FINANCE DOCKET NO. 21326[1]

NUECES COUNTY NAVIGATION DISTRICT NO. 1, ET AL. CONSTRUCTION AND OPERATION IN NUECES COUNTY, TEX.

Decided July 31, 1967

In Finance Docket Nos. 21326 and 21327:

1. Motions to vacate and set aside order reopening proceedings for lack of jurisdiction, denied.

2. Upon reopening and hearing, (a) the rendering by Corpus Christi Terminal Association of switching services for the Southern Pacific Company within the Hughes Street-Tancahua industrial area of Corpus Christi, Tex., and (b) the performance by Southern Pacific Company and The Texas Mexican Railway Company (1) of joint switching operations, with yard engines and crews in common with both carriers, within their joint railroad yard and throughout the railroad yard limits of both such carriers at Corpus Christi, Tex., and (2) of switching services, with yard engines and crews in common with both carriers, when either carrier is performing switching for the Corpus Christi Terminal Association, found to be consistent with the public interest, and to be within the authority of the order of November 16, 1960; and (c) further found that, neither the proposals of labor, or evidence thereof, having been presented, petitioners have not shown the demands of labor to be contrary to the public interest.

Application in Finance Docket No. 23505 dismissed. Issues moot and authority requested superfluous.

Tom M. Davis and *Elmore H. Borchers* for applicants.

James L. Highsaw, Jr., for Railway Labor Executives' Association, protestant.

George L. Schmidt, R. D. Jones, John L. Purdum and *Odes Jackson* for Brotherhood of Railroad Trainmen, protestant.

SUPPLEMENTAL REPORT AND ORDER OF THE COMMISSION

WALRATH, *Commissioner:*

By certificate and order of the Commission, division 4, in 317 I.C.C. 245 (1960), in Finance Docket Nos. 21325, 21326, and dated

[1] This report also embraces Finance Docket No. 21327, Operation of Port Railroad Facilities at Corpus Christi, Tex., and Finance Docket No. 23505, Southern Pacific Co. and Texas Mexican Railway Co. Joint use in Corpus Christi, Tex.

21327, the Texas and New Orleans Railroad Company (T&NO), predecessor in interest to Southern Pacific Company (SP), was authorized (in Finance Docket No. 21325) to abandon that portion of its line of railroad extending from milepost 147.99 to milepost 149.93 in the city of Corpus Christi, Tex.; in Finance Docket No. 21326, authority was granted to (a) the Nueces County Navigation District No. 1 (Navigation District) to construct an extension of a line of railroad from a point on the existing trackage of T&NO near the north side of the Upper Harbor Bridge at Corpus Christi extending in a southerly direction via such bridge to a point of connection with the main track of The Texas Mexican Railway Company (TexMex); and (b) to T&NO to operate over such extension of line to be constructed and over the existing trackage on the north side of the harbor channel which extends from a point north of the Upper Harbor Bridge in an easterly direction paralleling the ship channel to a point of connection with the Gregory-Corpus Christi line of the T&NO (now the SP[2]); and in Finance Docket No. 21327, the terms of three agreements, identified as the "Primary Agreement," the "Joint Yard Agreement," and the "Corpus Christi Joint Track Agreement," entered into jointly by the Navigation District, the Missouri-Pacific Railroad Company (MoPac), Tex-Mex, and T&NO were approved. All of the transactions were approved subject to the same conditions for the protection of employees as were prescribed in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177. In addition to the other authority granted, the Corpus Christi Terminal Association (CCTA) was authorized to provide switching service to industries in the Hughes Street-Tancahua area of Corpus Christi in lieu of SP's predecessor in interest, an area located immediately below the circles N and to the left of the arrowhead indicating the former SP yard property, appearing in appendix A attached hereto.

Following consummation on November 18, 1960, of the various transactions involved in the proceedings, a dispute arose between the three named railroads and the Brotherhood of Railroad Trainmen (BofRT) concerning the manner of conducting certain operations within the Corpus Christi terminal area. This ultimately resulted in strike threats, court action by the railroads to avert a strike, and the filing by SP and TexMex of a petition with the Commission seeking limited reopening of the proceedings. By order

[2]T&NO, a wholly owned subsidiary of SP, was the operating company in Texas and Louisiana prior to its merger with SP approved October 31, 1961, in *Southern Pacific Co. Merger*, 312 I.C.C. 598.

dated May 22, 1963, the Commission, division 3, reopened the proceedings for the purpose of determining (1) whether the order of November 16, 1960, to the extent it involves Finance Dockets Nos. 21326 and 21327, should be modified or supplemented in any respect, including the provision thereof in respect of employees of the carriers involved, and (2) whether the demands of the employee representatives are contrary to the public interest in the effectuation of the transactions authorized by said order.

Hearings, based on the order of reopening, were held before an examiner, and on November 23, 1964, his report and recommended order were issued. Exceptions were filed by applicants and protestants and each replied to the exceptions of the other. By order of May 21, 1965, the proceedings were recalled by the Commission from division 3 and the parties have been heard on oral argument. Our conclusions differ in some respects from those of the examiner.

A map of the specific rail lines and areas within the Corpus Christi terminal area involved in the instant transactions, previously referred to as appendix A, is attached to this report. Since there is no dispute concerning the facts specified by the examiner as to the matters here in issue, they will not be restated here except as necessary for clarity of discussion.

JURISDICTIONAL ISSUES

The Railway Labor Executives' Association and BofRT, hereinafter sometines referred to collectively as protestants, challenge the jurisdiction of the Commission to reopen the proceedings for the purposes stated in the order and urge that the order be vacated and set aside for lack of jurisdiction. It is their contention that only labor issues are involved in the controversy between applicants and protestants and that the Commission's action in reopening the proceedings is an attempt to exercise jurisdiction over collective bargaining agreements between applicants and their employees and to exercise control over the changes to be made in such agreements, which it has no power, under the Interstate Commerce Act, to exercise. It is further urged that, even assuming the Commission might have had jurisdiction to take action with respect to the subject matter of the instant proceeding in aid of its order of November 16, 1960, it does not now have such jurisdiction because the transactions approved by such order have been consummated and the authority to act in connection with the proceedings has expired.

Neither of these contentions is meritorious. Not only does the Commission have jurisdiction under its continuing regulatory power to reopen a proceeding for further consideration, but also under the authority granted in section 5(9) of the act to "make such orders, supplemental to any order made under paragraphs (1), (2), or (7) of section 5 as it may deem necessary or appropriate." Both of the proceedings here considered involve matters falling under the provisions of section 5(2) and, good cause therefor having been shown by applicants, the Commission is authorized to take appropriate action (such as the reopening procedure followed herein) to enable it to determine whether the order of November 16, 1960, should be modified or supplemented in any respect.

Although a labor dispute caused applicants to file the petition to reopen the proceedings, the issue presented is not one of settling such dispute, nor is the Commission asked to enter upon any regulatory activity that conflicts with any other regulatory agency or board. Rather, one of the issues is whether the outstanding order requires modification. The approval given was in broad outline only. When, as in the instant case, parties present section 5(2) proposals in the form of an agreement which is approved on the basis of the application and pleadings without oral hearing, it is not feasible for us to pass upon every detail of the operation in question; and the appropriate procedure for obtaining clarification as to whether a specific detail of the operation has been approved or should be approved or requires Commission appraisal, is by petition for reopening, or, as here, by petition for a supplemental order.

When they first filed this transaction with us, applicants did not request Commission approval of any operation with the degree of specificity they now consider necessary. They merely sought general approval of cooperative and, in some aspects, joint operation as agreed upon by themselves and certain other interested parties. The Commission, in its certificate and order, gave its approval in general to the transaction as presented. These further proceedings followed, because the order is said to need clarification in detail so that it may be properly implemented.

Specific work rules were not approved herein. As a matter of fact, the Commission took note that work rules were still in the formulation stage at the time its approval of the transaction was first sought. The approval then given was directed primarily

at the abandonment of certain trackage, the construction of new trackage, the use of one railroad's facilities by another and joint operations within the port area. The decision did not touch upon the work rules.

The approved transaction has long been consummated. It cannot, at this point, be undone: the bascule bridge has been dismantled, old track has been abandoned, new track and other facilities have been constructed and put into use. Assuredly, the solution does not lie in ordering the restoration of the bridge or of the *status quo ante*. As the events occurred which physically changed the rail access to and approaches within the port, a change in working conditions and work rules became inevitable. Under these circumstances it is entirely conceivable that certain methods of operation, because inefficient, unsafe, unable to satisfy customer requirements, or other inadequacies could cancel out the benefits of the new arrangement at the port, or otherwise effectively subvert the transaction.

Such methods of operation are properly subject to Commission appraisal. Our obligation is to administer and apply the Interstate Commerce Act so as to advance the national transportation policy. Turning our back on transportation factors not consistent with the implementation of that policy, would constitute a failure of duty. Under section 5(9) it is contemplated that the Commission might from time to time reexamine a consummated section 5(2) transaction, and for good cause shown, modify the terms of its approval order. This possibility of reexamination and modification, as well as the statutory provision establishing it, is an integral part of the Commission's approval of a transaction, no less so than would be the case if specific provision therefor was made in the approval order. Consequently, we hold that we have jurisdiction to determine whether particular plans of operation would render the transaction inconsistent with the public interest. If specific plans of operations advanced by either side are brought before us, we can and should rule on them; and if either or both are consistent with the public interest, we must so find.

In this case the decision making is complicated by the fact that the transaction has already been effectuated, and certain major aspects of it, such as the cutting of the bascule bridge, have been accomplished. Ordinarily, when the transaction before it is entirely prospective, the Commission is in a position to make known the terms and conditions we consider necessary to render the transaction consistent with the public interest, before any

steps toward consummation are taken. And the applicants have an option whether to accept the terms and consummate, or not.

Here, that option not available, we must consider that the applicants and others with whom they have contracted in this cooperative endeavor, have committed substantial capital and effort in creating the facilities and shaping the operation into its present form. The spectrum from which we might draw conditions has itself been conditioned or limited, in practical effect, by the events which have already taken place in the transaction. This practical limitation applies to our appraisal of the operations here in issue. But the fact that the die has been cast as to major parts of the transaction, as in this case, should not be permitted to afford undue advantage to the one side over the other.

On the other hand, this Commission has no jurisdiction to approve a section 5(2) transaction which, during the 4 years following its order, would place employees in a worse position with regard to their employment. That does not mean that all jobs must be preserved and all employment frozen during the protective period. *Maintenance Employees* v. *United States*, 366 U.S. 169 (1961). It does mean, among other things, that the applicants, if they consummate, must provide compensating conditions and emoluments for adversely affected employees and that the Commission must impose upon the applicants just and reasonable terms for the protection of those employees but to an extent no less than the statutory requirement. *Railway Labor Assn.* v. *United States*, 339 U.S. 142 (1950). The certificate and order of approval in this case were issued subject to the *Oklahoma* conditions.[3]

It is apparent from the BofRT threat to strike and the court litigation which followed,[4] that the BofRT did not consider the protection adequate. This protestant chose, however, not to seek reconsideration before this Commission. Contending that the new method of operation and work rules are in violation of standing collective bargaining agreements, it chose instead to strike. The courts appear to have concluded that BofRT has a right to strike, subject, however, to the possibility that, in the circum-

[3]The same conditions as were imposed for the protection of employees in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177.

[4]*Texas & New Orleans R. Co.* v. *Brotherhood of Railroad Trainmen*, 197 F. Supp. 848, affirmed in 307 F. 2d 151 and 307 F. 2d 162, cert. den. 371 U.S. 952 (1963).

stances of this case, that right might be foreclosed by our finding the labor demands contrary to the public interest. This is what gives rise to our second issue—whether on this record labor demands are shown to be contrary to the public interest.

We would not be meeting our responsibilities under the act by following protestants' suggestions to vacate the order of reopening and leave the parties to their own devices. The issues here presented fall squarely within the Commission's jurisdiction and are matters which we are specifically empowered to determine. That such determination may have repercussions in the labor relations of the carriers involved does not detract from our jurisdiction under the Interstate Commerce Act. *Carpenters Union* v. *Labor Board*, 357 U.S. 93, 109; *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 170, 173-74. In exercising that jurisdiction in this area, however, we are mindful of the national labor relations policy and do not purport, by our decision herein, to determine any involved labor dispute which falls within the exclusive jurisdiction of other agencies. Aware that the policies of the Interstate Commerce Act and labor legislation must be accommodated one to the other, *Burlington Truck Lines* v. *United States*, *supra*, at page 172, we shall confine outselves to the issues raised by the reopening order and at the further hearing, and shall make findings accordingly. Such findings having been made the parties will be free to use appropriate procedures and forums for solutions to their labor disputes and work-rule problems arising therefrom.

Commission jurisdiction over the instant proceedings having been established, the aforementioned motions to vacate and set aside the order of reopening are denied.

Operations In Issue

The controversy giving rise to the reopening proceedings centers around the manner in which switching services have been performed in the Corpus Christi area since the issuance of our order of November 16, 1960. TexMex and SP's predecessor formerly conducted entirely separate operations throughout the Corpus Christi area, but since the consummation of the transactions referred to in the order, SP and TexMex have been performing joint switching service, with their engines and crews in common, not only within their joint railroad yard, but throughout the Corpus Christi terminal area. Also, since issuance of the order,

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CCTA, rather than SP, has rendered the switching service for industries in the Hughes Street-Tancahua area.

Protestants contend that applicants neither sought nor were granted authority under our order of November 16, 1960, to perform any joint service, with so-called joint switch engines and crews, in any portion of the Corpus Christi area, and that there is no valid reason for CCTA, rather than SP, to switch SP's industries in the Hughes Street-Tancahua area. As protestants see it, each carrier must perform its own switching service in the terminal area with its own yard engines and crews.

On the other hand, SP and TexMex insist that all changes in their operations within the Corpus Christi terminal area were pursuant to the aforementioned agreements which provided the bases for the various applications here considered, and were authorized by our certificate and order of November 16, 1960. They contend that performance at the terminal area service in the manner demanded by the BofRT would be contrary to such authority.

Notwithstanding the dispute between them, all parties agree as to the manner in which the switching operations have been performed since the issuance of the order of November 16, 1960. We have reopened these proceedings to determine what specific operations within the Corpus Christi terminal area (whether those presently performed by applicants, those which might be favored by the BofRT, some other type of operation) would be consistent with the public interest, and whether the prior order should be modified or supplemented in any respect. The reopening order gave clear notice of these purposes.

Applicants presented evidence designed to show that their present joint operations within the terminal area are more in the public interest than those said to be demanded by BofRT. Protestants participated fully in the hearing and were accorded full opportunity to demonstrate whether any of the present joint operations were not consistent with the public interest or that alternative methods of operations would also be consistent with the public interest. They elected, however, not to present affirmative evidence respecting any aspect of the operations in question. Under such circumstances, there clearly is no merit to protestants' claim, made at the oral argument herein, of a denial of due process in these proceedings.

PUBLIC INTEREST ASPECTS OF THE OPERATIONS

The examiner concluded that, because of what he considered to be limitations on the issues properly to be considered under the order reopening the proceedings, the evidence presented by applicants to indicate which type of operation within the Corpus Christi terminal area would best serve the public interest was improper, and, therefore, must be disregarded in reaching conclusions in this matter. We do not concur in that view. In view of the broad scope of the reopening order, we believe the evidence presented by applicants, and disregarded by the examiner, relates directly to the issues contemplated in that order and is entitled to be fully considered.

Operations by SP and TexMex within the terminal area since the issuance of the order of Novemer 1960, are performed in the following fashion: each carrier furnishes yard engines and crews. Ordinarily TexMex assigned three yard engines and SP assigns two to switching service; but during the alternate periods when each carrier is responsible for performing CCTA switching, two additional yard engines are assigned. These engines are assigned to switching work on a 60-percent TexMex, 40-percent SP, crew-consist basis, the work being performed in common for either carrier or as a joint service for both carriers. When operating within the "joint yard" (the area located between points G and H on appendix A and between the "joint yard" and the common interchange yard (the area between points B and C on appendix A), the yard engines perform both joint-yard work and the sole work of either SP or TexMex. When performing joint-yard work, i.e., the switching services incident to the breaking up and making up trains and the moving of cars in interchange to and from the common interchange yard, the service is performed by engines and crews as a joint operation of both carriers with the expense being prorated between the two railroads on an equated car basis. The assigned yard engines and crews also operate outside the joint-yard area in switching services for either carrier, the charges being borne exclusively by the carrier whose sole work is being performed. Under the arrangement, provision is also made for assessing charges for nonproductive time. If the bulk of the time consists of joint-yard work, nonproductive time is charged against the joint-yard operations and charges are prorated between the two carriers on a per-car basis. If, however,

the bulk of the work is the sole work of one of the railroads, the nonproductive time is charged against that railroad. Thus, when a yard engine, regardless of which carrier's crew mans it, switches TexMex industries, it is a Tex Mex engine operated at the expense of TexMex. Likewise, when switching for SP, it is an SP engine rendering service for, and at the exclusive expense of, SP. The effect of this arrangement is that neither carrier operates over the line of the other outside the "joint yard" and neither assumes control, dominion or responsibility over or for traffic moving to or from any point on the other carrier's lines within the area where the so-called joint services, with engines and crews in common, are provided.

The joint switching services are now provided throughout the terminal facilities of both TexMex and SP at Corpus Christi. This includes, among other things, the yard limits of both carriers, and an operation extending out 21 miles to the Naval Air Station at Flour Bluff, Tex.

The "joint service" is also provided during the periods when either SP or TexMex is perfirming CCTA switching. Although the service actually may be performed for one of the carriers by the yard engine and crew of the other, the service in question is the sole responsibility of, and at the expense of, the carrier whose turn it is to render CCTA switching for the year in question. Included in such service is the switching of SP industries in the Hughes Street-Tancahua Area as a part of CCTA operations.

No issue has been raised respecting any aspect of the order of November 16, 1960, other than those relating to the switching operations performed within the terminal area. Accordingly, our considerations herein will be restricted to those matters only.

It was established by the director of planning for the city of Corpus Christi and by the chairman of the Transportation Committee of the Area Development Committee that one of the important objectives of the group undertaking the development and improvement program for the area was the rearranging of rail transportation facilities and services within the terminal area to provide for more efficient use of streets and highways and to reduce traffic hazards at street crossings from the then existing crosstown operation of the three railroads serving the area, but without depriving the railroads of the means of providing a complete service throughout the area. In furtherance of these objectives, consideration was given to the consolidation of all-rail

facilities in the area, the elimination of duplicating railroad services, and the conducting of joint operations by all three railroads. A number of plans were studied, but most were ultimately rejected in favor of the plan whereby MoPac would continue to conduct its independent operation within the area, TexMex and SP would conduct the joint switching operations described herein, and CCTA would provide the switching of SP industries within the Hughes Street-Tancahua area. The details of the new operating plan were brought forth into an agreement executed by the participating groups.

Witnesses representing these groups expressed the view that the "primary agreement" described in the examiner's report was intended to reflect the undertaking by SP and TexMex to perform the joint switching operations agreed to as a part of the operating plan which was finally adopted by the development group. Their position was that the operating arrangement adopted and contracted by the three-named carriers is the best available for insuring efficient service to the public while helping to meet the basic objectives of the improvement program. They assert that, through the joint service provided by SP and TexMex, the number of movements daily over grade crossings have been reduced without depriving the industries in the area and the public generally of adequate rail transportation service. They also expressed the view that any change in operations within the Corpus Christi terminal area which would increase the number of movements of trains or engines across grade crossings or reduce service to industries in the area would not only be detrimental to the development program but would be contrary to the best interests of the public in creating unnecessary traffic hazards and in restrictin the free flow of traffic over streets and highways in the area.

The removal of the bascule bridge resulted in the cutting off of SP's main track into the Corpus Christi port area. In order to provide access into the area, SP's main track was connected to a navigation district running track through the north port area, over the new high-lift bridge at the west end of Nueces Bay, thence on to a new track connection known as the Savage Lane line and from that point to a connection with TexMex main track, then over TexMex main track westerly to the SP-TexMex joint yard. All SP trains in and out of Corpus Christi now use this route. Inter-

change of cars between all of the railroads and the CCTA, except the interchange between TexMex and SP which is accomplished in the joint yard, takes place in the common interchange yard located between point B and C on appendix A.

SP-TexMex joint terminal operations are handled by joint employees performing all of the service of SP and TexMex in common. During the periods when neither SP nor TexMex is performing switching for CCTA, three yard engines are assigned by TexMex and two by SP to perform switching operations.

Since May 1, 1964, joint-yard crews of SP-TexMex have performed CCTA switching. This required the assignment of two additional yard engines and these assignments were to continue until May 1, 1966, when MoPac was again to take its turn of performing CCTA switching for a 1-year period. Thus, the present arrangement for switching CCTA is to allocate 1 year to MoPac engines and crews and 2 years to the joint SP-TexMex yard engines and crews, with the change being made on May 1 of each year. When it is TexMex's turn to provide CCTA switching, joint engines and crews are used, and the same method prevails when it is SP's turn.

The joint SP-TexMex yard engines perform all the yard switching service of both railroads, with traffic of either or both being handled in common by any of the yard engines performing yard switching or interchange. Traffic consigned to or originating at SP industries in the Hughes Street-Tancahua area is handled in common with CCTA traffic and movements between the SP-Tex Mex joint yard and the common interchange yard are made by joint SP-TexMex yard engines. Movements between the common interchange yard and the Hughes Street-Tancahua area are made in common with CCTA traffic, and this traffic is handled by yard engines of MoPac or SP-TexMex during the periods prescribed for performing CCTA switching.

Under the present arrangements for handling traffic within the terminal area joint-yard engines average four trips daily making delivery to the common interchange yard and bringing back to the joint-yard interchange deliveries to SP-TexMex. TexMex industries between the joint yard and TexMex freight stations are switched by two, and frequently by three, engines each day. Also, TexMex industries in the Flour Bluff-U.S. Naval Station and Clarkwood areas are also switched by at least one engine every day. Over the single-track Savage Lane line between the common interchange yard and the SP-TexMex

joint yard, there are two movements of SP road trains plus at least eight yard engine movements daily. The joint service, with joint-yard engines and crews performing service in common, is provided throughout the terminal facilities of both TexMex and SP at Corpus Christi.

No employee represented by the BofRT has been laid off nor has his position been abolished as a result of the operating changes made in November 1960. In fact, during the 2-year period while SP-TexMex joint-yard crews performed CCTA switching, TexMex had to use two additional engines and employ additional personnel to man them. A comparison of engine hours worked by SP and TexMex employees at Corpus Christi, excluding service for CCTA, reveals that the annual yard-engine hours for the year immediately preceding the change in operations was almost identical with those for the first year of operations after the operating changes were made (13,767 hours, 53 minutes, compared with 13,776 hours, 36 minutes). For the second year after the changes in operations, the total engine hours of the joint engines, exclusive of CCTA service, were 13,971 hours, 31 minutes, and for the third year, the comparable figure was 13,626 hours, 17 minutes. The record herein does not indicate that any employee of either SP of TexMex at Corpus Christi, represented by the BofRT, has lost any employment time as a result of the changed operations which began in November 1960. In this connection, it may be noted that, under the conditions which were imposed in the order of November 16, 1960, for the protection of employees adversely affected by said order, any employee who may have earned less due to the changed operation, would be made whole for a period of 4 years from the date of the order if he had been in service that long.

SP and TexMex studied each of the plans proposed for serving the Corpus Christi terminal area after removal of the bascule bridge, including the methods which, it was understood, the BofRT was insisting the carriers adopt in respect of the performance of switching services in the area. They concluded that the operating plan described herein, which has been followed ever since the operating changes began in November 1960, provided the most effective means of affording prompt service to the public and assisting the city in the accomplishment of its objectives under the program. While recognizing the physical possibility of serving the area in some other manner, officials of SP and TexMex expressed the view that the present method of operation is

the most efficient and economical of any of which they have knowledge.

As hereinbefore noted, all of the operating plans suggested by groups participating in the development program were rejected in favor of the present plan and, insofar as the officials of the city and certain participants in the development program are concerned, the present method of operation has been found to be as satisfactory and efficient as possible under the circumstances. Certain representatives of industries in the area also indicated their satisfaction with the present method of affording rail service in the area.

Although declining to present any affirmative evidence in support of a particular method for serving the terminal area, protestants did attempt, through the cross-examination of applicants' witnesses, to establish that applicants could provide as economical, safe, and efficient a service to the public as that presently provided, by (1) SP and TexMex each, performing its own switching services, with its own engines and crews, throughout the entire terminal area; and (2) SP providing its own switching service, with its own engine and crew within the Hughes Street-Tancahua area. The evidence fails, however, to establish that position.

While recognizing that SP and TexMex were both authorized, by the order of November 16, 1960, to operate within the joint yard, protestants contend that the carriers should keep their businesses separated within the yard by each having its own tracks, with interchange tracks provided where cars may be interchanged by switching crews furnished separately by each carrier. It is protestants' position that this type of service can be provided in the present joint yard without increasing yard facilities and without adversely affecting the efficienty of operations any place in the terminal area.

The evidence establishes, however, that, in the event SP and TexMex discontinued their present joint operations within the joint yard, and each operated separately but with SP continuing to use the joint yard, substantial changes would have to be made in the track arrangements within the yard and additional facilities, including yard property, would be required. The cost of providing these additional facilities would approximate $231,000, not including the ad valorem taxes or the recurring maintenance expense on the new facilities.

Even if we were to disregard this matter of added expense, applicants clearly established that, under separate operations within the

joint yard, the efficiency of the service, in certain respects, could be expected to be adversely affected. Applicants point out that, whereas they are now able, with their joint operations, to handle all of the business within the joint yard with only two joint engines on duty in the yard at the same time, under separate operations there would be three yard engines on duty at the same time and sometimes as many as four using the same trackage for the separate handling of cars for each carrier. This could result in interference, congestion and delays within the yard, which, in turn, would adversely affect service to industries throughout the terminal area. Additionally, the elimination of joint operations within the joint yard would prevent the carriers from conducting their other closely coordinated switching services outside the joint yard.

While separate operations by SP and TexMex would increase the number of movements by yard engines between the joint yard and the common interchange yard, neither carrier would have around-the-clock yard engine service, a service now provided with the joint engines. Also, there would be fewer opportunities for interchanging traffic. Under present operations, the SP-TexMex interchange for the CCTA or MoPac has an average of slightly more than four opportunities per day to be handled by joint-yard engines. Under separate operation, the SP interchange would have only three opportunities for movement to and from the common interchange yard, and the TexMex interchange would have only two such opportunities.

Under separate operations, and with more engines attempting to work in the joint yard at the same time, the final delivery of cars brought in by SP trains could be delayed, regardless of whether the cars were going to industries served by SP, by TexMex or by MoPac. For the same reason, there would be delays to cars coming from industries on TexMex, CCTA, SP and MoPac and leaving Corpus Christi on SP trains. It was estimated that the delay caused by separate operations in spotting cars at industries would average about 2 hours on cars brought in on SP trains. On outbound movements, SP's train, now scheduled to depart Corpus Christi at approximately 10 a.m., would not leave until 1 or 1:30 p.m., thereby complicating SP's operations beyond Corpus Christi and, possibly, causing the train to miss connections at Skidmore, Tex., or at other points such as San Antonio or Victoria, Tex. This, in turn, would delay the arrival of cars at final destination by as much as 12 to 24 hours.

The largest shipper on SP's San Antonio Division is served by SP within the Corpus Christi terminal area. This shipper's business would be adversely affected whenever the Corpus Christi train failed to make connections at Skidmore, or if there were any delay in furnishing it empty cars out of Corpus Christi for loading and return. This shipper has found the present service adequate for its present needs.

The only issue raised by protestants respecting the switching service performed by SP and TexMex for CCTA relates to the switching of SP industries in the Hughes Street-Tancahua area. Protestants contend that SP should be required to switch its own industries in the named area with its own separate yard engine and crew.

Authority was requested, under the instant applications, for CCTA engines to perform switching services within the Hughes Street-Tancahua area as a part of CCTA operations within the Corpus Christi port area. Such authority was requested because of the inability of SP's predecessor in interest to perform that service directly after the change in operations without operating over MoPac's tracks from their connection with the Savage Lane line (point I on appendix A) to the Hughes Street yard (point J on appendix A), an operation which MoPac at that time refused to sanction. It was MoPac's view that such an operation would create undue congestion and might result in its trains being delayed unreasonably. As a means of providing service to SP's industries in the Hughes Street-Tancahua area, it was agreed by all the parties participating in formulating the development program that authority would be sought for the carrier taking its turn of performing service for CCTA also to perform the switching within the Hughes Street-Tancahua area. The order of November 16, 1960, approved the modified CCTA agreement, which included authority for CCTA to perform the Hughes Street-Tancahua switching, and since the consummation of the transactions on November 18, 1960, such service has been performed by the carrier responsible for CCTA switching.

Although protestants recognize the existing authority of CCTA to perform this switching service, they claim that changed circumstances now make it possible and practicable for SP to operate over MoPac's line to the Hughes Street yard in order to perform its own switching and that there is, therefore, no good reason why CCTA's authority to perform the Hughes

Street switching should not be eliminated and SP should not be required to render its own switching service in that area.

In support of their claim of changed circumstances, protestants refer to the fact that, when MoPac reached a settlement with the BofR T on January 21, 1963, on the issue of working conditions within the Corpus Christi terminal area, MoPac agreed to permit SP to use its tracks to switch SP's industries in the area in question, and to the fact that, notwithstanding its awareness of that agreement, SP has indicated no interest in utilizing MoPac's tracks for such purpose, claiming that such use would be inefficient, uneconomical, and detrimental to public safety.

Protestants argue that it would be as consistent with the public interest for SP to perform its own switching in the Hughes Street-Tancahua area as it is for such service to be performed by CCTA, and that, inasmuch as the Commission's order in the proceedings is merely permissive in nature, the parties in question were not bound to consummate the transactions approved and, even after consummation, are not precluded from abandoning them and obtaining new operating authority which would provide for SP to operate over MoPac's tracks and to perform its own switching services.

Entirely aside from the question of whether operation by SP in the manner urged by protestants would be as much in the public interest as the present method of operation, or more so, we would point out that the only proposal involving the Hughes Street service that was submitted for Commission approval under the instant applications, and which was covered by an agreement, was that providing for CCTA switching in the area. Further, that while section 5(2) of the act empowers us to condition our grant of authority upon modification of a submitted transaction as necessary to make it consistent with the public interest, we are wholly without power in the circumstances of this case to force applicant carriers to agree to specific trackage rights agreements or to consummate a transaction which we may approve. Absent a section 5(2) application for approval of the operating changes urged by protestants, if we can find that the operation generally approved in the order of November 16, 1960, (and before us now in detail) is consistent with the public interest, no further standard need be met, and further testing would be inappropriate.

With respect to that issue, the Hughes Street-Tancahua area is now served by the CCTA engine which operates over MoPac

tracks between points I and J on appendix A in reaching such area. The route over MoPac's tracks between the MoPac connection with the Savage Lane line and Hughes Street is in a crowed industrial area with MoPac yard engines, arriving and departing MoPac road trains, and CCTA engines all utilizing the same tracks. CCTA engines now frequently encounter serious delays because of MoPac congestion on the tracks, and to add the operation of the SP yard engine proposed by protestants would result in additional congestion and delay movements in and out of the area. There are 22 switches to auxiliary tracks from this main track between Savage Lane and the Hughes Street connection and to add yard engine operations over this track would result in increased interference with vehicular traffic at the 10 grade crossings between Savage Lane and Hughes Street; and, with only three of these crossings being protected by automatic warning signals, traffic hazards would be substantially increased.

Under the present arrangement for switching the Hughes Street-Tancahua area, industries in the area are provided, if needed, two and, in some instances, three switches a day. If SP performed this service as a separate operation, these industries would receive only one switch a day. Also, under present CCTA operation, cars are usually spotted at the Hughes Street industries each morning between 10 and 11 a.m. Under separate SP operation, there would be a 2- to 3-hour delay in spotting these cars.

The port director for Nueces Navigation District expressed the view that it would be a serious interference with the port's business to experience delays of from 1 to 3 hours in the spotting and picking up of cars at the port, and that the present switching service is satisfactory. Representatives of several industries located in the Hughes Street-Tancahua area also expressed satisfaction with the rail services being provided under the present arrangement and indicated that it would be detrimental to their businesses to experience delays of from 2 to 3 hours in the spotting of cars at their plants or to be deprived of the present convenient pickup and delivery of cars moving to or from their plants.

Several other shippers and receivers of freight whose industries are located in the Corpus Christi terminal area expressed general satisfaction with the service now being provided by applicants and indicated the adverse effect that any reduction in service would have upon their businesses.

Applicants state they are not aware of any complaints respecting the present method of serving the terminal area and, indeed, excepting those from protestants, no such complaints have come to our attention. Any change in operations which would curtail rail service or make it less efficient would be detrimental to shippers and receivers of rail freight throughout the Corpus Christi area. The present coordinated joint switching service reduces traffic hazards in the area by keeping to a minimum, consistent with good service, the number of engine and train movements across grade crossings in the Corpus Christi area.

Nothing in the record indicates that the CCTA service is in any way inconsistent with the public and, from the evidence presented, it is clear that the public interest will be served by CCTA continuing to provide the switching services within the Hughes Street-Tancahua area. Accordingly, there is no justification for withdrawing the authority given in the order of November 16, 1960, for CCTA to perform such operations.

General Discussion

Regardless of the variety of methods by which applicants and CCTA might provide rail service in the Corpus Christi terminal area, the record established that the method of operation thus far employed provides convenient, efficient and adequate service to the public. Not only is it generally satisfactory to the governing bodies involved, to important industries in the area, and to the public at large, but also it has made a distinct contribution to traffic safety in the area. This has been accomplished, so far as to the record shows, generally without adverse effect upon the employees of the carriers involved. In the light of that showing, and in the absence of any indication that the services in question are contrary to the public interest, the transaction with present methods of providing rail service throughout the Corpus Christi terminal area as described should be found consistent with the public interest within the meaning of section 5(2) of the act. As thus described those operations are within the approval given through the order of November 16, 1960; and the effect of our finding herein is that the evidence presented at the further hearing does not warrant modification of that order.

We make no findings regarding the demands of the BofRT. While acknowledging jurisdiction to determine whether the transaction, subject to those demands, would be consistent with the public interest, and to impose just and reasonable employee conditions, among others, to meet the employee protection requirements of the statute, we are unable to fully exploit that jurisdiction because the record does not provide the necessary basis. We have related in detail the present method of operation at Corpus Christi, and find that, with such method, the transaction is consistent with the public interest. The outstanding approval order without supplementation reflects this. But this is not to say that other methods of operation, other work rules, or demands for compensation in lieu of work would necessarily render the transaction inconsistent with public interest. We have not been provided with sufficient evidence to give us a clear understanding of the method of operation or other considerations sought by the BofRT or of how the overall transaction would be affected thereby, nor did applicants provide any evidence to show such plans were contrary to public interest. Except to observe that the present operations seem to be more efficient than suggestions implicit in the BofRT cross-examination of applicants' witnesses, we make no findings regarding the work rules and method of operation sought by BofRT, other than that they have not been shown to be contrary to the public interest.

The examiner found that under section 16(7) the employees of the applicants were required to execute the transaction in the manner approved by the Commission; more specifically, that the employees of the carriers involved were "*** obliged to accommodate themselves so that none of their actions would prevent the effectuation of ***" the Commission's approval order; and that any action by the BofRT to prevent a Commission approved operation from being performed would be contrary to the public interest.

While section 16(7) makes it mandatory for carriers and their agents and employees to observe and comply with a Commission order so long as it remains in effect, we do not believe it applies here precisely in the manner contemplated by the examiner. In the first place, the order of November 16, 1960, was permissive, rather than mandatory, in that it provided a license for the applicants to engage in certain coordinative operations, and set a

time period for consummation, but imposed no requirement by the public interest that the consummation be accomplished.

Whether the BofRT has a right to strike, in this case, or whether a use of its ultimate economic weapon here would be contrary to the public interest, are questions we do not presume to answer on this record. An elaborate governmental and legal structure has been erected to deal with such questions and administer to the problems arising from labor-management conflict. The responsibility for such administration and the expertise in that field lies with other agencies.

We recognize that the policies of the Interstate Commerce Act and of the Nation's labor legislation must be accommodated one to the other, as the Supreme Court has ruled in *Burlington Truck Lines* v. *United States, supra;* and we must heed the court's admonition at page 173, that if either agency is not careful, it may trench upon the other's jurisdiction, and, because of lack of expert competence, contravene the national policy as to transportation or labor relations. Our purpose here has been to contribute as much to the solution of this problem as is possible under the transportation law. The limitations in the evidence have served proportionately to curtail the exercise of our jurisdiction.

APPLICATION IN FINANCE DOCKET NO. 23505

Following issuance of the examiner's report and recommended order herein, SP and TexMex, as a precautionary measure, filed a joint application, Finance Docket No. 23505, seeking specific authority to perform the same joint switching services as those considered herein. In view of our findings in the reopened proceedings, the authority requested by the new application would be superfluous and the issues involved therein are moot. Accordingly, the application will be dismissed.

FINDINGS

Upon reopening and hearing in Finance Docket Nos. 21326 and 21327, we find that, subject to the previously mentioned conditions for the protection of railroad employees, (a) the rendering by the Corpus Christi Terminal Association of switching services for the Southern Pacific Company within the Hughes Street-Tancahua terminal area of Corpus Christi, Tex., and (b) the performance by

the Southern Pacific Company and The Texas Mexican Railway Company (1) of joint switching operations, with yard engines and crews in common with both carriers, within their joint-railroad yard in Corpus Christi, Tex., and throughout the railroad yard limits of both such carriers at Corpus Christi, Tex., and (2) of switching services, with yard engines and crews in common with both carriers, when either carrier is performing switching for the Corpus Christi Terminal Association, to be transactions within the scope of section 5(2) of the act and are consistent with the public interest, and were contemplated by the order of the Commission, division 4, issued on November 16, 1960, in said proceedings; and that no modification of said order is warranted.

We also find that, for the reasons hereinbefore set forth, the joint application of the Southern Pacific Company and The Texas Mexican Railway Company in Finance Docket No. 23505 should be dismissed.

We further find that no showing has been made of the method of operation demanded by labor, and that, as a result, it has not been shown on this record that the demands of labor are contrary to the public interest.

Appropriate orders will be entered.

CHAIRMAN TUCKER, concurring in the result:

I concur in the result. The petitioning carriers not having shown that "the union demands are contrary to the public interest in the effectuation of the section 5(2) transaction," there is no cause for the Commission to exercise any continuing jurisdiction. *Texas & New Orleans R. Co.* v. *Brotherhood of Railroad Trainmen, supra,* 307 F. 2nd, at page 161.

COMMISSIONER GOFF concurs in the result.

COMMISSIONER BUSH, dissenting in part:

While issues involving transportation subject to the jurisdiction of the Interstate Commerce Commission or labor relations referable to the Railroad Adjustment Board may at times be difficult of ascertainment, I do not find such to be the case in this proceeding. Notwithstanding the allegedly broad scope of the issues defined in the order of reopening, as admitted by the majority that which caused the applicants to petition for the reopening hereof was clearly and solely a *"labor dispute."* It

was not the plan or methods of operation by the involved railroads which were approved and the transaction consummated over 6 years ago which motivated the filing of the petition herein, but rather the adverse decision by the court to the railroads in *Texas & N.O.R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F. 2d 151 (1962), *cert.* denied 371 U.S. 952. The provisions of the Norris-La Guardia Act, 29 U.S.C.A. §101 *et seq.*, were not preempted by the provisions of section 5(2) and (11) of the Interstate Commerce Act wherein our authority is "exclusive and plenary" in approving and authorizing carrier unifications, merger, acquisitions of control, joint use of railroad lines and/or trackage rights. Commission approval of new methods of operation incorporated in primary or supplemental agreements does not entitle railroads to injunctive relief against unions which instituted a strike on the ground that employees would be adversely affected by such agreements, since such strike concerned a *"labor dispute"* within the Norris-La Guardia Act, *supra*.

Moreover, notwithstanding any other provisions of the Interstate Commerce Act, an agreement pertaining to the protection of the interests of carrier employees may after approval of a transaction conditioned upon employee protection by us be entered into by any carrier and the duly authorized representatives of its employees or the employees themselves. Such is the case of the Missouri Pacific Railroad Company and the Brotherhood of Railroad Trainmen who heretofore withdrew from this litigation.

In its present posture the status of the management and employee dispute is one of negotiation or mediation before the proper tribunal, namely: the Railroad Adjustment Board and not this Commission where jurisdiction is lacking. I would, therefore, grant the association's motion to strike for lack of jurisdiction rather than consider the merits of a consummated transaction of many years ago, although I am in accord with the original decision.

COMMISSIONER MURPHY, dissenting:

I would grant the motion to dismiss filed by protestants. The Commission did all it was authorized to do when it found, in 1960, that the operations then proposed were consistent with the public interest.

In the absence of the submission of a new plan of operation by protestants there was nothing before the Commission requiring adjudication in Finance Docket No. 21326.

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Granting the motion to dismiss would have obviated any necessity to go into the merits of the dispute. However inasmuch as the majority failed to so rule, and did treat the matter on its merits, I believe comment on the merits of the report is warranted.

I am in agreement with the conclusions of the majority insofar as it finds that the current operations within the Hughes Street-Tancahua industrial area of Corpus Christi, Texas are consistent with the public interest. However this finding had previously been made in 1960.

I respectfully dissent to the finding that the proposals of labor have not been shown to be contrary to the public interest. The record demonstrates that the carriers did everything in their power to establish that labor's proposals were not consistent with the public interest, however the protestants, because they presented no evidence, by default, avoid any adverse finding.

This decision is particularly intolerable when the uncontroverted evidence and findings of fact are considered. The majority finds that discontinuance of the present joint operations would require substantial change in track arrangements and additional facilities, costing approximately $231,000, not including taxes or recurring maintenance expenses; that joint yard efficiency could be affected adversely by the addition of crews and engines, adversely affecting service; that around-the-clock engine service would not be available; that there would be fewer opportunities for interchanging traffic; that there would be delays in the final delivery of cars; and that the possibility of missed connections could result in delays of from 12 to 24 hours in final delivery. The safety of the operation would also be affected because an increased number of movements would have to be accomplished across grade crossings possibly restricting the free flow of traffic over streets and highways in the area.

Thus any form of individual operation as proposed by protestants, would result in additional costs, less efficiency, and additional safety hazards to the public in general. These uncontroverted findings should establish that the method of operation proposed by protestants would not be consistent with the public interest.

COMMISSIONERS DEASON AND STAFFORD did not participate in the disposition of this proceeding.