

SURFACE TRANSPORTATION BOARD AFFIRMS "2-TO-1" SHIPPER'S USE OF RIGHTS UNDER "OMNIBUS CLAUSE" IMPOSED ON "UNION PACIFIC/SOUTHERN PACIFIC" RAIL MERGER

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In a decision issued in August 1996, the Board approved the merger of the Union Pacific (UP) and Southern Pacific (SP) railroads. To remedy potential competitive problems, the Board imposed numerous conditions addressing the competitive harm that the merger would otherwise have produced. Several conditions were directed specifically to the competitive harm that otherwise would have been suffered by 2-to-1 shippers (that is, shippers served exclusively by UP and SP prior to the merger). A trackage rights condition, granting extensive trackage rights over UP/SP lines to the Burlington Northern Santa Fe (BNSF) railroad, protected most 2-to-1 shippers. An additional condition, commonly referred to as the omnibus clause, was imposed to protect any 2-to-1 shipper not covered by BNSF trackage rights. The omnibus clause required UP and BNSF to enter into arrangements "under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service" to each 2-to-1 shipper covered by the clause.

In the decision issued today, the Board addressed the applicability of the omnibus clause to Union Electric's coal-fired electric generating plant at Labadie, Franklin County, Missouri, which is not covered by trackage rights granted in 1996 to BNSF. UP had acknowledged in this case that Union Electric was a 2-to-1 shipper (because the Labadie plant was accessed, prior to the UP/SP merger, by UP and by SP and by no other railroad), but argued that a settlement agreement entered into by Union Electric in March 1996 removed Union Electric from omnibus clause coverage. The Board rejected UP's argument. The Board noted that nowhere in the March 1996 settlement agreement had Union Electric agreed to give up its rights under the omnibus clause. The Board thus concluded that Union Electric still had rights, which UP must respect. The Board anticipates that, now that the omnibus-clause issue has been resolved, UP and BNSF will attempt to negotiate an arrangement "under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service" to Union Electric at Labadie.

Today's decision represents another instance of the Board's enforcement of the various pro-competitive conditions imposed in *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1966). For example, in Decision No. 61, issued to the public on November 20, 1996, the Board rejected a narrow reading of Board-imposed "new facilities" and "transload" conditions. The Board ruled that these conditions allow BNSF to serve (1) any new facility (except as otherwise indicated) located

post-merger on any UP/SP line over which BNSF received trackage rights, and (2) any new transload facility, including those owned or operated by BNSF itself, located post-merger on any UP/SP line over which BNSF received trackage rights. Similar prior Board rulings include: Decision No. 73, issued August 14, 1997, stating that BNSF's 1996 trackage rights were immediately effective for a coal-fired electric generating station at Halsted, Texas; Decision No. 75, issued October 27, 1997, stating that a transload facility at Sparks, Nevada, was a "new" facility for purposes of the transload condition, and therefore open to BNSF; Decision No. 81, issued October 5, 1998, finding that a transload facility at San Antonio, TX, was within the geographical limits of the San Antonio switching district, and could therefore be accessed by BNSF; Decision No. 86, issued July 12, 1999, finding that any new facility located adjacent to a spur, an industrial track, and/or a yard served by a trackage rights line was located "on" the trackage rights line and was therefore open to BNSF; and Decision No. 88, issued March 31, 2000, stating that the "general build-out" condition covered a planned build-out from an Arkansas power plant to a nearby SP "island" that SP had accessed, prior to the merger, via trackage rights over a UP line.

The Board's decision was issued today in *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*, Finance Docket No. 32760, Decision No. 89.

A printed copy of today's decision is available for a fee by contacting: **Da-To-Da Office Solutions, Room 405, 1925 K Street, N.W., Washington, DC 20006, telephone (202) 466-5530**. The decision is also available for viewing and downloading via the Board's website at **www.stb.dot.gov**. **[STOP]**