.R.*, 317 I.C.C. 344, 346 (1961); *see also, e.g., Black v. ICC*, 837 F.2d 1175, 1178 (D.C. Cir. 1988) *(Black); Southern Ry.-Control-Central of Georgia Ry.*, 317 I.C.C. 557, 583 (1962).[11]

Under their common carrier and interchange obligations, however, the origin and bottleneck carrier together must provide at least *one* route to complete the shipper's needed multi-carrier service from the desired origin point. *Bottleneck,* 1 S.T.B. at 1063-64. 49 U.S.C. 11101(a), 10742; *see also*, 49 U.S.C. 10703. Accordingly, if the carriers cannot agree on an interchange that would

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[10] Historically, interchange cases under section 10742 (and former section 3(4), its statutory predecessor) have mainly concerned discrimination issues between carriers; *i.e.*, whether, under section 10742, a rail carrier has failed to provide a complaining rail carrier with interchange facilities "equal" to those offered to other railroads. *See, e.g., Pennsylvania Ry. v. United States*, 236 U.S. 351, 371-72 (1915); *Burlington N. R.R. v. United States*, 731 F.2d 33, 36-38 (D.C. Cir. 1984) *(BNRR)*. In that regard, the cases are of little help in resolving interchange disputes in bottleneck rate cases which do not raise those issues, but instead involve routing and rate issues between bottleneck carriers and shippers. Thus, the interchange issue posed here is, in a significant sense, one of first impression.

[11] The fact that, in a connecting carrier discrimination case, a delivering bottleneck carrier need only offer, among potential interchange points with "equal" facilities, that "option which best serves its own business interests," *BNRR*, 731 F.2d at 40, would not, in the circumstances posed by MidAmerican, change the "mutual-agreement" requirement or otherwise permit the bottleneck carrier to dictate its chosen interchange point where the origin carrier, with equal routing rights, has selected a different point.

act to create that route, we will determine one.[12] That determination would not involve the competitive access regulations. As we explained in our *Bottleneck* decision, the competitive access rules provide an avenue for remedies for situations where a carrier has exploited its market power to perpetuate its own inadequate service or to foreclose more efficient service offered by another rail carrier. *Bottleneck,* 1 S.T.B. at 1068. By determining an interchange for service from an origin that the bottleneck carrier does not serve, we would not be adding a competitive alternative, but merely resolving the carriers' disagreement as to the route over which the carriers would be required to provide service.

In those circumstances, our determination of an interchange, absent an agreement between the carriers, would not be governed by the competitive access rules, but rather by a variety of other factors, including a comparison of the physical and operational feasibility of interchange at the points selected by the carriers.[13] The shipper-carrier contract for service over the non-bottleneck segment, while not conclusive by itself, could also be useful as a factor in our determination of an interchange point (*compare Bottleneck*, 1 S.T.B. at 1068-72, in which we discussed the role of contracts in competitive access cases).

Once an interchange point establishing the required route has been mutually agreed to by the participating carriers (or, if necessary, determined by the Board), where a shipper has a contract with the origin carrier for service to that interchange point, the bottleneck carrier cannot refuse to complete the transportation from that point simply because it cannot enter into a preferred joint rate with the origin carrier. Clf. Pet. at 8. Rather, it must provide whatever rate is necessary to complete the transportation over the route the carriers established for the traffic, and to the extent that we need to clarify our *Bottleneck* decision to reinforce that intended determination, we do so here.

This outcome must occur because any tension between a bottleneck carrier's discretion to determine the kind of rates it will use (joint, proportional, or local,

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[12] *See, United States v. Pennsylvania R.R.*, 323 U.S. 612, 619 (1945) (the regulatory authority to require railroads to interchange derived originally from the authority to prescribe through routes).

[13] *See, e.g., Black*, 731 F.2d at 1177-78, *aff'g Indiana R.R.-Exempt.-Acq. & Oper.*, Finance Docket No. 30789, 1987 ICC LEXIS 370, at * 3-5 (ICC April 7, 1987). We would point out, however, that while the competitive access rules are not applicable in these circumstances, evidence comparable to what would be provided under any of the competitive access criteria would not be precluded. For example, evidence comparing the efficiency of the entire origin-to-destination service using each of the chosen interchange points, a required consideration in an access case (49 CFR 1144.5(a)(1)(B)), could also be probative in an interchange determination.

see, 49 U.S.C. 10701a (now 49 U.S.C. 10701(c)), and its obligation as a carrier to provide service, *see,* 49 U.S.C. 11101(a), must be resolved here in favor of service. Unlike the situation where the bottleneck carrier serves the origin, when service is required from an origin it does not serve, the bottleneck carrier's discretion to determine the kind of rates that it will offer is not absolute, but must necessarily be accommodated with that equally held and exercised by the origin carrier. In MidAmerican's hypothetical, the origin carrier, through its contract with the shipper to provide service over the non-bottleneck segment, has necessarily declined to enter into a unitary, joint-rate arrangement with the bottleneck carrier, and that choice must be accommodated with the bottleneck carrier's own preferences.

In those circumstances, the bottleneck carrier cannot insist on only providing joint-rate service and, as a result, refuse service when it is unable to make those rates; instead, its common carrier obligation requires it to provide a rate necessary to complete the transportation.[14] As we determined in our *Bottleneck* decision, because we lack jurisdiction to review the reasonableness of the terms associated with the portion of the movement covered by the contract, the rate provided by the bottleneck carrier in these circumstances (likely a proportional rate) would be separately challengeable on rate reasonableness grounds. *Bottleneck,* 1 S.T.B. at 1074-75.[15]

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[14] This result would stand in contrast to the three complaints considered in our *Bottleneck* decision. By requesting in those cases that the Board first prescribe local rates over the bottleneck segment, prior to any determination by the origin carrier of the service it would provide over its lines, the utilities would deprive the bottleneck carrier, from the outset, of any discretion to explore with the origin carrier the possibilities of providing joint or proportional through rates for the involved through traffic. That result, we explained, could not be sustained in the face of statutory provisions protecting a railroad's initial rate and routing discretion. In contrast, where a shipper has first obtained a separate contract with the origin carrier for service over the non-bottleneck segment, the origin carrier has acted and chosen not to enter into a joint rate arrangement with the bottleneck carrier, thus necessarily circumscribing the latter's rate discretion.

[15] To illustrate further, in the *CP&L* case, SP held out through rail service via Ft. Worth (as opposed to Victoria) for CP&L coal traffic destined to Coleto Creek from the Powder River Basin, an origin not served by SP. *Bottleneck,* 1 S.T.B. at 1076; UP Reply Comments, October 25, 1996, at 8. If, ***unlike*** the facts of its complaint, CP&L had first separately contracted with UP or BN for service from the Powder River Basin to Ft. Worth, then, under our *Bottleneck*, SP could not have refused service from Ft. Worth to Coleto Creek on the ground that it offered only joint-rate service for this traffic. Rather, under our decision, SP's initial discretion to determine its rates would have had to yield to its obligation to provide service to Coleto Creek over its provided route, requiring it to depart from its "general" policy of offering only joint rates (UP Reply at 8 n.9), and to provide

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Suggesting that this may not be the only or proper remedy, AAR asserts that we could prescribe, under 49 U.S.C. 10705(a)(1), a joint rate with an appropriate division for the bottleneck carrier. AAR Opposition at 8. We foresee little likelihood, however, of granting that kind of relief in bottleneck rate cases. In our *Bottleneck* decision, we noted our responsibility to facilitate competition, but observed that the utilities' request for "local" bottleneck-segment rates, by precluding the bottleneck carriers from pursuing any cooperative rate and routing possibilities with the origin carriers, would work to impermissibly force competition. *Bottleneck*, 1 S.T.B. at 1068. AAR's suggested joint rate/division remedy, where a shipper has first obtained a contract from the origin carrier for service over the non-bottleneck segment, would just as impermissibly allow the bottleneck carriers to avoid competition.

PETITION FOR RECONSIDERATION

WRI, supported by WCTL, asks us to reconsider our *Bottleneck* decision.[16] WRI alleges that we wrongly presumed that non-bottleneck carriers would, on request, offer contracts over the non-bottleneck segment of a through movement without our prior prescription of a bottleneck-segment rate. Pointing to evidence allegedly showing that UP, the non-bottleneck rail carrier for the origin segment of WRI's desired coal traffic, refused to enter into a service contract for that segment for the utility's account, WRI, a Kansas electric utility, argues that non-bottleneck railroads in fact will not contract. As a result, WRI asks that we not make bottleneck-segment relief contingent on the "illusory" condition that shippers first obtain contracts for the non-bottleneck segment of the origin-to-destination service, but rather that we permit shippers to seek such contracts

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[15](...continued)
a proportional rate or other rate from Ft. Worth that would operate in combination with the contract to complete the transportation. We would have required the same from Conrail in the *PP&L* case if PP&L had entered into a contract with Norfolk Southern (NS) for service to the interchange established at Hagerstown, MD, or if PP&L had contracted with CSX Transportation, Inc. (CSX) for service to the interchange established at Lurgan, PA. Had those events occurred, any common carriage rates provided by SP or Conrail to complete the transportation over the respective bottleneck segments would have been, under our *Bottleneck* decision, separately challengeable on rate reasonableness grounds.

[16] WRI states that the affidavit and exhibits upon which its petition is based are confidential and, as a result, asks that they not be made part of the public docket. We agree to that request.

after we prescribe a bottleneck segment rate. Petition at 7.[17] UP, supported by AAR, opposes the petition.

We will deny WRI's petition. We did not presume in our December 31st decision that rail carriers would provide shippers with non-bottleneck segment contracts in response to every request. Indeed, we could not have done so because, under section 10709, contracting between rail carriers and shippers is permissive. Because we cannot direct contracting, railroads' decisions to enter into contracts must necessarily be driven by market forces and other considerations, not regulation. As UP explained, choosing whether or not to contract "turns on the circumstances of each particular situation;" in certain instances the carrier may prefer to cooperate with its connecting road on a joint-rate basis, while in other instances it may choose to compete by offering a segment contract. UP Opposition at 2-3; V.S. Gough at 2.[18] That choice is within a rail carrier's discretion, and simply establishing that a carrier has declined to enter into a non-bottleneck segment contract in one particular situation does not warrant reconsidering our *Bottleneck* decision.[19]

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[17] In addition to filing comments in this proceeding, WRI has also filed a complaint seeking the prescription of bottleneck-segment unit-train coal rates over Santa Fe lines between interchanges at Kansas City and Topeka, KS, and WRI's generating stations at Lawrence and Tecumseh, KS. *Western Resources, Inc. v. The Atchison, T. & S.F. Ry.*, No. 41604 (filed July 31, 1995). Santa Fe has moved to dismiss the complaint on grounds similar to those of the other bottleneck carriers in the other bottleneck complaints. By decision served May 31, 1996, we stayed consideration of WRI's complaint pending state court resolution of certain contract interpretation matters. On December 20, 1996, the Kansas state district court issued a ruling on this matter, WRI Aff. Reid, Exh. H, and WRI's complaint and Santa Fe's motion to dismiss are now under active consideration by the Board. Like other shipper interests, WRI argues that it will be able to secure competitive service contracts from the non-bottleneck carriers only after obtaining a regulatory prescribed maximum reasonable rate for the Santa Fe bottleneck segment.

[18] Just as NS, for example, indicated that it stood ready to negotiate a contract with PP&L for the non-bottleneck segment of the utility's through transportation, *Bottleneck*, 1 S.T.B. at 1071, citing Transcript of Oral Argument, October 31, 1996 at 208-09 (Transcript), UP also asserts that it does not have a policy against segment contracts and has entered into such contracts "whenever it has found it in its business interest to do so." UP Opposition at 2; V.S. Gough at 2-3. With only unsupported or unpersuasive assertions that a more concentrated and anticompetitive rail industry would decline to enter non-bottleneck segment contracts, *Bottleneck*, 1 S.T.B. at 1070, Transcript at 29-30, 245-46, there was nothing to convince us that other rail carriers would not act similarly.

[19] Thus, the fact that WRI was able in 1994 to secure a separate contract for the non-bottleneck segment of its coal transportation from certain origins does not mean that UP must agree to a non-bottleneck segment contract today for additional traffic from other origins. Petition at 5-6; WRI Aff. Reid ¶ 5. We should also note that it does not appear, contrary to WRI's representations,

(continued...)

In any event, our determination in the *Bottleneck* decision to dismiss the utilities' requested bottleneck-segment rate relief in the three complaints before us and provide guidance for subsequent cases did not, contrary to WRI's suggestions, rest on an assumption that railroads would provide non-bottleneck segment contracts in all circumstances. While we encourage non-bottleneck carriers to take advantage of opportunities to compete and provide contracts, even if such action might result in a separately challengeable bottleneck-segment rate, shippers cannot, as a matter of law, force that result beforehand by having us prescribe a local bottleneck-segment rate for what is clearly a through service. That result, as we have explained at length in our prior decision, and have restated here, would run afoul of a bottleneck carrier's statutorily protected rate and service initiatives.

CHAIRMAN MORGAN, *commenting*:

The overriding goal of any rail economic regulatory scheme should be to ensure good service at reasonable prices. The Staggers Rail Act of 1980 sought to achieve this goal by promoting the railroad industry's financial health and encouraging competition within the industry, and throughout the transportation sector, through the removal of regulatory constraints that had stymied the operation of positive market forces. To further these objectives, Congress included in that law a variety of provisions, reaffirmed recently in the *ICC Termination Act of 1995*, to guide the ICC (and now the Board) in reviewing railroad rate and service matters. The Board has attempted in its first bottleneck decision, and in the decision rendered today, to apply those provisions in a way that appropriately balances these objectives.

In the rate proceedings at issue here, each of the interests has argued about these objectives, and, more specifically, that only its position would advance what it claims to be the overriding policy that should guide all of our actions.

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[19](...continued)
that UP has in fact refused WRI's request for a non-bottleneck segment contract for its new coal traffic. Until the recent state court decision, it was in dispute whether, under the terms of its existing contract with Santa Fe, WRI could in fact obtain (and tender to UP) coal from origins other than those listed in the contract, and in its late 1996 correspondence UP was clearly awaiting the court's decision before finalizing any service it would offer from the new origins. WRI Aff. Reid, Exhs. E, G. More significantly, UP's January 16, 1997 letter upon which WRI relies discloses only that UP asked WRI to explain why it would be advantageous for UP to separately contract, not that it was declining to do so. WRI Aff. Reid, Exh. J. at 1; *see also,* UP Reply at 2, V.S. Gough at 1-2.

The shippers have asserted that "open access," or, more specifically, unconditioned shipper authority to direct rates and routes, is needed to promote the procompetitive goals of the statute. The railroads have claimed that any limitations on the rate and route initiatives of bottleneck carriers would seriously erode the financial health of the industry in contravention of the statute. Rather than choosing between these two diametrically opposed positions — a result which the statute did not envision — our decisions in these bottleneck cases have concluded that Congress intended that these goals be implemented in a balanced and complementary way. Thus, our decisions have given effect to the statutory rate and routing initiatives of railroads, while at the same time promoting the interests of the shippers in efficient, innovative and competitive service.

Some of the shippers have expressed their concern that the Board has not afforded them meaningful relief. I disagree. The Board has given the shippers the opportunity to obtain significant relief, within the limits of the statute, while keeping in mind the interest of balancing the objectives of the law. The Board has not provided for "open access," but existing law does not permit that sort of a remedy. The law directs the Board to promote competition, but not to governmentally force it simply upon demand, and these decisions do just that.

Thus, while access is not automatic where a bottleneck carrier already provides origin-destination service, the Board will afford competitive access relief where efficient, innovative and competitive service is being precluded. In describing the competitive access remedy, the Board in its first bottleneck decision recognized the balance struck in the law by Congress as follows:

> "The competitive access rules [are] designed to protect the railroads' freedom to rationalize their systems and maximize service over their most efficient routes, legitimate goals that both Congress and this Board clearly endorse. However, they [are] not designed to defeat legitimate competitive efforts by other rail carriers and shippers by permitting bottleneck carriers to foreclose more innovative, advantageous, and efficient service."

The Board cannot indicate more clearly that we view the competitive access remedy as a real one that we will take seriously when a case is brought to us.

Likewise, I disagree with those representatives in the railroad industry that, in response to MidAmerican's petition for clarification at issue in this decision, have characterized our bottleneck decision as changing little. To the contrary, in reaffirming that bottleneck carriers cannot refuse a shipper's request for service from an origin not now served, and, as clarified today, providing the

availability of bottleneck-segment rate relief should it obtain a separate contract for service over the non-bottleneck segment of this "new-origin" traffic, the Board has taken the opportunity presented by the cases before us to clarify and strengthen the legal conclusion that the railroads' rate and route initiative is not absolute and must be balanced against the statutory objective of promoting competition. Businesses are resourceful, and they will compete if given the opportunity to do so. Our decisions are significant because they encourage railroads to compete for bottleneck traffic in response to the needs of the shippers.

I recognize that the relief that these decisions provide is not self-executing. As noted, competitive access cases must be brought where a carrier already provides origin-to-destination service, and, as indicated in today's decision, the Board may need to resolve interchange disputes brought to it in "new source" cases where carriers cannot agree on an interchange point. Moreover, shippers, to secure separate bottleneck-segment rate review, will have to enter into contracts with non-bottleneck railroads. However, if history is any guide, and if shippers are diligent in negotiating, railroads will seek out contracts to capture new business. Initiative can produce positive results.

These proceedings raise difficult issues of first impression. I believe that the Board has addressed them in a fair and evenhanded manner. If shippers and competing railroads pursue the competitive avenues afforded them in these decisions, they will find that our decisions have provided real opportunities.

It is ordered:

1. The petition for clarification is granted to the extent set forth above, and is otherwise denied.
2. The petition for reconsideration is denied.
3. This decision will be effective on May 30, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen. Chairman Morgan commented with a separate expression.