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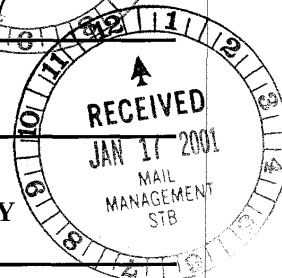
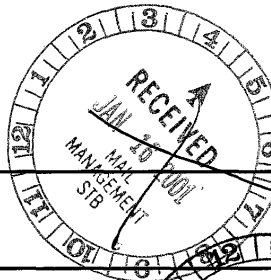
Part of
Public Record

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

Ex Parte 582 (Sub-No.1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REBUTTAL COMMENTS OF
SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY



The Southern California Regional Rail Authority ("SCRRA") hereby submits its Rebuttal Comments with respect to the revised railroad merger procedures set forth in the Notice of Proposed Rulemaking dated October 3, 2000 (the "NPRM").¹ SCRRA, in its initial Comments (filed jointly with the Maryland Mass Transit Administration on behalf of MARC Rail Service) and Reply Comments has expressed its views about those proposed rules. The purpose of this Rebuttal is to clarify the record with respect to other parties' misstatements either of facts or of the positions SCRRA has articulated in this proceeding.

1. CSX states in its Reply (at p. 69) that "... the circumstance of a merger between two freight railroads does not warrant any change in the fundamental relationship between freight railroads and passenger rail agencies." This is not always the case. CSX asks the Board to make an assumption that too often is not borne out by the facts. In fact, the agreed upon relationship between the parties changes enormously as a result of a merger.

Each contract for shared use between a commuter operator and a freight railroad begins with an understanding of what the respective operations of each will be. The agreements include

¹ These Rebuttal Comments were due on January 11, 2001. SCRRA has today filed a Motion for Leave to File Rebuttal Comments Out of Time, and is submitting these Rebuttal Comments in anticipation of a favorable ruling.

commitments for service reliability and operating characteristics based on information each party has received from the other about their projected volumes and frequencies. In most cases, the public agencies make investments in the infrastructure that improve service for both freight and passenger operations. Often, the parties include projections of changes in traffic levels or train frequencies. These projections can lead the parties to agree prior to the start of operations on infrastructure improvements that will be needed in the future if those frequencies or traffic levels arrive.

When mergers take place, as the operating plans and density charts that are an essential element of each application often show, the freight carrier makes plans to change its side of those projections. In many cases, those changes may adversely affect its ability to fulfill its obligations to the commuter carrier with respect to operating windows or service reliability. The freight railroad, not the commuter operation, has fundamentally changed the scenario. Too often that same railroad then attempts to use this Board's approval of its transaction as a shield to protect it from allegations that its change to the deal should cause it to bear the cost of infrastructure improvements necessary to restore the *status quo* to which the parties had agreed at the outset.²

The Association of American Railroads ("AAR") objects, at p. 18 of its Reply Comments, to the proposal that "merging railroads be required to make improvements in the railroad infrastructure for the benefit of commuter railroads". Like CSX, the AAR attempts to make the request of MARC and SCRRA something that it is not. CSX, AAR and others misapprehend the request these commuter railroads are presenting. The commuters want the benefit of their bargain. When the railroads change the playing field, they and not the public

² In these circumstances, and contrary to the suggestion of Norfolk Southern in its Reply Comments (at page 51) it is the freight railroad and not the commuter carrier that is attempting to rewrite the contractual commitments made by the parties.

agencies should bear the burden of repairing it to its former condition. The commuter carriers seek fairness.

It is a fundamental tenet of contract law that when one party elects to not fulfill its part of an agreement, for whatever reason, that party is in breach.³ Typically, the courts will provide a remedy that is designed either to order the non-performing party to perform or to repay the party for its losses from the breach, restoring the injured party to the position upon which it initially agreed. Here, however, there is a potential problem if a commuter railroad that is not getting what it bargained for brings arbitration or a court action. In that proceeding, it may well face an argument from the offending railroad that the tribunal has no ability to remedy the breach because the STB's approval of the transaction at issue immunizes the carrier from the application of all other law as necessary to implement their transaction. 49 U.S.C. §11321(a). Refusal by the Board to condition its approval on remedies that will address issues raised by the commuter authorities that are legitimately caused by the transaction puts the commuters in a position where:

- (a) the Board, which has plenary jurisdiction over the freight railroads and the merger transactions that are the subject of this rulemaking proceeding (49 U.S.C. §10501(c) and §11324) will not address the adverse impacts created by the fundamental change in the contractual relationship that is effected by the merger; and
- (b) the court or an arbitrator may conclude (whether properly or not) that the broad preemption clause in the statute permits the railroad to change at will its

³ "When performance of a duty under a contract is due any non-performance is a breach." *Restatement (Second) of Contracts*, §235(2), 1981.

obligations under the contract as long as it can make a showing that the change is necessary to carry out the terms of an approved transaction.

In short, the Board's refusal to acknowledge the impact of mergers on the ability of freight railroads to fulfill their obligations under agreements with passenger operators and to condition the approval of transactions on a requirement that the freights fulfill those obligations could leave the public with no remedy whatsoever. Such a result would clearly not be consistent with the "public interest" standard that guides the Board's review of these transactions. 49 U.S.C. §11324.

2. CSX mischaracterizes the nature of the presumption that MARC and SCRRRA have requested the Board to include in the revised regulations. In their initial joint comments MARC and SCRRRA asked the Board to presume that commuter rail services are essential. This is materially different from the description CSX provides at p. 71, where it states that "there should be no general presumption that the preservation of passenger rail service takes precedence over freight rail services or other public interest considerations." If that were the request that MARC and SCRRRA were presenting, the debate would be different. But, it is not. Rather, MARC and SCRRRA ask the Board to presume that the services that commuter rail operators provide is "essential" within the meaning of 49 C.F.R. §1180.1(c)(2)(ii). Then, if the proposed merger will have some impact on that service, appropriate conditions will be imposed to protect against the denigration of that service.⁴ This is materially different from the request CSX opposes. MARC's and SCRRRA's requested change to the regulations is reasonable and should be granted.

⁴ Contrary to Norfolk Southern's statement at page 50 of its Reply Comments, MARC and SCRRRA do not seek protective conditions "even in the absence of any proper showing under the "essential services" standard." The Board should approve such conditions only upon a showing that the proposed transaction will provide an adverse effect that the proposed conditions are designed to address.

3. Union Pacific plays on the Board's sympathy with its description of the sale by Southern Pacific Transportation Company ("SP") of two of its lines to SCRRA to address cash flow issues, attempting to create the impression that SCRRA took lines from SP, reducing its available capacity in exchange for a cash payment for which it was desperate. (Union Pacific Reply Comments at p. 28.) UP has it wrong. The commuting public that has suffered as a result of UP's inability to manage its merger with SP, and not the UP, is the victim here. UP's reduction of freight service, and its transfer of dispatching authority over the Lancaster/Palmdale and Coast Lines was part of a deal in which SP made out very well. SP agreed to accept a substantial sum of money in exchange for its lines. At the time, its traffic volume was down and it made an assessment that its future needs did not include the capacity it was transferring to the public for its use in operating commuter rail service. SP curtailed freight service on the Coast Line because it did not have enough volume to justify maintaining two separate routes. It, not SCRRA on its behalf, made a decision to use the inland route through the valley rather than the Coast Line. Even so, part of the deal required SCRRA to expend substantial capital on the line to improve service and to permit SP and now UP to run the trains it decided it still wanted to operate on that line.

UP refers to the commuter railroads' consumption of freight capacity. Commuter authorities like SCRRA have paid, and remain willing to pay, for the capacity they use. In fact, commuters around the country have demonstrated their willingness to make improvements to permit safe and efficient operation of the freight service, the commuter service and any Amtrak service that may also operate on the line.⁵ However, when a merger occurs and the freight

⁵ The freight railroads conveniently overlook one important feature of the commuter railroads' expenditures on infrastructure improvements. SCRRA, like many other commuter operators, operates on the line only a few hours each day. During all of the other hours, the freights are free to use that capacity, at the commuter agencies' expense.

railroad elects to increase its volume of traffic on the line, the facilities suddenly become inadequate. To the commuters and the public agencies that operate them, it does not make sense that once having paid for improvements to handle a negotiated level of commuter traffic, there should be any additional payment required when the freight railroad, not the commuter service, increases over the agreed upon levels. SCRRA has seen UP's traffic increase on lines they share by 14% in the period between June 1999 and June 2000.⁶ While SCRRA traffic has grown, it has not increased beyond the levels or frequencies agreed upon by the parties. UP's growth should not permit it to ignore its obligations under those agreements, nor should SCRRA be required to pay for the capacity enhancements necessary to handle that traffic.

UP's description of the SP transaction explains better than any argument that SCRRA or any commuter authority might present why this Board must explicitly protect the interests of the commuting public in the event of future mergers. SCRRA and the predecessor the Los Angeles County Transportation Commission ("LACTC")⁷ made a deal for which the taxpayers of Southern California paid dearly. True enough that as part of that deal, SP relinquished some of its capacity. But it was a negotiated deal. SCRRA's persistent participation in proceedings before this Board has been designed not to enhance its bargain, but to compel UP to give SCRRA the benefit of the bargain it made and for which its members paid dearly. It has brought the issues to this Board, and will bring them again if necessary, because the issues that have arisen have been caused directly by a transaction approved by this Board.

UP's description of the situation on the Riverside Line it shares with SCRRA (UP Reply Comments at 30) similarly demonstrates its willingness to ignore both the facts and the reality of

⁶ It is interesting that in recent discussions of traffic projections with SCRRA, UP personnel have stated that they do not anticipate further growth in traffic on the shared lines.

what happens on that line. The agreement is clear - - peak period trains operating in the peak direction receive absolute priority, not equal treatment. Trains outside the peak, by contract, are supposed to receive equal treatment. UP says, in its Reply Comments at page 30, that the Board should respect the contracts with the commuter authorities. SCRRA suggests that so, too, should UP.

UP was paid handsomely for SCRRA's rights. In December 1991, the LACTC and SCRRA agreed to the Union Pacific's proposal and contractually formed a business relationship by agreeing to pay over \$71,000,000 for capital improvements, track rights and the purchase of track to accommodate the operation of a specified number of commuter trains. UP assured LACTC/SCRRA that those trains could coexist with the existing freight traffic between Riverside and Los Angeles. Union Pacific accepted the money and the accompanying agreement outlining the specifics of train operations and priority of dispatch that are essential to make a commuter service viable.

SCRRA and its customers blame UP, justifiably, for delays because UP periodically has not complied with its obligations to keep trains out of SCRRA's way during the peaks. Given UP's contractual commitment to give SCRRA trains priority during the peaks, SCRRA would have no reason whatsoever to build flexibility into its schedules to accommodate UP trains as UP suggests it should. Contrary to the impression UP attempts to create, passenger railroads rarely "inflict" damage on freight service. The reverse is too often the truth. The reality of the railroad environment suggests that the freight carriers have the cards, and play them to the detriment of the commuting public, despite the promises they made in transactions in which they received handsome compensation for relinquishing some portion of their operating rights. On a line

⁷ The Los Angeles County Transportation Commission is a predecessor agency to the Los Angeles County Metropolitan Transportation Authority which succeeded to its interests and remains a part of the SCRRA joint

dispatched by UP, when the commuter train is contractually awarded priority operating rights, SCRRA can not exercise those rights if UP puts a train on the line ahead of the commuter and that train is a slow moving freight or one that encounters difficulties and stops on the tracks where there is no siding either near enough or large enough to permit the commuter train to go around.

While SCRRA's problems with UP are less frequent at this moment than they have been at other times in the parties' relationship these issues have arisen before and they will again. Despite substantial public investment in the line, and despite the presence of contractual promises made in exchange for a considerable cash infusion coupled with infrastructure improvements, the freight railroads do not feel compelled to honor the rights of commuter carriers. When this situation is caused by traffic increases that follow a merger that changes in a fundamental way the premises upon which the commuter and freight carriers agreed to their respective operating and other rights and obligations, the Board can and should intervene by conditioning its approval of a transaction on the freight carriers' making expenditures that will permit the freight railroads to fulfill the promises they made in the initial transaction documents.

UP is absolutely correct that the "Board should protect the nation's rail freight capacity." When a railroad makes a decision to relinquish a portion of its capacity, this Board does not intervene so long as the railroad preserves the ability to fulfill its common carrier obligation. *State of Maine D.O.T. - - Acquisition Exemption - - Maine Central R. Co.*, 8 I.C.C. 2D 835 (1991). *See also Southern Pacific Transp. Co. - - Abandonment Exemption - - Los Angeles County, CA*, 9 I.C.C. 2d 385 (1993) (affirming on reconsideration the ICC's prior assertion of jurisdiction over a transaction in which the transferring railroad relinquished rights that the ICC believed could limit its ability to fulfill its common carrier obligation). As monitor of the public powers board.

interest, though, this Board must hold the freight railroads to the promises they made. Then, when a railroad makes a decision to effect a significant change in the environment from that which was in place or contemplated at the time an agreement to permit commuter operations is made, and that change prevents the railroad from fulfilling its promises with respect to commuter operations, the Board should require the railroad that is changing the rules to pay for changes or improvements that will preserve the *status quo* upon which the parties agreed.

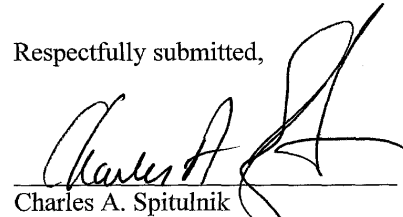
CONCLUSION

In this proceeding, SCRRRA and other commuter or passenger interests seek fairness. SCRRRA is asking this Board to include in its merger rules provisions that will effectuate the Congressional mandate that the Board approve only transactions that are consistent with the public interest, or that it impose conditions that will require the railroads to fix the problems their transaction creates. UP and other railroads (including UP's predecessor the SP) have willingly extended their hands to receive the cash provided by commuter agencies when lines are purchased or infrastructure improvements are made. Those same railroads should not be permitted to use those same hands to beat up on the commuting public when a merger will suit the railroads' interests but will harm the commuters. The conditions that SCRRRA has proposed will reduce the likelihood of that occurring and the Board should adopt those changes if it proceeds with its plans to adopt the rules set forth in the NPRM.

WHEREFORE, and in view of all of the foregoing, and for all of the reasons presented by SCRRA in the initial Comments, the Reply Comments and this Rebuttal, the changes proposed by SCRRA should be approved.

Dated: January 16, 2001

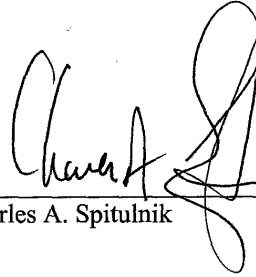
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2001, a copy of the Rebuttal Comments of Southern California Regional Rail Authority was served by first class mail, postage pre-paid upon all Parties of Record.

A handwritten signature in black ink, appearing to read "Charles A. Spitulnik", written over a horizontal line.

Charles A. Spitulnik