

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32760 (Sub-No. 23)

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

Decided: September 5, 1997

By petition (designated UP/SP-306) filed July 17, 1997, applicants¹ seek a determination that the terms of the proposed merger of SSW into SSW Merger Corp., including the \$6,800-per-share price to be paid to the four minority shareholders who own the 61 shares of SSW's common stock that are publicly held, are just and reasonable. See Schwabacher v. United States, 334 U.S. 192 (1948).²

By decision served July 29, 1997 (and published that day in the Federal Register at 62 FR 40566), we set August 28, 1997, as the due date by which interested persons could submit comments respecting whether the terms and conditions of the proposed merger of SSW into SSW Merger Corp. are just and reasonable. We set that due date to make possible the issuance of a final decision prior to September 30, 1997, in view of applicants' claim that, unless they were able to merge SSW into SSW Merger Corp. prior to the end of the fiscal third quarter, they would be required to go to the considerable time, expense, and difficulty of preparing financial statements that reflect the operations of SSW as a separate entity.

By petition filed August 15, 1997, Benjamin Zatz and Donald Zatz (petitioners) requested a 60-day extension of the comment due date. Petitioners indicated: that they are two of the four minority SSW shareholders, and own 55 of the 61 minority shares; that they had devoted considerable time to locating and retaining transportation counsel and a financial analyst; that they had retained such counsel, but that such counsel needed time to familiarize himself with the case; and that it appeared unlikely that they would be able to retain a financial analyst sufficiently in advance of the comment due date. Petitioners further indicated that, because they believed that it would be impossible to prepare their comments without first reviewing the workpapers and supporting documents pertaining to applicants' Credit Suisse First Boston appraisal³ as well as detailed financial statements of SSW, they had already submitted to applicants their first request for the production of documents.

In our decision served August 20, 1997, we noted that, in our opinion, petitioners had failed to justify the 60-day extension they had requested. We stated: that the central issue posed by the UP/SP-306 petition as regards petitioners concerns the value of the 61 minority SSW shares; that this issue does not appear to be overly complex; that, given the amount of time petitioners had

¹ As indicated in the decision served July 29, 1997, slip op. at 4, the word "applicants" now has reference to Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), and St. Louis Southwestern Railway Company (SSW).

² Applicants indicate that the merger of SSW into SSW Merger Corp. will occur prior to and in anticipation of the merger, now scheduled to occur in February 1998, of SPT into UPRR.

³ See UP/SP-306, Exhibit A.

already had to develop their case, an extension of the length sought by petitioners was clearly excessive; and that, furthermore, the extension requested by petitioners would make it impossible to issue a final decision on the UP/SP-306 petition prior to September 30, 1997. We found, however, that, under the circumstances, an extension of 10 days for the comment due date would provide petitioners with sufficient opportunity to develop their submission while preserving our ability to issue a final decision prior to September 30, 1997. Accordingly, we extended the comment due date for petitioners to September 8, 1997.

By "petition to reopen" filed September 4, 1997, petitioners now seek reconsideration of our denial of their request for a 60-day extension of the comment due date. Contending that they will not have, with the September 8 due date, a meaningful opportunity to offer their own view as to the fair value of their SSW shares, petitioners note: that the Credit Suisse First Boston workpapers were not produced by applicants until August 27, 1997; that, because applicants have still not responded to petitioners' first set of interrogatories (served August 19, 1997), petitioners will have to file a motion to compel;⁴ and that their newly retained economic consultant, Mr. John J. Grocki, needs at least an additional month to analyze the carload waybill statistics database.⁵ Petitioners add: that, because the Credit Suisse First Boston appraisal was available to applicants on April 14, 1997, but was not made available to petitioners until July 14, 1997, any delay (up to the first three months, anyway) in issuing a final decision is attributable to applicants; that, in view of the fact that SPT has held at least an 85% ownership interest in SSW for a great many years, the notion that substantial resources will be wasted unless SSW is quickly merged out of existence is simply implausible; and that, in any event, the merger of SSW into SSW Merger Corp. can take place prior to our issuance of a decision on the valuation of the SSW shares.⁶

By reply (designated UP/SP-317) filed September 5, 1997, applicants urge the denial of the petition to reopen.

⁴ Applicants' UP/SP-316 pleading (applicants' responses to petitioners' first set of interrogatories) is dated September 3, 1997. We assume that petitioners had not yet received their copy of the UP/SP-316 pleading at the time they filed their petition to reopen. We note, in this respect, that we received our copies of the UP/SP-316 pleading on September 4, 1997 (the date of filing of the petition to reopen). See also UP/SP-317 at 10 n.4 (applicants insist that the UP/SP-316 pleading was hand delivered by a courier service "and signed for at [petitioners'] counsel's building at 8:44 p.m., September 3").

⁵ Petitioners appear to be suggesting that any valuation of SSW should reflect the proposed acquisition of control of Conrail Inc. (Conrail) by CSX Corporation (CSX) and Norfolk Southern Corporation (NS). See CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 12 (STB served July 23, 1997, and published that day in the Federal Register at 62 FR 39577). Petitioners apparently envision that a detailed study of the carload waybill statistics would enable them to determine what potential traffic diversions could be made by a post-merger CSX/Conrail or a post-merger NS/Conrail if either such post-merger entity were also to acquire ownership of SSW.

⁶ Petitioners apparently do not concede that a post-merger valuation would be governed by federal law (49 U.S.C. 11321 and 11324) and not by state law (the remedies available to dissenting shareholders under the laws of the state in which SSW is incorporated).

DISCUSSION AND CONCLUSIONS

Petitioners' arguments are without merit. Petitioners received the UP/SP-306 petition on or about July 14,⁷ but inexplicably waited until August 15 to enter a formal appearance in this proceeding. In their petition (filed August 15) for an extension of the comment due date, petitioners indicated that they needed an extension in order to locate and retain a financial analyst, and, largely for this reason, we granted an 11-day extension of the comment due date. Now, however, petitioners evidently will not be retaining a financial analyst (there is no indication in the petition to reopen that petitioners have retained or any longer expect to retain such an analyst). Petitioners now indicate, however, that they have retained an economic consultant, and that he needs more time to analyze the carload waybill statistics.

The econometric approach, upon which petitioners have now embarked, will involve an analysis of the traffic realignments that might be expected to follow in the wake of the division of Conrail by and between CSX and NS. Petitioners will evidently seek to argue that, following a rail realignment in the Eastern United States, the SSW franchise will be worth substantially more (either under its present UPC ownership, or pursuant to a sale to either CSX/Conrail or NS/Conrail) than it is worth today. This approach, however, is entirely speculative. The Conrail merger application is a recently filed, pending case, and our final written decision on the merits of that application will not even be issued until June 8, 1998. Moreover, this approach is, for the same reason, entirely directed to SSW's future valuation, not to SSW's present valuation.

We conclude that petitioners have failed to provide any relevant basis for finding that the extension they seek would in any way improve their chances of receiving a valuation higher than the \$6,800-per-share valuation offered by applicants. We will therefore adhere to our determination to issue a final decision by September 30,⁸ and we will deny the petition to reopen. In the interest of allowing petitioners the maximum possible opportunity to present their case, however, we will extend by three days the comment due date.⁹

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to reopen, filed September 4, 1997, by petitioners Benjamin Zatz and Donald Zatz, is denied.
2. The procedural schedule established in the decision served July 29, 1997, as modified in the decision served August 20, 1997, remains in effect, except as indicated in ordering paragraph 3.

⁷ Petitioners indicate that they received the UP/SP-306 petition "some time after" July 14, see the petition to reopen at 2, but the context suggests that this receipt must have occurred within a few days after July 14.

⁸ Applicants are correct in their assertion that, unless they are able to merge SSW into SSW Merger Corp. prior to the end of the fiscal third quarter, they will be required to go to the considerable time, expense, and difficulty of preparing financial statements that reflect the operations of SSW as a separate entity. See UP/SP-317 at 7 (applicants note that, in view of already accomplished integration of SSW accounting functions, they would incur costs in excess of \$300,000 if they were required to prepare the data necessary to allocate revenues to SSW).

⁹ Petitioners are two of the four minority SSW shareholders. To assure that the other two minority SSW shareholders are kept informed of the status of this proceeding, we will direct applicants to serve a copy of this decision upon these other two shareholders no later than September 11, 1997, and to certify to us that such service has been made.

3. Comments by petitioners Benjamin Zatz and Donald Zatz are due by September 11, 1997.

4. Applicants' reply to any comments filed by petitioners Benjamin Zatz and Donald Zatz remains due by September 15, 1997.

5. Applicants must serve copies of this decision upon the other two minority SSW shareholders by September 11, 1997, and must certify to us that such service has been made.

6. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary