

STB FINANCE DOCKET NO. 32760 (SUB-NO. 21)

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

OVERSIGHT

Decision No. 11

Decided January 21, 1998

The Board adopts protocol for resolving the status of particular shipper facilities at 2-to-1 points and for deciding whether the Burlington Northern and Santa Fe Railway Company is entitled to serve such facilities.

BY THE BOARD:

In *Union Pacific/Southern Pacific merger*, 1 S.T.B. 233 (1996) (*UP/SP*), we approved, subject to various conditions, 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). Our conditions to the *UP/SP* merger included a 5-year oversight condition "to examine whether the conditions we have imposed have effectively addressed the competitive issues they were intended to remedy." *Id.* at 420. We also specifically reserved the authority to impose additional conditions as necessary to alleviate competitive harm, if the trackage rights granted to The Burlington Northern and Santa Fe Railway Company (BNSF) or the other specific conditions were shown to be ineffective. *Id.*

3 S.T.B.

As part of the oversight condition, UP and BNSF have filed quarterly reports beginning October 1, 1996. More recently, we instituted the instant oversight proceeding in which UP, BNSF, and numerous parties filed comments regarding the competitive effects of the merger and the conditions. See, STB Finance Docket No. 32760 (Sub-No. 21), *Decision No. 1*, served May 7, 1997, and published at 62 Fed. Reg. 25,014 (1997). After reviewing those comments, we concluded that the present record did not demonstrate that the merger, with the conditions we imposed, has caused any substantial competitive harm. We also concluded, nevertheless, that certain additional requirements and directives were warranted to ensure that the conditions we imposed were implemented more effectively. See, *Union Pacific/Southern Pacific Merger*, 2 S.T.B. 703 (1997) (*Decision No. 10*). One of the additional measures we imposed in *Decision No. 10* was the requirement that UP and BNSF establish a protocol for resolving the status of particular shipper facilities at 2-to-1 points, *i.e.*, points where shippers' post-merger options declined from two railroads to one, and for deciding whether BNSF is entitled to serve such facilities under the terms of the BNSF settlement agreement.¹

In submissions filed November 26, 1997, UP and BNSF indicate that, while they agree on most provisions of a 2-to-1 facilities protocol,² they continue to disagree with respect to two provisions. The disagreement concerns burden of proof and the ability of BNSF to provide service while a dispute is pending before an arbitrator or before us. BNSF argues that UP's insistence that it must approve a facility's 2-to-1 status before the facility gains competitive access unfairly places the evidentiary burden of proof on BNSF and inhibits shippers' ability to take advantage of BNSF's new service capability. BNSF contends that, as a result of UP's gatekeeper role, there should be a presumption that BNSF is entitled to serve a particular shipper facility at 2-to-1 points, unless UP can provide specific evidence that the facility was not open to both UP and SP before the merger. BNSF maintains that UP should have the evidentiary burden of establishing the status of a facility because UP had the pre-merger

¹ See, *UP/SP*, 1 S.T.B. at 247 n.15 (description of the BNSF agreement).

² UP and BNSF have reached substantial agreement on an access protocol. See, BNSF's revised draft protocol, dated November 25, 1997, and UP's response dated that same day (both documents are attached to the parties' November 26, 1997 submissions). As pertinent, UP and BNSF have agreed that UP will respond within 5-business days to any BNSF request for access to a 2-to-1 facility. If BNSF makes more than five requests in a single day, UP may respond within 10-business days to those requests in excess of five. If UP fails to respond by the deadline, BNSF is then entitled to serve the facility, with no UP right to appeal. If UP denies a request, BNSF can submit the matter to the Board or, by agreement of the parties, to an arbitrator.

relationship with the shipper and retains control over the records necessary to make the required factual determination.³

UP contends that, because BNSF's proposed presumption would inappropriately require that UP prove a negative with "specific evidence," the correct resolution for a protocol is for there to be no presumption in favor of any particular outcome. UP indicates that, in previous 2-to-1 access requests by BNSF, UP has addressed the requests in good faith and has not insisted that BNSF present some quantum of "specific" documentary evidence before access is granted. According to UP, its good faith in reviewing BNSF's requests for access to 2-to-1 points is reflected in the fact that, in the year since merger consummation, the Board has not been asked to resolve any 2-to-1 dispute.

The second disagreement concerns BNSF's proposal that it be permitted to serve a facility pending resolution of any dispute over the status of a particular facility. BNSF contends that, if its proposal is not accepted, the involved shippers will be deprived of competitive service during the adjudication period, and BNSF will be deprived of the additional traffic. UP responds that BNSF's proposal unfairly places the onus on UP to appeal from its own denial of a BNSF request. UP also maintains that railroad operations and shipper business activities would be unduly disrupted by BNSF's absolute right to serve a facility during the review process, and that nothing in the record indicates that future 2-to-1 disputes cannot be resolved expeditiously.

DISCUSSION AND CONCLUSIONS

Although two issues remain in dispute, we commend UP and BNSF for their substantial agreement thus far on a 2-to-1 facilities protocol. Under the draft agreement, UP has agreed to respond within 5-business days to any BNSF request for access to a 2-to-1 facility, and within 10-business days to BNSF service requests in excess of five. Under the agreement, BNSF will gain access to the facility if UP fails to respond by the deadline. UP's responsiveness under the agreement, the availability of arbitration, and our continued availability to resolve 2-to-1 disputes expeditiously⁴ make it unnecessary that BNSF be permitted to serve shipper facilities pending resolution of disputes. BNSF has

³ In its January 2, 1998 quarterly progress report filed in Finance Docket No. 32760, BNSF asserts that UP has been unresponsive during the time the protocol dispute has been pending, a contention that UP disputes in its January 15, 1998 reply to BNSF's quarterly progress report. Both parties' concerns should be resolved by the protocol we are adopting here.

⁴ Although we remain available to resolve such disputes, we encourage the parties to submit to arbitration as provided for in ¶9 of their draft agreement.

not shown that there have previously been problems resolving such disputes, nor has it shown that UP has a track record of arbitrarily refusing to admit that particular shippers are 2-to-1 shippers. Accordingly, BNSF's proposal for interim service will not be adopted. If it turns out that, under this protocol, UP is consistently refusing to grant access to shippers that are 2-to-1 shippers by invoking arbitration or our adjudication as a delaying tactic, then we will further consider BNSF's proposal.

We also reject BNSF's proposal that, unless UP provides specific evidence that a facility was not open to both UP and SP prior to the merger, there should be a presumption that BNSF is entitled to serve the shipper's facility. Rather, we believe that there should be no presumption in favor of any particular party or result, and that all the involved parties, including shippers supporting BNSF's competitive access, should be able to draw upon any and all available information to resolve the status of a particular facility. Although we recognize that UP retains the right initially to determine a facility's status, we disagree with BNSF that such a procedure is unfair. Pertinent 2-to-1 information should be available to BNSF through its supporting shipper, which should be eager to gain access to an additional rail carrier. Thus, we will adopt the draft protocol agreed to by UP and BNSF with the modifications proposed by UP regarding the two issues in dispute as discussed above.

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

It is ordered:

1. BNSF's protocol proposals, as discussed in this decision, are not adopted.
2. The draft protocol agreed to by UP and BNSF, as modified by the revisions of UP, is adopted for the purposes of this proceeding.
3. This decision is effective on January 23, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.