

FD 30400

EC

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30400

SERVICE DATE

FEB 27 1987

SANTA FE SOUTHERN PACIFIC CORPORATION-CONTROL-SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: February 24, 1987

In 1983, the Southern Pacific Transportation Co. ("SPT") and The Atchison, Topeka, and Santa Fe Railway Co. ("ATSF") agreed to merge. Following merger of their respective holding companies, these competing railroads were to be owned by a single holding company, Santa Fe Southern Pacific Corporation ("SFSP"). However, 49 U.S.C. 11343 prohibits the merger or common control of railroads without prior Commission approval. In order to avoid violating the statute while its application to merge was pending before the Commission, SFSP placed the stock of SPT in an independent voting trust.^{1/} Voting trusts are often used to insulate a carrier from common control while an application is being considered by the Commission. See B. F. Goodrich Co. v. Northwest Industries, Inc., 303 F. Supp. 53 (D. Del. 1969), aff'd, 424 F.2d 1349 (3d Cir. 1970).

On December 23, 1983, the Commission approved SFSP's use of a voting trust and the provisions of the voting trust agreement.^{2/} The main purposes of the trust are to preserve the independence of SPT and to ensure its continued existence as a viable, vigorous competitor throughout the life of the trust. Thus, the Commission noted in its decision that the trust was designed and would be monitored to prevent "impermissible cooperative action" between SPT and SFSP.

In November 1986, SFSP issued a press release announcing a major restructuring of the rail operations of both SPT and ATSF. That announcement suggested that SPT and SFSP might be taking some "impermissible cooperative action" in violation of the control provisions of the statute and undermining the independence of the voting trust. The Chairman, in consultation with the Commission, directed the Office of Compliance and Consumer Assistance ("OCCA") to conduct an informal, preliminary investigation of the matter.

The investigation disclosed contacts in several areas during 1985 and 1986 that we consider undesirable. These include the possible assertion by SFSP of influence over the timing and amount of certain SPT tax write-downs, and exchanges of information from SPT to SFSP.^{3/}

^{1/} The Valley National Bank of Arizona was trustee of the independent voting trust until October 1, 1986, when it was succeeded by the current trustee, the LaSalle National Bank, Chicago, Illinois.

^{2/} As conditions to its approval of the trust agreement, the Commission incorporated SFSP's pledges (1) to adhere to the principle of total independence of SPT; (2) to make any amendments to the trust required by the ICC to avoid a violation of the Interstate Commerce Act; (3) to refrain from hiring away from SPT any officers believed to be essential to SPT's continued viability; and (4) to provide financial aid to SPT where determined to be necessary by the ICC.

^{3/} These exchanges consisted of financial data, actual and projected revenues and expenses, audit information, agreements with other carriers, labor strategies, and capital budgets.

Our most critical conclusion is that the voting trust, as implemented, and the undertakings of the holding company, have not insulated SPT from SFSP to the extent we originally intended. While to date the investigators have not found any evidence of harm to competition, there are indications of possible influence and exchanges of information that we think should not have occurred, which could in the future jeopardize SPT's ability to operate as an independent railroad. As a consequence, we will clarify the obligations of SFSP and SPT management, and of the trustee, to ensure that any past questionable actions do not continue.

The managements of both SFSP and SPT are responsible for maintaining the independence of SPT. SFSP/ATSF and SPT personnel must be circumspect in their dealings with one another. Specifically, there should be no communications between those two companies except: (1) as concern pursuing the merger application and related proceedings before the Commission (and the courts if necessary); and (2) those normally carried on by competing railroads in their day-to-day affairs. Such communications may include either planning for the merger itself or dismantling merger plans. The intermingling of officers is strictly prohibited. Of course, there cannot be personnel who share duties with both companies.

The trustee has the fiduciary responsibility to manage SPT, through its board of directors, in the interests of whoever will own the company in the future, consistent with the law and Commission orders. As the Commission's initial decision in the merger proceeding demonstrates, it cannot be assumed that SPT will eventually be merged with SFSP. The trustee's duties, therefore, are not merely custodial in nature. SPT must be maintained as an independent, viable competitor for the duration of the trust, insulated from SFSP influence. Concomitantly, the trustee must ensure that SPT officers do not incur duties or obligations to SFSP.

Moreover, the trustee has the responsibility to monitor exchanges within the two classes of permissible communications described above. While as a general principle that is the only information that may be shared by SPT and SFSP, we understand the difficulty of anticipating what communications might be necessary between the two companies. Therefore, to the extent that further exchanges of information may be deemed necessary, the trustee must act as more than a mere conduit of information. It must examine the information to assure that it: (1) may be properly exchanged between competitors; and (2) does not (a) suggest that SPT take some action that is potentially harmful to itself, or (b) provide information to SFSP that it should not have, as parent of SPT's competitor, ATSF.

To summarize, we expect SFSP's management not to exert any influence over the management of SPT, or to otherwise compromise SPT's independence. Officers of Santa Fe Industries ("SFI"), ATSF, and SFSP who were formerly officers of SPT or the Southern Pacific Company ("SPC") may not now use "competitive information" about SPT to ATSF's advantage over SPT. We also expect the trustee to oversee the management of SPT to ensure that no action is taken to jeopardize SPT's position as an independent competitor. It should be noted that failure to comply with the voting trust agreement or attendant Commission orders that results in a violation of 49 U.S.C. 11343 can subject the involved persons and carriers to the civil and criminal penalties contained in 49 U.S.C. 11901(a), 11912, 11914(a), and 11915.

We will continue to monitor the relationship of SFSP, ATSF, and SPT and the voting trust agreement to ensure the independence of SPT.

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

It is ordered:

1. The voting trust agreement is clarified as stated above.
2. This decision will be effective on the date served.

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

Noreta R. McGee
Secretary

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