

SURFACE TRANSPORTATION BOARD<sup>1</sup>

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY--CONTROL AND MERGER--SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[Decision No. 66]<sup>2</sup>

Decided: December 30, 1996

In Decision No. 44, we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company)<sup>3</sup> and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation

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<sup>1</sup> Proceedings before the Interstate Commerce Commission (ICC) that remained pending on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; Finance Docket No. 32760 (Sub-No. 18), Utah Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company; Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company; and STB Finance Docket No. 32760 (Sub-No. 20), The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Southern Pacific Transportation Company.

<sup>3</sup> Union Pacific Corporation is referred to as UPC. Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) are referred to collectively as UP.

Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company)<sup>4</sup> subject to various conditions, including the terms of the BNSF agreement,<sup>5</sup> the terms of the URC agreement,<sup>6</sup> the new facilities and transload conditions,<sup>7</sup> and the build-in/build-out condition.<sup>8</sup> Common control was consummated on September 11, 1996.<sup>9</sup>

In Decision No. 61, we affirmed that the new facilities and transload conditions should be read literally: BNSF may serve any new facility (except as otherwise indicated), including but not limited to any new transload facility (even those owned or operated by BNSF itself), located post-merger on any UP/SP line over which BNSF has received trackage rights in the BNSF agreement; and BNSF's right to serve a new transload facility includes the right to handle all traffic transloaded at that facility. See Decision No. 61, slip op. at 7.

In this decision, we address matters respecting the new facilities condition, the transload condition, and the build-in/build-out condition that have been discussed in the UTAH-7 pleading filed September 23, 1996, by URC, and in the BN/SF-72 reply filed October 15, 1996, by BNSF. We also address the matters discussed in the pleading styled "Railco, Inc.'s Reply in Support of Its Request for Clarification or Modification," filed September 23, 1996, by Railco, Inc.

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<sup>4</sup> Southern Pacific Rail Corporation is referred to as SPR. Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) are referred to collectively as SP.

<sup>5</sup> Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company are referred to collectively as BNSF. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

<sup>6</sup> Utah Railway Company is referred to as URC. See also Decision No. 44, slip op. at 18-19 (description of the URC agreement).

<sup>7</sup> See Decision No. 44, slip op. at 145-46. Insofar as the new facilities condition concerns transload facilities, it is referred to as the transload condition. See Decision No. 61, slip op. at 2.

<sup>8</sup> See Decision No. 44, slip op. at 146.

<sup>9</sup> UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

(Railco), and in the UP/SP-287 reply filed October 10, 1996, by UP/SP.

#### BACKGROUND

URC: Pre-Merger Status. Prior to the merger, URC operated in Utah on 98 miles of track between Provo and Mohrland. This consisted of 73 miles of track between Provo and Utah Railway Jct., and 25 miles of track between Utah Railway Jct. and Mohrland. See UTAH-3, V.S. West, Appendix A (maps).

The 25 miles of track between Utah Railway Jct. and Mohrland, which consisted of two segments (a 22.3-mile segment between Utah Railway Jct. and Hiawatha, and a 3.5-mile segment between Hiawatha and Mohrland), constituted URC's "proprietary" line. UTAH-6 at 8 & n.1. This proprietary line was owned and operated exclusively by URC.

The 73 miles of track between Provo and Utah Railway Jct. also consisted of two segments: a 21-mile Provo-Thistle segment; and a 52-mile Thistle-Utah Railway Jct. segment. UTAH-6 at 10. The Provo-Utah Railway Jct. line was not owned and operated exclusively by URC; rather, it constituted a part of the SP (formerly the DRGW) Central Corridor mainline. The Provo-Thistle segment consisted of two tracks, one owned by URC and one owned by SP (formerly DRGW); the Thistle-Utah Railway Jct. segment also consisted of two tracks, both owned by SP (formerly DRGW). Operations by both URC and SP on both segments were governed by a 1913 URC/DRGW Operating and Trackage Agreement (the 1913 URC/DRGW Agreement), see UTAH-3, V.S. Barker, Appendix A, that has created what URC refers to as "an intertwined ownership and trackage rights relationship with SP," UTAH-7 at 3. URC claims that its and SP's "ownerships and cross-rights [in the two segments] are purposely intertwined and made inseparable without the written consent of each party." UTAH-6 at 4.<sup>10</sup>

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<sup>10</sup> See also Rio Grande Industries, et al.--Control--SPT Co., et al., 4 I.C.C.2d 834, 927-28 (1988) (DRGW/SP) (noting, among other things, that URC's trackage rights over the then DRGW-owned Provo-Thistle track and the then DRGW-owned Thistle-Utah Railway Jct. segment were overhead rights that did not allow URC to originate traffic at any DRGW points).

URC: Rights Received In Connection With The Merger. The BNSF agreement entered into on September 25, 1995, included extensive grants of trackage rights by UP/SP to BNSF. The trackage rights lines included, among others, the Provo-Utah Railway Jct. line. The terms of the 1913 URC/DRGW Agreement, however, apparently created some doubt respecting UP/SP's ability to grant such trackage rights to BNSF without URC's consent; and, to resolve this matter, UP/SP and URC entered into a settlement agreement (referred to as the URC agreement) under which: (i) URC authorized UP/SP to grant BNSF the right to use the Provo-Utah Railway Jct. line; and (ii) UP/SP granted to URC *both* access to additional coal sources *and* certain overhead trackage rights. Decision No. 44, slip op. at 18-19. The access to the additional coal sources provided by the URC agreement consisted of: rights in common with UP/SP to serve the Savage Coal Terminal coal loading facility on the CV Spur near Price, UT;<sup>11</sup> and exclusive rights to serve the Cyprus Amax Willow Creek mine adjacent to the SP mainline near Castle Gate, UT.<sup>12</sup> The overhead trackage rights received by URC under the URC agreement run approximately 179 miles between Utah Railway Jct. and Grand Junction, CO. UTAH-5 at 4-5; UTAH-7, V.S. West at 2.

In addition to the rights provided for by the URC agreement, URC also received, in merger-related agreements entered into outside the scope of the URC agreement: rights to serve a solid waste transload facility to be operated by East Carbon Development Company/Laidlaw (ECDC) on the CV Spur near the Savage Coal facility;<sup>13</sup> and rights to serve the Moroni Feed

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<sup>11</sup> The Savage Coal facility is not located on the Provo-Utah Railway Jct. line.

<sup>12</sup> The Willow Creek mine is located on the Provo-Utah Railway Jct. line. The Willow Creek mine is apparently a new mine. See UTAH-6 at 16 (URC indicates that it will have access to "a significant new coal loading facility to be created by Cyprus Amax") and at 24 (URC indicates that it will have access to "the important new facility now being built for the Cyprus Amax Willow Creek Mine with a projected annual output of 5 million tons by mid-1998").

<sup>13</sup> The ECDC facility is not located on the Provo-Utah Railway Jct. line.

Transfer (MFT) facility at Spanish Fork near Provo, UT.<sup>14</sup>  
UTAH-5, V.S. Blaydon at 5.<sup>15</sup>

URC's Grievance. URC contends that, in Decision No. 44, we effected an "inadvertent dilution," UTAH-7, V.S. West at 1, of URC's rights<sup>16</sup> when we extended the scope of the BNSF and CMA agreements.<sup>17</sup> (1) CMA Paragraph 2 had provided that the BNSF agreement would be amended to grant BNSF the right to serve new shipper facilities on SP-owned lines over which BNSF received trackage rights, but had further provided that this right would not apply to load-outs or transload facilities. In Decision No. 44, we extended CMA Paragraph 2 by requiring, among other things, that the term "new facilities" include transload facilities, including those owned or operated by BNSF. Decision No. 44, slip op. at 145-46. See also Decision No. 61 (affirming this aspect of Decision No. 44). (2) CMA Paragraph 13 had provided that CMA members solely served either by UP or by SP would receive certain build-in/build-out rights. In Decision No. 44, we extended CMA Paragraph 13 to all shippers (not just CMA members), which necessarily includes shippers located in the Central Corridor. Decision No. 44, slip op. at 146 (our build-in/build-out condition).

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<sup>14</sup> The MFT facility is not located on the Provo-Utah Railway Jct. line.

<sup>15</sup> URC contends that these rights transformed the status of MFT and ECDC from 1-to-1 to 2-to-1. UTAH-7 at 4. URC apparently means to say: (i) that UP/SP had previously argued that MFT and ECDC were 1-to-1 shippers and therefore would not be adversely affected by the merger; but (ii) that the merger-related agreements opening these shippers to URC amounted to an implicit concession by UP/SP that these shippers were really 2-to-1 shippers that would have been adversely affected by the merger had not relief, in the form of URC access, been arranged. URC indicates that although each of these shippers was exclusively served, prior to the merger, by a single carrier (either UP or SP), each had claimed 2-to-1 status by virtue of the fact that it had other facilities located on the other carrier (SP or UP, respectively). UTAH-7 at 4 n.1.

<sup>16</sup> URC, citing both the URC agreement and the agreements entered into with respect to MFT and ECDC, insists that it had "extended its reach and broadened [its] shipper access" before we issued Decision No. 44. UTAH-7 at 4.

<sup>17</sup> The Chemical Manufacturers Association is referred to as CMA. See also Decision No. 44, slip op. at 18 (description of the CMA agreement).

Relief Sought By URC. (1) *Transload Condition.* URC asks, in essence, that we clarify the transload condition as sought by UP/SP in the UP/SP-275 petition, and make clear that a BNSF transload facility located on the Provo-Utah Railway Jct. line can serve only shippers located on a UP line. See Decision No. 61, slip op. at 3-4 (description of the transload clarification sought in the UP/SP-275 petition). URC adds, however, that, in view of the 1913 URC/DRGW Agreement, there would still be a question whether BNSF could serve a transload facility located on the Provo-Utah Railway Jct. line; and, in any event, the clarification sought by URC in the next paragraph would effectively moot the matter discussed in this paragraph.

(2) *New Facilities Condition.* URC asks that we clarify that the new facilities condition does not authorize BNSF to serve new facilities located on the Provo-Utah Railway Jct. line. The new facilities condition, URC suggests, applies to UP/SP lines over which trackage rights have been granted to BNSF by UP/SP; it does not apply to an SP/URC line over which trackage rights have been granted to BNSF by URC.<sup>18</sup>

(3) *Specific Shipper Access.* URC notes that, under the URC agreement, it received the exclusive right to serve the Willow Creek mine, and that, in additional agreements not made part of the URC agreement, it received the right to serve both the MFT facility and the ECDC facility. URC contends that the agreements referred to in the preceding sentence "protect and insulate UTAH's rights from BNSF/CMA access." UTAH-7 at 6. These agreements, URC claims, will not interfere with the UP/SP merger, and thus, URC hints, these agreements cannot be overridden under 49 U.S.C. 11341(a); and therefore, URC apparently means to say, we cannot authorize BNSF to access these shippers. URC adds that our rationale for imposing the CMA-enhanced BNSF agreement is not applicable to MFT and ECDC (which URC considers to be 2-to-1 shippers); BNSF access to these

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<sup>18</sup> In the URC agreement, at Paragraph 3, URC "authorize[d] UP/SP to grant BN/Santa Fe the right to use, in common with UTAH and UP/SP and subject to the November 1, 1913 Agreement, the trackage of UTAH covered by the November 1, 1913 Agreement." Although a literal reading of URC Paragraph 3 would tend to indicate that BNSF's Provo-Utah Railway Jct. trackage rights were granted by UP/SP, URC claims that it was URC that "granted BNSF trackage rights" on URC's property. UTAH-7 at 5.

shippers, URC maintains, is not required to provide an effective replacement for a no-longer independent SP.

Alternative Relief Sought By URC. URC suggests that, if we choose to make BNSF's trackage rights on the Provo-Utah Railway Jct. line "subject to CMA enhancement," we should similarly make URC's rights subject to CMA enhancement *both* on the Provo-Utah Railway Jct. line previously operated over by URC *and* on the Utah Railway Jct.-Grand Junction line opened up to URC under the URC agreement. UTAH-7 at 7; see also UTAH-7, V.S. West at 2-3. URC claims that this balancing approach would be equitable and logical, but adds that it continues to believe (and it apparently asks us to declare) that, even if URC's rights are made subject to CMA enhancement, BNSF still should not have access to the Willow Creek mine, the MFT facility, and the ECDC facility.

Railco. Railco, like Savage Coal, owns and operates a coal loadout facility on the CV Spur; the Railco facility is located in the immediate vicinity of the Savage Coal facility; and, at the two facilities, coal hauled by truck from coal producers in Carbon and Emery Counties is loaded on trains for shipment by rail to coal purchasers. Prior to the merger, both facilities were rail-served exclusively by SP. In connection with the merger, however, URC obtained, in the URC agreement, access to the Savage Coal facility, but not to the Railco facility. Therefore, post-merger, Savage Coal now has access to two rail carriers (UP/SP and URC), but Railco has access only to one (UP/SP). Railco, which fears that it will be competitively disadvantaged by its lack of access to URC, asks that the URC agreement be clarified or amended to require that URC be granted the same access to the Railco facility that it has already been granted to the Savage Coal facility.

#### **DISCUSSION AND CONCLUSIONS**

**APPLICABLE STANDARDS.** A prior decision may be clarified whenever there appears to be a need for a more complete explanation of the action taken therein. See, e.g., FRVR Corporation--Exemption Acquisition and Operation--Certain Lines of Chicago and North Western Transportation Company--Petition For Clarification, Finance Docket No. 31205 (ICC served Jan. 29,

1988) (clarifying jurisdiction and other matters); St. Louis Southwestern Ry. Co. Compensation--Trackage Rights, 8 I.C.C.2d 80 (1991) (clarifying four technical issues not explicitly considered in the prior decisions in that proceeding).

A proceeding may be reopened upon a showing of material error, new evidence, or substantially changed circumstances. 49 CFR 1115.3(b) (1995). See also Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Nov. 27, 1995) (Decision No. 43, slip op. at 2).

**UTAH RAILWAY COMPANY.** The UTAH-7 pleading, styled "Response of Utah Railway Company to Applicants' and BNSF's Petitions for Clarification," referred to the UP/SP-275 petition and the BN/SF-65 petition. In the UP/SP-275 petition, which we addressed in Decision No. 61, UP/SP sought clarification or reconsideration of the new facilities condition and the transload condition. In the BN/SF-65 petition, which we addressed in Decision No. 57, BNSF sought clarification of the contract modification condition. Although the UTAH-7 pleading expresses support for the clarification sought in the UP/SP-275 petition as respects the transload condition, the UTAH-7 pleading is, as a practical matter, a petition in its own right seeking relief premised upon an entirely new argument respecting our authority to impose the new facilities, transload, and build-in/build-out conditions. We will therefore treat the UTAH-7 pleading as if it were a petition for clarification or reopening.<sup>19</sup>

**URC's Jurisdictional Argument.** URC argues, in essence: (i) that we lack the authority to authorize BNSF to serve new facilities (including transload facilities) on the Provo-Utah Railway Jct. line; (ii) that we lack the authority to authorize BNSF to serve new build-in/build-out lines that may connect with the Provo-Utah Railway Jct. line; and (iii) that we lack the authority to allow BNSF the opportunity to access traffic moving from/to the Willow Creek mine, the MFT facility, and the ECDC facility.

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<sup>19</sup> Petitions seeking reconsideration of Decision No. 44 were due September 3, 1996. Thus, we will treat the UTAH-7 pleading as if it were a petition for clarification or reopening.

**The Three Specified Shippers.** Insofar as the UTAH-7 pleading seeks clarification or reopening respecting the three specified shippers, URC's request will be denied.

We have not explicitly authorized BNSF to access traffic moving from/to the Willow Creek mine, the MFT facility, or the ECDC facility. BNSF, however, may be able to access such traffic via new facilities (and, in particular, new transload facilities) established on the Provo-Utah Railway Jct. line under the auspices of the new facilities and transload conditions. BNSF may also be able to access traffic moving from/to the Willow Creek mine and the ECDC facility via new facilities (and, in particular, new transload facilities) established on the Utah Railway Jct.-Grand Junction line under the auspices of the new facilities and transload conditions.<sup>20</sup> BNSF may also be able to access the MFT facility via a connection constructed under the auspices of the build-in/build-out condition.<sup>21</sup>

URC contends, in essence, that even assuming that we have the authority to impose the new facilities condition, the transload condition, and the build-in/build-out condition on the Provo-Utah Railway Jct. line and on the Utah Railway Jct.-Grand Junction line, we still have no authority to allow BNSF to access, via facilities established or connections constructed under the auspices of such conditions, traffic moving from/to the Willow Creek mine, the MFT facility, and the ECDC facility. We

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<sup>20</sup> We note that, with reference to the Willow Creek mine, we are not saying that BNSF *will* be able to access such traffic, only that BNSF *may* be able to access such traffic, via facilities established under the auspices of such conditions. Cf. Decision No. 61, slip op. at 12 (noting, under the transload condition, BNSF will be allowed to access exclusively served shippers only by a legitimate transload operation, which will necessarily entail *both* the construction of a rail transload facility as that term is used in the industry *and* operating costs above and beyond the costs that would be incurred in providing direct rail service). We realize that the Willow Creek mine is exclusively served by URC and not by UP/SP, but we wish to make clear that, as with shippers exclusively served by UP/SP, BNSF, if it acts under the auspices of the transload condition, can access this mine only via a legitimate transload operation.

<sup>21</sup> BNSF will not be able to access the Willow Creek mine or the ECDC facility via connections constructed under the auspices of the build-in/build-out condition. That condition applies only if a shipper has a facility that, pre-merger, was solely served by UP but could have had a build-in/build-out to a point on SP (and vice versa).

disagree. We think that we have, under the conditioning power provided by 49 U.S.C. 11344(c), ample authority to impose these conditions on these lines, and to allow BNSF to handle all traffic moving through facilities established under the auspices of the new facilities and transload conditions or moving over connections constructed under the auspices of the build-in/build-out condition.

What URC is really arguing is that we are violating its "rights" by allowing BNSF to access, via facilities established or connections constructed under the auspices of these conditions, traffic moving from/to the Willow Creek mine, the MFT facility, and the ECDC facility. For various reasons, we disagree. (1) URC's rights vis-à-vis these shippers are derived from the contracts it entered into with UP/SP in anticipation of our approval of the merger. We reject URC's implicit argument that merger applicants, by contracts entered into with third parties in connection with a pending merger, can restrict the scope of the conditioning power conferred upon this Board by 49 U.S.C. 11344(c) (now 49 U.S.C. 11324(c)). (2) URC's contract-derived rights vis-à-vis the MFT and ECDC facilities allow URC to exclude other railroads (except UP/SP) from direct rail access to these facilities, and URC's contract-derived rights vis-à-vis the Willow Creek mine allow URC to exclude all other railroads (UP/SP included) from direct rail access to this mine. We have not violated URC's contract-derived rights vis-à-vis these shippers: (a) because BNSF will not have, under the auspices of the transload condition, direct rail access to these shippers; (b) because BNSF will not have, under the auspices of the new facilities condition, direct rail access to any facilities currently operated by these shippers; and (c) because BNSF will not have, under the auspices of the build-in/build-out condition, direct rail access to the MFT facility via a connection constructed by UP/SP.<sup>22</sup>

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<sup>22</sup> Even if our conditions could be deemed to contravene URC's contract rights, those rights have been preempted under 49 U.S.C. 11341(a). See Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117 (1991) (Dispatchers).

URC has not explicitly argued that we lack the authority to allow BNSF the opportunity to access traffic moving from/to the Savage Coal facility, but its arguments about the ECDC facility are equally applicable to the Savage Coal facility. Our analysis of the ECDC facility is also equally applicable to the Savage

(continued...)

**New Facilities and Transload Conditions: Applicability to The SP-Owned Provo-Thistle Track and the SP-Owned Thistle-Utah Railway Jct. Segment.** We will not interpret the applicability of the new facilities and transload conditions to the Provo-Thistle track owned by SP and the Thistle-Utah Railway Jct. segment owned by SP in the manner requested by URC.

We will assume, for present purposes only, that, under the terms of the 1913 URC/DRGW Agreement, UP/SP can admit another railroad to the SP-owned Provo-Thistle track and to the SP-owned Thistle-Utah Railway Jct. segment only with the consent of URC.<sup>23</sup> We will further assume, for present purposes only, that, under the terms of the URC agreement negotiated in anticipation of the UP/SP merger, this consent was forthcoming only as respects the overhead (not local) trackage rights that UP/SP intended to grant to BNSF.<sup>24</sup> We are therefore assuming, in essence, that, under the terms of the 1913 URC/DRGW Agreement, UP/SP, acting on its own initiative and without URC's consent, could not have allowed BNSF to serve new facilities (including new transload facilities) located either on the SP-owned Provo-Thistle track or on the SP-owned Thistle-Utah Railway Jct. segment.

We have said that the immunity provision can effect an override of a consent requirement in a joint facility agreement as "necessary" to implement a transaction (49 U.S.C. 11341(a)), but that an override cannot be considered "necessary" if a

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<sup>22</sup>(...continued)  
Coal facility.

<sup>23</sup> See the 1913 URC/DRGW Agreement at 22-23 ("neither party hereto shall have the right to sell, assign, transfer, set over or convey to any other railroad company any interest in this agreement or any right, privilege or benefit arising under or by virtue of this agreement, without the written consent thereto of the other party hereto").

<sup>24</sup> See the URC agreement, Paragraph 3 ("UTAH hereby authorizes UP/SP to grant BN/Santa Fe the right to use, in common with UTAH and UP/SP and subject to the November 1, 1913 Agreement, the trackage of UTAH covered by the November 1, 1913 Agreement, subject to the entry of a Final Order [of the Surface Transportation Board, etc.]). Although this authorization is worded broadly, it is preceded by a reference to the first two versions of the BNSF agreement (the versions dated September 25, 1995, and November 18, 1995). Because these two versions indicated that BNSF would have only overhead trackage rights on the Provo-Utah Railway Jct. line, it is at least arguable that, in URC Paragraph 3, URC authorized UP/SP to grant BNSF only overhead (and not local) trackage rights on that line.

terminal trackage rights remedy is available to achieve the same result under 49 U.S.C. 11103(a). See Decision No. 44, slip op. at 170. In the circumstances applicable to the SP-owned Provo-Thistle track and the SP-owned Thistle-Utah Railway Jct. segment, a terminal trackage rights remedy is not available because we find that a 73-mile line in the mountains of Utah cannot possibly be, in its entirety, a "terminal facilit[y]" within the meaning of 49 U.S.C. 11103(a). An override of the URC consent requirement is therefore necessary,<sup>25</sup> and is hereby effected under 49 U.S.C. 11341(a). See Decision No. 44, slip op. at 170 n.217.

**New Facilities and Transload Conditions: Applicability to The Provo-Thistle Track Owned By URC.** Insofar as the UTAH-7 pleading seeks clarification respecting the applicability of the new facilities and transload conditions to the Provo-Thistle track owned by URC, URC's request will be granted.

As with the SP-owned Provo-Thistle track and the SP-owned Thistle-Utah Railway Jct. segment, we assume that, under the terms of the 1913 URC/DRGW Agreement, UP/SP can admit another railroad to the URC-owned Provo-Thistle track only with the consent of URC. There is, however, a crucial difference. With respect to the SP-owned Provo-Thistle track and the SP-owned Thistle-Utah Railway Jct. segment, on the one hand, URC's veto power vis-à-vis UP/SP is derived from the 1913 URC/DRGW Agreement, and URC's rights vis-à-vis UP/SP are therefore rooted in contract. With respect to the URC-owned Provo-Thistle track, on the other hand, URC's veto power vis-à-vis UP/SP may be reflected in the 1913 URC/DRGW Agreement but is ultimately derived from URC's ownership of, or easement in, the underlying real estate. We do not think that an override of these interests in the URC-owned Provo-Thistle track is "necessary" under 49 U.S.C. 11341(a). The new facilities and transload conditions were imposed: (1) so that the post-merger competitive options provided by BNSF vs. UP/SP competition would replicate the pre-merger competitive options provided by UP vs. SP competition; and (2) so that BNSF could achieve sufficient traffic density on

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<sup>25</sup> The override is necessary if the new facilities and transload conditions are to fulfill, on the Provo-Utah Railway Jct. line, the purposes they were intended to serve. See Decision No. 44, slip op. at 106 (explanation of the purposes served by these conditions).

its trackage rights lines. Decision No. 44, slip op. at 106. The two purposes served by the new facilities and transload conditions are adequately served, with respect to the Provo-Thistle segment of the Provo-Utah Railway Jct. line, by BNSF's rights vis-à-vis new facilities (including new transload facilities) established on the Provo-Thistle track owned by SP. Thus, the new facilities and transload conditions will not apply to the Provo-Thistle track owned by URC.

**Build-In/Build-Out Condition.** Insofar as the UTAH-7 pleading seeks clarification respecting the applicability of the build-in/build-out condition to the Provo-Utah Railway Jct. line, URC's request will be granted in part and denied in part. As with the new facilities and transload conditions and for essentially the same reasons, the build-in/build-out condition: (i) applies both to the Provo-Thistle track owned by SP and to the Thistle-Utah Railway Jct. segment owned by SP; but (ii) does not apply to the Provo-Thistle track owned by URC.

**Build-In/Build-Out Condition: Additional Clarification.** Both URC and BNSF are under certain misimpressions concerning the reach of the build-in/build-out condition. URC has suggested that the build-in/build-out condition might be applicable to a new facility constructed on the Provo-Utah Railway Jct. line. See UTAH-7, V.S. West at 2 (URC fears that, under "the build-in and build-out conditions for transloading . . . ECDC could choose to locate a new facility somewhere along the SP mainline where both UTAH and BNSF have trackage rights but only BNSF would have the option to build-in or build-out," which, URC fears, would leave URC at a competitive disadvantage). URC's concerns in this regard implicate the new facilities condition and the transload condition, not the build-in/build-out condition. The build-in/build-out condition has no relevance to a facility to which BNSF will have direct rail access even without a build-in or a build-out.

BNSF has suggested that the build-in/build-out condition will allow BNSF to serve build-ins/build-outs linking the Provo-Utah Railway Jct. line with any shipper located nearby that, prior to the merger, had the option of building out to SP. See BN/SF-72 at 6 (lines 8-14). This suggestion is accurate only if the hypothetical nearby shipper is located on a UP line and, prior to the merger, was solely served by UP (and only if the

connection with BNSF will be at a point on the SP-owned Provo-Thistle track or the SP-owned Thistle-Utah Railway Jct. segment). CMA Paragraph 13, from which our own build-in/build-out condition is derived, applies to any situation in which a shipper has a facility that, pre-merger, was solely served by UP but could have had a build-in/build-out to a point on SP (and vice versa). Our own build-in/build-out condition expands upon CMA Paragraph 13: by making it applicable to all shippers, not just CMA members; by removing the time limit previously agreed to by UP/SP and CMA; and by clarifying that a shipper invoking this condition need not demonstrate economic feasibility. Decision No. 44, slip op. at 146; Decision No. 61, slip op. at 13-14 (¶ 5). But neither CMA Paragraph 13 nor our build-in/build-out condition applies to a shipper that, prior to the merger, was not located on any rail line.

**RAILCO.** Although the Railco pleading filed September 23rd is styled a "reply" and purports to be in support of a previously filed request, it is, for all practical purposes, a petition seeking relief that had not previously been requested in a formal pleading. We will therefore treat the Railco pleading as if it had been designated by Railco as a petition for clarification. The relief sought will be denied both on procedural grounds and on the merits.<sup>26</sup>

**Procedural Aspects.** Railco did not properly seek, in the evidentiary phase of this proceeding, the relief it seeks now, and its pleading was filed several weeks after the applicable deadline for petitions for reconsideration. The relief sought should therefore be denied on procedural grounds alone. (1) In the evidentiary phase, Railco, though it indicated that it opposed the merger, did not seek any specific protective conditions. See Railco's "Notice Of Opposition To Merger And Intent To Participate In Proceedings," dated March 21, 1996. In Decision No. 44, we noted that the merger had been opposed by numerous parties (Railco was but one of many) not specifically mentioned in that decision, see Decision No. 44, slip op. at 11 (last paragraph); and no further discussion with respect to

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<sup>26</sup> We will grant Railco's request, filed October 15, 1996, for a waiver of the otherwise applicable service requirements. Aside from UP/SP, BNSF, and URC, other parties on the service list are not likely to have any interest in the matters raised by Railco.

Railco was then required. (2) After our voting conference but before we issued Decision No. 44, Railco requested, by letter dated July 29, 1996, the relief it seeks now. We indicated, in Decision No. 44, that several parties had submitted post-voting conference requests seeking clarification of determinations made at the conference, but we noted that nothing in the procedural schedule, our regulations, or our precedents authorized parties to submit such requests. We therefore indicated that we would not address the clarification requests that had previously been submitted, and we noted that parties would have to await our written decision before seeking clarification or other forms of appellate relief. See Decision No. 44, slip op. at 13 n.18.

(3) After we issued Decision No. 44, Railco requested, by letter dated August 21, 1996 (to which was attached a copy of its letter dated July 29, 1996), "written confirmation" that the merger would not affect Railco's access to coal markets. Railco's August 21st letter would have been timely filed had it been a petition; but it was merely an item of correspondence, and we treated it as such. (4) Finally, by pleading filed September 23rd, Railco sought reconsideration or clarification of Decision No. 44. The due date for seeking such relief, however, was September 3, 1996. See 49 CFR 1115.3(e).

**The Merits.** The relief sought would be denied even if we were to reach the merits. We realize that the URC agreement, by providing an increased rail option for one shipper but not for another, may disadvantage the one for whom the increased option has not been provided. That, however, is not the kind of harm that should be rectified under the 49 U.S.C. 11344(c) conditioning power, which was not used by the ICC and will not be used by us to equalize rates and service among competing shippers. Railco is not concerned that it is losing a transportation option, but only that its competitor is gaining one. Given this context, a requirement that a settlement agreement be changed to improve the competitive situation of a particular shipper is not proper. See Decision No. 44, slip op. at 183 (Montana Wheat and Barley Committee, Montana Farmers Union, and Governor Racicot), 189-90 (Formosa Plastics Corporation), 191 (International Paper Company and United States Gypsum Company), and 193 (Weyerhaeuser Company). See also Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket

No. 32549 (ICC served Aug. 23, 1995) (Decision No. 38, slip op. at 99) (Bunge Corporation).

**Misrepresentation Allegation.** In pleadings filed in the evidentiary phase of this proceeding, URC stated that the Savage Coal facility was "the only public [i.e., not controlled by a producer] truck transfer unit train facility" in the region. UTAH-5, V.S. Blaydon at 9-10 (footnote omitted); UTAH-6 at 24. Railco insists that it is independently owned and not directly affiliated with any coal producer, and that its loadout facility is therefore as "independent" as Savage Coal's; and Railco therefore maintains that the referenced statements were false. The dispute apparently centers around the proper meaning, in this context, of the word "public," but we see no need to resolve it. The URC statements, which were not cited in Decision No. 44, were not material to the matters at issue in this proceeding. We would have imposed the terms of the URC agreement as a condition, and denied the condition request embraced in Railco's September 23rd pleading, even if URC had indicated that the Savage Coal facility was one of two public truck transfer unit train facilities in the immediate vicinity (and even if the condition request embraced in Railco's September 23rd pleading had been requested in a timely fashion during the evidentiary phase).

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

It is ordered:

1. Treating the UTAH-7 pleading as a petition for clarification or reopening, the petition is granted in part and denied in part, as indicated in this decision.
2. The new facilities condition, the transload condition, and the build-in/build-out condition are clarified as indicated in this decision.
3. Railco's request for a waiver of the otherwise applicable service requirement is granted.

4. The relief sought by Railco is denied because its pleading was untimely, and because its arguments are without merit.

5. This decision shall be effective on December 31, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams  
Secretary