

Surface Transportation Board Ends Formal Oversight of "Union Pacific-Southern Pacific" Railroad Merger; Resolves Various Disputes; Will Continue Enforcement of Agency-Imposed Merger Conditions

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the Board has issued two decisions addressing the remaining unresolved issues raised in the fifth annual round of the "Union Pacific (UP)-Southern Pacific (SP)" general oversight proceeding, and concluding the formal oversight process imposed on that merger. In particular, the Board addressed various disputes concerning the trackage rights received by The Burlington Northern and Santa Fe Railway Company (BNSF) in connection with the 1996 UP-SP merger; announced the end, as scheduled, of the formal 5-year oversight process established in connection with the merger; and confirmed that, notwithstanding the end of the formal oversight process, the Board will continue to be available to resolve merger-related disputes concerning the BNSF trackage rights and the various other conditions imposed on the merger.

DECISION NO. 20

In Decision No. 20, the Board specifically addressed certain disputes concerning the scope of the BNSF Agreement (containing a complete description of the rights granted to BNSF in connection with the UP-SP merger) involving: (1) the definition of "2-to-1" points; (2) the definition of "existing transload facilities" and "new transload facilities"; (3) BNSF's access to "new facilities" on the Stockton-Elvas trackage rights line; and (4) BNSF's right to purchase or lease "team tracks" at 2-to-1 points. [FOOTNOTE 1: The Board previously addressed the railroads' conflicting proposals regarding the scope of BNSF's trackage rights in the Houston-Memphis-St. Louis corridor in Decision No. 19, discussed in Surface Transportation Board "News" release No. 01-59 issued November 9, 2001.] The Board held that:

(1) 2-to-1 Points. The BNSF Agreement contains a provision requiring 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 shipper facilities at 2-to-1 points located on UP-SP lines over which BNSF was *not* previously granted trackage rights. The Board ruled today that, when read in concert with the BNSF Agreement as a whole, this provision was intended only to protect the relatively few 2-to-1 points not explicitly covered by the line sales and trackage rights accorded to BNSF under the agreement; it is not intended to greatly expand the number of points open to BNSF beyond those that fall under the traditional definition of 2-to-1 points as used in this merger, that is, points at which, at the time of the merger, at least one shipper had available to it, either directly or via reciprocal switching, service from both UP and SP and from no other railroad.

(2) Transload Facilities. The BNSF Agreement contains a number of provisions granting BNSF access to transload facilities. The Board ruled that, for now, there is no need to attempt to include in the BNSF Agreement a precise definition of the transload facilities to which BNSF will have access. In offering guidance for future disputes, however, the Board observed that the crucial issue in identifying a qualifying transload facility is whether the facility is legitimate, and added that the agency would remain available, as it has in the past, to resolve, on a case-by-case basis, any disputes concerning the scope of BNSF's access to transload facilities.

(3) New Facilities. The BNSF Agreement provides that BNSF shall have access to new shipper facilities located on UP-SP lines over which BNSF was granted trackage rights in connection with the merger. The Board ruled that BNSF has access to such new shipper facilities on *all*, not just *some*, of the UP-SP trackage rights lines, including the Stockton-Elvas trackage rights line.

(4) Team Tracks. Team tracks are tracks on which cars are placed for the public's use in loading or unloading freight using trucks, and the BNSF Agreement provides that BNSF has a right to construct, at 2-to-1 points on the UP-SP

trackage rights lines, team tracks for BNSF's exclusive use. The Board ruled that BNSF has no right, though, to require UP to sell or lease to BNSF team tracks no longer used by UP. The Board noted that, under the BNSF Agreement, BNSF is to construct its own facilities unless UP has specifically agreed to provide them. The Board added, however, that it expects UP to work cooperatively with BNSF to enable BNSF to construct team tracks and ancillary facilities (including loading facilities and necessary connections with UP-SP tracks) when BNSF notifies UP of its desire to do so along a UP-SP line.

DECISION NO. 21

In Decision No. 21, the Board addressed the remaining unresolved issues raised in the fifth annual round of the UP-SP general oversight proceeding, and also concluded, as scheduled, the formal 5-year oversight process for the merger. Regarding certain of those issues, the Board held that:

(1) Directional Running. In the past several years, UP has instituted "directional running" by "pairing" single-tracked lines that, prior to the merger, could not have been paired because one line was UP's and the other line was SP's. On the paired lines over which BNSF already has trackage rights, BNSF's trains, as well as UP's trains, have benefitted from UP's directional running arrangements. BNSF asserted, however, that it should be able to participate in directional running when BNSF has trackage rights only over one of the paired lines but not over the other. The Board ruled that, if BNSF can demonstrate that the institution of directional running on paired lines has interfered with BNSF's ability to provide service on a trackage rights line, BNSF must be allowed to join in the directional running.

(2) Reciprocal Switching. In connection with the trackage rights accorded to BNSF under the terms of the BNSF Agreement, UP in some circumstances provides reciprocal switching services to BNSF. The Board ruled that, when UP provides reciprocal switching services under the BNSF Agreement, such services must be provided on an impartial basis.

(3) Terms of Access. The BNSF Agreement contemplates that, from time to time, BNSF will access, on the UP-SP trackage rights lines, shipper facilities that it has not previously accessed. In such circumstances, BNSF generally submits to UP an access request (i.e., a request that UP concur in BNSF's view that BNSF has, under the BNSF Agreement, a right to access a certain facility) and a service proposal (i.e., a proposal that BNSF be allowed to achieve that access in a certain way). The Board ruled today that UP must expeditiously address such access requests and service proposals.

(4) Trackage Rights Fees. The BNSF Agreement provides that trackage rights fees under the agreement shall be adjusted each year to reflect changes in UP's costs. The Board observed that a dispute has arisen between BNSF and UP regarding UP's method of adjusting the trackage rights fees. The Board, however, stated that it would take no action at this time regarding the ongoing dispute, as it is under active negotiation, and emphasized that a settlement negotiated by the two railroads would be preferable to a solution imposed by Board order. The Board noted, however, that the right of the American Chemistry Council to audit the adjustment calculations of the trackage rights fees would continue under the BNSF Agreement as updated.

(5) Final BNSF Agreement. UP and BNSF submitted, for Board review, a "restated and amended" version of the BNSF Agreement. This updated version incorporates Board-imposed merger conditions, as well as certain agreements that UP and BNSF have reached relating to those conditions and other matters. The Board today approved the updated version, insofar as its terms are consistent with conditions previously imposed, and with the Board's decisions in Decision Nos. 19, 20, and 21. The Board also directed UP and BNSF to submit, no later than March 1, 2002, a final updated version of the BNSF Agreement.

Formal Oversight Process Is Concluded. In 1996, when the Board approved the UP-SP merger, the agency established a 5-year oversight process to examine whether the various conditions the Board imposed would effectively address the competitive issues they were intended to address. Because the evidence submitted in the fifth round of annual oversight

has demonstrated that the Board-imposed conditions are working as intended, the agency determined that the formal oversight process should end, as scheduled. The Board noted, in particular, that the public record in this case demonstrates that the imposed conditions have maintained and fostered rail competition in the western United States, and that BNSF has become an effective competitive replacement for the competition that would otherwise have been lost or reduced when UP and SP merged.

Authority To Enforce Merger Conditions Continues. The Board noted that, although the formal oversight process for the UP-SP merger is ending, the Board has authority to enforce the conditions it imposed on the merger. The Board specifically stated that, notwithstanding the conclusion of the formal oversight process, the Board will remain available--into the indefinite future--to consider and promptly resolve any disputes of general applicability relating to BNSF's access to shippers under the BNSF Agreement, or other issues relating to the parties' compliance with the conditions that were imposed on the merger, subject to any applicable requirement to arbitrate.

The Board's decisions issued today are Decision Nos. 20 and 21 in the case entitled *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 (General Oversight)*, STB Finance Docket No. 32760 (Sub-No. 21). **A printed copy of each decision is available for a fee by contacting Da-2-Da Legal, Room 405, 1925 K Street, N.W., Washington, DC 20006, telephone (202) 293-7776, or via [http://Da_To_Da@Hotmail.com](mailto:Da_To_Da@Hotmail.com).** The decisions also are available for viewing and downloading via the Board's website at <http://www.stb.dot.gov>.

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