

SURFACE TRANSPORTATION BOARD AFFIRMS "BUILD-OUT" CONDITION IMPOSED ON "UNION PACIFIC/SOUTHERN PACIFIC" RAILROAD MERGER

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the Board has issued a decision affirming the general "build-out" condition imposed in 1996 in connection with the "Union Pacific/Southern Pacific" merger.

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. One such condition, commonly known as the "general build-out condition," was imposed to preserve the pre-merger option of shippers solely served by UP to "build out" a new rail connection to SP (and vice versa).

In the decision issued today, the Board addressed the applicability of the general build-out condition to a planned build-out at a coal-burning power plant operated by Entergy Arkansas (Entergy) near Redfield, Arkansas. At the time of the merger, this plant was, and currently continues to be, solely served by UP. An SP track segment is located nearby, some 12 miles from the plant. For many years prior to the merger, however, this SP track segment had existed as an "island;" that is, it did not have a direct rail link with any other SP line, and it was accessible by SP only via trackage rights over a UP line.

The decision issued today resolves a dispute between UP and Entergy over the nature of the trackage rights by which SP formerly accessed the island. UP argued that SP could not have used these trackage rights to transport coal to an Entergy build-out to the island (and therefore, UP claimed, Entergy had not had a meaningful pre-merger build-out option). Entergy argued that SP could have used its trackage rights to transport coal to an Entergy build-out to the island (and therefore, Entergy maintained that it had a meaningful pre-merger build-out option). The dispute was complicated by the fact that the SP trackage rights had never been set down in a formal trackage rights agreement. The only written documentation concerning these trackage rights appears to be a Memorandum of Understanding (MOU) that contemplated the creation of the trackage rights.

In the decision issued today, the Board concluded that: (1) because the MOU did not explicitly restrict the SP trackage rights against service to future build-outs, no such restriction would be assumed; (2) thus, SP could have used its trackage rights to transport coal to an Entergy build-out to the island, which means that Entergy did have a meaningful pre-merger build-out option; and (3) the general build-out condition preserves Entergy's build-out option, and requires UP to grant The Burlington Northern and Santa Fe Railway Company (BNSF) trackage rights access to the SP island in order to allow BNSF to serve any build-out that Entergy may construct.

The Board issued its decision 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*, STB Finance Docket No. 32760, Decision No. 88.

A printed copy of today's decision is available for a fee by contacting: **Da-To-Da Office Solutions, Room 210, 1925 K Street, N.W., Washington, DC 20006, telephone (202) 289-4357**. Today's decision is also available for viewing and downloading via the Board's website at **www.stb.dot.gov**.

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