

**SURFACE TRANSPORTATION BOARD ANNOUNCES FAVORABLE APPEALS COURT RULING AFFIRMING DECISION
IN "UP-SP MERGER"**

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the United States Court of Appeals for the District of Columbia Circuit has issued a decision affirming in all respects the Board's decision approving, with numerous conditions, the "UP-SP Merger" application.

In August 1996, the Board approved the common control and merger of the Union Pacific (UP) and Southern Pacific (SP) rail systems. Because the pre-merger UP and SP systems competed with each other at certain locations, an unconditioned merger would have reduced the railroad service options of some shippers from two carriers to one. To protect against this potential competitive harm, the Board imposed numerous conditions on its merger approval. Most significantly, through a grant of trackage rights, the Board made it possible for the Burlington Northern and Santa Fe Railway Company (BNSF) to serve any "two-to-one" shippers that could have been served by SP before the merger, but would only be served by UP after the merger. The Board also retained jurisdiction to oversee the merger for five years to ensure that the competitive conditions were effective.

The Board's decision was challenged in court by Western Coal Traffic League (WCTL), an organization representing electric utility companies involved with the rail shipment of coal. WCTL, which wanted the Board to either deny the merger or to order divestiture (that is, to order UP to give up ownership of some lines to other carriers), asked the court to reverse the Board's decision on the ground that the merger will have significant anticompetitive effects within the western coal transportation market. Finding the Board's decision rational and supported on the record, the court denied WCTL's request for review.

In support of its position, WCTL argued that the reduction in the number of major railroads carrying coal in the West from three to two would result in rate increases. Citing its experience with other two-carrier markets, however, the Board found that rates would not likely rise as a result of the merger because the merger would produce rivalry, not collusion. The court found that the Board's explanation for its conclusion was reasonable and supported by substantial evidence, and thus it rejected WCTL's argument.

WCTL also argued that the merger would have adverse competitive consequences by reducing "source" competition. The source competition argument stemmed from the fact that before the merger, UP and BNSF shipped much of their coal from mines in the Powder River Basin, while SP shipped most of its coal from the Uinta Basin of Utah and Colorado. By giving UP control over the transportation of both Uinta Basin and Powder River Basin coal, WCTL argued, the merger would reduce competition that had previously served to hold down rail rates. The Board, however, found that Uinta Basin coal and Powder River Basin coal serve different markets and thus were not competitive even before the merger. Thus, the Board concluded, UP's acquisition of SP's Uinta Basin coal lines would not have an adverse competitive effect on rail rates in the West. The court found the Board's conclusion justified.

Finally, WCTL argued that the fees that BNSF negotiated with UP for use of the trackage rights would be so high that the trackage rights would not be an effective competitive constraint. The Board, however, found that the trackage rights fees would in fact put the tenant on the same competitive footing as the landlord, and it noted that it retained full authority to adjust the rates if necessary to preserve competition. The court found the Board's conclusion rational and supported by the evidence.

The Board's decision was issued on August 12, 1996 in *Union Pacific Corp.--Control and Merger--Southern Pacific*

Rail Corp., Finance Docket No. 32760, Decision No. 44. The decision is available on the Board's web site at **www.stb.dot.gov**. The court's decision was issued on March 23, 1999, in *Western Coal Traffic League, et al. v. Surface Transportation Board*, No. 96-1373 (D.C. Cir.) and is available on the court's web site at **www.cadc.uscourts.gov**.

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