

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. 95

Decided February 28, 2002

The Board urges UP and BNSF to attempt to settle, through negotiation, issues arising from implementation of the build-in/build-out condition that the Board imposed when it approved the UP/SP merger. The Board notes that, although UP cannot successfully assert entitlement to a remedy or compensation simply because new BNSF service to a build-in/build-out line leads to some interference with UP's operations, BNSF would not, in most circumstances, be free from responsibility for at least a share of the costs for improvements required by new traffic patterns associated with a build-in/build-out line.

BY THE BOARD:

In this decision, we address the petition filed by The Burlington Northern and Santa Fe Railway Company (BNSF) concerning conditions imposed in the underlying merger proceeding to preserve "build-in/build-out" options for shippers to obtain access to an additional rail carrier. While some general guidance is appropriate, we urge further negotiations, and we will address controversies that remain as necessary in specific cases in which they arise.

BACKGROUND

By decision served August 12, 1996, we approved the merger of the "UP" rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the "SP" 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) subject to various conditions, including the extensive BNSF trackage rights over UP/SP lines that were provided for in the BNSF Settlement Agreement (BNSF Agreement) with UP, and further including a “build-in/build-out” condition that was intended to preserve certain procompetitive options that might otherwise have been eliminated by the merger. *See Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) (*UP/SP Merger*).

By petition (designated BNSF-97) filed December 17, 2001, BNSF has asked that we clarify the circumstances in which it should be required to construct or fund, on the lines of UP, new connections, facilities, or other improvements in order to provide service to a build-in/build-out line. BNSF proposes that it should be required to construct or fund new connections, facilities, or other improvements only if (i) UP demonstrates that, absent such construction, BNSF’s proposed service would unreasonably and materially interfere with UP’s service to its customers, and (ii) requiring BNSF to undertake such construction would not impair BNSF’s ability to provide competitive service. Specifically, BNSF seeks the imposition of the following procedures: (1) when BNSF presents to UP an operating plan to serve a build-in/build-out line, UP must approve that plan unless it would cause unreasonable and material interference with UP’s operations; (2) if UP believes that the proposed plan would cause such interference, UP must provide both a detailed written explanation and also an alternative plan that would enable BNSF to provide competitive service with the least additional cost; (3) if UP’s alternative plan would require BNSF to construct or fund new facilities or other improvements, UP must explain why the operations of the two carriers cannot be coordinated to avoid the need for the construction of new facilities; and (4) if UP and BNSF continue to disagree as to the need for the construction of new facilities and as to how they should be funded, the issue may be resolved either in arbitration or by the Board.¹

¹ BNSF’s clarification request was prompted by disputes related to its anticipated construction of the recently exempted Kamey-Seadrift line, which will run between Kamey, TX (a point on a pre-merger SP line) and Seadrift, TX (the site of a chemical complex that, prior to the merger, was rail-served exclusively by UP). *See The Burlington Northern and Santa Fe Railway Company—Construction and Operation Exemption—Seadrift and Kamey, TX*, STB Finance Docket No. 34003 (STB served January 25, 2002). BNSF has indicated that it is not now seeking Board resolution of the specific disputes related to the Kamey-Seadrift line, but instead seeks general policy (continued...)

By reply (designated UP/SP-391) filed January 14, 2002, UP states that BNSF has asked the Board to impose an inflexible, multi-step procedure that would discourage negotiations to solve operating conflicts and shift BNSF's responsibilities for finding solutions to UP. Instead, UP argues that we should make clear that BNSF must bear the responsibility of avoiding or remedying all unreasonable interference during construction and, upon completion, all material interference between its build-in/build-out operations and existing rail service, consistent with the requirements of 49 U.S.C. 10901(d).²

Additional replies to the BNSF-97 petition were filed separately by Union Carbide Corporation (UCC), The National Industrial Transportation League (NITL), and the American Chemistry Council (ACC), and jointly by ATOFINA Petrochemicals, Inc., Basell USA Inc., Equistar Chemicals, LP, and Lyondell Chemical Company (referred to collectively as the Bayport Producers). UCC, NITL, and the Bayport Producers generally support the position taken by BNSF as respects the interference issue.³ ACC indicates that, although it agrees with BNSF that UP has no right to demand that BNSF undertake expensive capital improvements whenever its trackage rights create any interference with UP's operations, ACC believes that the more important issue is whether the potential interference can be avoided or remedied by dispatching, scheduling, or other

¹(...continued)

clarification regarding such matters.

BNSF also suggests one other instance, San Jacinto Rail Limited's proposed build-out to the Bayport Loop, where guidance might be necessary. *See San Jacinto Rail Limited Construction Exemption and The Burlington Northern and Santa Fe Railway Company Operation Exemption—Build-Out To The Bayport Loop Near Houston, Harris County, TX*, STB Finance Docket No. 34079 (STB served November 28, 2001) (instituting a proceeding).

² In particular, according to UP, BNSF would have UP show that BNSF's service to or from a build-in/build-out line would "unreasonably and materially" interfere with UP's operations before BNSF would be responsible for constructing or funding a construction project. This, says UP, would, by mixing what it describes as two different standards, in effect apply the assertedly more liberal "unreasonable interference" construction-phase standard of 10901(d)(1)(A) to determine liability during the post-construction operations phase of any BNSF build-in. UP states that, as an alternative, it is proposing to apply the "unreasonable interference" standard only to the construction phase of a build-in and its associated projects, and would apply the "material interference" standard of 10901(d)(1)(B) to post-construction operations. UP states that, while section 10901(d) technically applies only to rail crossings, BNSF's build-in/build-out projects will cause interference not only at rail crossings, but at other locations on UP's lines where BNSF must use the trackage rights it received in *UP/SP Merger* to reach the build-in/build-out line.

³ We note that UCC's interests relate to the Kamey-Seadrift line, *see supra* note 1. Similarly, the Bayport Producers' interests relate to the "Bayport Loop" line, construction and operation of which are at issue in a pending proceeding, *see supra* note 1.

operational coordination, and, if so, BNSF and UP should be required to work out the problems themselves.

DISCUSSION AND CONCLUSIONS

We find it inappropriate to adopt either of the broad standards suggested by BNSF and UP to apply to all operational problems resulting from the application of our build-in/build-out condition. BNSF has suggested only two instances in which a rule of general applicability would provide useful guidance to parties in build-in/build-out situations. More importantly, the standards proposed by BNSF and UP appear to provide undue leverage to the party proposing the standard, creating disincentives on the part of one party or the other to actively seek out creative dispatching, scheduling, or other operational solutions that would minimize the need for additional capital expenditures. The BNSF standard could affect UP's ability to conduct its own operations on the trackage rights lines, and, in certain instances, could compel UP to subsidize the build-in/build-out operations. BNSF's proposal also would result in an inflexible, multi-step procedure that would discourage negotiations to solve operating conflicts. And the UP standard could limit the underlying competition-preserving purpose of the build-in/build-out condition, and, in certain instances, could prevent BNSF from replicating the competitive posture of the pre-merger SP.⁴

In view of these shortcomings, we urge BNSF and UP to settle, through negotiation, as many of the issues arising from implementation of the build-in/build-out condition as possible. Any remaining controversies may be submitted to us for resolution, as necessary, on a case-by-case basis within the factual confines of each case or to arbitration as provided in the BNSF Agreement. We will, however, offer certain guidance to BNSF and UP for purposes of their negotiations.

In this regard, UP should recognize that it cannot successfully assert entitlement to a remedy or compensation whenever new BNSF service to a build-in/build-out line via the trackage rights lines leads to *any* interference with its operations. BNSF's trackage rights operations, by definition, potentially interfere with UP's operations on the trackage rights lines and UP agreed to this potential interference when it accepted the conditions, including the terms of the BNSF Agreement, that we imposed when we approved the UP/SP merger. At

⁴ The UP standard is not compelled by 49 U.S.C. 10901(d). That provision normally applies only when one railroad seeks to build a line that must "cross" the line of another railroad.

the same time, BNSF should recognize that it would not, in most circumstances, be free from responsibility for at least a share of the costs for improvements required by new traffic patterns associated with a build-in/build-out line, depending upon the particular circumstances of the case (which, as we have stated above, should be examined individually in each case).

BNSF and UP, in attempting to craft a solution to an operational problem resulting from the application of the build-in/build-out condition, should, as indicated in Section 8(l) of the BNSF Agreement, “seek to minimize the operating inconvenience to UP, consistent with ensuring that BNSF can provide competitive service.” UP/SP-386 (filed July 25, 2001, in STB Finance Docket No. 32760 (Sub-No. 21)) at 34. Although Section 8(l) purports to apply only to the routing of any additional trackage rights needed by BNSF to access a build-in/build-out line, the general principle set forth in Section 8(l) should also be applied to off-site problems generated by BNSF’s operations over a build-in/build-out line. We are endorsing this general principle, in this broader context, because we agree with ACC that “[t]he UP and BNSF interests, and the interests of shippers and the public, will best be accommodated if UP and BNSF both have incentives to avoid the construction of new facilities if they are not needed, to minimize the costs of any new facilities that are needed, to construct new facilities that will make both UP and BNSF operations more efficient, and to share the cost of the new facilities in accordance with their respective use by and economic benefit to UP and BNSF.” CMA-14 at 6.

Accordingly, we will not adopt a generic standard for all build-in/build-out situations. For us to attempt to establish a standard now for future use in determining the necessity of, or the responsibility for the funding of, every particular construction associated with a build-in/build-out would remove important incentives on the part of BNSF and UP to arrive at appropriate and mutually agreeable scheduling, dispatching, or other operational solutions to problems that they may encounter – solutions that could minimize the need for those capital expenditures.

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

It is ordered:

1. The BNSF-97 petition for clarification is granted to the extent set forth in this decision, but the specific relief sought in the BNSF-97 petition is denied.
2. BNSF and UP should resume negotiations consistent with this decision.
3. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.