STB FINANCE DOCKET NO. 32760[1]

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. 72

Decided May 9, 1997

The Board: (1) in regards to routing options, directs Union Pacific Railroad/Southern Pacific and Burlington Northern/Santa Fe to amend the terms of the BNSF agreement and the Houston, Texas to Valley Junction, Illinois Trackage Rights Agreement as indicated in this proceeding, and submit to the Board an updated version of the BNSF agreement; and (2) rejects the Texas Utilities Electric Company's proposals in regards to facilities selection, enforcement rights, and commodities limitations.

[1] 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. 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.*

BY THE BOARD:[2]

In *Union Pacific/Southern Pacific Merger,* 1 S.T.B. 233 (1996)(*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) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) subject to various conditions, including the terms of the BNSF agreement and a condition (referred to as the TUE condition) that requires that the BNSF agreement be amended to permit KCS and BNSF to interchange TUE coal trains: (a) at Shreveport, LA, for movement by BNSF over SP's line between Shreveport, LA, and Tenaha, TX; and (b) at Texarkana, TX/AR, for movement by BNSF over UP's line between Texarkana, TX/AR, and Longview, TX. With respect to the implementation of the TUE condition, we directed the interested parties (TUE, UP/SP, BNSF, and KCS) to submit, by December 10, 1996, either agreed-upon terms or separate proposals. *See Decision No. 44,* 1 S.T.B. 471 and 549 (ordering paragraph 32).[3]

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[2] 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.

[3] Union Pacific Corporation is referred to as UPC. Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) were formerly referred to collectively as UP. On January 1, 1997, MPRR merged into UPRR, *see, Decision No. 67* at 1 n.3; and, for the period beginning January 1, 1997, the acronym "UP," as used in this decision, shall be understood to refer to UPRR.

Southern Pacific Rail Corporation is referred to as SPR. Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company are referred to collectively as SP.

UPC, UP, SPR, and SP are referred to collectively as applicants. *See Decision No. 44*, 1 S.T.B. at 241 n.3. Common control of UP and SP, as approved in *Decision No. 44*, was consummated on September 11, 1996.

Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) were formerly referred to collectively as BNSF. On December 31, 1996, SF merged into BN, and the surviving corporation was renamed The Burlington Northern and Santa Fe Railway Company, *see, Decision No. 67* at 1 n.3; and, for the period beginning December 31, 1996, the acronym "BNSF," as used in this decision, shall be understood to refer to the surviving

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In *Decision No. 64*, the December 10 deadline was extended to January 24, 1997.

We address, in this decision, the issues raised in the following pleadings: the submissions respecting implementation filed January 24, 1997, by TUE (TUE-20), applicants (UP/SP-296), BNSF (BN/SF-78), and KCS (KCS-72); and the replies thereto filed by applicants (UP/SP-299, filed January 29, 1997) and TUE (TUE-23, filed February 3, 1997).[4]

BACKGROUND

We noted in *Decision No. 44* that, prior to the UP/SP merger, the generating units at TUE's Martin Lake Station near Henderson, TX, were fueled by lignite mined nearby and hauled to Martin Lake over a private rail line operated by a TUE affiliate, Texas Utilities Mining Company (TUMC). We further noted that, although the UP/SP merger would have no impact on the transportation of this lignite, TUE anticipated that, in the year 2000, it would begin to supplement local lignite receipts with Wyoming Powder River Basin (PRB) coal receipts, with Wyoming PRB coal receipts to continue over the remaining 20-year life of Martin Lake. TUE, we noted, had explained that both BNSF and UP will be able to deliver this coal to Martin Lake: BNSF already has direct access to Martin Lake (via a spur that connects its Longview-Tenaha line with the TUMC line near Tatum, TX), and UP, though it does not yet have direct access, will soon be able to achieve direct access (by constructing a 6-mile connection to link the TUMC line with the UP line into Henderson).[5]

We further noted in *Decision No. 44* that, but for the merger, TUE's PRB coal receipts could have been routed into Martin Lake via either of two efficient routings: a 1,480-mile BNSF-KCS-SP-BNSF joint-line routing (with a BNSF-KCS junction at Kansas City, a KCS-SP junction at Shreveport, and an SP-

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[3](...continued)
corporation. *See also, Decision No. 44*, 1 S.T.B. at 247 n.15 (description of the BNSF agreement).

Texas Utilities Electric Company is referred to as TUE.

The Kansas City Southern Railway Company is referred to as KCS.

[4] TUE also filed: a motion (TUE-22) for leave to file its TUE-23 reply; and a letter (TUE-21) indicating that TUE has no objection to our acceptance of the UP/SP-299 reply provided that we also accept the TUE-23 reply. Both replies will be accepted and considered.

[5] Construction of the 6-mile connection will require expenditures in the $7 to $12.5 million range. These expenditures are not merger-related (*i.e.*, they are not caused by the merger).

BNSF junction at Tenaha); or a 1,510-mile UP single-line routing (via Kansas City and Little Rock). TUE, we noted, feared that the merger would eliminate the BNSF-KCS-SP-BNSF joint-line routing as a competitive alternative because UP/SP would exercise bottleneck power over the Shreveport-Tenaha segment. We further noted: that TUE conceded that there were two other possible routings (a 1,749-mile BNSF single-line routing via Denver, Fort Worth, Silsbee, and Tenaha, and a 1,721-mile BNSF-SP-BNSF joint-line routing via Memphis and Tenaha); that TUE claimed, however, that these other routings were extremely circuitous and, therefore, substantially more expensive; and that TUE also claimed that, even aside from the circuity, the merger would effectively eliminate the BNSF-SP-BNSF joint-line routing as a competitive alternative because UP/SP would exercise bottleneck power over the Memphis-Tenaha segment. Finally, we noted that TUE had concluded that, post-merger, its only real competitive options for PRB coal transport would be the 1,510-mile UP single-line routing and the substantially more expensive 1,749-mile BNSF single-line routing. *See, Decision No. 44*, 1 S.T.B. at 307-08.

We determined that, if the merger were not conditioned, all but one of TUE's PRB routings would involve UP/SP, and the one that would not would be excessively circuitous. We therefore imposed the TUE condition, which allows for the creation of a BNSF-KCS-BNSF joint-line routing by requiring that the BNSF agreement be amended to permit KCS and BNSF to interchange TUE coal trains: (a) at Shreveport, for movement by BNSF over SP's line between Shreveport and Tenaha; and (b) at Texarkana, for movement by BNSF over UP's line between Texarkana and Longview. We noted that, although TUE had sought only a Shreveport interchange, we were allowing a Texarkana interchange as well, to allow BNSF's routings of TUE coal trains to connect with the additional BNSF trackage rights provided for in the CMA agreement. We further noted that this would also facilitate BNSF's directional running of these trains. *See, Decision No. 44*, 1 S.T.B. at 429-30 and 471.[6]

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[6] The CMA agreement, which was entered into by UP/SP, BNSF, and the Chemical Manufacturers Association (CMA), provided, among other things, that the BNSF agreement would be amended to give BNSF overhead trackage rights (for traffic moving from/to points south of Bald Knob and Brinkley, AR) over UP's line between Houston, TX, and Valley Junction, IL, via Palestine, TX. *See, Decision No. 44*, 1 S.T.B. at 254 (general description of the CMA agreement).

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DISCUSSION AND CONCLUSIONS

The parties disagree with respect to four matters: (1) routing options; (2) facilities selection; (3) enforcement rights; and (4) commodity limitations.

Routing Options. The TUE unit trains that are the main focus of TUE's interest in this proceeding will carry coal in a generally southbound direction from the PRB to Martin Lake Station, and will return empty in a generally northbound direction from Martin Lake Station to the PRB. Read literally, the TUE condition would allow BNSF to run these trains: (1) in both directions on the Shreveport-Tenaha line; (2) in both directions on the Texarkana-Longview line; and (3) in accordance with UP/SP's planned directional routing pattern, *i.e.*, southbound on the Shreveport-Tenaha line and northbound on the Texarkana-Longview line. This literal reading reflects the fact that the TUE condition allows BNSF to operate over SP's line "between" Shreveport and Tenaha and over UP's line "between" Texarkana and Longview, *Decision No. 44*, 1 S.T.B. at 471. The word "between" clearly means, in this context, "in both directions" and "in either direction." Citation to authority is hardly necessary to establish this point. *But see,* TUE-20 at 5-6 (citation to authority).[7]

TUE urges, in this respect, a literal reading of the TUE condition, so as to allow BNSF to run TUE trains either (1) exclusively on the Shreveport-Tenaha line (hereinafter referred to as the Shreveport-Tenaha routing), or (2) exclusively on the Texarkana-Longview line (hereinafter referred to as the Texarkana-Longview routing), or (3) directionally over both lines, *i.e.*, southbound on the Shreveport-Tenaha line and northbound on the Texarkana-Longview line

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[6](...continued)

The term "directional running" has reference to UP/SP's plans: (a) to run its northbound trains primarily on UP's line between Houston, TX, and Valley Junction, IL, via Palestine, TX; and (b) to run its southbound trains primarily on SP's line between Memphis, TN, and Houston, TX. *See, e.g.*, *Decision No. 44*, 1 S.T.B. at 408-09.

The Texarkana-Longview line referenced in the TUE condition is a segment of UP's (northbound) Houston-Valley Junction line. The Shreveport-Tenaha line referenced in the TUE condition is a segment of SP's (southbound) Memphis-Houston line.

[7] Read literally, the TUE condition would also allow BNSF to run TUE's coal trains: (4) in a reverse directional pattern, *i.e.*, southbound on the Texarkana-Longview line and northbound on the Shreveport-Tenaha line. Because none of the parties has expressed an interest in a reverse directional pattern, we shall not consider this matter further.

(hereinafter referred to as directional routing).[8] TUE adds that, prior to the commencement of BNSF service, TUE will select one of these routings and inform UP/SP of the selection so that the specific service details can be arranged in advance of the commencement of BNSF service. TUE notes that, whichever routing is selected, substantial facilities improvements will have to be made. By TUE's calculations, the Shreveport-Tenaha routing would require facilities improvement expenditures of approximately $6.7 million;[9] the Texarkana-Longview routing would require facilities improvement expenditures of approximately $6.6 million;[10] and directional routing would require facilities improvement expenditures of approximately $13.3 million.[11]

With respect to the non-directional aspects of the Shreveport-Tenaha and Texarkana-Longview routings, TUE and BNSF claim that operation of TUE trains "against the flow" both on the 85.5-mile Texarkana-Longview line and on the 54.5-mile Shreveport-Tenaha line would be feasible from an operating perspective because there are, on both lines, a sufficient number of passing sidings to facilitate the non-directional running of TUE trains. Applicants agree that non-directional running would be feasible on both the Texarkana-Longview line and the Shreveport-Tenaha line. UP/SP-299 at 4-5.

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[8] BNSF and KCS agree with TUE that the TUE condition allows a Shreveport-Tenaha routing, a Texarkana-Longview routing, and a directional routing.

[9] The $6.7 million estimate covers: construction of a connection between the KCS and SP lines in Shreveport; rehabilitation of the connection between the SP and BNSF lines at Tenaha; modifications to adjust existing curves on BNSF's line between Tenaha and Tatum; and construction of a loop track connecting the BNSF line with the TUMC line accessing the Martin Lake Station near Tatum. These expenditures, it should be noted, are not merger-related; even without the merger, these expenditures would have been necessitated by the pre-merger 1,480-mile BNSF/KCS/SP/BNSF routing.

[10] The $6.6 million estimate covers: construction of a connection between the KCS and UP lines in Texarkana; construction of a connection between the UP and BNSF lines at Longview; track rehabilitation and bridgework on BNSF's line between Longview and Tatum; and construction of a track connecting the BNSF line with the TUMC line accessing the Martin Lake Station near Tatum. The $6.6 million estimate does not include any expenditures to "straighten out" the Texarkana-Longview line; TUE insists that the Texarkana-Longview line, as it presently exists, is not too "undulating" to handle loaded unit trains of coal.

[11] The facilities improvement expenditures required for directional routing represent the sum of: (a) the facilities improvement expenditures required for the Shreveport-Tenaha routing; and (b) the facilities improvement expenditures required for the Texarkana-Longview routing. Directional routing, TUE notes, would necessitate facilities improvements on both the Shreveport-Tenaha-Tatum line and the Texarkana-Longview-Tatum line.

TUE indicates that, because ongoing routing and operating studies have not been completed, no final decision has yet been made with respect to the three routing options. TUE frankly acknowledges, however, that, based on the data presently available, it anticipates that it will select the Texarkana-Longview routing. Directional routing, in TUE's view, would be prohibitively expensive, in that it would impose an unnecessary $6.6 million handicap on the BNSF/KCS/BNSF competitive alternative created by the TUE condition; and that leaves the Shreveport-Tenaha and Texarkana-Longview routings. TUE contends that, as between the two, the Texarkana-Longview routing appears to be preferable because, in TUE's view, the Texarkana-Longview line has a superior siding configuration and is equipped with Centralized Traffic Control. TUE-20 at 13; TUE-20, V.S. Dunn at 12. The TUE condition, TUE notes, was intended "to permit BNSF and KCS to provide an efficient PRB joint-line movement into Martin Lake as an independent competitive alternative" to the UP single-line routing, *see*, *Decision No. 44,* 1 S.T.B. at 429-30; and TUE appears to believe that, based on the data presently available, the Texarkana-Longview routing is "the most efficient routing that will keep BNSF/KCS as a viable and efficient competitor for TUE's Martin Lake coal business." TUE-20 at 15-16.[12]

The Texarkana-Longview routing, however, is the one routing that applicants insist TUE cannot be allowed to use. Applicants concede that the Shreveport-Tenaha routing, which would have been available but for the merger, would be appropriate, and that directional routing, which would allow BNSF to go "with the current of flow" on both lines, would also be appropriate. Applicants argue, however, that the Texarkana-Longview routing would not be appropriate, and applicants therefore claim that a literal reading of the TUE condition gives that condition a broader reach than warranted by the evidentiary record. Citing *Decision No. 44*, 1 S.T.B. 419 & n.176, applicants correctly note that when we impose conditions to remedy harms caused by the loss of rail options, our conditions are intended to restore the lost options, not to create altogether new ones; we do not, applicants correctly note, impose conditions that put the recipient in a better position than it occupied before the merger. The

[12] Applicants apparently agree that the Texarkana-Longview routing would be the most efficient of the three open to TUE, although they suggest that this routing's superiority reflects the fact that the Texarkana-Longview-Tatum routing is approximately 45 or 46 miles shorter than the Texarkana-Shreveport-Tenaha-Tatum routing.

Texarkana-Longview routing, applicants argue, fails this test: it improves TUE's pre-merger competitive options by creating a shorter (and therefore more effective) BNSF/KCS/BNSF route than the route TUE would have had absent the merger, which, applicants correctly note, had no effect on the Texarkana-Longview routing's availability as a competitive option for TUE's future PRB coal trains.[13]

The TUE condition need not, and should not, be construed as literally as TUE urges here. When we imposed this condition, we had two purposes in mind. Our primary purpose was to replace the independent BNSF-KCS-SP-BNSF routing that TUE would be losing due to the merger. Our condition permits KCS to replace SP in that routing. A secondary purpose of our condition was to facilitate efficient BNSF operations over trackage rights in this region by permitting a second routing that allows TUE's trains to be handled as a part of a directional running scheme. It now appears that neither BNSF nor TUE anticipates that this traffic will be handled by directional running of trains due to the expense of rehabilitating or upgrading the track that would be needed to handle unit-train traffic. We did not make the Texarkana-Longview routing available in order to give TUE an option of running trains in both directions over that route.

The TUE condition should not be read to be any broader than it needs to be to rectify the harm to TUE caused by the merger. We therefore read the TUE condition, not literally as urged by TUE, but rather in accordance with our intention in imposing that condition. Thus read, the TUE condition allows BNSF to run TUE trains both (a) exclusively on the Shreveport-Tenaha line (what is herein referred to as the Shrevenport-Tenaha routing), and also (b) directionally, *i.e.*, southbound over the Shrevenport-Tenaha line and northbound over the Texarkana-Longview line (what is herein referred to as directional routing). The TUE condition, however, does not allow BNSF to run TUE trains exclusively on the Texarkana-Longview line (what is herein referred to as the Texarkana-Longview routing). TUE did not have, prior to the merger, a non-UP Texarkana-Longview routing option; the merger, therefore, did not deprive TUE of a non-UP Texarkana-Longview routing option; and it necessarily follows that the TUE condition could not have been intended to provide TUE with a non-UP Texarkana-Longview routing option.

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[13] Applicants are concerned that the Texarkana-Longview routing will work to UP/SP's competitive disadvantage in competing for future TUE coal shipments.

We therefore direct UP/SP and BNSF to amend Section 6(c) of the BNSF agreement[14] by adding at the end thereof words to the effect that BNSF shall have the right to interchange with KCS (a) at Shreveport, for movements of TUE coal trains to and from TUE's Martin Lake Generating Station, and (b) at Texarkana, for movements of empty TUE coal trains returning from TUE's Martin Lake Generating Station. We also direct UP/SP and BNSF to make a corresponding amendment to Section 2(a)(v) of the related "Houston, Texas to Valley Junction, Illinois Trackage Rights Agreement" (hereinafter referred to as the Houston TRA).[15] We further direct UP/SP and BNSF to add at the end of Section 2(c) of the Houston TRA words to the effect that transportation over the "Joint Trackage" to and from TUE's Martin Lake Generating Station "shall be considered a local move for purposes of this Section."[16]

Facilities Selection. Section 9(b) of the BNSF agreement reads as follows:

> BNSF and UP/SP will conduct a joint inspection to determine necessary connections and sidings or siding extensions associated with connections, necessary to implement the trackage rights granted under this Agreement. The cost of such facilities shall be borne by the party receiving the trackage rights which such facilities are required to implement. Either party shall have the right to cause the other party to construct such facilities. If the owning carrier decides to utilize such facilities constructed by it for the other party, it shall have the right to do so upon payment to the other party of one-half (1/2) the original cost of constructing such facilities.

UP/SP-22 at 331-32.

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[14] *See*, Section 5(d) of the second supplemental agreement dated June 27, 1996, which amends Section 6(c) in its entirety.

[15] The Houston TRA was filed in this proceeding on June 28, 1996, as one of numerous attachments to UP/SP-266.

[16] Section 2(c) of the Houston TRA provides that it is, in general, the parties' intent that BNSF traffic shall operate with the current of flow along with UP/SP traffic. Section 2(c) further provides, however, that this provision does not apply to "local or switch" moves by BNSF. We have no need to determine whether Section 2(c), in its present form, should be read to require directional routing of TUE's coal trains. It suffices, for present purposes, merely to observe that Section 2(c), if it must be so read, must yield, in this respect, to the TUE condition we imposed in *Decision No. 44*; UP/SP and BNSF simply cannot, by agreement among themselves, effectively limit a condition we have imposed in favor of a shipper. This result is made all the more certain by the fact that the Houston TRA was agreed to by BNSF and UP/SP prior to our imposition of the TUE condition.

TUE asks that this provision be amended by adding thereto the following sentence:

> In addition, BNSF, UP/SP, KCS and TU Electric will agree upon the necessary connections and sidings or siding extensions associated with connections, necessary to implement the trackage rights granted BNSF under this Agreement to provide service to TU Electric's Martin Lake Generating Station.

TUE-20 at 18. TUE contends that it should be able to participate in the facilities selection process because it is the party that sought the TUE condition, and because it is the party that has led the efforts to identify the needed trackage rights facilities and that will ultimately (though indirectly) pay for the cost of such facilities.[17]

Applicants oppose, and BNSF has taken no position with respect to, TUE's facilities selection proposal. KCS, though expressing general support for the principles advocated by TUE, has not specifically addressed facilities selection.

We do not think that TUE and KCS should be given a formal contractual right to participate in decisions relating to facilities on the Texarkana-Longview and Shreveport-Tenaha lines, and we are therefore rejecting TUE's facilities selection proposal.

As regards TUE, we believe that facilities selection decisions should be made by UP/SP and BNSF, which are likely to possess superior knowledge and experience respecting matters of railroad engineering and operations, and which must also bear the risks associated with operating over any new facilities. Besides, TUE would not have had a formal contractual right to participate in facilities selection with respect to the pre-merger BNSF/KCS/SP/BNSF routing, and we are not persuaded that there is sufficient reason to provide it with a formal contractual right to participate in facilities selection with respect to the post-merger BNSF/KCS/BNSF routing. In any event, we can think of no good reason to confer upon TUE alone a formal contractual right that has been conferred upon no other shipper in connection with the UP/SP merger.

As regards KCS, it suffices to observe that KCS will have the inherent right to participate in facilities selection decisions to the extent its own trackage is involved, and that, to the extent its own trackage is not involved, new construction on UP/SP's property is not KCS' concern.

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[17] TUE has also proposed a similar amendment to the corresponding provision of the Houston TRA.

Enforcement Rights. Section 17 of the BNSF agreement reads as follows:

> This Agreement is intended for the sole benefit of the signatories to this Agreement [*i.e.*, UP/SP and BNSF]. Nothing in this Agreement is intended or may be construed to give any person, firm, corporation or other entity, other than the signatories hereto, their permitted successors and permitted assigns, and their affiliates any legal or equitable right, remedy or claim under this Agreement.

UP/SP-22 at 339.

We observed, in *Decision No. 44*, that although we were imposing as a condition the terms of the BNSF agreement, this particular term could not be given a literal reading:

> Section 17 of the BNSF agreement appears to be a standard "no third party beneficiaries" provision; it provides that nothing in the BNSF agreement is intended to give any person other than the signatories any legal or equitable right, remedy or claim. This provision may be standard but it is clearly at odds with the logic of the BNSF agreement, and we therefore wish to clarify that we understand that the BNSF agreement does provide rights and claims (and, by implication, remedies) to persons other than the signatories. We note, by way of illustration, that a shipper at a point opened up to BNSF under the BNSF agreement is such a person; a subsequent UP/SP-BNSF arrangement restricting BNSF's ability to serve that shipper would, among other things, violate that shipper's rights under the BNSF agreement.

Decision No. 44, 1 S.T.B. at 247 n.15.

TUE now asks that Section 17 be amended by adding thereto the following proviso:

> provided, however, TU Electric and KCS shall be permitted to enforce the rights granted hereunder to BNSF to serve TU Electric's Martin Lake Generating Station in the manner set forth in the Surface Transportation Board's *Decision No. 44* in Finance Docket No. 32760.

TUE-20 at 19-20. TUE contends that its suggested proviso would conform Section 17 to *Decision No. 44*.

Applicants oppose, and BNSF has taken no position with respect to, TUE's enforcement rights proposal. KCS, though expressing general support for the principles advocated by TUE, has not specifically addressed enforcement rights.

We think that it is neither necessary nor appropriate to modify the BNSF agreement to provide that TUE and KCS may enforce the rights granted in that agreement to BNSF, and we are therefore rejecting TUE's enforcement rights

proposal. TUE and KCS already have, by virtue of the conditions imposed in *Decision No. 44*, the right to enforce those conditions insofar as their own interests are implicated. As applicants themselves concede, any beneficiary of the *Decision No. 44* conditions has the right to seek relief from the Board[18] if it believes that these conditions have not been implemented in a manner that achieves their competition-preserving objectives. UP/SP-296 at 13.[19]

Commodity Limitations. In its comments filed March 29, 1996, TUE, noting that it was committed to using PRB coal commencing in the year 2000, requested that we order "that KCS be permitted to interchange TU Electric trains with BN/SF at Shreveport" for movement over SP's line between Shreveport and Tenaha. TUE-8 at 2. In its brief filed June 3, 1996, TUE repeated this request. TUE-17 at 2 (requesting that the BNSF agreement be amended to permit BNSF and KCS "to interchange TU Electric trains" at Shreveport). And TUE explicitly stated in its brief that its request was intended to allow BNSF to operate over the Shreveport-Tenaha line "for the sole and limited purpose of transporting TU Electric coal trains between Shreveport and Tenaha." TUE-17 at 11-12.

In *Decision No. 44*, we required that the BNSF agreement be amended to permit KCS and BNSF to interchange "TUE coal trains" at Shreveport and at Texarkana. Our reference to "TUE coal trains" reflected the evidentiary record. TUE's interest in this proceeding, as far as the record indicated, concerned PRB coal that will be used at Martin Lake Station in the years to come; there was no indication in the record that TUE's interests were any broader.

TUE now insists that the TUE condition should be understood to apply not only to TUE coal trains but also to TUE shipments of commodities other than coal. TUE notes: that, prior to the merger, it could have used all or portions of its proposed coal train routings involving UP and SP to transport commodities other than coal; that the merger eliminated this UP vs. SP competition for all commodities; and that, for this reason, the TUE condition should apply to all commodities. TUE adds that even though the City Public Service Board of San

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[18] We wish to clarify that shippers have rights under the BNSF agreement because we have imposed the terms thereof as a condition to the merger. These shipper rights, however, are not contract rights enforceable in courts. Rather, shippers have recourse to the Board for enforcement of the merger conditions.

[19] TUE has acknowledged that its proposed enforcement rights merely "incorporate, by reference, the rights the [Board] accorded to all similarly situated shippers." TUE-23 at 8.

Antonio (CPSB), a coal-burning utility like TUE, focused its evidentiary presentation on coal train service, we ultimately approved BNSF trackage rights to CPSB's Elmendorf Station that included BNSF's right to transport all commodities, and not just coal, over its UP/SP trackage rights. *See, Decision No. 44,* 1 S.T.B. at 469-70; *Decision No. 52*, 1 S.T.B. at 626 (trackage rights apply to "CPSB traffic").

Applicants oppose, and BNSF has taken no position with respect to, TUE's commodity limitations proposal. KCS, though expressing general support for the principles advocated by TUE, has not specifically addressed commodity limitations.[20]

We think that TUE's request to open up the TUE condition to commodities other than coal has come too late, and we are therefore rejecting TUE's commodity limitations proposal. This request could have been made in the evidentiary phase of this proceeding, and, at the very latest, it should have been made in a petition for reconsideration. The due date for filing such a petition, however, was September 3, 1996. *See,* 49 CFR 1115.3(e). *See also*, *Decision No. 67* at 3 (once the time for seeking reconsideration of a condition adopted in *Decision No. 44* has expired, that matter is no longer subject to administrative review).[21]

Additional Matter. In *Decision No. 44*, we noted that by "BNSF agreement" we mean the agreement dated September 25, 1995 (UP/SP-22 at 318-347), as modified by the supplemental agreement dated November 18, 1995 (UP/SP-22 at 348-359), and as further modified by the second supplemental agreement dated June 27, 1996 (UP/SP-266, Exhibit A). *Decision No. 44*, 1 S.T.B. at 247 n.15. Since the August 12, 1996, service date of *Decision No. 44*, the BNSF agreement has been further modified in various minor respects. *See*,

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[20] Although TUE has argued strongly that BNSF should, and applicants have argued strongly that BNSF should not, be allowed to carry commodities other than coal over the Texarkana and/or Shreveport interchanges, no party has indicated what these additional commodities might be.

[21] As respects the "CPSB traffic" argument, we think it appropriate to observe that, in view of TUE's explicit statement, in its brief, that the rights it sought were for TUE "coal trains" only, we do not think that we erred in incorporating the "coal trains" limitation into the TUE condition we imposed in *Decision No. 44*. But if we did err in that respect, TUE was required to object to that error by filing a petition for reconsideration no later than the September 3, 1996, deadline. No such petition having been filed then, TUE cannot raise the matter now. In any event, there is no support in the record for the notion that, as respects TUE, the merger has had an anticompetitive impact concerning commodities other than coal.

e.g., *Decision No. 52*, 1 S.T.B. at 626 (amendments to the BNSF agreement to satisfy the CPSB conditions).

Because it would be useful to have an updated version of the BNSF agreement that incorporates, in the text thereof, the agreement dated September 25, 1995, and the various modifications thereto made in the supplemental agreement and in the second supplemental agreement, as well as any modifications made subsequent to the second supplemental agreement,[22] we will direct applicants to submit an updated version of the BNSF agreement no later than July 1, 1997 (the date on which applicants' next progress report is due). If, at the time the updated version is submitted, applicants have reason to believe that any further modifications will or may be made in the relatively near future, applicants should so indicate in as much detail as is practicable.

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

It is ordered:

1. The UP/SP-299 and TUE-23 replies are accepted for filing and made part of the record in this proceeding.
2. As respects routing options, UP/SP and BNSF shall amend the BNSF agreement and the Houston TRA in the manner indicated in this decision.
3. TUE's proposals respecting facilities selection, enforcement rights, and commodity limitations are rejected.
4. Applicants shall submit, no later than July 1, 1997, an updated version of the BNSF agreement.
5. This decision is effective on May 23, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

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[22] We are under the impression that the modifications made in the supplemental agreement and in the second supplemental agreement are the only modifications made through the date of the second supplemental agreement. We expect that applicants will advise us if otherwise.