

INTERSTATE COMMERCE COMMISSION 07/03/96

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1 Thank you.

2 SECRETARY WILLIAMS: Chairman Morgan?

3 CHAIRMAN MORGAN: I don't usually make
4 long statements, but given the importance of this
5 case, I'm going to keep you a little bit longer.

6 The sun keeps coming in and going out. I
7 don't know what that means, but anyway, I will
8 proceed.

9 The merger case that we have considered
10 today is a true test of the Board's statutory
11 authority to permit transportation-related
12 transactions that are in the public interest.

13 In determining the public interest in a
14 merger case, the Board must carefully balance the
15 benefits flowing from the consolidation against the
16 anti-competitive consequences that may result.

17 In this case, the transportation benefits
18 are clear and the anticompetitive effects of approving
19 this merger without conditions are significant.

20 Throughout this merger proceeding, the
21 Board has heard from a broad cross-section of
22 interests about the impacts, both positive and

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1 negative, associated with this merger.

2 We have heard from shippers who support
3 the merger and shippers who oppose the merger.

4 We have heard from railroads who are for
5 the merger and railroads who are against it.

6 We have heard from states that are for it,
7 and states that are against it.

8 The Board has considered a variety of
9 options in resolving this matter. The Board's
10 challenge, as I saw it, was to weigh all of the
11 evidence and arrive at a balanced decision ensuring
12 that the harm could be addressed and the
13 transportation benefits could be preserved.

14 I believe that we have met that challenge
15 here today. We heard at oral argument on Monday that
16 this case should be easy to decide. If there is a
17 competitive problem, you just say no and deny the
18 whole merger, leaving it to the parties to move to the
19 next resolution acceptable to government.

20 With all due respect, while that may be an
21 easy answer here, particularly with the opposition, I
22 do not believe that that is the right answer here.

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1 Government's role in today's world in my view should
2 be to work more in partnership with industry of all
3 types, to empower it to take the steps necessary to
4 compete.

5 When private industry comes forward in
6 good faith with what it believes to be a benefit for
7 economic growth and development, we should not pursue
8 collusion in the first instance, but dismiss the
9 proposal altogether.

10 Rather we must attempt to craft a response
11 that balances the many competing interests.

12 There are real pluses to this merger.

13 First, the merger permits UP and SP to
14 achieve tremendous efficiencies. History has shown
15 that restructuring in the rail industry has
16 strengthened the rail transportation system in the
17 form of better service and lower rates, and this
18 merger should be no exception.

19 Second, the merger ensures that shippers
20 on the SP system will continue to receive competitive
21 service. We heard some at the oral argument say do
22 not worry about SP; however the State of California on

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1 behalf of its shippers and the United Transportation
2 Union on behalf of its employees are worried.

3 Denying the merger and risking a downsized
4 SP or an SP broken up in pieces is not what they want;
5 and it is not a risk that we should be willing to
6 take. We should do all that we can to allow the
7 efficiencies promised by this merger and to save the
8 SP system as a viable competitive force.

9 We also heard at oral argument that there
10 is another simple, quick, and obvious way to fix the
11 competitive problems associated with this merger.
12 Divestiture.

13 Divestiture may be an obvious fix for
14 some, but it is not an obvious fix for me in this
15 case.

16 First, it would be a dramatic solution,
17 one that must be pursued only if there is clearly no
18 other viable alternative. Railroads with their
19 network economies are different from other industries;
20 and if you take away part of their network, you can
21 take away part of their economies of operation.

22 There is clear evidence on this record

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1 that divestiture would significantly undercut the
2 efficiencies associated with this merger. The
3 divestiture proposals discussed in this case are
4 far-reaching, with one suggestion even suggesting a
5 divestiture of 1200 miles. This remedy goes beyond
6 the harm to be addressed and does not distinguish
7 between those shippers that will lose direct and
8 indirect competition and the shippers whose
9 competitive position will not be substantially
10 affected by the merger.

11 The government remedies must be
12 specifically tailored to the identifiable harm.
13 Furthermore, divestiture is not simple and quick. To
14 the contrary, it could lead to more government
15 intrusion, more regulatory oversight, and ultimately,
16 more litigation when the unsuccessful suitors seek
17 relief.

18 This is particularly true given the fact
19 that certain divestiture proposals were not even
20 formally presented in the record of this proceeding.
21 Divestiture could mean another proceeding and more
22 delay, creating the type of uncertainty and

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1 unpredictability for business that the government of
2 today and certainly this Board is trying to avoid.

3 This risk might be worth taking if there
4 were no other way to fix the competitive harm in this
5 case; however, there are other ways. The applicants
6 admit that there is much overlapping track and they
7 have sought to address this competitive issue by
8 providing a private sector solution through the
9 granting to BN/Santa Fe of extensive trackage rights.

10 Parties have complained that those
11 trackage rights will not produce as much competition
12 as an independent SP. I disagree. BN/Santa Fe is a
13 strong competitor that has the desire to and knows how
14 to compete.

15 Trackage rights are used successfully
16 throughout the industry and there is no evidence that
17 because of their scope, the trackage rights here would
18 not be an effective, competitive alternative. If
19 managed properly, and we have the means and the
20 mandate to make sure that they are, these trackage
21 rights can replicate SP's existing competitive
22 presence and can provide market discipline to the

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1 merged UP/SP system.

2 The BN/Santa Fe agreement is clearly
3 strengthened by the privately negotiated agreement
4 with the Chemical Manufacturers Association. However
5 the Board has concluded, and rightfully so, that more
6 is needed to address the competitive harm.

7 The Board has augmented conditions in the
8 important areas of build-ins and build-outs,
9 transloads, new facilities, storage and transit
10 facilities and contract service.

11 We have responded to the concerns of
12 various shipper groups and specific shippers,
13 particularly coal, plastic, petrochemical shippers,
14 grain, and others in the NAFTA trade.

15 Our conditions are carefully crafted to
16 preserve competitive alternatives existing today
17 without undermining the benefits of the merger.

18 We also provide for five years of
19 oversight.

20 At the oral argument, oversight was
21 attacked on the one hand as a meaningless gesture, and
22 on the other hand as burdensome overregulation. Well,

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1 which is it? The answer is neither. The condition
2 which the Board is imposing today requires the
3 applicants and their business partners to report
4 periodically to demonstrate to us that the protective
5 conditions are, in fact, working.

6 The Board will not depend upon shippers
7 and affected parties to do the monitoring for us. If
8 competitive harm appears imminent, we can and will
9 act. The divestiture option will remain available
10 during the entire oversight period. The Board has
11 taken this case very seriously from the beginning and
12 it will continue to do so.

13 I believe that the decision that we are
14 rendering today is a balanced one that recognizes the
15 many competing issues in this case. It preserves the
16 benefits of the transaction, benefits that cannot be
17 ignored. It ensures a strong competitive alternative
18 for shippers and communities served by SP. We owe
19 them no less.

20 It recognizes the importance of the
21 transaction to the employees, for it is they who have
22 much at stake. It mitigates the competitive harm

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1 without the risk of potentially more intrusive
2 governmental action.

3 It recognizes the importance of
4 market-based plans and private sector negotiations.

5 On balance, this decision is a sound one.
6 It represents good government. It is good for
7 transportation and it is good for the economy.

8 Now, before I cast my vote, in case there
9 is no doubt, I want to echo what has been said about
10 the Staff and I could name all the Staff people who
11 have been involved in this case and I cannot do that
12 because we would be here quite a bit longer; but I
13 will try to highlight the groups that have been
14 involved in this and for which we all owe a great deal
15 of gratitude.

16 First of all, I want to thank the team led
17 by Julia Farr. This is a team that a year ago worked
18 on another important case. They have once again done
19 outstanding work. I thank all of you.

20 I want to thank the Secretary's office led
21 by Vernon Williams. They have done a tremendous job
22 in handling these two days. This has not been easy.

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1 They have done it with grace and professionalism. I
2 thank you.

3 I also thank Don Hirst and his Staff. He
4 has helped with security and other coordination.
5 Again, this has not been easy to coordinate.

6 I also want to thank Rich Fitzsimmons and
7 Dennis Watson for all of the press and the media setup
8 that has also not been easy, but I am proud that we
9 have handled that as well as we have.

10 I also want to thank my fellow Board
11 members. I reiterate what the Vice Chairman has said:
12 this is a fine Board, and all of you should be happy
13 and proud to have the Board that you have for this
14 case and other cases.

15 I would like to thank Commissioner Owen
16 and Vice Chairman Simmons for the continued
17 collegiality, cooperation, interest, professionalism,
18 and support. These last several months have not been
19 easy ones, not only because of this case, but because
20 of a lot of other issues that have faced the people at
21 the Board.

22 And I would say that what we have been

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1 able to accomplish has only been because of these
2 Board members.

3 I also want to thank the Board member
4 staffs. I know my own staff, I have two sitting
5 behind me, and one, Mary Turek, is not here, who has
6 done a tremendous amount of work on these last two
7 days. But I also want to recognize the other Board
8 member staffs, Frank Wilner, Dennis, Ricky, as well as
9 Craig and Richard behind me.

10 This has been a tremendous effort and it
11 is for those of you who may not agree with what we
12 have done today, and I'm sure there are those, I just
13 want to say to you that this has been a professional,
14 hard-working effort. We took it seriously. We feel
15 very good about what is being done here. I think it
16 is a credit to everyone that we have gotten to where
17 we are.

18 With that, I vote aye.

19 SECRETARY WILLIAMS: The motion to accept
20 the Staff recommendation passes.

21 The merger has been approved.

22 VICE CHAIRMAN SIMMONS: Madam Chairwoman,

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1 if there is any doubt why I voted the way I did, I
2 will submit my comments for the report.

3 CHAIRMAN MORGAN: Very good.

4 I believe there is no more business before
5 us today.

6 The Board members and Staff will be
7 available briefly for any questions from the press
8 Without further ado, the meeting is adjourned.

9 (Whereupon, at 12:30 p.m., the hearing was
10 concluded.)

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CERTIFICATE

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

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

Before:

Surface Transportation Board
Finance Docket No. 32760

Date:

July 1, 1996

Place:

Washington, DC

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

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