

FINANCE-30400

INTERSTATE COMMERCE COMMISSION

SERVICE DATE

FEB 3 1984

DECISION No. 3

Finance Docket No. 30400

SANTA FE SOUTHERN PACIFIC CORPORATION-CONTROL-SOUTHERN PACIFIC
TRANSPORTATION COMPANY, MERGER-THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY AND SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: January 26, 1984

Santa Fe Southern Pacific Corporation (SFSP), The Atchison, Topeka and Santa Fe Railway Company (ATSF), and Southern Pacific Transportation Company (SPT) have filed a petition seeking waiver or clarification of certain provisions of Railroad Acquisition, Control, Merger, Consolidation Project, Trackage Rights and Leave Procedures, 49 U.S.C. 1180 (Consolidation Procedures). They also seek a protective order.

PETITION FOR WAIVER OR CLARIFICATION

Petitioners request waiver or clarification of three provisions of the Consolidation Procedures.

First, they seek clarification that "applicant carrier" does not include rail carriers where ATSF and SPT will not have a controlling interest. Petitioners state that the 18 railroads identified in the petition are not part of the rail system of either railroad, are operated independently of ATSF and SPT, and maintain their own records. Petitioners intend to include information about these carriers in the corporate chart to be submitted with the consolidation application but request clarification that no additional information about them need be provided.

Petitioners seek a similar clarification for two railroads that they would control if the consolidation is approved, the Central California Traction Company (CCT) (combined 66.6% stock ownership) and the Sunset Railway Company (Sunset) (combined 100% stock ownership). Petitioners say that control of each of these railroads would have no effect on shippers and is of limited scope. Petitioners also say that CCT and Sunset are both operated independently of ATSF and SPT and maintain their own records. Because of this, ATSF and SPT state that it would be very burdensome to submit all information required from an applicant for CCT and Sunset. Instead, petitioners offer to submit the information on these railroads in the corporate chart, and then submit additional information if requested by a party or the Commission.

We agree with petitioners' interpretation. Since these carriers are operated independently, not as part of the ATSF or SPT systems, and their records are separately maintained, they are not "applicant carriers" as defined in 49 C.F.R. 1180.3(b), and we see no useful purpose in requiring the production of detailed data regarding them. Since they will be identified in the corporate chart required by 49 C.F.R. 1180.4(b)(6), any interested parties may seek discovery regarding them during the initial stages of the proceeding upon a showing of good cause.^{1/}

^{1/} See Finance Docket No. 30,000, Union Pacific Corporation and Union Pacific Railroad Company-Control-Missouri Pacific Corporation and Missouri Pacific Railroad Company (not printed), served August 25, 1980.

Petitioners also request a waiver of the requirement at 49 C.F.R. 1180.6(b)(6) that for each company identified in the corporate chart, a statement be included indicating any directors or officers which that company has in common with any other company listed on the chart. They argue that this requirement would be burdensome in compelling descriptions of numerous intracompany director and officer interlocks for SFSP and its subsidiaries and for SPT and its subsidiaries. Petitioners propose instead to list only those officers and directors (1) common to SFSP or any of its subsidiaries and to SPT or any of its subsidiaries, and (2) common to SFSP or SPT or any of their subsidiaries and to any carrier outside of either the SFSP or SPT corporate families. We accept this proposal, which will satisfy our informational needs, and waive the requirement.^{2/}

Finally, petitioners request clarification of 49 C.F.R. 1180.6(b)(8), which requires the disclosure of intercorporate relationships, through ownership of stock or otherwise, between applicant carriers or affiliated persons and other carriers or persons affiliated with other carriers. Petitioners seek clarification that disclosure only of significant intercorporate or financial relationships is required. They propose to describe only those relationships involving ownership by petitioners or their affiliates of more than 5 percent of a non-affiliated carrier's stock, including those relationships in which a group of people affiliated with petitioners owns more than 5 percent of a non-affiliated carrier's stock. This approach conforms with the substance of the requirements of this section and will be permitted.^{3/}

PETITION FOR PROTECTIVE ORDER

SFSP, Santa Fe, SPCo, ATSF and SPT have filed a joint petition for a protective order which would allow personnel and consultants of such companies to work together and exchange information without violating the terms of the Voting Trust Agreement or Sections 11343 and 11910 of the Interstate Commerce Act ("Act"). These petitioners allege that a cooperative effort is necessary to prepare the application, supporting data and testimony. The petitioners have submitted proposed conditions which they believe will provide adequate protection.

The Missouri-Kansas-Texas Railroad Company ("MKT") replied to the petition. While MKT has no objection to a protective order being issued, it objects to issuance of an order that does not define the materials to be protected.

We conclude that the proposed conditions and restrictions are appropriate and necessary. The purposes of these conditions are the prevention of possible violations of Sections 11343 and 11910 of the Act and the protection of confidential materials. The conditions will allow SFSP, Santa Fe, SPCo, ATSF and SPT to prepare and present all relevant material which may be required for our analysis of the forthcoming application for control. In

^{2/} See Finance Docket No. 30,300, CSX Corporation-Control-American Commercial Lines, Inc. (not printed), served October 19, 1983.

^{3/} Id.

addition, we conclude that a protective order is necessary to protect confidential data which may be subject to discovery by interested third parties. Such an order will promote the public interest by facilitating discovery and preventing improper or unnecessary disclosure of confidential matter.

However, we will modify petitioners' proposed order to specify the types of material which should be protected. If in the course of the consolidation proceeding the petitioners decide that additional matter should be protected, they may of course petition the administrative law judge hearing the case.

This decision will not significantly affect energy consumption or the quality of the human environment.

It is ordered:

1. Petitioners' requests for waiver and clarification of the Consolidation Procedures are granted to the extent set forth in this decision.
2. Petitioners and all parties to this proceeding shall comply with the provisions of the protective order appended to this decision.
3. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison.

(SEAL)

James H. Bayne
Acting Secretary

APPENDIX

Protective Order

1. For purposes of this order "Confidential Information and Data" means traffic data (including but not limited to waybills, abstracts, study movement sheets and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific traffic data, and the confidential terms of contracts with shippers. Such materials will be maintained on a confidential basis as follows:

(a) Confidential Information and Data may be disclosed by SPT^{2/} or SPT personnel only to "restricted access group" personnel of SFSP, Santa Fe Industries, Inc., Southern Pacific Company and ATSP (hereinafter referred to as the "Santa Fe Group") that are identified by the Santa Fe Group and only for use in the consolidation proceeding. Such "restricted access group" personnel may include outside consultants, attorneys, or Santa Fe Group personnel identified by name. "Restricted access group" personnel may not disclose Confidential Information and Data of SPT to persons outside the "restricted access group," and will be required to execute affidavits indicating their understanding of the obligation not to disclose such Confidential Information and Data. A list of such personnel, and any additions to that group that may be made from time to time to that list, shall be provided to the Commission staff and made available to any interested party upon request. To the extent that any Confidential Information and Data are Disclosed to any Santa Fe Group Personnel, such materials shall be treated as confidential. Such materials, any copies, and any data derived therefrom shall be used solely for the purpose of the consolidation proceeding, or any court litigation arising therefrom and not for any business, commercial, or other competitive purpose.

(b) Confidential Information and Data may be disclosed by the Santa Fe Group or their personnel only to "restricted access group" personnel of SPT identified by SPT and only for use in the consolidation proceeding. Such "restricted access group" personnel may include outside consultants, attorneys, or SPT personnel identified by name. "Restricted access group" personnel may not disclose Confidential Information and Data of the Santa Fe Group to personnel outside the "restricted access group," and will be required to execute affidavits indicating their understanding of the obligation not to disclose such Confidential Information and Data. A list of such personnel, and any additions to that group that may be made from time to time to that list, shall be provided to the Commission staff and made available to any interested party upon request. To the extent that any Confidential Information and Data are disclosed to any SPT personnel, such materials shall be treated as confidential. Such materials, any copies, and any data derived therefrom shall be used solely for the purpose of the consolidation proceeding, or any court litigation arising therefrom and not for any business, commercial or other competitive purpose.

^{2/} For purposes of this protective order, "SPT" will include all carrier subsidiaries of Southern Pacific Transportation Company.

(c) Any meetings or conferences between or among marketing or operating personnel of the Santa Fe Group and SPT who are not part of the "restricted access group" may occur only if counsel for each company involved are informed before or at the time of such meeting and are afforded an opportunity to participate in or monitor such meetings or conferences. A permanent record of such meeting or conferences must be prepared through the use of detailed minutes or other similar methods.

2. If the application for consolidation is ultimately denied, or the transaction is not consummated, or if no application is filed, all data, materials, information, etc. exchanged by the Santa Fe Group and SPT in preparing the application for filing and in the course of the consolidation proceeding shall be returned to the originating party.

3. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other confidential or proprietary information are produced pursuant to a request for discovery by any party to the consolidation proceedings, such materials shall be treated as confidential. Such materials, any copies, and any data derived therefrom:

(a) Shall be used solely for the purpose of the consolidation proceeding, or any court litigation arising therefrom and not for any business, commercial, or other competitive purpose.

(b) Shall not be disclosed in any way or to any person without an order of the Commission or the Administrative Law Judge presiding in the consolidation proceeding except:

(1) To employees, counsel, or agents of the party requesting such materials, solely for use in connection with the consolidation proceeding or related court litigation, provided that such employee, counsel, or agent has been given and has read a copy of this Protective Order and agrees to be bound by its terms prior to receiving access to such materials; and

(2) To any participant in the consolidation proceeding who is not an employee, counsel, or agent of the requesting party only in the course of public hearings in such proceedings.

(c) Any materials produced through discovery shall be destroyed, and notice of such destruction served upon the Commission and presiding Administrative Law Judge and the party producing the materials, at such time as the party receiving the materials withdraws from the consolidation proceeding or otherwise at the completion of the proceeding and any related court litigation.

(d) If contained in any pleading filed with the Commission, the procedure set forth at 49 C.F.R. 1104.14 shall be followed. See 48 Fed. Reg. 44826, 44827 (1983).

4. To the extent that any meeting, conferences, exchanges of data, or other cooperative effort between the Santa Fe Group and SPT are held and carried out in compliance with the first paragraph above, such meetings, conferences, exchanges of data, and other cooperative efforts are deemed essential for the disposition of the application and shall not be deemed a violation of 49 U.S.C. 11343.

5. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information are produced by a party in this proceeding and held and used by the receiving person in compliance with the third paragraph above, such production, disclosure, and use of the materials and of the data that the materials contain are deemed essential for the disposition of the application and shall not be deemed a violation of 49 U.S.C. 11910.

6. All parties shall comply with all of the provisions stated in this protective order unless good cause, as determined by the Commission, is shown by any party to warrant suspension of any of the provisions herein.