

INTERSTATE COMMERCE COMMISSION

03/27/96

FINANCE DOCKET # 32760

2445-2474

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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DISCOVERY CONFERENCE

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IN THE MATTER OF: :

UNION PACIFIC CORPORATION, :
UNION PACIFIC RAILROAD COMPANY, :
and MISSOURI PACIFIC RAILROAD : Finance Docket
COMPANY : No. 32760
:
- CONTROL AND MERGER - :
:
SOUTHERN PACIFIC RAIL CORPORATION, :
SOUTHERN PACIFIC TRANSPORTATION :
COMPANY, ST. LOUIS, SOUTHWESTERN :
RAILWAY COMPANY, SPCSL CORP., :
AND THE DELAVER AND RIO GRANDE :
WESTERN RAILROAD COMPANY. :
-----X

Wednesday, March 27, 1996

Federal Energy Regulatory
Commission
Hearing Room 3
Second Floor
888 First Street, N.E.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 2:00 p.m.

BEFORE:

THE HONORABLE JEROME NELSON
Administrative Law Judge

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P-R-O-C-E-E-D-I-N-G-S

(2:01 p.m.)

JUDGE NELSON: Let's get a record of who is in attendance.

MR. BULGOZDY: John Bulgozdy of Harkins Cunningham, for Southern Pacific, Your Honor.

MR. CUNNINGHAM: Paul Cunningham, Southern Pacific.

MS. JONES: Erika Jones for Burlington Northern Railroad Company, and the Atchison, Topeka and Santa Fe Railway Company. Adrian Steel of our firm is with me as well.

MR. HESTER: Your Honor, Timothy Hester of Covington and Burling, on behalf of Union Pacific.

JUDGE NELSON: Hester is it?

MR. HESTER: Hester, yes.

MR. MCBRIDE: Good afternoon, Your Honor. Michael McBride for Western Shippers Coalition.

JUDGE NELSON: These are disputes that Mr. McBride has brought on, with reference to the labelling of certain portions of depositions as confidential or highly confidential. We had an

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1 informal telephone conversation yesterday. I
2 apologize that we didn't really get a lot done.

3 I had tried, thinking it might be the kind
4 of thing we could easily get rid of because I was in
5 the middle of a case, and I knew you had to make a
6 filing on Friday. It became apparent from the phone
7 conversation that I was in over my head. Namely, I
8 hadn't read this material. So it became apparent to
9 me the conversation made no sense. So here we are.

10 Now I have read everything. That is, I
11 have read Mr. McBride's letter of March 25. I have
12 read the relevant portions, the disputed portions of
13 the transcripts. I have read a response from SP, a
14 letter dated March 26 from Mr. Cunningham. I read the
15 magazine article, so much as I could get anything out
16 of it. I have read the Delaware Code. I have read
17 the Davidson materials that you submitted. I guess
18 I'm ready to discuss them.

19 But before we get into it, is there any
20 progress toward agreement on any of these issues? Any
21 room for -- that we could resolve the dispute without
22 the formality of adjudication?

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1 MR. MCBRIDE: I did speak to Ms. Jones
2 this morning, but I am afraid we are at an impasse.
3 I did not have a further conversation with the
4 applicants.

5 JUDGE NELSON: Because I do remember Ms.
6 Jones saying something on the phone about trying to
7 get somewhere, but I gather that effort had not worked
8 out.

9 MR. MCBRIDE: I made the comment on the
10 call, Your Honor, that perhaps if she had a
11 stipulation she wanted to offer me to be considered,
12 that didn't happen. I don't want to get into who is
13 responsible for the impasse, so I'll just leave it
14 there.

15 JUDGE NELSON: You are now in the position
16 of preparing your submissions for Friday.

17 MR. MCBRIDE: That's correct.

18 JUDGE NELSON: You are representing the
19 coal miners? Is that the group? I have forgotten
20 these different entities here.

21 MR. MCBRIDE: Western Shippers Coalition.
22 Among the members are Geneva Steel and another company

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1 that is involved in one of the backhauls that was the
2 subject of a question that I put to Mr. Anschutz.

3 JUDGE NELSON: These are the coal
4 customers?

5 MR. MCBRIDE: Well, the latter company is
6 a waste hauling company. Coal is hauled in the same
7 cars in the opposite direction.

8 JUDGE NELSON: Is there another group that
9 represents the mine owners of the utilities?

10 MR. MCBRIDE: There is another group
11 represented by Slover and Loftus. The name is Western
12 Coal Traffic League.

13 JUDGE NELSON: It's the two Westerns that
14 fouled me up. So who is in your group?

15 MR. MCBRIDE: Geneva Steel, ECDC Laidlaw
16 Environmental, which is the waste hauler, Coastal
17 Corporation, Arco Coal, Andalax, Pacific Corp, Idaho
18 Power, Sierra Pacific -- Coastal Corp, by the way, may
19 have withdrawn. I'm not sure of the current status of
20 that.

21 JUDGE NELSON: So you have also got
22 utilities who use coal?

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1 MR. MCBRIDE: That's right. Public
2 Shippers Colorado

3 JUDGE NELSON: So it's shippers and buyers
4 of coal primarily?

5 MR. MCBRIDE: Primarily, but there's also
6 Kennecott Copper, Great Salt Lake Minerals, they've
7 withdrawn. We had a couple of other utilities. We
8 had a company called Maroni Grain and Feed, which is
9 a grain company. Farm Land Industries just joined.

10 JUDGE NELSON: I know them from oil
11 litigation.

12 MR. MCBRIDE: Right. So it's bulk
13 materials, predominantly coal, but not exclusively.
14 So what's called SP Central corridor.

15 JUDGE NELSON: Which is?

16 MR. MCBRIDE: If I may approach

17 JUDGE NELSON: Sure.

18 MR. MCBRIDE: Primarily what we are
19 talking about is the line --

20 JUDGE NELSON: We're pointing to a line on
21 a map that is an exhibit in the case. How can this
22 be?

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1 MR. CUNNINGHAM: Is the conversation
2 generally going to be -- well, I'll have to try to do
3 my best and jump in and interrupt.

4 JUDGE NELSON: Let's begin at the
5 beginning. I don't want to tell any secrets. That is
6 one of the reasons I have problems with this stuff.

7 I have in my hand a map that says section
8 1180.6(a)(6). I got it out of volume one of the
9 application in this case. Is this map a secret? No
10 one knows?

11 MR. HESTER: No, it's not.

12 MS. JONES: It's not.

13 JUDGE NELSON: All right. The BN says
14 it's not. How about the Union Pacific and Southern
15 Pacific? It's their application.

16 MR. HESTER: It's not confidential, Your
17 Honor.

18 JUDGE NELSON: All right. Can I ask Mr.
19 McBride to come up here and point to something on the
20 map to me. Is that secret?

21 MR. MCBRIDE: Absolutely not, Your Honor.

22 JUDGE NELSON: If he shows me the route --

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1 what did you call that route, the central route?

2 MR. MCBRIDE: Southern Pacific Central
3 corridor.

4 JUDGE NELSON: Can he show me that
5 corridor?

6 MR. MCBRIDE: Absolutely, Your Honor.

7 JUDGE NELSON: All right. So far we're
8 all right, Mr. McBride.

9 Now be on your toes, ladies and gentlemen.
10 If there are any secrets here, I don't want to be the
11 one who releases them.

12 MR. MCBRIDE: If you were to start in
13 eitner Oakland or Stockton, California, and head east
14 on the lines that are for the purposes of the rest of
15 the people in the room, sort of a gold color.

16 JUDGE NELSON: A yellowish gold.

17 MR. MCBRIDE: Yellowish gold color.
18 Follow it along through Ogden and Salt Lake City,
19 Utah. Then through the mountains of Utah and
20 Colorado, until you get to either Denver or Pueblo.
21 Then Southern Pacific has trackage rights east from
22 Pueblo to Kansas City, Missouri.

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1 JUDGE NELSON: So it goes through the Utah
2 and Colorado coal producing areas?

3 MR. MCBRIDE: That is correct.

4 JUDGE NELSON: Known as?

5 MR. MCBRIDE: SP's Central Corridor.

6 JUDGE NELSON: I mean those coals in this
7 case.

8 MR. MCBRIDE: Uinta Basin. U-I-N-T-A.

9 JUDGE NELSON: That's close to the Powder
10 River coals, which are in Wyoming?

11 MR. MCBRIDE: Correct. Then there's an --
12 I won't complicate this, another coal field I can tell
13 you about, but why don't we stick with those two. I
14 don't think we need to get into the other coal fields
15 this afternoon, but I'll be happy to --

16 JUDGE NELSON: I've just been for a week
17 in the gas fields of Wyoming and primarily
18 northeastern Colorado, so --

19 MR. MCBRIDE: Since you mentioned Wyoming,
20 I am going to tell you about the Hanna Basin of
21 Wyoming.

22 JUDGE NELSON: Right.

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1 MR. MCBRIDE: Which is another coal field
2 in the West. But primarily, the biggest ones are the
3 Uinta Basin and the Powder River Basin. My clients
4 are primarily interested in the Uinta Basin coals.

5 JUDGE NELSON: That's the Utah Colorado
6 area.

7 MR. MCBRIDE: That's correct. By the way,
8 while I am on my feet, may I report to Your Honor, if
9 you haven't seen it, the Commission did issue an order
10 on the applicant's appeal. I don't know if you were
11 aware of that.

12 JUDGE NELSON: We received a fax this
13 morning. I don't know if that's the one you are
14 referring -- with reference to the phase one, phase
15 two discovery.

16 MR. MCBRIDE: Yes. You had asked earlier
17 about Commission treatment on the appeal. I wanted
18 you to know.

19 JUDGE NELSON: I had earlier received, I
20 think it was one of the applicants faxed over an
21 earlier order on two other rulings.

22 MR. MCBRIDE: When we were on the phone

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1 with you, Mr. Livingston reported to both of us they
2 had ruled on the other appeals. In any event, if I
3 may, or I'll just answer your questions.

4 JUDGE NELSON: Let me refresh my
5 recollection on the coals. So your concern, your
6 client's concern is about this merger in so far as it
7 reduces competition for coal?

8 MR. MCBRIDE: Yes. If I may, because
9 Powder River Basin is served by Union Pacific and
10 Burlington Northern. Colorado and Utah are almost --
11 Utah and Colorado are served by Southern Pacific and
12 by Union Pacific, but primarily by Southern Pacific.

13 JUDGE NELSON: Both railroads serve the
14 Utah Colorado coals?

15 MR. MCBRIDE: Yes.

16 JUDGE NELSON: I don't see that on the
17 map. Oh, I see north south routes of the UP.

18 MR. MCBRIDE: Yes. The Union Pacific goes
19 --

20 JUDGE NELSON: And east west routes of the
21 SP. So they are complementary at that point.

22 MR. MCBRIDE: That's right. But SP's only

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1 coal region is the Utah Colorado region. That's our
2 concern.

3 JUDGE NELSON: But your claim has always
4 been, you and others, that the two coals compete with
5 themselves.

6 MR. MCBRIDE: That's correct.

7 JUDGE NELSON: Therefore, it is important
8 to have the competition of each railroad for that
9 coal.

10 MR. MCBRIDE: That's correct.

11 JUDGE NELSON: And that if those two
12 railroads become one, there won't be any competition
13 any more.

14 MR. MCBRIDE: That's right.

15 JUDGE NELSON: You wouldn't get the
16 benefits of the competition you get now. I'm with you
17 so far.

18 MR. MCBRIDE: That is exactly right.

19 JUDGE NELSON: All right. Let's move into
20 the portion. You want to take them in the order in
21 which our letter presents them?

22 MR. MCBRIDE: That's fine. Page 248 and

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1 249 of Mr. Anschutz's deposition. If I may --

2 JUDGE NELSON: Let me remember Mr.
3 Anschutz. He is the person who turns out to have
4 controlling interest of the Southern Pacific Railroad?

5 MR. MCBRIDE: I don't know if they
6 stipulate to that, but he has 25 percent of the shares
7 and he's the chairman of the board.

8 JUDGE NELSON: I think we did have him.
9 Wasn't he at one time described as in control? Is
10 that correct?

11 MR. CUNNINGHAM: Well, if we don't want to
12 draw a legal conclusion, he's certainly the most
13 influential shareholder.

14 JUDGE NELSON: Right.

15 MR. MCBRIDE: If I may put one other thing
16 in front of you as the preliminary matter. I'm
17 putting before the judge for purposes of the record
18 page 687 of volume two of the application in this
19 case. This is the redacted version. I have the
20 unredacted too as well, if there is any question about
21 it.

22 I would like to point out to Your Honor

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1 one sentence. This is from the verified statement of
2 Mr. Sharp, who is the applicant's coal witness. The
3 sentence reads near the bottom of page 687, "In
4 assessing Geneva Steel traffic and related back haul
5 coal transport arrangements, the merger will 1) place
6 UP/SP in a similar position to the position SP is in
7 today, but with more efficient and extensive routings
8 to midwestern markets, et cetera. The rest of it is
9 not relevant.

10 JUDGE NELSON: So there's a discussion of
11 your client and related back haul coal transport?

12 MR. MCBRIDE: That's right. So the waste
13 back haul that has come up in this --

14 JUDGE NELSON: Well, we'll get to that.
15 Let's start with the coal.

16 MR. MCBRIDE: Well, it's coal and waste.
17 You see waste goes in one direction and coal goes in
18 the same cars in the opposite direction.

19 JUDGE NELSON: Where is Geneva? I
20 couldn't get that out of the article too well.

21 MR. MCBRIDE: It is near Provo. I believe
22 it's just north of Provo.

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1 JUDGE NELSON: I know we've had this
2 before. I see Provo. I see Geneva. All right. This
3 is a place in Utah.

4 MR. MCBRIDE: Yes. So you'll know the
5 facts --

6 JUDGE NELSON: What do they make there?
7 What do they do?

8 MR. MCBRIDE: They make steel. What they
9 do is, if Your Honor would look at the same map up at
10 northern Minnesota, taconite ore comes from northern
11 Minnesota on a shortline to the Wisconsin Central, to
12 the Southern Pacific through Chicago, all the way to
13 Geneva.

14 JUDGE NELSON: I see that. The SP is not
15 in Minnesota.

16 MR. MCBRIDE: There's a shortline railroad
17 up in northern Minnesota in this region.

18 JUDGE NELSON: Yes.

19 MR. MCBRIDE: Then I am pointing to the
20 area for the record, north of Duluth. Then you get on
21 the Wisconsin Central down to Chicago, where you can
22 pick up the Southern Pacific all the way to Utah.

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1 JUDGE NELSON: I see. This other railroad
2 takes the taconite from the Duluth area to Chicago?

3 MR. MCBRIDE: Yes.

4 JUDGE NELSON: Where it is turned over to
5 the Southern Pacific?

6 MR. MCBRIDE: Correct. Which takes it all
7 the way --

8 JUDGE NELSON: Which takes it to Geneva.
9 Geneva uses the taconite in the steel process?

10 MR. MCBRIDE: Empties 105 cars.

11 JUDGE NELSON: And then the empties go
12 back with coal?

13 MR. MCBRIDE: Correct. To the mid-west.

14 JUDGE NELSON: All right.

15 MR. MCBRIDE: That is called a back haul.

16 JUDGE NELSON: Yes.

17 MR. MCBRIDE: Now there is some dispute as
18 to which is the front haul and which is the back haul.
19 It doesn't matter for today's purposes.

20 There is also another back haul
21 arrangement, which is what I asked Mr. Anschutz about,
22 which is waste from southern California to Utah, and

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1 then coal back to southern California, evidently for
2 export. Same cars, same type of arrangement.

3 That kind of arrangement has allowed, in
4 our contention, Southern Pacific to be a more
5 aggressive marketer of coal. Able to offer a lower
6 price and still make a profit we contend.

7 JUDGE NELSON: And therefore?

8 MR. MCBRIDE: And therefore, these kind of
9 back haul arrangements are what has distinguished
10 Southern Pacific from Union Pacific in the competitive
11 coal market out there today.

12 JUDGE NELSON: If the back hauls are
13 economical, and of course they are, why doesn't that
14 same factor exist merged or un-merged?

15 MR. MCBRIDE: Well, because Union Pacific
16 was not able to bid on the back haul. It lost it to
17 Southern Pacific for Geneva Steel. As I indicated to
18 Your Honor earlier, we have testimony from Mr.
19 Davidson. It's not in the pages I gave to you, but I
20 represented to you from his deposition, that he
21 wondered -- and I can show you the pages, that they at
22 Union Pacific wondered how Southern Pacific could make

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1 a profit at the levels that Union Pacific got under
2 bid by. That Union Pacific got under bid by Southern
3 Pacific for the coal business.

4 So he has also further indicated that he
5 intends to terminate the cash flow pricing of Southern
6 Pacific after the merger. It is therefore our
7 contention that rates will rise after the merger,
8 whether or not they can continue these back hauls.

9 JUDGE NELSON: So now let's look at the
10 question. Now this is classified as what?

11 MR. MCBRIDE: Highly confidential.

12 JUDGE NELSON: Highly confidential.

13 MR. MCBRIDE: It means I can't even talk
14 to my client about it. The back hauls, the only word
15 that I added to the question on 248 to Mr. Anschutz
16 that doesn't appear in Mr. Sharp's testimony is waste.

17 JUDGE NELSON: Well, let's get there.
18 We're not there yet. Let's start with line 12.

19 Is there any claim that the question
20 itself should be classified?

21 MR. MCBRIDE: That is what they did.

22 JUDGE NELSON: Well, I'm asking. This is

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1 SP now?

2 MR. BULGOZDY: Yes, Your Honor.

3 JUDGE NELSON: The question is classified?

4 MR. BULGOZDY: Yes. In this instance.

5 JUDGE NELSON: Page 248, line 12.

6 MR. BULGOZDY: Yes.

7 JUDGE NELSON: Let's begin with the first
8 thing we see in line 12. How about the queue, can
9 that be declassified?

10 MR. BULGOZDY: I suspect we could agree to
11 that, Your Honor.

12 JUDGE NELSON: How about the next phrase,
13 just a couple? How about that?

14 MR. BULGOZDY: I think that we could
15 probably agree that line 12 and line 13.

16 JUDGE NELSON: Very well. Let's look at
17 the question that begins with the word R at the end of
18 line 13. How about if we went up through the word
19 "had". Are we now in classified session?

20 MR. CUNNINGHAM: That's what I asked in
21 the beginning, Your Honor.

22 JUDGE NELSON: I see the problem. Why

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1 don't we do go into closed session so that we can
2 freely discuss this material.

3 Is there any objection to that?

4 (Whereupon, the proceedings went
5 immediately into a closed session.)
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CERTIFICATE

This is to certify that the foregoing transcript in
the matter of:

Discovery Conference:
Union Pacific Corporation, et al.
-Control and Merger-
Southern Pacific Rail Corporation, et
al.

Before: Surface Transportation Board
Finance Docket No. 32760

Date: March 27, 1996

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

John Mangover