

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. 63]<sup>2</sup>

Decided: December 3, 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 Company, St. Louis Southwestern Railway Company, SPCSL Corp., and

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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. 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.

The Denver and Rio Grande Western Railroad Company),<sup>4</sup> subject to various conditions, the most prominent of which was the BNSF agreement.<sup>5</sup> Common control was consummated on September 11, 1996.<sup>6</sup>

The trackage rights provided for in the BNSF agreement, as modified by the amendments required by Decision No. 44, allow BNSF: (1) to handle traffic of shippers open to all of UP, SP and KCS<sup>7</sup> at Lake Charles and Westlake, LA;<sup>8</sup> (2) to handle traffic of shippers open to SP and KCS at West Lake Charles, LA; and (3) to interchange with KCS, at Shreveport and Texarkana, traffic that was originated by KCS at or that will be delivered by KCS to shippers at Lake Charles, Westlake, or West Lake Charles (collectively, the Lake Charles area).<sup>9</sup> The BNSF trackage rights respecting the Lake Charles area were not provided for in the initial version of the BNSF agreement dated September 25, 1995, nor in the supplemental agreement dated November 18, 1995. They were first provided for in Paragraph 8 of the CMA agreement dated

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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 (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) 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> UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

<sup>7</sup> The Kansas City Southern Railway Company is referred to as KCS.

<sup>8</sup> The point we have previously referred to as "West Lake" (two words), see, e.g., Decision No. 44, slip op. at 188-89, is actually known as "Westlake" (one word). See KCS-65 at 1; BN/SF-70 at 2 & n.2; CMA-14 at 5; and MONT-11 at 2.

<sup>9</sup> Prior to the merger, Lake Charles was served exclusively by UP, but was open through reciprocal switching to SP and KCS; Westlake was served by KCS and SP jointly, but was open to UP through reciprocal switching; and West Lake Charles was served by KCS and SP, and was not open to reciprocal switching by UP. Prior to the merger, Rose Bluff Yard, located on the western edge of Westlake, was owned jointly by KCS and SP, and allowed KCS and SP to interchange with each other cars moving to/from industries at Westlake and West Lake Charles. UP did not have, prior to the merger, access to Rose Bluff Yard.

April 18, 1996;<sup>10</sup> they were expanded by UP/SP in its brief dated June 3, 1996, see UP/SP-260 at 23 n.9; and they were further expanded by the modifications required by Decision No. 44, see slip op. at 152-54 (the Lake Charles discussion) and 188-89 (the Montell/Olin discussion).<sup>11</sup>

In this decision, we address the matters raised in the KCS-65 petition to reopen/reconsider filed by KCS, and in the replies filed by: BNSF;<sup>12</sup> CMA;<sup>13</sup> and Montell USA Inc. (Montell), Olin Corporation (Olin), and PPG Industries, Inc. (PPG).<sup>14</sup>

### BACKGROUND

*KCS' Argument.* KCS concedes that an unconditioned UP/SP merger would have had certain anticompetitive consequences of the 2-to-1 variety in the Lake Charles area. This concession focuses upon traffic that prior to the merger could have moved in either an SP single-line routing or a KCS-UP joint-line routing. KCS notes that, after the merger, UP/SP will be in both such routings, and will therefore have a bottleneck on this traffic. KCS also notes that our Shreveport/Texarkana interchange condition, which KCS supports, represents an attempt to address one aspect of the bottleneck problem. This condition, KCS claims, preserves two independent routings with respect to traffic moving to/from Memphis, St. Louis, or beyond that

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<sup>10</sup> The Chemical Manufacturers Association is referred to as CMA. See also Decision No. 44, slip op. at 18 (description of the CMA agreement); UP/SP-219 (CMA agreement is an attachment); and UP/SP-230 (same).

<sup>11</sup> In Decision No. 44, we required that the BNSF agreement be modified: (a) to eliminate certain geographical restrictions respecting traffic either originated or terminated by BNSF at Lake Charles, Westlake, and West Lake Charles; (b) to allow KCS to interchange with BNSF, at Shreveport and Texarkana, traffic that was originated by KCS at or that will be delivered by KCS to shippers at Lake Charles, Westlake, or West Lake Charles; and (c) to eliminate the so-called "phantom haulage fee" applicable to certain traffic.

<sup>12</sup> BN/SF-70.

<sup>13</sup> CMA-14.

<sup>14</sup> The reply filed jointly by Montell, Olin, and PPG is designated "MONT-11, OLIN-5, PPG-4."

previously could have used either an SP single-line routing or a KCS-UP joint-line routing.

KCS acknowledges that our Shreveport/Texarkana interchange condition does not address the bottleneck problem for traffic moving to/from Houston or New Orleans that prior to the merger could have been routed either SP single-line or KCS-UP joint-line. KCS notes that these bottleneck problems were addressed by CMA Paragraph 8 (which eliminated the New Orleans bottleneck by allowing BNSF to handle traffic moving to, from, and via New Orleans) and by the other conditions we imposed in Decision No. 44 (which eliminated the Houston bottleneck by allowing BNSF to handle traffic moving to, from, and via Houston, and which also eliminated the phantom haulage fee). KCS contends, however, that the solutions we provided were excessive because they gave BNSF direct access to all Lake Charles area shippers, even those that would have suffered no competitive harm from the merger.

*Relief Sought By KCS.* KCS asks, in essence: that we reject CMA Paragraph 8 as respects Lake Charles area traffic; that we likewise reject the corresponding provision of the BNSF agreement;<sup>15</sup> that we vacate our Decision No. 44 condition that required the elimination of certain geographical restrictions respecting traffic either originated or terminated by BNSF in the Lake Charles area; that we similarly vacate our Decision No. 44 condition that required the elimination of the phantom haulage fee; and that we require UP/SP to ensure that KCS can interchange traffic with BNSF (i) at Beaumont for movements to Houston and (ii) at Lake Charles for movements to New Orleans. This relief, KCS claims, will allow for the creation of a KCS-BNSF joint-line routing (replacing the pre-merger KCS-UP joint-line routing) to compete against a UP/SP single-line routing, and will resolve, in the least intrusive way possible, both the bottleneck problem and any concern over plastics storage capacity.

KCS suggests that, at the very least, we should vacate our Decision No. 44 conditions which eliminated the Houston bottleneck and the phantom haulage fee. This partial relief, KCS notes, will undo our expansion of CMA Paragraph 8. KCS adds that

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<sup>15</sup> The corresponding provision of the BNSF agreement is the fourth sentence of Section 5b, as contained in Section 4b of the second supplemental agreement dated June 27, 1996.

BNSF would still be required, for reasons provided below, to file a terminal trackage rights application.

KCS adds that another alternative, at least with respect to traffic moving to/from Houston, would be a complete grant of the Tex Mex<sup>16</sup> responsive application as sought by Tex Mex in its own petition for reconsideration. See Decision No. 62. KCS notes that this would allow for the creation of a KCS-Tex Mex routing via Beaumont, and would thus preserve two independent routings from Lake Charles to Houston.

*KCS Asserts Veto Power Over BNSF Access.* KCS contends that UP/SP can provide BNSF access to facilities at Westlake and West Lake Charles (and possibly at Lake Charles as well) only with KCS' consent, and that we can require KCS to provide such access only under 49 U.S.C. 11103 (which, KCS notes, has not been invoked with respect to the Lake Charles area). It argues that the access provided *both* by CMA Paragraph 8 and the corresponding provision of the BNSF agreement *and* by our imposition (and expansion) of those provisions is unenforceable.<sup>17</sup>

KCS' argument rests upon four joint facility agreements entered into by KCS and The Texas and New Orleans Railroad Company (T&NO, an SPT predecessor): a 1934 contract; a 1940 contract; a 1948 contract; and a 1954 contract.<sup>18</sup> KCS claims that the four joint facility agreements prohibit T&NO (and, by succession, SP and UP/SP) from granting to BNSF, without the

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<sup>16</sup> The Texas Mexican Railway Company is referred to as Tex Mex.

<sup>17</sup> There are certain ambiguities in the position taken by KCS. KCS contends either: (i) that KCS' consent is required for BNSF access to facilities at Westlake and West Lake Charles, see KCS-65 at 2, line 7 (as revised by the KCS-66 errata sheet); or (ii) that KCS' consent is required for BNSF access to facilities in the Lake Charles area (i.e., facilities at Lake Charles, Westlake, and West Lake Charles), see KCS-65 at 13, Heading C, line 2 (also as revised by the KCS-66 errata sheet). And it is not entirely clear whether KCS is referring to *all* facilities at Westlake and West Lake Charles (and possibly at Lake Charles as well) or only to *some* such facilities.

<sup>18</sup> KCS also references a 1951 contract entered into by KCS and T&NO (that added a segment of track to the 1940 contract) and a 1981 contract entered into by KCS and SPT (respecting operating procedures in the Lake Charles area). The veto power asserted by KCS, however, derives from the 1934, 1940, 1948, and 1954 contracts.

consent of KCS, access to the track and facilities covered by these contracts. KCS contends: with respect to the 1934 and 1940 contracts, that KCS is the sole owner of the trackage governed by these contracts, and that KCS and KCS alone has the right to grant another carrier access over that track; and, with respect to the 1948 and 1954 contracts, that neither KCS nor T&NO may grant another carrier access to the track governed by these contracts without the consent of the other.<sup>19</sup>

KCS maintains that UP/SP thus cannot unilaterally provide BNSF access to the Lake Charles area. It argues that, because KCS is not an applicant in the UP/SP merger proceeding, we cannot provide such access under the conditioning power authorized by 49 U.S.C. 11344(c).<sup>20</sup> It also contends that such access cannot be effected under the immunizing power of 49 U.S.C. 11341(a) because, in view of the availability of a 49 U.S.C. 11103(a) remedy, an override of the contractual prohibitions contained in the four joint facility agreements cannot be deemed necessary.<sup>21</sup> KCS therefore argues that, if we continue to believe that BNSF should be granted direct access to the Lake Charles area, we must require BNSF to file a terminal trackage rights application.<sup>22</sup>

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<sup>19</sup> KCS adds that certain trackage governed by the 1954 contract is owned solely by KCS, so that KCS and KCS alone can grant additional access to this trackage.

<sup>20</sup> See, e.g., Decision No. 44, slip op. at 74 n.79 and 191 (respecting the San Diego & Imperial Valley Railroad).

<sup>21</sup> See Decision No. 44, slip op. at 170 & n.217, where we noted: (i) that the 49 U.S.C. 11341(a) immunity provision can override a consent requirement in a joint facility agreement; but (ii) that such an override cannot be deemed necessary if terminal trackage rights can be awarded under 49 U.S.C. 11103(a).

<sup>22</sup> KCS apparently concedes that the Lake Charles area tracks covered by the four cited joint facility agreements constitute "terminal facilities" as that term is used in 49 U.S.C. 11103(a). KCS indicates that the filing of a 49 U.S.C. 11103(a) application would provide KCS an opportunity to demonstrate that the use of these tracks by BNSF would not be in the public interest, and would substantially impair the ability of KCS to handle its own traffic. See, e.g., Decision No. 44, slip op. at 167-69. And KCS apparently has in mind that approval of a BNSF terminal trackage rights application under 49 U.S.C. 11103(a) would allow KCS to charge compensation for such rights in excess of the compensation provided for by the four cited joint facility agreements. See KCS-65 at 19.

## DISCUSSION AND CONCLUSIONS

**Applicable Standards.** A proceeding may be reopened, and reconsideration granted, 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). KCS has asserted material error and, to a limited degree, new evidence; it has not asserted substantially changed circumstances. As a practical matter, however, the KCS-65 petition, except insofar as it deals with the KCS-T&NO joint facility agreements, rests entirely upon the assertion of material error because, aside from the joint facility agreements, the new evidence that has been presented is only tenuously "new" and is certainly not material.

**Preliminary Matters.** KCS has suggested that, if we decline to accept its KCS-68 reply,<sup>23</sup> we should treat KCS-68 *either* as a motion for leave to file a reply to a reply or as a motion to strike BNSF-PR#1 at 22-24. KCS-68 at 2 n.3. Our acceptance of the KCS-68 reply moots this suggestion. Montell and PPG have filed a motion (MONT-12) to strike the KCS-68 reply, and KCS has filed a reply (KCS-69) to the MONT-12 motion to strike. That we may decide in a fully informed manner the matters raised by the KCS-65 petition, we will deny the MONT-12 motion to strike.

**The Merits.** KCS seeks elimination of certain important aspects of the conditions that we imposed giving BNSF access to shippers in the Lake Charles area.<sup>24</sup> KCS maintains that we

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<sup>23</sup> Because BNSF's "Progress Report and Operating Plan" filed October 1, 1996 (BNSF-PR#1) includes, at pp. 22-24, material that had previously appeared in the BN/SF-70 reply, KCS has filed an additional pleading of its own (KCS-68) to address the arguments made both in BN/SF-70 and in BNSF-PR#1 at 22-24. The KCS-68 reply, for the most part, merely repeats arguments previously made in the KCS-65 petition.

<sup>24</sup> We found three shortcomings with CMA Paragraph 8, even as expanded by UP/SP in its June 3rd brief, that required us to craft additional competition-preserving remedies. The first problem was that Lake Charles movements from and to St. Louis and Chicago would have had to use one of applicants' lines, even if originated or terminated at Lake Charles by KCS. (KCS takes no

(continued...)

selected the wrong remedy for the competitive problems presented by the merger in this region. Although KCS did not originally suggest any remedy other than divestiture or denial, it now says that it would have preferred for us to have allowed a KCS-BNSF routing via Beaumont for Houston traffic, and a KCS-BNSF interchange at Lake Charles for New Orleans traffic, rather than for us to have given BNSF additional rights and responsibilities. We will deny the KCS-65 petition.

We carefully considered the issues raised by KCS in Decision No. 44. We explained there that it was necessary to expand the voluntary settlement agreements involving UP/SP, BNSF, and CMA, and that giving BNSF additional rights was the most effective way to assure continued competition for Lake Charles area shippers. Id. at 105-07, 133. In spite of its service to the Lake Charles area, KCS lacks a sufficient route structure to be competitive with UP/SP in many corridors on a single-line basis. As KCS now acknowledges, it needs to interline traffic destined to New Orleans, Houston, and Laredo. Moreover, as various Lake Charles area shippers (Montell, Olin, and PPG) point out, and as we discussed in Decision No. 44, KCS must interline to offer competitive service to the St. Louis gateway.

The competitive loss to Lake Charles area shippers was stressed by several parties in their original comments, including Montell, Olin, PPG, SPI<sup>25</sup>, and KCS. KCS specifically noted that this area should be deemed, not a "3-to-2" point, but a "2-to-1" point due to the routing limitations faced by KCS in getting to Houston and New Orleans. Now that we have chosen BNSF to correct this, KCS argues that the problem of which it complained earlier is not really so severe, and that our solution is overly

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<sup>24</sup>(...continued)  
issue with our solution here: preserving its opportunity to participate in St. Louis- and Chicago-bound traffic through interchanges with BNSF at Texarkana and Shreveport.) The second problem was that BNSF's access was restricted to shipments moving between the Lake Charles area and either Mexico or New Orleans. The third problem was that BNSF was to pay a fee to UP/SP above and beyond the trackage rights fee for a service that UP/SP would not actually be providing.

<sup>25</sup> The Society of the Plastics Industry, Inc. is referred to as SPI.

intrusive.<sup>26</sup> We must reject KCS' efforts to retract its prior testimony that the merger would cause a significant competitive problem for these shippers.<sup>27</sup> Moreover, we continue to believe that the conditions we imposed, by building upon a privately negotiated settlement agreement, as endorsed by all relevant shippers, offer a better competitive solution than KCS has offered.

**The KCS-T&NO Joint Facility Agreements.** KCS contends, in essence, that, unless and until the Board approves a terminal trackage rights application, neither UP/SP nor the Board can authorize BNSF to conduct trackage rights operations on the lines subject to the four KCS-T&NO joint facility agreements. KCS has further suggested, in its KCS-68 pleading, that these agreements bar UP/SP even from entering into a reciprocal switching arrangement with BNSF without KCS' consent. BNSF insists, however, that, despite the four agreements, it can access the Lake Charles area by reciprocal switch. BNSF further insists that, in any event, an override of the terms of the four agreements can be had under 49 U.S.C. 11341(a).

We need not resolve these matters at this time. As to the terms of the four KCS-T&NO joint facility agreements,<sup>28</sup> if the parties (KCS, BNSF, and UP/SP) are not able to come to an

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<sup>26</sup> For example, KCS witness Grimm attempts to retract much of his own previous testimony regarding the economic significance of this downstream monopoly bottleneck. See KCS-65, V.S. Grimm at 6-8.

<sup>27</sup> KCS also argues that we removed the restrictions on BNSF access to the Lake Charles area based merely upon concerns about inadequate storage-in-transit capacity. This mischaracterizes our decision; we removed the limitations "[b]ecause BNSF would only be able to handle shipments routed to certain destinations, and because the destinations are not known when the product moves to the storage point . . ." Decision No. 44, slip op. at 153. If the Mexico/New Orleans BNSF restriction were allowed, then shipments going elsewhere would have to be returned from storage to complete the haul, thus severely limiting BNSF's ability to offer effective competition for those movements it would have been permitted to handle.

<sup>28</sup> KCS could have brought the four agreements to BNSF's attention prior to September 3rd, but it was not required to do so. The procedural posture of this case was such that, with respect to these four agreements, KCS simply was not in the position of a defendant that must raise any arguments by a certain date or be forever foreclosed from raising them thereafter.

agreement, any differences in interpretation of the four joint facility agreements may be submitted to arbitration under the terms of those agreements.<sup>29</sup> If the parties (KCS, BNSF, and UP/SP) are unable to agree and the arbitral interpretation produces a situation where BNSF access to the Lake Charles area is blocked, BNSF may return to the Board to seek approval of a terminal trackage rights application under new 49 U.S.C. 11102(a);<sup>30</sup> and, if and to the extent that application is ultimately denied, an override of the terms of the four joint facility agreements might be necessary under old 49 U.S.C. 11341(a).<sup>31</sup>

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

It is ordered:

1. The MONT-12 motion to strike is denied.

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<sup>29</sup> The four KCS-T&NO joint facility agreements provide that controversies arising thereunder that cannot be settled by the parties (KCS and T&NO) shall be referred to arbitration. We realize, of course, that BNSF is not a party to the four agreements. We expect, however: (i) that BNSF, which claims rights derivative to the rights conferred by the four agreements on T&NO, will accept the arbitration remedy provided by the four agreements; and (ii) that, if and to the extent BNSF so requests, SPT will invoke that arbitration remedy on behalf of BNSF.

<sup>30</sup> If BNSF were to file a terminal trackage rights application under new 49 U.S.C. 11102(a), and we granted the application, BNSF could not claim, under old 49 U.S.C. 11341(a), any necessity for an override of the terms of the four joint facility agreements.

<sup>31</sup> We have said that the immunity provision can effect an override of a consent requirement in a joint facility agreement, but only insofar as such an override can be considered "necessary" within the meaning of old 49 U.S.C. 11341(a) and new 49 U.S.C. 11321(a). We have also said, however, that an override cannot be considered "necessary" if a terminal trackage rights remedy under old 49 U.S.C. 11103(a) or new 49 U.S.C. 11102(a) is available. See Decision No. 44, slip op. at 170 & n.217. BNSF contends, in essence, that because any decision we might issue on a terminal trackage rights application cannot be issued at the same time as Decision No. 44, an override must be deemed necessary even if BNSF never invokes the terminal trackage rights remedy provided by new 49 U.S.C. 11102(a). We are not persuaded that the necessity alleged by BNSF is sufficient for anything more than a "bridge the gap" application of the immunity provision.

2. The KCS-65 petition is denied.
3. This decision shall be effective on December 4, 1996.

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

Vernon A. Williams  
Secretary