

Board in Finance Docket No. 34079.¹ The issue posed by the BNSF petition is whether the position of UP that “any level of interference with [UP’s] operation and service to its customers by operating rights granted in the UP/SP merger is unacceptable”² is consistent with the trackage rights granted to BNSF, the build-in/build-out condition imposed on UP/SP, and statutory and Board policies.

The interest of the Bayport Producers arises out of UP’s “Comments on Infrastructure and Safety for the Build-out to the Bayport Loop.”³ While UP gave “lip-service” to support of the exemption petition,⁴ and while UP stated it “will not attempt to delay the Bayport Loop build-out,”⁵ UP then dedicated 13 of the 18 pages of its pleading to raising unwarranted questions regarding the petition, based upon erroneous facts, and by raising questions about the adequacy of the up-stream infrastructure to accommodate the handling of the traffic generated by BNSF along the SJRL line. UP’s Comments were carefully calculated to raise questions concerning the exemption which UP ostensibly endorsed, and to pose additional burdens upon BNSF, both financially and operationally, which also likely could have the effect of delaying the build-in.

UP characterized the SJRL traffic projections as “unrealistic”; and based on this assessment, UP asserted its concerns about the Houston infrastructure were “heightened.”⁶ In

¹ A petition for exemption from 49 U.S.C. §10901 for the Bayport build-in was filed with the Board on August 30, 2001.

² Petition at Attachment B, letter of September 24, 2001 from Steve Barkley, Regional Vice President, Southern Region, UP, to Rollin Bredenberg, Vice President, Service Design & Performance, BNSF..

³ UP/SP-390, submitted jointly in the instant Docket and also in Finance Docket No. 34079, filed October 9, 2001 (“UP Comments”).

⁴ “As petitioners propose, the Board should grant the exemption . . . The proposal fulfills a condition imposed on the UP/SP merger to preserve pre-merger competition between SP and UP.” UP Comments at 3.

⁵ *Id.* at 17.

⁶ *Id.* at 10.

support of this contention, UP asserted that “Industries on the loop generate some 600 carloads of petrochemicals and plastics on a typical work day.”⁷ Subsequently, UP argued that “BNSF would carry more traffic than [the 36 to 66 carloads that] petitioners state in the Petition.”⁸ As demonstrated by SJRL and BNSF, and as conceded by UP, the representation that an average of 600 carloads of traffic are generated from Bayport Loop shippers on a daily basis was erroneous and misleading. Rather, according to STB carload waybill sample analysis, the average daily number of carloads is approximately 129.⁹ This is substantially below the 600 carloads cited by UP in its Comments, which gave rise to its “heightened” concern about the impact on the Houston infrastructure. At the projected level, SJLR would garner approximately 28% of Bayport traffic at startup, rising to approximately 51% (or, based upon UP’s data, 24% and 44%, respectively). These percentages are quite compatible with the UP/SP estimate of competitive traffic which BNSF would secure as represented during the course of the UP/SP merger, and totally refute any implication that SJRL has provided the Board with unrealistic traffic estimates, and therefore had underestimated daily train operations.

Moreover, in its Comments UP raised a number of issues regarding rail infrastructure in the Houston area with regard to the GH&H Line, with which the SJRL line would connect. UP stated that it operates 8 to 9 trains per day over the line “and cannot absorb additional trains without delaying UP service.”¹⁰ UP also cited to several upstream locations where it asserted

⁷ *Id.* at 2-3.

⁸ *Id.* at 11.

⁹ See SJRL and BNSF Reply to Union Pacific Railroad Company’s “Comments on Infrastructure and Safety for the Build-out to the Bayport Loop” at 2-4 (Oct. 29, 2001); See also Letter from J. Michael Hemmer, Covington & Burling, to the Hon. Vernon A. Williams (Nov. 15, 2001). In his November 15 letter, Mr. Hemmer cites to “an average of over 300 cars of rail traffic, loaded and empty, on a typical day.” Mr. Hemmer’s figure of 300 cars loaded and empty is equivalent to 150 carloads, as the latter is commonly understood in rail transportation, a figure consistent with the SJRL/BNSF figure calculated from the waybill data.

¹⁰ UP Comments at 14-15.

that the infrastructure currently is inadequate and would need to be upgraded to accommodate the BNSF Bayport Loop train.¹¹ Notably, however, with regard to operations within the Bayport Loop, UP indicated that both UP and SJRL/BNSF operations can be conducted safely through coordinated dispatching.¹² UP's contentions regarding the Houston infrastructure have been addressed in the SJRL/BNSF Reply and need not be repeated here. For the purpose of this proceeding, it is sufficient to note that considering both UP's Comments on the SJRL exemption petition and UP's September 24, 2001 "no interference with UP operations" position, it is apparent that the issues and principles addressed in the BNSF petition are germane to the Bayport build-in as well as to Seadrift.

In evaluating UP's position, it must be recognized that any additional train operations on existing track provide some limitation on UP's existing operations and therefore constitute what UP would deem to be "interference." This is elementary, since it is a basic and immutable law of physics that two objects (*e.g.*, trains) cannot occupy the same space at the same time.

Consequently, UP's "no interference" position is thoroughly inconsistent with UP's voluntary grant of trackage rights to BNSF to operate over 5,000 miles of UP's lines. Such a position also undermines the Board's conditions imposed to maintain competition in the Gulf Coast, as well as the settlement between UP/SP and the Chemical Manufacturers Association.

In addition, UP's position flies in the face of statutory policy regarding the common and intersecting operations of rail carriers. That policy is reflected in three (3) provisions of the ICC Termination Act. Section 11102 provides that the Board may require one carrier to allow another to utilize terminal facilities where the Board finds such use "to be practicable and in the

¹¹ *Id.* at 11-14.

¹² *Id.* at 16.

public interest without substantially impairing the ability of the rail carrier owning the facilities . . . to handle its own business.” 49 USC §11102(a) (emphasis added). Similarly, Section 11103 requires a carrier to maintain a switch connection to enable traffic to move “to the best of its ability without discrimination in favor of or against the shipper when the connection (1) is reasonably practicable . . .” 49 USC §11103(a) (emphasis added). Thirdly, pursuant to the directly analogous circumstance of line crossing for new rail construction, “no other rail carrier may block any construction . . . by refusing to permit the carrier to cross its property if - . . . (B) the operation does not materially interfere with the operation of the crossed line . . .” 49 USC §10901(d)(1) (emphasis added). Accordingly, the statute itself establishes the criteria for intersecting carrier operations based upon reasonable accommodation (or stated alternatively, toleration of reasonable interference), rather than based upon the absolute “no interference” standard asserted by UP.

In conclusion, it is abundantly clear based upon both the response of UP concerning operation of the Seadrift build-in and the comments of UP with regard to the SJRL exemption petition, that there is a fundamental policy issue which the Board needs to address and resolve regarding the nature and meaning of the trackage rights and the build-in/build-out condition imposed in the UP/SP merger. The Bayport Producers respectfully urge the Surface Transportation Board to address the standards underlying the UP/SP merger conditions, and to do so in a manner which will fulfill the Board’s intent to preserve the pre-merger competition between UP and SP. Those standards require mutually cooperative use of the trackage rights lines, entailing no adverse and material interference with train operations, rather than a standard of “no interference with UP’s operations.”

WHEREFORE, THE PREMISES CONSIDERED, the Bayport Producers respectfully urge the Surface Transportation Board to grant the BNSF Petition for Clarification, and to adopt as the guiding principles those set forth in the BNSF petition and the ICC Termination Act.

Respectfully submitted,



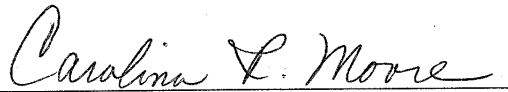
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CERTIFICATE OF SERVICE

I, Carolina R. Moore, do hereby certify that on this 14th day of January, 2002, I have caused a copy of the foregoing Comments in Finance Docket Number 32760 to be served, by first class mail, postage paid, upon all parties of record.



Carolina R. Moore