

FD-30400

SERVICE DATE

MAY 21 1984

EC

INTERSTATE COMMERCE COMMISSION

Decision No. 6

Finance Docket No. 30400

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

Decided: May 14, 1984

CLARIFICATION OF EMPLOYEE STOCK OWNERSHIP

By petition filed March 8, 1984, Southern Pacific Transportation Company (SPT), seeks clarification of Decision No. 2, served December 23, 1983, which lifted the cease and desist order prohibiting the consolidation of the Southern Pacific Company (SPC), and Santa Fe Industries, Inc. (SFI). The cease and desist order was lifted contingent on the acceptance of certain conditions including a prohibition against awarding SPT officers economic benefits that depend upon the profitability of the Santa Fe Southern Pacific Corporation (SFSP)<sup>1/</sup>, which now owns and controls the Atchison, Topeka and Santa Fe Railway Company (SF or Santa Fe). SPT now seeks a ruling that this prohibition does not apply to various employee bonus and stock ownership plans that SPT offers its employees.

The SPT maintains two cash bonus plans and four stock ownership plans:

- (1) Executive Compensation Plan,
- (2) Incentive Compensation Plan,
- (3) 1981 Key Employee Stock Option Plan,
- (4) Southern Pacific Stock Purchase & Savings Plan,
- (5) Employee Stock Ownership Plan, and
- (6) Merrill Lynch Plan

DESCRIPTION OF PLANS

Executive Compensation Plan and Incentive Compensation Plan. These two plans provide cash bonuses for top management personnel based in part on personal performance and in part on "company performance." Currently, 92 management personnel may participate in the Executive Compensation Plan. The Incentive Compensation Plan is limited to 15 employees.

<sup>1/</sup> The terms of the condition, paragraph 2 of the Appendix of the December 23, 1983 decision provide:

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.

1981 Key Employee Stock Option Plan. This plan, adopted in 1981, provides stock options for 72 officers of SPT who are also participants in either the Executive Compensation Plan or the Incentive Compensation Plan or both. According to petitioner, after the combination of SPC and SFI, these options were converted to options to acquire SFSP stock. These options are no longer awarded pursuant to the conditions of Decision No. 2.

Southern Pacific Stock Purchase And Savings Plan. This plan permits all salaried employees who have been with the SPT for a minimum of one year to contribute between one and six percent of their total compensation toward the purchase of stock. The SPT matches 50 percent of the employee's contribution toward the stock purchase subject to an annual maximum contribution of \$30,000 for each participating employee. The vesting of the employer's contribution with the employee is delayed as follows: 60 percent after four years of service, 80 percent after five years of service, and 100 percent after six years of service. Until vesting, SPT's contributions are placed in trust managed by Wells Fargo National Bank. SPT contributions cannot normally be returned to SPT. Dividends on the stock may also be used to purchase additional stock.

This plan qualifies for beneficial tax treatment and employees are not taxed on distributions of stock purchased with their own contributions. The sale of stock by the employee normally qualifies for long-term capital gain treatment.

After consummation of the merger of SPC and SFI into SFSP, SPC stock was converted to SFSP stock.

SPT is considering amending and replacing this plan with an individual retirement account program as provided by section 401(k) of the Internal Revenue Code of 1954, as amended. This would allow deferment of income taxes on the employee's contribution until actual stock distribution. It would also provide for investment in three funds: a guaranteed interest fund, an equity or bond fund, and an employer stock fund. Petitioner states that the stock to be used in this program will be SFSP stock.

Employee Stock Ownership Plan (ESOP). The ESOP covers all employees with three years or more service with SPT. It is funded by an additional one percent investment tax credit (ITC) under the Tax Reform Act of 1975. Under this plan, stock or cash that is contributed by an employer to buy stock qualifies as a tax credit for the employer. As of 1982, SPC

had unused ESOP ITCs of approximately \$13.8 million that have been carried forward from 1979 to 1982 and that either must be converted to employee stock awards or be paid to the Federal government as taxes. SPC anticipates awarding stock to SPC and SPT employees and using its remaining credits with its 1983 returns.

Merrill Lynch Plan. This plan allows employees to make a voluntary payroll deduction, up to \$99 per month, to purchase employer stock through the Merrill Lynch brokerage whose fees are paid by SPT, not the purchasing employee. Current purchases are for SFSP stock.

RELIEF REQUESTED

Petitioner requests a finding that use of the Southern Pacific Stock Purchase and Savings Plan, Employee Stock Ownership Plan, and the Merrill Lynch Plan to purchase SFSP stock for SPT employees are not prohibited by the December 23, 1983 decision. In support of this position, petitioner explains that these plans are generally available to all employees and not limited to management employees<sup>2/</sup>, provide for cash purchases and not an award of benefits, and further the competitive interests of SPT by maintaining programs that existed prior to the merger of the parent companies and that are designed to enhance employee morale and performance. Similar plans are usually offered by other railroads to their employees. Discontinuation of the plans would place SPT at a disadvantage in retaining and attracting quality personnel. SPT also details the favorable tax treatment that these plans have provided for both the employees and the corporate entity, and alleges that the loss of the availability of these plans for SPT personnel will have adverse affects on its employees.

DISCUSSION

General. Petitioner does not suggest that the awarding of cash benefits under the Executive Compensation Plan or the Incentive Compensation Plan presents any questions of conflict with the Commission's approval of the Voting Trust Agreement of November 22, 1983, by and between SPC and The Valley National Bank of Arizona. So long as cash bonuses are conditioned on the performance of the covered employees and/or SPT, and not on the performance of the SFSP, these programs do not require this Commission's specific approval.

The stock ownership programs raise questions of the continued independence and competitiveness of SPT because its employees are purchasing the stock of SFSP, the owner of one of SPT's competitors and the potential owner of SPT. In resolving this issue we will balance the potential harm to SPT's independence and competitiveness against any adverse effects that discontinuance of these plans may have on SPT's employees.

<sup>2/</sup> Stock option plans that are otherwise offered to all employees are sometimes superseded by the terms of collective bargaining agreements.

The stock programs presently available to SPT employees create a unique situation not previously considered by this Commission. These procedures establish a link through stock issues between major competitors. Considerable stock in SFSP has already been given to SPT employees resulting from the consummation of the merger of SFI and SPC. While this consolidation was made possible by our previous action lifting the cease and desist order that prevented the merger of the parent companies, our disinclination to prevent the consummation of the parent corporations' merger was not intended to allow the separate natures of SPT and Santa Fe to disappear prior to our consideration of the merger application under 49 U.S.C. 11344(b)(1).<sup>3/</sup> Our statutory duties require preservation of the elements necessary to maintain the status quo between the two carriers until the merger application is decided.

Adverse Impacts - control and collusion.

1. Control. We first question whether the ownership of SFSP stock by SPT employees may result in the blurring of corporate identities and possible control (or the power to control) despite the voting trust.

Based upon the facts of this situation, we do not consider this a problem. SFSP has more than 140,000 stockholders and in excess of 190 million shares of common stock outstanding. In our estimation the current holdings in SFSP by SPT employees are de minimis. Future purchases of SFSP stock by SPT's employees are limited by the terms of the stock ownership plans and the duration of SPT's trust status.<sup>4/</sup> These future acquisitions by SPT's employees will also be offset by the stock acquisitions in SFSP available to SFSP and Santa Fe officers and employees. For these reasons we do not consider it likely that the acquisition of stock under the three plans<sup>5/</sup> that SPT seeks to have approved will result in unlawful control.

2. Collusion. We are also concerned that SPT's employee stock programs might tend to restrain competition and have an adverse impact on shippers. The stock purchase plans will not decrease employee desire to maintain healthy competition with non-applicant carriers. However, in order to maximize their contributions to SFSP, SPT and Santa Fe could collude to

<sup>3/</sup> In Decision No. 2, we stated that the merger of the SPC and SFI was "essentially a private one" and considering the overwhelming approval of the stockholders for the consolidation with the full disclosure of the uncertainty surrounding the merger, this Commission would not interfere absent unlawful conduct regardless of the indeterminate wisdom of such action prior to Commission approval of the merger of the regulated transportation companies.

<sup>4/</sup> We must decide this case no later than October 20, 1986.

<sup>5/</sup> We include in these three plans as one plan the Southern Pacific Stock Purchase and Savings Plan currently in effect, and its proposed replacement individual retirement account program.

reduce competition between them resulting in higher prices and less efficient service to shippers at a time when most of the nation's carriers are becoming increasingly competitive. We conclude that this fear is unfounded.

While employee business judgments, both minor and significant, are difficult to quantify in terms of whether such judgments originate from individual prudence or from collusion, price-fixing schemes, even in regulated industries, remain subject to the antitrust laws with both civil and criminal penalties. Thus both Santa Fe (including SPSP) and SPT managements should find that it is safest to maintain the greatest degree of competition possible during the pendency of the SPT trust.

While the nation's antitrust laws provide legal recourse to redress direct price-fixing agreements between the two carriers,<sup>6/</sup> our concern also goes to the absence of vigorous competition. The effect of SPT's stock programs on subtle business judgments of employees cannot be precisely measured.

The complexity of the present system of rates and charges minimizes the possibility of improper interaction between SPSP and SPT. The common carrier tariff schedule sets forth voluminous rates and charges that are often quantified by discounts predicated on quantity, volume, length of service, car-hire allowance, etc. This system is further complicated by numerous SPT and Santa Fe contracts. Many of these contracts are long term and would not be subject to change during the pendency of the SPT trust. In addition the common carrier tariff system is monitored by rate bureaus and the Commission. Therefore, the pricing system of the railroad industry tends to preclude any hidden collusion that can escape scrutiny.

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<sup>6/</sup> Price fixing is illegal per se. United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940). Even if the proposed merger is found to be in the public interest and to allow sufficient competition to continue to exist for the market, no action of this Commission would insulate applicant carriers from possible prosecution if actual price fixing occurs.

In contrast to the hypothetical nature of our concerns over the continuance of SPT stock programs involving SFSP stock, the denial of stock programs to SPT employees have an adverse impact on employee morale, by alienating employees from their company, decreasing incentives to remain with SPT, and reducing employee income potential. Poor employee morale would reduce the competitiveness of the SPT with all carriers including the Santa Fe. Failure to continue employee benefits that maintain the status quo prior to the merger of SPC and SFI would produce a result desired by no one.

Balancing the potential harm of continuing the SPT's stock plans with the anticipated injury resulting from discontinuing stock purchase plans, we conclude that the stock purchase plans should remain in effect. In essence, the harm of continuing the stock purchase plans is the de minimis likelihood of a reduced level of competition between competing carriers with fewer routing, service, or price options for transportation users through otherwise unlawful employee actions. By contrast, the harm of discontinuing these programs is that poor employee morale can be expected that would reduce the efficiency of SPT. In these circumstances, SPT stock benefit programs shall be allowed to remain in effect.

We find that the stock plans: (1) Southern Pacific Stock Purchase & Savings Plan, (2) Employee Stock Ownership Plan, and (3) Merrill Lynch Plan are not prohibited by the conditions set forth in the decision entered in this docket on December 23, 1983, and otherwise may remain in effect.

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

It is ordered:

1. The petition is granted.
2. This decision is effective upon the date served.

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

James H. Bayne  
Secretary

(Seal)