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INTERSTATE COMMERCE COMMISSION

SERVICE DATE

DEC 23 1983

DECISION NO. 2

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: December 22, 1983

We have decided to lift the cease and desist order that presently prevents the consolidation of the Southern Pacific Company (SPC) and Santa Fe Industries (SFI). This action is contingent upon the acceptance of specified conditions. A petition for a proceeding under the Clayton Act and a request for a limited hearing on the voting trust issues are denied. We conclude that the voting trust, as conditioned, is compatible with our regulations and our responsibilities under the Interstate Commerce Act.

BACKGROUND

On November 22, 1983, Santa Fe Southern Pacific Corporation (SFSP), Atchison, Topeka and Santa Fe Railway Company (ATSF), and Southern Pacific Transportation

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1/ Because the issues and parties at this time are the same in this proceeding and Finance Docket No. 30360, Petition of Union Pacific Railroad Company and Missouri Pacific Railroad Company to Institute a Proceeding Under Clayton Act Section 11 and for an Immediate Restraining Order, we have previously and are here considering both proceedings on a consolidated basis.

Company (SPT), jointly filed, pursuant to 49 C.F.R. 1180.(b), a prefiling notification of intent to file an application under 49 U.S.C. 11343 et seq., seeking authorization of SFSP's proposed acquisition of control of SPT and the merger of ATSF and SPT, within approximately three months.

Pursuant to a "Combination Agreement and Plan of Reorganization" entered into on October 4, 1983, SFSP intends to acquire all issued and outstanding stock of Santa Fe Industries, Inc. (SFI) and Southern Pacific Corporation (SPC). SPC intends first to place all of its stock in SPT, a rail carrier also owning a motor carrier subsidiary, in an irrevocable, independent voting trust pursuant to 49 C.F.R. 1013 to preclude SFSP's control of SPT. The voting trust is intended to insulate SPT from the control of SFSP, SPC or any successor or affiliate of SPC, pending the filing and resolution of a proceeding for the consolidation of the rail carriers pursuant to 49 U.S.C. 11343 et seq.

On December 14, 1983, the stockholders of the two holding companies met and voted to approve the Combination Agreement. However, by decision served December 14, 1983, the Commission entered a temporary cease and desist order against the consummation of the combination pending a Commission decision on the issues raised by the proposed merger of the holding companies and the placement of the SPT in an independing voting trust.

The proposal was first challenged before the Commission on November 15, 1983, by Missouri-Kansas-Texas Railroad Company (MKT) which filed petitions for (1) limited hearing and (2) discovery concerning a voting trust presented for informal staff review pursuant to 49 C.F.R. Part 1013. United Transportation Union filed a statement in support of the MKT position on November 21, 1983. Additional statements in support of MKT were filed by Sunkist Growers, Inc., on December 5, 1983, and by PPG Industries, Inc., on December 6, 1983.

MKT argues that absent the imposition of conditions controlling the actions of the management of SPT and ATSF, the proposed voting trust will not prevent anti-competitive consequences and unauthorized control during the existence of the voting trust. MKT requests a hearing and discovery, prior to approval of the voting trust, to demonstrate the consequences which might occur prior to resolution of the consolidation proceeding.

MKT maintains that informal approval of the voting trust will have the practical effect of permitting immediate implementation of working arrangements between the railroads, prior to consideration of the merger. MKT states that the facts will demonstrate that operations during the voting trust will have anticompetitive effects despite the existence of the voting trust, and that the injury suffered by competitors and shippers, if the

voting trust is abused or if the merger is not approved, will be irreparable.

MKT requests a hearing to resolve whether the voting trust in fact prevents unauthorized common control, and whether the trust must be disapproved, leaving SPT and ATSF independent, as they are today, to await the outcome of the merger proceeding. MKT also seeks production of documents relating to, among other things, the plans for divestiture of SPT, should the merger be disapproved.

MKT asserts that the two carriers will favor each other while SPT is in the voting trust through their ability to cancel joint rates and through routes with MKT and other carriers, and enter into contracts with shippers which exclude MKT from the routing. MKT also asserts, based on its Vice President-Traffic's former employment with the former Great Northern Railway and his participation in joint studies surrounding the Northern Lines merger, (Great Northern Pac.-Merger-Great Northern, 331 I.C.C. 228 (1967)), that similar studies must be developed to plan both post-merger operations for the SPT and ATSF, and also to plan interim operations during the period of the voting trust. MKT seeks discovery of those planning papers.

On November 25, 1983, the SPC, SPT, ATSF and SFI replied, arguing that a voting trust, strictly complied with, is a proper means of divesting control of a

regulated carrier in advance of a Commission decision approving control, and that MKT's request is inconsistent with the Commission's policy that individuals other than prospective applicants have no standing to participate in a proceeding prior to the acceptance of an application. SPT states that the voting trust guidelines embody the necessary principle that the effectiveness of the trust depends on the independence of the trustee in the creation and administration of the trust, and that the trust at issue complies with this principle. Further, SPT acknowledges that this necessary principle is not a mere formality but that it gives rise to serious and substantial duties on the part of the trustee, and recognizes our responsibility to take whatever action is necessary, including forced divestiture of stock, where a voting trust is used improperly to obtain unauthorized control, 44 Fed. Reg. at 59909.

SPT also states that it is not appropriate to consider or rule on speculative future violations of law, and that MKT has provided no basis for asserting that the voting trust will not ensure against unlawful control. Such assertion, it is argued, rests on the assumption that the trustee will disregard its obligations under the terms of the voting trust, or that the trust does not

exist. This proposition would hold true in every case of a proposed consolidation because it assumes unlawful conduct on the part of management in every case. Such an assumption would make voting trusts useless and makes consolidation of regulated carriers difficult if not impossible.

On December 6, 1983, the Union Pacific Railroad Company and the Missouri Pacific Railroad Company (UP), filed a petition to institute a proceeding under Section 11 of the Clayton Act to determine: (1) whether the immediate effect of the proposed combination prior to the completion of a proceeding under 49 U.S.C. 11343 (which would consider the common control of the SPT and the ATSF) would so lessen rail competition in the southwestern United States as to violate Section 7 of the Clayton Act; and (2) whether implementation of the proposed Combination Agreement prior to such a proceeding would foreclose the ability of the Commission to restore the competitive situation which presently exists among the western railroads. The UP specifically stated that it was not through this petition challenging the merger under section 11343 nor the efficacy of the voting trust arrangement as a means of avoiding unlawful premature common control of the two railroads under section 11343. This petition was assigned Finance Docket No. 30360, supra, footnote 1.

In its petition the Union Pacific argues that consolidation of the SPT and the ATSF is necessarily anti-competitive because the companies are direct competitors for southwestern traffic, and particularly for traffic in Northern and Southern California. The UP further argues that under the proposed arrangement SPT officials will be demoralized and without incentive to pursue competition with the ATSF. It argues that the loss of top management officials will immediately weaken the ability of SPT, and it questions the ability of the SPT to remain financially capable of aggressive competition without the support of its present parent.

SFSP, SFI, ATSF, SPC, and SPT (applicants) replied to UP's petition, acknowledgingthat the Commission has jurisdiction over the transaction including the ability to issue a cease and desist order, but arguing that the antitrust matters raised in the UP petition were more appropriately considered in the control proceeding. As to the possible sale of the SPT, applicants argue that there is no legal constraint on the sale of a regulated carrier to an unaffiliated non-carrier and that absent the actual combination of carriers, the merger of non-rail assets of SPC and SFI cannot result in an unlawful restraint of trade. Therefore, the question actually presented is whether the voting trust is sufficient.

Applicants aver that it is. They dismiss the arguments tnat insufficient managerial resources will remain at SPT and point to the trustee's ability to hire and supervise any and all personnel.

By motion filed December 13, 1983, 2/ RLEA moved for a temporary cease and desist order pending further Commission action on the UP and MKT petitions. On December 13, UP and MKT also moved for a temporary cease and desist order, citing the District Court's opinion that the Commission had appropriate authority to isssue such orders as were required to preserve the integrity of its jurisdiction to consider railroad mergers.

Applicants objected, noting that all appropriate filings had been made with the Securities and Exhange Commission and that notice of the proposed transaction had been given to the Federal Trade Commission (FTC) and the Department of Justice (DOJ), as required by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976), and that the 30-day waiting period under that Act had passed without any request for additional information by either the FTC of the DOJ. Applicants also argued that the traditional

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2/ By petition filed December 13, 1983, RLEA filed for leave to intervene in Finance Docket No. 30400. Considering the unusual nature of this merger proceeding and the need to address the concerns of parties in Finance Docket No. 30360, the motion is granted. All parties of record in Finance Docket No. 30360 are hereby made parties of record in Finance Docket No. 30400, notwithstanding our normal procedure not to begin proceedings until a formal application is submitted.

requirements for injunctive relief had not been established, in that (1) the UP had not shown a substantial likelihood of prevailing on the merits in this action; (2) absent a grant, there would be irreparable injury; (3) the issuance of injunctive relief would not substantially harm other parties, including applicants; and (4) injunctive relief would be in the public interest.

As noted above, on December 14, a temporary cease and desist order was issued precluding consummation of the merger of the holding companies. In that decision, we emphasized that no prejudgment of the substance of the pending petitions or of the merger application was being made; rather, we required further time in which to consider the matters before us.

On December 15, applicants filed an Emergency Petition for Vacation of Cease and Desist Order or, in the alternative, Request for Immediate Decision on the Merits. Applicants argue that none of the claims presented by UP or MKT justify a continued delay in consummation of the combination, and the resulting harm to SFI, SPC and their stockholders. Although applicants urge that the claims of a weakened SPT with management unable to compete vigorously are unfounded, they state that changes may be made in the voting trust if the Commission decides that they are necessary to ensure compliance with the law. Applicants argue that the cease

and desist order is injurious to them and unnecessary to protect the Commission's jurisdiction, the public interest, or any legitimate interests of UP or MKT.

UP responded to SP's Emergency Petition, and alleges that the need for urgency stated by SP is insufficient to justify lifting the cease and desist order. They urge that because the combination agreement contains a provision that neither party is free to withdraw without the consent of the other before June 30, 1984, the deal is unlikely to collapse if not closed shortly. Further, UP urges that other railroad consolidations have not included a structure similar to the one here, with a holding company combination pre-dating the rail merger by several years. UP argues that the impact on SPC's and SFI's stockholders of a continued, if brief, delay is inconsequential, and continues to urge that there is a substantial basis for its competitive concerns. UP argues that the issues they raise were not adequately addressed by affidavits submitted by applicants and seeks an opportunity to depose the affiants.3/

MKT responded to SP's Emergency Petition by urging again that the voting trust, if it goes into effect, will enable SPT to close routes and cancel rates with MKT.

DISCUSSION AND CONCLUSIONS

We issued the temporary cease and desist order to assure that we would have sufficient time for review of

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3/ UP's request for discovery is moot in light of our decision here to deny its petition to institute a Clayton Act proceeding.

the issues raised in the petitions. We have now had further opportunity to consider these issues. Subject to conditions, we will lift our temporary cease and desist order prohibiting SFI and SPC to merge, we will dismiss UP's petition to institute a Clayton Act proceeding, and we will deny the hearing sought by MKT and others seeking similar relief. We have concluded additionally that the voting trust, as conditioned here, should be approved.

The decision of Santa Fe Industries and the Southern Pacific Company to merge their non-transport operations before hearing on an application for approval of the associated rail merger is not one that we would have encouraged. It has committed two corporations to a course of action well in advance of any possible governmental approval of a major part of their mutual corporate plan. However, the Commission cannot and will not reach any judgments about the wisdom or legality of the proposed rail merger before considering the record developed through hearing.

Nevertheless, the decision to merge these two parent corporations is essentially a private one, so long as no provision of law has been violated. We understand that the non-transportation aspects of this merger have been considered under the Hart-Scott-Rodino Antitrust Improvements Act pre-merger procedures and no action has been taken. The stockholders of these corporations have voted

overwhelmingly to approve consolidation, even with full disclosure of the uncertainty surrounding merger of the subsidiary rail companies. There remains for us only to determine whether there has been any violation of the Interstate Commerce Act or, as the Union Pacific alleges, the Clayton Act. Regardless of the concerns we have about the wisdom of the chosen course, we cannot interfere if it is lawful.

We conclude that none of the actions taken or proposed so far, as disclosed by the record before us, violates any provision of the Interstate Commerce Act or the Clayton Act. It has been established that a properly constituted voting trust is a sufficient buffer against premature control under the consolidation provisions of the Interstate Commerce Act. We have reviewed the provisions of the trust at issue and find that they are satisfactory from this standpoint, particularly as clarified by statements that have been made by the parent companies in subsequent pleadings.

Arguments by competitors and shippers regarding the possibility of future activity aimed at diminished competition to the benefit of the ATSF and the detriment of shippers, competitors and the SPT alike are not without basis in logic. Nevertheless, with the SPT held in voting trust, the Commission is in at least as strong a position to guard against unacceptable cooperation as it would be if these

companies chose to remain separate pending application. This is particularly so since the SFI and SPC expressly stipulate that the Commission can at any time require modifications to the voting trust to ensure compliance with the law. Interested parties affected by the actions of the SPT will be free to petition the Commission for assistance under this reserved jurisdiction where it can be shown that actions have been taken against the interests of the SPT and for the benefit of the ATSF or its parent. All concerned should be aware that we do not at the outset put any limit on the type of condition that might be imposed. To date the fears expressed have to do with shipper access to competing lines and traffic interchange between connecting carriers. We should not hesitate to impose conditions to rectify abuses that might develop in these or any other areas.

The UP and MKT also express fears that as a result of the proposed combination and the placement of SPT in a voting trust, (1) SPT management will be weakened because of a so-called "brain-drain" caused by the departure of top executives; (2) remaining SPT officers will have inadequate incentive to compete vigorously with the ATSF; and (3) SPT will be financially debilitated.

First, we cannot agree with UP that the departure of four of 19 SPT officers constitutes a "brain-drain".

It should be remembered that under normal circumstances all of SPT's officers could depart at the same time, and we would be powerless to prevent it. In this case, however, the four officers in question are to be employed by SFSP, and therefore we will condition our approval of the trust and lifting of the cease and desist order upon agreement that none of the officers who had access to SPT competitive information will use such information to the competitive advantage of ATSF relative to SPT or participate in any management decisions affecting that competitive relationship.

Second, during the pendency of any proposed merger, there may well be a diminished incentive to compete vigorously with a prospective consolidation partner. But this is not adequate reason to prohibit the proponents from seeking regulatory approval, since any other conclusion would result in mergers never taking place. Through the use of an independent voting trust, which imposes duties of independent action, together with our authority to impose conditions, we conclude that possible anti-competitive effects can and will be minimized. In this case UP asserts that the stock option arrangement for SPT management (described supra) will result in reduced incentive for competition with ATSF. Out of an abundance of caution we will require that SPT's management not receive interest in SFSP as part of an executive compensation plan during the existence of the voting trust.

Finally, we are unable to conclude that SPT will be financially weakened by the subject proposal. Rather, the record shows that deposit of SPT stock into the voting trust will leave SPT's financial status unchanged. Moreover, SFI and SPC have provided express assurances of financial support for SPT if such support is needed. See Verified Statement of John J. Schmidt at 2. Our approval of the trust and lifting of the cease and desist order is thus further conditioned upon such guarantee.

MKT seeks a limited hearing to demonstrate the alleged inefficacy of the voting trust. MKT argues that SPT has engaged in, and under the voting trust will have the incentive to engage in, inefficient and anticompetitive cancellation of joint rates and through routes with MKT and other carriers. However, regardless of any SPT corporate restructuring, such actions are and will still be governed by the standards of 49 U.S.C. §§ 10705 and 10705a. Moreover, we will still have the authority to suspend and investigate such actions upon protest under 49 U.S.C. section 10707, and to review such actions upon complaint under 49 U.S.C. section 11701. It should also be emphasized that, if it can be shown that such actions are anticompetitive, competing carriers and shippers will have an additional remedy, in that petitions for reformation of the voting trust can be filed. We are therefore unable to conclude that an oral hearing prior to approval of the trust agreement is justified.

Given the fact of a voting trust designed and monitored so as to prevent impermissible cooperative action, we think the arguments of the Union Pacific and Missouri Pacific regarding present or potential violations of the Clayton Act are without merit. We have formed no opinion whatsoever whether the ultimate consolidation of these railroads should be approved and we will not do so until after full hearing. The UP parties remain free to press Clayton Act arguments in the course of proceedings on the consolidation application. So long as SPT is operated in accordance with the voting trust established for it, we do not think a claim of presently existing Clayton violations has merit.

Finally, we have noted that the applicant carriers have stipulated that the Commission retains the power to modify the proposed voting trust as circumstances warrant. It is, however, possible that our view of the scope of authority we propose to retain over the voting trust is more plenary than that envisioned by the applicants. In particular, we have indicated that remedies might well be fashioned that would preserve shipper access and connecting carrier relationships in satisfactory condition during the pendency of this proceeding. We cannot say with any precision what particular conditions might entail since they would result only from the evaluation of specific problems as brought to our attention by affected parties. In these circumstances, we believe it is essential that we receive written confirmation of the acceptance of the conditions we have discussed and of our reserved jursidiction.

Failure to abide by an acceptance, if received, could well lead to an interruption in the merger proceeding to allow consideration of the Clayton Act issue which could become ripe upon the failure of the voting trust as a protective device.

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

It is ordered:

1. Petitions for hearing and discovery are denied.

2. Petition for proceeding under the Clayton Act is denied.

3. The Commission reserves its jurisdiction over the lead proceeding.

4. The cease and desist order entered in these proceedings on December 14, will be lifted subject to our receipt of a full and unqualified acceptance of the Commission's authority to impose conditions upon the trust instrument governing the ownership and operation of the SPT, to include but not limited to matters discussed in the text of this decision.

5. The trust agreement between these parties, when modified to conform with the requirements of this decision and the appendix hereto, is approved.

6. All other petitions, to the extent not granted above, are denied.

7. This decision will be effective at 5:00 p.m. (E.S.T.) on December 23, 1983, provided that prior to that time we have received the acceptance referred to in paragraph 4.

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

James H. Bayne
Acting Secretary

(SEAL)

APPENDIX

1. During the term of the voting trust, no officer of SFI, ATSF, or SFSP who was an officer of SPT or SPC and who, while an officer of SPT or SPC had responsibility for or access to "competitive information" as herein defined, may use such competitive information acquired during his SPT or SPC employment to the competitive advantage of the ATSF relative to SPT, nor participate in any management decisions relating to ATSF's competitive position relative to SPT.

2. Unless approved by the Commission, no officer of SPT during the term of the voting trust may be awarded any right to benefits whose economic value depends upon the profitability of SFSP, such as a stock option of SFSP stock. In addition, the Commission shall not disapprove any SPT executive compensation plan except upon the ground that said plan is substantially contrary to the competitive interests of SPT.

3. During the term of the voting trust, SFSP shall abide by the undertakings set forth by Mr. John J. Schmidt in his Verified Statement dated December 13, 1983.

4. For purposes of this order:

a. "Competitive information" shall mean information of competitive value, of a type ordinarily considered confidential and sensitive, including but not limited to the identification of shippers and receivers in conjunction with shipper-specific

traffic data (e.g., revenues, tons, car lots), the confidential terms of contracts with shippers, and other operational, sales and marketing information.

b. "Voting trust" means the voting trust agreement, dated November 22, 1983, by and between SPC and The Valley National Bank of Arizona.

EC
FR-7035-01

INTERSTATE COMMERCE COMMISSION

NOTICE

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: December 19, 1983

On November 22, 1983, Santa Fe Southern Pacific Corporation (SFSP), The Atchison, Topeka and Santa Fe Railway Company (ATSF), and the Southern Pacific Transportation Company (SPT), jointly filed, pursuant to 49 C.F.R. 1180.4(b), a prefiling notification of intent to file an application under 49 U.S.C. 11343 et seq., seeking authorization of SFSP's proposed acquisition of control of SPT and the merger of ATSF and SPT, within approximately three months.

Pursuant to a "Combination Agreement and Plan of Reorganization" entered into on October 4, 1983, SFSP intends to acquire all issued and outstanding stock of Santa Fe Industries, Inc.(SFI), and Southern Pacific Company (SPC). SPC intends first to place all of its stock in SPT, a rail carrier also owning a motor carrier subsidiary, in an irrevocable, independent voting trust pursuant to 49 C.F.R. 1013 to preclude SFSP's control over SPT. SFSP will acquire control over the common carrier subsidiaries of SFI, which are operated as a single system. See Finance Docket No. 25906, ATSF, Inc.-Merger-Atchison Inc., and Atchison, Topeka and Santa Fe Ry, (not printed) served February 12, 1970.

SFSP and SPT state that calendar year 1982 will be used for any impact analysis or other studies including costing and financial data submissions.

Because the application involves the control of and merger of two class I railroads, the transaction is a major transaction under 49 C.F.R. 1180.2(a) and will be filed under the requirements of 49 C.F.R. 1180 relating to major transactions, subject to any modifications that may be ordered in response to appropriate requests or on our motion. An order delineating what additional information must be filed in order to complete the application will be issued subsequent to the publication of this notice. See 49 C.F.R. 1180.4(b)(2)(v). A procedural schedule will be issued after an application is filed and accepted as complete.

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

JAMES H. BAYNE
Acting Secretary

(SEAL)