

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. 88

Decided March 20, 2000

The Board interprets conditions imposed in merger authority.

BY THE BOARD:

In this decision,¹ we are interpreting conditions that we imposed in granting merger authority that relate to the preservation of pre-merger build-in, build-out options for all shippers. Because petitioner has demonstrated that it had a build-out option before the merger, that option will be preserved with appropriate trackage rights.

¹ We address here the matters raised in the following pleadings: ESI-30 petition "for enforcement of merger condition," filed September 20, 1999, by Entergy Services, Inc. (ESI), and Entergy Arkansas, Inc. (EAI, formerly Arkansas Power & Light Company); ESI-32 reply filed October 22, 1999, by Entergy (ESI and EAI are referred to collectively as Entergy); BNSF-88 and -89 replies filed October 12 and October 22, 1999, respectively, by The Burlington Northern and Santa Fe Railway Company (BNSF); and the UP/SP-370 and -372 replies filed October 12 and October 15, 1999, respectively, by Union Pacific Corporation, Union Pacific Railroad Company, and Southern Pacific Rail Corporation. That the issues may be addressed on the most complete record available, the ESI-31 motion for leave to file the ESI-32 reply and the UP/SP-371 motion for leave to file the UP/SP-372 reply will be granted and the ESI-32 and UP/SP-372 replies will be accepted for filing and made part of the record.

BACKGROUND

On August 12, 1996, we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation and those controlled by Southern Pacific Rail Corporation.² We imposed various conditions, including, as relevant here, a condition preserving all pre-merger build-in/build-out options that might otherwise have been eliminated by the merger;³ and a condition requested by Entergy preserving a specific 21-mile pre-merger build-out option at its White Bluff Steam Electric Station (White Bluff).⁴

The specific Entergy build-out condition we imposed was based on the premise that the 21-mile build-out to the SP line at Pine Bluff it described was its best option. Entergy now contends, however, that before the merger it had a shorter 12-mile build-out option that could have linked its plant at White Bluff with a closer SP line. Entergy notes that the Pine Bluff Arsenal⁵ lies between

² See, *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) (*Merger Dec. No. 44*). The carriers controlled by Union Pacific Corporation were Union Pacific Railroad Company and Missouri Pacific Railroad Company; those controlled by Southern Pacific Rail Corporation were Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company. Common control was consummated on September 11, 1996. With respect to the period ending September 10, 1996, "UP" refers to the rail carriers then controlled by Union Pacific Corporation, and "SP" refers to the rail carriers then controlled by Southern Pacific Rail Corporation. Beginning September 11, 1996, "UP" refers to the combined UP/SP system.

³ This condition, referred to as the general build-out condition, includes options by a railroad to "build in" to a shipper and by a shipper to "build out" to a railroad. We built upon an agreement among applicants, BNSF, and the Chemical Manufacturers Association (CMA agreement) permitting CMA members to raise, for a limited time only, a claim that the merger had deprived it of a build-out option. If so, then the shipper's pre-merger access to a second rail carrier through construction would be preserved by a grant of the necessary trackage rights upon construction of a line to the premerger interchange point. We expanded the CMA approach by preserving pre-merger build-out options for all shippers and by removing the time limit, and by clarifying that the only test of feasibility would be whether the line is actually constructed. See, *Merger Dec. No. 44*, 1 S.T.B. at 373, 420.

⁴ We addressed Entergy's argument that the merger would eliminate competition for the movement of coal to White Bluff. The White Bluff plant, located on the pre-merger UP line between Little Rock and Pine Bluff, receives coal originated at Southern Powder River Basin (PRB) mines served by both UP and BNSF. Entergy had argued that, although White Bluff was rail-served exclusively by UP, the merger would eliminate the plant's pre-merger build-out option to a nearby SP line, 21 miles away at Pine Bluff, creating a BNSF-SP routing from the Southern PRB.

⁵ The Pine Bluff Arsenal (the Arsenal) is owned by the United States Government.

White Bluff and Pine Bluff, and that, from the mid-1940s⁶ to the mid-1980s, an SP line connected the Arsenal and Pine Bluff. Entergy argues that, although the Pine Bluff end of this SP line has been severed, SP reached shippers located on this "island" by trackage rights over UP's Little Rock-Pine Bluff line. Entergy now argues that, prior to the merger, it could have constructed a build-out line linking White Bluff and the SP island, thereby giving Entergy access to a BNSF-SP routing for its inbound coal supplies.

The key issue here is the scope of SP's trackage rights to serve shippers on the "island." These rights derive from a 1984 Memorandum of Understanding (1984 MOU) among local authorities in Pine Bluff, SP, and UP. That plan was intended to relieve congestion in downtown Pine Bluff caused by the parallel single-track lines operated by SP (on Third Avenue) and UP (on Fourth Avenue). Under the plan, SP removed its track from Third Avenue, and both carriers used the UP Fourth Avenue corridor.⁷ The removal of SP's Third Avenue track severed the Arsenal Lead from the SP main line through Pine Bluff, resulting in the creation of an SP island that SP served using overhead trackage rights over UP's Little Rock-Pine Bluff line. See, 1984 MOU at 3. SP agreed to file any applications necessary for it to secure authority "to operate over [UP] tracks for access to the Pine Bluff Arsenal." *Id.* at 8.⁸

Entergy now plans to construct an 8.6-mile line linking the island with its White Bluff plant and a new crossover, at SP MP 272.81, linking the island to the UP Little Rock-Pine Bluff line.⁹ Entergy asks that we enforce our general

⁶ In 1942, an SP affiliate, St. Louis Southwestern Railway Company (hereinafter SP), was authorized: (1) to construct and operate the Arsenal Lead from downtown Pine Bluff to the Arsenal; and (2) to operate over a rail line on the Arsenal grounds that connected with the Arsenal Lead. A UP predecessor, Missouri Pacific Railroad Company (hereinafter UP), also had access to the Arsenal, over the line that is now UP's Little Rock-Pine Bluff line. In the mid-1950s, SP and UP constructed a 2.24-mile spur track, called the Gaylord Spur, branching from the Arsenal Lead to permit both carriers to provide service to certain new customers near the Arsenal. Also at this time, SP and UP constructed a 0.12-mile crossover between UP's Little Rock-Pine Bluff line and SP's Arsenal Lead.

⁷ The 1984 MOU was signed by representatives of: UP; SP; the Arkansas State Highway and Transportation Department; the City of Pine Bluff; and Jefferson County. See, ESI-30, V.S. McClanahan, Exhibit (RRM-3) (the 1984 MOU).

⁸ The 1984 MOU contemplates SP access to the Arsenal Lead using the 0.12-mile crossover.

⁹ Entergy indicates that BNSF trains could reach White Bluff even without the contemplated new crossover by using the existing 0.12-mile crossover, but that the new crossover would be safer and more efficient, and would reduce potential disruption to UP service over its Little Rock-Pine Bluff line.

Entergy's plan also includes the rehabilitation of an existing 3.4-mile line on the Arsenal
(continued...)

build-out condition by declaring that, upon completion of its proposed 12-mile build-out, BNSF will have the right to provide rail transportation service to and from White Bluff using trackage rights over UP lines.¹⁰

DISCUSSION AND CONCLUSIONS

Our general build-out condition preserved any build-out option that Entergy had. The basic question here is whether Entergy had a pre-merger option to build out to the SP island, in which case BNSF will be given trackage rights that give it access to the build-out connection point, contingent upon the construction.¹¹ On the present record, we conclude that Entergy had such an option, and thus hold that BNSF should be accorded access, to which we find SP was entitled prior to the merger. As respects Entergy's request that UP be required to cooperate in the establishment of a more efficient crossover connection between the Little Rock-Pine Bluff line and the Arsenal Lead, any unresolved disputes respecting this issue should be submitted to arbitration. In light of the determination made here, we need take no action on Entergy's request that UP be required to reconstruct those lines whose removal resulted in the creation of the SP island.

Before the merger, SP had access to the northern segment of the Arsenal Lead using overhead trackage rights over UP's Little Rock-Pine Bluff line. The terms, conditions, and limitations respecting these overhead trackage rights are

⁹(...continued)

grounds and the 0.19-mile northern segment of the Arsenal Lead, linking the 8.6-mile segment to the new proposed crossover, which is just beyond the existing crossover.

¹⁰ Entergy asks that we either: (1) require that BNSF be granted access to the Entergy build-out via trackage rights over UP's Little Rock-Pine Bluff line (and further require that UP cooperate with Entergy in the establishment of a more efficient connection); or (2) require that the Arsenal Lead's central and southern segments and the eastern portion of SP's old Third Avenue corridor be reconstructed by UP (as successor to the pre-merger SP), and that BNSF be granted access to the Entergy build-out via trackage rights over those tracks. By petition filed July 30, 1999, in STB Finance Docket No. 33782 (Entergy's construction petition), two Entergy affiliates (Entergy Arkansas and Entergy Rail) seek an exemption to construct an 8.6-mile track segment extending between White Bluff and the Arsenal grounds. By decision served October 28, 1999, in STB Finance Docket No. 33782, a proceeding to consider this exemption was instituted. A second STB Finance Docket No. 33782 decision, reflecting the action we have taken today, will be issued soon.

¹¹ The build-out connection point is the point of connection at approximately SP MP 273, between the Arsenal Lead and the existing 3.4-mile track segment located on the grounds of the Arsenal.

not reflected in a written trackage rights agreement.¹² But the 1984 MOU itself, the only document defining the parameters of those rights, contains no restrictions or limitations that would preclude the service that Entergy seeks.

UP argues that, if Entergy's now-contemplated build-out line had been constructed to the Arsenal Lead prior to the merger, SP could not have hauled Entergy coal trains over UP's Little Rock-Pine Bluff line because of restrictions, either explicit or implicit, in the 1984 MOU. We find these arguments unpersuasive.

The MOU indicates that SP's trackage rights over UP should be "overhead" rights, not "local" rights. This limitation meant that SP could use them to reach its own lines,¹³ but could not use them to reach shippers, spurs, build-out lines, etc., at intermediate points on the UP trackage rights line. This restriction, however, would not prevent SP from serving shippers that it reached by its own lines connecting with either the Gaylord Spur or the Arsenal Lead. Such shippers would by definition be on SP's lines, and could be served using these overhead trackage rights.

UP argues that the 1984 MOU explicitly provided that SP could use its trackage rights to serve SP's *existing* shippers.¹⁴ This argument fails because the "existing shippers" referenced by the 1984 MOU were existing shippers located in downtown Pine Bluff. *See*, the 1984 MOU at 2. The "existing shippers" reference appears at the end of a paragraph that concerns "the consolidation of the operations of the [UP] and the [SP] in a common corridor along Fourth Avenue within the Pine Bluff central city area." Because every other sentence in this paragraph clearly concerns downtown Pine Bluff, we think that the restriction to existing shippers is fairly read to apply to existing shippers in downtown Pine Bluff, and not to shippers reached by the Arsenal Lead or Gaylord Spur.

The 1984 MOU, at 7 and 8, also indicates that UP and SP will formulate agreements respecting service to "the existing industries in the downtown area." There are no similar references directing UP and SP to formulate agreements respecting service to existing industries accessed from the northern segment of

¹² The parties apparently never sought approval by the Interstate Commerce Commission (ICC) of such an agreement, despite the fact that the 1984 MOU contemplates, and the statute required, that action. Neither party has produced a copy of a relevant trackage rights agreement, nor has either party indicated that there was one.

¹³ The end points of the trackage rights line are: (1) the western end of the SP/UP Fourth Avenue corridor in downtown Pine Bluff; and (2) the eastern end of the 0.12-mile crossover.

¹⁴ The relevant portions of the 1984 MOU have been reproduced verbatim in Appendix A to this decision.

the Arsenal Lead. The only references relevant to shippers beyond the downtown area are in a separate part of the MOU, and omit any mention of "existing shippers." See, 1984 MOU at 2 and 8. We will not interpolate on SP's pre-merger right of access to the northern segment of the Arsenal Lead a restriction that was not included by the parties in the only written agreement concerning these rights that is of record.

UP argues that the 1984 MOU did not give SP the right to serve existing UP-exclusive shippers such as Entergy. While the 1984 MOU did not specifically mention any right of SP to build in from its lines to serve existing UP-exclusive shippers such as Entergy, it did authorize SP to reach the northern segment of the Arsenal Lead and it did not impose any restrictions on the shippers that SP could serve via any tracks that might in the future connect with that segment. As the MOU did not impose any restrictions on such construction, we will not create one. UP argues that the "existing shippers" interpretation it urges is similar to limitations found in many other joint facilities agreements, is consistent with longstanding industry practice, is justified by the circumstances surrounding the Pine Bluff relocation project, and is the kind of limitation that the Board and the ICC have routinely approved. This is all beside the point because the limitation asserted by UP was not included in the MOU, the best evidence of record. Because, as far as the record indicates, no trackage rights agreement was ever approved by the ICC, the limitation asserted by UP was never approved either. Accordingly, the issues raised here of whether such a limitation might have been in a trackage rights agreement if the parties had filed one, and whether the ICC would have approved such an agreement that only slightly restrained future competition (or SP's common carrier obligation) are irrelevant.

UP argues that it would never have agreed to grant SP unrestricted trackage rights to/from the northern segment of the Arsenal Lead if it had thought that SP could use those rights to access a UP-exclusive shipper like Entergy. Entergy argues that SP would never have entered an agreement that precluded that use. While both UP and Entergy offer plausible arguments, we will not go beyond the written document in interpreting the parties' rights in these circumstances.¹⁵

¹⁵ Arguments concerning the intent of the various parties that are signatories to the 1984 MOU are based on testimony submitted by UP and Entergy of persons who actively participated in the negotiations that led to the MOU. As explained above, our finding that, absent the UP/SP merger, SP could have provided service to the build-out now proposed by Entergy is based on our interpretation of the written document itself, and not on post-agreement, conflicting statements concerning the parties' intent.

We therefore conclude that, if Entergy's now-contemplated build-out had been constructed prior to the merger, SP would have had the right to reach Entergy's plant. It necessarily follows that the general build-out condition preserves Entergy's pre-merger SP build-out option, and requires that BNSF be granted overhead trackage rights over UP's Little Rock-Pine Bluff line,¹⁶ between (1) the western end of the SP/UP Fourth Avenue corridor in downtown Pine Bluff, and (2) the eastern end of the 0.12-mile crossover.

The New Crossover. We recognize that Entergy's request that UP be required to cooperate in the establishment of a more efficient connection between the Little Rock-Pine Bluff line and the Arsenal Lead appears to go somewhat beyond the general build-out condition.¹⁷ Nevertheless, the BNSF/UP merger agreement that we also imposed as a condition to the merger provides:

BNSF shall have the right to inspect the UP and SP lines over which it obtains trackage rights under this agreement and require UP/SP to make such improvements under this section as BNSF deems necessary to facilitate its operations at BNSF's sole expense. Any such inspection must be completed and improvements identified to UP/SP within one year of the effectiveness of the trackage rights.¹⁸

And CMA § 13 provides:

[I]f the parties do not agree on the route over which BN/Santa Fe shall receive any necessary trackage rights to reach the Point of Build-In, the arbitrator shall decide the route, and in doing so shall seek to minimize the operating inconvenience to UP/SP, consistent with ensuring that BN/Santa Fe can provide competitive service.

¹⁶ BNSF, unlike SP, will have to pay a trackage rights fee. See, CMA § 13 (the next to the last sentence provides that the "compensation terms of any trackage rights" awarded to BNSF under CMA § 13 "shall [generally] be the same as for all other" BNSF trackage rights provided for in the BNSF agreement).

¹⁷ The general build-out condition was imposed in order to preserve, not to improve, pre-merger build-out options.

¹⁸ See, UP/SP-303 (UP's July 1, 1997 Progress Report), Exhibit B, § 9(k) at 23 (Exhibit B contains the BNSF agreement, "amended and restated" as of June 30, 1997).

We will therefore direct UP and BNSF to submit to arbitration, under section 15 of the BNSF agreement¹⁹ and/or under section 13 of the CMA agreement,²⁰ any unresolved dispute respecting the construction of the new crossover.

The Reconstruction Issue. Entergy argues that the Arsenal Lead's 2.97-mile central segment and the Arsenal Lead's 1.24-mile southern segment, and, by implication, the eastern portion of SP's old Third Avenue corridor, were never authorized for abandonment. Entergy argues that, if it had constructed its now-contemplated build-out line prior to the merger, and if SP had been unable to handle Entergy's White Bluff traffic because of limitations on its trackage rights, SP would have been obligated to reconstruct these segments to meet its common carrier obligations. Because of the relief we are granting here, we need not further examine this issue.

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

It is ordered:

1. The UP/SP-371 motion for leave to file the UP/SP-372 reply is granted, and the UP/SP-372 reply is accepted for filing and made part of the record in this proceeding.
2. The ESI-31 motion for leave to file the ESI-32 reply is granted, and the ESI-32 reply is accepted for filing and made part of the record in this proceeding.
3. The ESI-30 petition is granted in part and denied in part, as indicated in this decision.
4. This decision is effective on March 21, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

¹⁹ Section 15 of the BNSF agreement provides: "Unresolved disputes and controversies concerning any of the terms and provisions of this Agreement or the application of charges hereunder shall be submitted for binding arbitration under [the] Commercial Arbitration Rules of the American Arbitration Association which shall be the exclusive remedy of the parties." See, UP/SP-303, Exhibit B, § 15 at 27-28.

²⁰ We stated in *Merger Dec. No. 44*, with respect to the general build-out condition: "Any technical disputes with respect to the implementation of this build-in/build-out remedy may be resolved either by arbitration or by the Board." *Merger Dec. No. 44*, 1 S.T.B. at 420.

APPENDIX A: EXCERPTS FROM 1984 MOU

The part of the 1984 MOU titled "Recitals" provides in pertinent part:

A basic feature of the project is the consolidation of the operations of the MP [Missouri Pacific Railroad Company, the UP predecessor] and the SSW [St. Louis Southwestern Railway Company, the SP predecessor] in a common corridor along Fourth Avenue within the Pine Bluff central city area. The main line track of the SSW will be relocated from the 3rd Avenue to the 4th Avenue corridor, generally paralleling the existing MP tracks. The SSW operation will make a transition from its existing main line on 3rd Avenue, beginning near Florida Street, and enter the 4th Avenue corridor near Louisiana Street, then make a transition to return to its existing main line between Locust and Fifth Avenue. Right-of-way within the 4th Avenue corridor needed for the consolidated rail operations will be provided by the City of Pine Bluff. The SSW will have the right to provide rail service to their existing shippers and receivers of railway carloads of freight by use of rail connections as provided by the project and/or as in agreement with MP operations.

The SSW lead to the Pine Bluff arsenal will be removed beginning at a location west of Ash Street, and the SSW will have the right to operate in bridge movements only, over tracks of MP for access to the Pine Bluff Arsenal.

See, the 1984 MOU at 2.

The part of the 1984 MOU titled "Specific Agreements Of The Missouri Pacific Railroad Company" provides in pertinent part:

(2) It will promptly enter into negotiations with the SSW to formulate agreement(s) governing the joint operations by the MP and SSW in the Fourth Avenue common corridor and to serve the existing industries in the downtown area. The agreement(s) will be completed and executed before the consolidation of operations of the MP and the SSW is begun; or if agreement(s) has not been reached by a time appointed by the AHTD [Arkansas State Highway and Transportation Department], the MP and SSW will by mutual agreement submit the matter to arbitration for a period of no longer than 30 days and in such event the decision of the arbitrator will be binding upon both parties.

See, the 1984 MOU at 7.

The part of the 1984 MOU titled "Specific Agreements Of The St. Louis Southwestern Railway Company" provides in pertinent part:

(1) It will promptly file and prosecute any and all applications necessary for it to secure authority from either the Transportation Commission of Arkansas or the Interstate Commerce Commission or other relevant government authorities for construction of tracks to connect its main line on 3rd Avenue to its newly constructed line on 4th Avenue, to conduct operations over the common corridor and to operate over MP tracks for access to the Pine Bluff Arsenal.

(3) It will promptly enter into negotiations with the MP to formulate agreement(s) governing the joint operations by the MP and SSW in the Fourth Avenue common corridor and to serve the existing industries in the downtown area. The agreement(s) will be completed and executed before the consolidation of operations of the SSW and the MP is begun; or if agreement(s) has not been reached by a time appointed by the AHFD, the MP and SSW will by mutual agreement submit the matter to arbitration for a period of no longer than 30 days and in such event the decision of the arbitrator will be binding upon both parties.

See, the 1984 MOU at 8-9.