

SURFACE TRANSPORTATION BOARD¹

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. 61]²

Decided: November 19, 1996

In Decision No. 44 (served August 12, 1996), 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)³ 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

¹ 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.

² 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; and 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.

³ Union Pacific Corporation is referred to as UPC. Union Pacific Railroad Company and Missouri Pacific Railroad Company are referred to collectively as UP.

Company),⁴ subject to various conditions. Common control was consummated on September 11, 1996.⁵

The *new facilities condition*, one of the several broad-based conditions we imposed in Decision No. 44, requires that BNSF⁶ be granted the right to serve new facilities (including transload facilities, and specifically including transload facilities owned or operated by BNSF) on both SP-owned and UP-owned track over which BNSF receives trackage rights in the BNSF agreement. See Decision No. 44, slip op. at 106 (third paragraph) and 145-46 (the "new facilities and transloading facilities" requirement). See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement). Insofar as the new facilities condition concerns transload facilities, we shall refer to it as the *transload condition*.

UP/SP has filed a petition (UP/SP-275) seeking either clarification or reconsideration of the new facilities condition, including the transload condition. Replies⁷ have been filed by: BNSF;⁸ Geneva Steel Company (GSC);⁹ Dow Chemical Company (Dow)¹⁰; the Chemical Manufacturers Association (CMA);¹¹ The National Industrial Transportation League (NITL);¹² The Society of the Plastics Industry, Inc. (SPI);¹³ The Western Coal Traffic League (WCTL);¹⁴ Sierra Pacific Power Company (SPP) and Idaho Power Company (IDPC);¹⁵ Quantum Chemical Corporation (QCC);¹⁶ Shintech

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

⁵ SPR was merged with and into UP Holding Company, Inc., a direct wholly owned subsidiary of UPC. See UP/SP-277 at 1. UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

⁶ Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) are referred to collectively as BNSF.

⁷ We have also received a number of letters that oppose the UP/SP petition.

⁸ BN/SF-68.

⁹ GS-5.

¹⁰ DOW-28.

¹¹ CMA-14.

¹² NITL-22.

¹³ SPI-26.

¹⁴ WCTL-24.

¹⁵ The reply filed jointly by SPP and IDPC is designated
(continued...)

Incorporated (Shintech);¹⁷ The International Paper Company (IPC);¹⁸ United States Gypsum Company (USG);¹⁹ Champion International Corporation (CIC); and Kennecott Utah Copper Corporation (KUC).²⁰ Additional replies have been filed by:²¹ UP/SP;²² NITL;²³ BNSF;²⁴ and IPC.²⁵

We are denying the UP/SP-275 petition, both as initially filed and as modified by the UP/SP-285 reply.²⁶

BACKGROUND

THE UP/SP-275 PETITION. UP/SP asks that we clarify or reconsider two aspects of the new facilities condition.²⁷

¹⁵(...continued)
SPP-18. SPP and IDPC are referred to collectively as SPP/IDPC.

¹⁶ QCC-7.

¹⁷ SHIN-3.

¹⁸ IP-17.

¹⁹ USG-4.

²⁰ KENN-22.

²¹ So that we may decide in a fully informed manner the matters raised by the UP/SP-275 petition, we have accepted for filing the additional replies filed by UP/SP, NITL, BNSF, and IPC. We have also accepted for filing the TFI-3 reply filed by The Fertilizer Institute (TFI), wherein TFI supports the positions taken by NITL and certain other parties.

²² UP/SP-285.

²³ NITL-24.

²⁴ BN/SF-71.

²⁵ IP-18.

²⁶ We will not address, in this decision, the matters raised by Utah Railway Company (URC) in its UTAH-7 pleading filed September 23, 1996. The UTAH-7 pleading, though it is styled a "response," seeks an altogether different clarification of BNSF's rights under the new facilities condition and the transload condition, and with respect to several specified shippers. We will address, in a subsequent decision, the matters that were raised by URC in its UTAH-7 pleading and that were discussed by BNSF in its BN/SF-72 reply thereto, including among others the argument raised by URC that the new facilities condition does not authorize BNSF to serve new facilities located on the Provo-Utah Railway Jct. line shared by URC and SP. Nothing said herein is intended to prejudice our decision on any of these matters.

²⁷ UP/SP also addresses certain additional details that, in its view, require clarification. See UP/SP-275 at 7 n.12. We
(continued...)

Transload Facilities. UP/SP asks, in essence, that we clarify: (1) that BNSF cannot use its right to serve new transload facilities on UP lines to access exclusively-served shippers on UP lines; (2) that BNSF's right to serve new transload facilities on UP lines is only for the purpose of handling traffic transloaded to or from points on SP lines; (3) that BNSF cannot use its right to serve new transload facilities on SP lines to access exclusively-served shippers on SP lines; and (4) that BNSF's right to serve new transload facilities on SP lines is only for the purpose of handling traffic transloaded to or from points on UP lines. UP/SP contends that clarification is necessary because the transload condition, read literally, allows BNSF to serve, via new transload facilities on the lines where it will receive overhead trackage rights, not only traffic trucked to or from a point on the other merging railroad, but also traffic trucked to or from a point on the very line where the transload facility is located (or on a nearby branch line of that merging railroad).

UP/SP notes, by way of example, that a coal mine at Cameo, CO, on the SP mainline over which BNSF will receive overhead trackage rights, is served by only one railroad (SP), and that the nearest points on other railroads to or from which traffic might be trucked (Denver, CO, served by BNSF and UP, and Creston, WY, served by UP) are over 225 highway miles away, so that trucking is not an economically feasible option. UP/SP further notes that, read literally, the transload condition permits BNSF to build and serve a new transload facility right at the mine, and to handle coal trucked a de minimis distance from the mine to that transload facility. Such an interpretation, UP/SP contends, would give the mine the very near equivalent of direct two-railroad service.

A literal reading of the transload condition, UP/SP insists, would come very close to opening all exclusively-served shippers on the overhead trackage rights lines to a second railroad. This result, UP/SP contends, would be unwarranted, because our purpose in imposing the transload condition was to preserve existing competitive options that shippers served by UP now have to truck their goods to or from transload facilities at points on SP, and vice versa. We crafted this condition, UP/SP argues, to preserve existing competitive alternatives, and we should therefore clarify that this condition should not be read to create new competition that did not exist prior to the merger.

Implicit in the clarification formula advanced by UP/SP is the contention that the transload condition does not allow BNSF to transload traffic moving from or to "off-rail" shippers, i.e., shippers located neither on UP nor on SP. UP/SP concedes that the transload condition could be interpreted as allowing BNSF to serve, via new transload facilities on the lines where it will receive overhead trackage rights, traffic trucked to or from a point not located on any UP/SP line. UP/SP would prefer that we not extend the transload condition to off-rail shippers, but adds that, if we do so, we should specify that the condition applies

²⁷(...continued)
 address these details in the first four paragraphs of the "Additional Matters" section of this decision.

only if the distance from the shipper to a new BNSF-served transload facility on one of the merging railroads is at least as great as the distance from the shipper to the nearest point on the other merging railroad. This clarification, UP/SP insists, would avoid creating extensive new competition for off-rail shippers. UP/SP contends, by way of example, that, if an off-rail coal mine is located a mile from the SP mainline at Cameo and trucks to an SP transload facility at Cameo, with its closest theoretical transload options more than 225 miles away at Denver and Creston, it is not appropriate to allow BNSF to open its own new transload facility right next door to SP's transload facility at Cameo and to handle the mine's coal through that facility.

New Facilities On Certain UP Lines. UP/SP asks that we clarify that BNSF's right to serve new facilities on UP/SP lines over which it will have trackage rights does not apply to certain specific UP lines.

UP's Placedo-Harlingen Line. UP/SP asks that we clarify that BNSF's right to serve new facilities on UP/SP lines over which it will have trackage rights does not apply to UP's line between Placedo and Harlingen, TX. UP/SP notes that, prior to the merger, SP operated over this line via overhead trackage rights and had no local service rights, which necessarily meant that there was no pre-merger UP vs. SP competition for the location of new industries in this area. UP/SP contends that the purpose of our new facilities condition was the preservation of existing competition, and it therefore argues that the logic of that condition does not apply to the Placedo-Harlingen Line.

UP's Houston-Valley Junction and Fair Oaks-Bald Knob Lines. UP/SP notes that, pursuant to the CMA agreement,²⁸ the BNSF agreement was amended to give BNSF overhead trackage rights over UP's line between Houston, TX, and Valley Junction, IL (via Palestine, TX, and Little Rock, AR), and over UP's line between Fair Oaks and Bald Knob, AR. These rights, UP/SP insists, were granted to address claims that BNSF might encounter operating problems (i) running "against the flow" in the Houston-Memphis corridor, and (ii) operating into St. Louis over its own line. UP/SP contends that, because the sole purpose for these additional rights was operating convenience, the rationale for expanding BNSF's access to new facilities does not apply to them. UP/SP adds that BNSF's ability to serve new industries on the nearby SP line between Houston and Memphis fully preserves siting competition in this "2-to-1" corridor, and that BNSF itself has a line in the Memphis-St. Louis corridor where it can compete for new industry sitings.

UP's Line Between Craig Junction, TX, and SP Junction (Tower 112), TX. UP/SP and the City Public Service Board of San Antonio (CPSB), in negotiations respecting the CPSB conditions imposed in Decision No. 44,²⁹ have agreed that BNSF

²⁸ See Decision No. 44, slip op. at 18 (description of the CMA agreement). See also UP/SP-219 (CMA agreement is an attachment) and UP/SP-230 (same).

²⁹ See Decision No. 44, slip op. at 56-58 (relief requested (continued...))

should be granted trackage rights over UP's "Track No. 2" line between Craig Junction and SP Junction (Tower 112). See Decision No. 52 (served September 10, 1996). UP/SP insists, however, that BNSF should not be allowed to serve "new industries or transloading facilities" on this line. See Decision No. 52, slip op. at 4. UP/SP contends that the new facilities condition we imposed in Decision No. 44 is not applicable to the BNSF trackage rights over Track No. 2 between Craig Junction and SP Junction (Tower 112) because these trackage rights were granted merely to provide BNSF an alternative route, solely for operating convenience, for CPSB traffic.³⁰

THE UP/SP-285 REPLY. The UP/SP-285 reply is directed to certain arguments made by BNSF, DOW, NITL, WCTL, SPP/IDPC, QCC, and IPC in their replies to the UP/SP-275 petition.

Transload Condition. UP/SP initially asked us to clarify that the transload condition applies only to shippers trucking traffic between a point on one of the merging railroads and a new BNSF transloading facility at a point on the other merging railroad. UP/SP-275 at 5. See also UP/SP-275 at 6 n.10 (UP/SP would prefer that the transload condition not apply to "off-rail" shippers, but suggested that, if it did apply, it should apply only if the distance from the shipper to a new BNSF-served transload facility on one of the merging railroads is at least as great as the distance from the shipper to the nearest point on the other merging railroad). UP/SP now suggests that we might wish to clarify that the transload condition applies to "off-line" shippers if the distance between the shipper and the transload facility is at least as great as the distance between the shipper and the nearest point on the other merging railroad. An "off-line" shipper, as UP/SP is now using the term, is a shipper not located on the line of the merging railroad over which BNSF does not have trackage rights; and what this means is that an "off-line" shipper must be located *either* (i) at a point not on either UP or SP (in which instance it would be an "off-rail" shipper) or (ii) at a point on the line of the merging railroad over which BNSF does have trackage rights.

UP/SP contends that this new formulation of its request for clarification³¹ addresses the argument that, where UP and SP have parallel lines and BNSF has trackage rights over only one of them, the clarification sought in the UP/SP-275 petition gives no

²⁹(...continued)
by CPSB) and at 185-86 (relief granted to CPSB).

³⁰ In Decision No. 52, we reserved judgment on the Track No. 2 facilities restriction pending our review of the replies to the UP/SP-275 petition. See Decision No. 52, slip op. at 5. We incorporate herein by reference our discussion in Decision No. 52 respecting the relative merits of the Track No. 1 routing (which all agree is an inferior routing as respects CPSB traffic) and the Track No. 2 routing (which UP/SP has agreed that BNSF has the right to use for CPSB traffic; the only question is whether BNSF must also be allowed to serve new facilities located on Track No. 2).

³¹ The second category of off-line shipper is not implicit in the UP/SP-275 petition; this aspect of the formulation is new.

remedy to a shipper located on the line over which BNSF has trackage rights. UP/SP contends that there is indeed a remedy: an off-line shipper in the second category (i.e., a shipper located at a point on the line of the merging railroad over which BNSF has trackage rights) would be allowed to truck its product to new transload sites at least as distant as sites it might have used pre-merger. The off-line shipper remedy, UP/SP insists, will be just as effective in preserving the existing level of competition occasioned by transloading opportunities for shippers located on the line over which BNSF has trackage rights as it is in preserving transloading options for shippers with no rail service at all.

New Facilities Condition. UP/SP initially asked us to clarify that the new facilities condition does not apply to certain UP lines, one of which is UP's Placedo-Harlingen line. UP/SP has now responded to arguments that its "requested clarification that the transloading condition does not apply to BNSF's trackage rights" over the Placedo-Harlingen line would eliminate the ability of shippers on adjacent SP lines, such as SP's Port Lavaca branch, to transload to UP on the Placedo-Harlingen segment. UP/SP-285, Reply at 6. UP/SP now indicates that it does not object to allowing shippers on SP lines adjacent to UP's Placedo-Harlingen segment to transload to BNSF facilities located on that segment. This limited transloading right, UP/SP claims, is consistent with the clarification it is seeking.

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 decision clarifying a prior decision is, in many respects, the functional equivalent of a declaratory order.

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). Insofar as UP/SP seeks reconsideration, it has asserted material error and, to a limited degree, new evidence; it has not asserted substantially changed circumstances. As a practical matter, however, the UP/SP-275 petition, insofar as it seeks reconsideration, rests entirely upon the assertion of material error, because the new evidence that has been presented is only tenuously "new" and is certainly not material.

PRELIMINARY MATTER. We are not completely unsympathetic to the procedural arguments made by NITL in its NITL-24 reply,

wherein it urges the denial of the UP/SP-285 motion for leave to file the reply attached thereto. The off-line concept is, as NITL suggests, entirely new; and it clearly should have been presented in the UP/SP-275 petition. We are nevertheless granting the UP/SP-285 motion for leave to file the reply attached thereto. The clarification sought in the UP/SP-285 reply, which would limit (*vis-à-vis* the clarification sought in the UP/SP-275 petition) *both* the loss of transload opportunities that were available prior to the merger *and* the loss of transload opportunities provided by the Decision No. 44 transload condition, does not really broaden the issues; as a practical matter, the clarification sought in the UP/SP-285 reply actually narrows the issues. There is no indication that UP/SP has acted in bad faith in presenting the off-line concept at a late date. The UP/SP-285 reply was likely prompted by UP/SP's assessment that the "all or nothing" approach of the UP/SP-275 petition might not be the best approach. Accepting the UP/SP-285 reply is not likely to be prejudicial to opposing parties. The UP/SP-285 pleading consisted of a motion to which was attached a reply; the contents of this pleading all but invited responses by parties such as NITL; and the responsive pleading, like NITL's, could easily have addressed the merits. The UP/SP-285 pleading has not resulted in a substantial delay in the issuance of this decision.

CLARIFICATION. Insofar as the UP/SP-275 petition seeks clarification, we are denying it. The new facilities condition should be read literally: BNSF may serve any new facility (except as otherwise indicated) located post-merger on any UP/SP line over which BNSF has received trackage rights in the BNSF agreement. The transload condition should likewise be read literally: BNSF may serve any new transload facility, including 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.

The transloads envisioned by the transload condition are not limited to truck transloads. Truck is, of course, the predominant mode of transloading, so that it is only natural, when speaking of transloading, to make reference to truck transloads. See, e.g., Decision No. 44, slip op. at 106 ("Transloading also results in additional costs, as freight is first loaded into a truck, and then reloaded into a freight car, or the reverse."). Truck, however, is not the only mode of transloading. The transloads covered by the transload condition also include product transfers involving barges and intermodal containers and product transfers between rail cars, see SPI-26 at 13, as well as new transload technologies that may be developed in the future, see DOW-28 at 2 n.2

RECONSIDERATION. We are denying the UP/SP-275 petition to the extent it seeks reconsideration. The new facilities and transload conditions that we imposed were appropriately crafted and necessary to allow approval of this merger.

New Facilities & Transload Conditions: Origins. In Decision No. 44 we imposed "a number of broad-based conditions that augment the BNSF agreement to help ensure that the BNSF trackage rights will allow BNSF to replicate the competition that

would otherwise be lost when SP is absorbed into UP." Decision No. 44, slip op. at 145. Because the UP/SP-275 petition concerns two of these broad-based conditions, we will briefly discuss the concerns that prompted these conditions.

Prior to the UP/SP merger, three Class I railroads operated throughout the Western United States: UP, SP, and BNSF. Their operations, however, were not uniform in geographical scope. All three operated at some points and in some corridors; at other points and in other corridors, only two operated; and, at still other points and in still other corridors, only one operated. Opponents of the merger argued that an unconditioned merger was certain to have an anticompetitive effect at all points and in all corridors that, as a consequence of the merger, would experience *either* a 3-to-2 reduction in competitive rail options or a 2-to-1 reduction in competitive rail options.

With respect to the 3-to-2 problem the applicants in the UP/SP proceeding countered with the argument that, throughout the Western United States, UP/SP vs. BNSF competition following the merger would be stronger and more intense, and certainly no weaker and no less intense, than the three-way competition that existed prior to the merger. We agreed with this argument. See, e.g., Decision No. 44, slip op. at 119: "We have examined in detail the nature of the 3-to-2 traffic at issue, and have determined that it presents little potential for significant, merger-related competitive harm."

This disposed of the 3-to-2 problem, but not the 2-to-1 problem. With a 2-to-1 reduction in competitive rail options, post-merger rail vs. rail competition would have been nonexistent. Applicants chose to address the 2-to-1 problem by working out a settlement that they argued would preserve 2-to-1 intramodal competition at all points and in all corridors that, prior to the merger, were served both by UP and by SP but by no other railroad. On September 25, 1995, only 7 weeks after the UP/SP merger had first been announced and 2 months prior to filing their application, applicants entered into a settlement with BNSF addressing the 2-to-1 problem. The BNSF agreement, applicants insisted, would allow BNSF to replicate the rail vs. rail competition that would otherwise be lost with the merger of SP into UP.

Many opponents of the merger, however, did not see in the BNSF agreement an entirely satisfactory resolution of the 2-to-1 problem, and two of the arguments the opponents made are of particular interest with respect to the new facilities condition and the transload condition.

(1) The BNSF agreement, certain opponents noted, allowed BNSF access only to 2-to-1 shippers at points served by UP and SP and no other railroad. Pre-merger UP vs. SP competition, these opponents insisted, was far broader than that, and included: potential build-outs or build-ins; the potential to truck transload; the potential to use joint truck/rail or barge/rail movements; the ability to shift production among numerous plants located on UP and SP; the ability to relocate plant facilities; the ability to play UP and SP against each other in deciding where to locate new facilities; and source and product competition between shippers located on UP and shippers located

on SP. See, e.g., Decision No. 44, slip op. at 27-28 (arguments of The Kansas City Southern Railway Company).

(2) The BNSF agreement, certain opponents added, was insufficient even with respect to the 2-to-1 shippers actually covered by the BNSF agreement. Allowing BNSF to carry only the traffic of these shippers, these opponents insisted, would be inadequate because the 2-to-1 traffic base would be too small to enable BNSF to achieve efficient operations. See, e.g., Decision No. 44, slip op. at 41 (arguments of SPI).

In the CMA agreement, applicants made certain commitments partially curing these and other deficiencies that certain opponents of the merger had identified in the BNSF agreement. CMA Paragraph 2, which is of particular concern here, provided that the BNSF agreement would be amended to grant BNSF the right to serve any new shipper facility (not including expansions of or additions to existing facilities or load-outs or transload facilities) located subsequent to the consummation of the merger on any SP-owned line over which BNSF received trackage rights in the BNSF agreement. CMA Paragraph 2, however, was an incomplete solution to the problems it purported to solve. In Decision No. 44, therefore, we expanded CMA Paragraph 2 in two respects: first, by requiring that BNSF be granted the right to serve new facilities on both SP-owned and UP-owned track over which BNSF would receive trackage rights; second, by requiring that the term "new facilities" was to include transload facilities, including those owned or operated by BNSF. Decision No. 44, slip op. at 145-46.

New Facilities & Transload Conditions: Purposes. Our new facilities and transload conditions were intended to serve two analytically distinct purposes. These 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 its trackage rights lines. See Decision No. 44, slip op. at 106: "[W]e have devised specific conditions [including, but not limited to, the new facilities condition and the transload condition] directly addressing both the competitive problems that have been raised with the BNSF agreement and the CMA agreement and concerns about whether BNSF will have sufficient traffic to compete effectively."

Replicating Pre-Merger Competitive Options. The BNSF agreement, which was intended to allow BNSF to replicate the competition provided by an independent SP at 2-to-1 points and with respect to 2-to-1 shippers, was initially hailed by applicants as preserving all of the pre-merger competitive options provided by UP vs. SP competition. We recognized, however, that the BNSF agreement, even as supplemented by the CMA agreement, did not preserve all pre-merger competitive options. We recognized that many shippers without direct access to both UP and SP nevertheless benefitted from UP vs. SP competition. A shipper with direct access only to one railroad might have a transload option to the other; a shipper, though it had no direct rail access at all, might have transload options to both railroads; and a shipper, though it had direct access only to one railroad, might benefit from UP vs. SP competition in connection

with the siting of a new plant. See, e.g., Decision No. 44, slip op. at 124: "[W]hen UP or SP lines run near the plant of an exclusively served shipper, the ability of that shipper to transload or build out to a second carrier can provide important leverage in rate and service negotiations with the carrier providing direct service to the plant" The BNSF agreement, even as supplemented by CMA Paragraph 2, did not entirely preserve these pre-merger competitive options.³²

The new facilities and transload conditions were intended, in part, to preserve the indirect UP vs. SP competition provided by siting and transload options. By requiring that BNSF be allowed to serve any new facility (except as otherwise indicated) located post-merger on any UP/SP line over which BNSF received trackage rights in the BNSF agreement, we guaranteed that all pre-merger UP vs. SP siting competition would survive the merger. By requiring that BNSF be allowed to serve any new transload facility, including those owned or operated by BNSF itself, located post-merger on any UP/SP line over which BNSF received trackage rights in the BNSF agreement, we guaranteed that all pre-merger UP vs. SP transload competition would likewise survive the merger.

Achieving Sufficient Traffic Density. The trackage rights provided for in the BNSF agreement were not unprecedented; trackage rights have often been imposed as remedies in merger cases. These trackage rights, however, were unprecedented in scope: they extended over some 4,000 miles of UP/SP lines. The great distances spanned by the BNSF trackage rights prompted much concern, because these were, for the most part, overhead trackage rights authorizing local service only at the 2-to-1 points. BNSF would therefore be carrying only two categories of traffic over its trackage rights lines: traffic moving from or to the 2-to-1 points, which represented "only a fraction of the total traffic" on the trackage rights lines, Decision No. 44, slip op. at 133; and traffic generated on BNSF's own lines and routed over the trackage rights lines. Given the great distances involved, there was concern that BNSF might not be able to achieve sufficient traffic density to conduct effective operations on its trackage rights lines.

The new facilities and transload conditions were intended, in part, to enable BNSF to achieve sufficient traffic density on the trackage rights lines, not only in the near future but in the more distant future as well. We concluded that, with these and certain other conditions, BNSF would be able to compete

³² See, e.g., Decision No. 44, slip op. at 124: "Applicants, for example, address the loss of transloading options by allowing BNSF to locate transloading centers only at 2-to-1 points. Applicants maintain that truck movements to new BNSF transloading centers at 2-to-1 points or to centers on BNSF's own lines would be sufficient to ensure that no shipper previously enjoying such options would be hampered by this limitation. But today UP or SP may locate transloading facilities anywhere on their lines to reach shippers on the other carrier."

efficiently for the 2-to-1 traffic opened up to it by the BNSF agreement. Decision No. 44, slip op. at 133 and 140.³³

UP/SP-275 Petition. The relief requested by UP/SP in the UP/SP-275 petition, even as scaled back in the UP/SP-285 reply, would be inconsistent with the purposes served by the new facilities condition and the transload condition.

New Facilities Condition. With respect to each of the lines discussed by UP/SP vis-à-vis the new facilities condition, the relief requested by UP/SP is inconsistent with one or the other of the purposes served by this condition.

(1) Prior to the merger, UP shippers located on the Placedo-Harlingen Line could have sited new facilities on the SP lines at both ends and at the middle of the Placedo-Harlingen Line, and SP shippers located on the SP lines at both ends and at the middle of the Placedo-Harlingen Line could have sited new facilities on the Placedo-Harlingen Line. The relief sought by UP/SP vis-à-vis the Placedo-Harlingen Line would result in the elimination of competitive siting options that existed prior to the merger, and, for this reason alone, is unacceptable.

(2) The original version of the BNSF agreement did not include the Houston-Valley Junction and Fair Oaks-Bald Knob Lines, and was therefore subject to the objection that BNSF would be handicapped in the Houston-Memphis-St. Louis corridor by UP/SP's anticipated "directional flow" operations. See, e.g., Decision No. 44, slip op. at 41 (arguments of SPI). These lines were later added to the BNSF agreement (pursuant to CMA Paragraph 1) to meet this and other related objections, and BNSF's trackage rights over these lines were not intended to rectify competitive problems of shippers on these lines. But the competitive justification was only one of two broad justifications underlying the new facilities and transload conditions; the traffic density justification was the second. The addition of the Houston-Valley Junction and Fair Oaks-Bald Knob Lines to the BNSF agreement solved one problem (the directional flow handicap) but did not solve, indeed it exacerbated, another (the insufficient traffic density problem). Because CMA Paragraph 1 expanded the scope of the BNSF trackage rights while providing no extra traffic on the Houston-Valley Junction and Fair Oaks-Bald Knob Lines, opponents of the merger argued that CMA Paragraph 1 would actually make the traffic density problem worse. See, e.g., Decision No. 44, slip op. at 39-40 (arguments of NITL).

The relief sought by UP/SP vis-à-vis the Houston-Valley Junction and Fair Oaks-Bald Knob Lines is inconsistent with the traffic density justification underlying the new facilities and transload conditions, and is, for this reason,

³³ See also Decision No. 44, slip op. at 132: "The dispatching protocol, additional trackage rights permitting BNSF to participate in directional running, the availability of additional SIT [storage-in-transit] facilities, and BNSF's ability to access additional traffic now under contract to UP or SP and to obtain transload and build-out traffic combine to ensure that these trackage rights will be a successful remedy."

unacceptable. We do not intend to jeopardize BNSF's ability to achieve sufficient traffic density on these lines.

(3) We are not persuaded by UP/SP's argument that the line between Craig Junction and SP Junction (Tower 112) was added to the BNSF agreement merely to provide BNSF an alternative route for handling CPSB's traffic: this "alternative" route is the only route that BNSF and CPSB ever contemplated for this traffic, and it is the route we would have required had the issue been put before us. The relief sought by UP/SP vis-à-vis this line is inconsistent with the traffic density justification underlying the new facilities and transload conditions, and is, for this reason, unacceptable.³⁴

Transload Condition. This matter is best illustrated by an example. Suppose that BNSF has trackage rights over an SP line but not over a nearby UP line. Suppose also that a UP shipper is located on the UP line, an SP shipper is located on the SP line, and two off-rail shippers are located on neither line. Suppose also that off-rail shipper #1 is located closer to the SP line and at a greater distance from the UP line, and that off-rail shipper #2 is located closer to the UP line and at a greater distance from the SP line.

As respects shippers located on the SP line (our hypothetical SP shipper) and off-rail shippers located closer to the SP line and at a greater distance from the UP line (our hypothetical off-rail shipper #1), the relief requested in the UP/SP-275 petition, as scaled back in the UP/SP-285 reply, would impose a distance-based handicap on BNSF transload operations. With respect to these shippers, BNSF could not simply set up a transload facility at any convenient point on its SP trackage rights line; rather, BNSF could conduct transloads for the SP shipper and for off-rail shipper #1 if, but only if, the distance between the shipper and the BNSF transload point were greater than or equal to the distance between the shipper and the nearest UP point. The distance criterion would matter in any case in which the distance between the shipper and the most convenient BNSF transload location was less than the distance between the shipper and the nearest UP point. In any such situation, the revised formulation advocated by UP/SP would effectively prohibit a BNSF transload operation at the most convenient location. BNSF might still be able to conduct the transload operation, but the distance would necessarily have to be greater and the cost of the off-rail movement would necessarily have to be higher. And, in an indeterminate number of cases, the extra distance and the resulting extra cost would make a BNSF transload operation economically impractical.

³⁴ In Decision No. 52, we directed BNSF to accept, pending our review of the UP/SP-275 petition, the Track No. 2 facilities restriction agreed to by UP/SP and CPSB. See Decision No. 52, slip op. at 5. The action we are taking today effectively nullifies this facilities restriction. We therefore anticipate that the relevant parties (UP/SP, BNSF, and CPSB) will make conforming amendments to the BNSF agreement and the Sealy Trackage Rights Agreement.

The transload relief requested by applicants is thus inconsistent with the traffic density purpose served by the transload condition, and is therefore unacceptable. We do not intend to jeopardize BNSF's ability to achieve sufficient traffic density on the trackage rights lines provided for in the BNSF agreement.

We are not unsympathetic to UP/SP's concern that a literal reading of the transload condition will allow BNSF to operate as if it directly reached *all* exclusively served UP/SP shippers on the trackage rights lines. That was not our intent in imposing this condition. BNSF will be allowed to access exclusively served shippers only by a legitimate transload operation. By way of example, we do not expect that BNSF will construct a truck transload facility adjacent to an exclusively served coal mine, and then truck the coal a short distance (say, 100 feet) from the mine to the facility; that would not be acceptable. A legitimate transload operation 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. The Board remains available to resolve controversies if applicants believe that BNSF is attempting to expand the transload condition beyond its intended purpose.

ADDITIONAL MATTERS. (1) In Decision No. 44, slip op. at 1-2, the first sentence of footnote 2 should be revised to read as follows: "The Finance Docket No. 32760 (Sub-No. 8) proceeding, wherein applicants seek an exemption from the trucking company acquisition requirements of old 49 U.S.C. 11343-44, involves a function that is not subject to our jurisdiction under the law in effect on and after January 1, 1996."

(2) In Decision No. 44, slip op. at 8, we indicated in footnote 5 that SSW was a 99.9%-owned subsidiary of SPR. This statement was correct. See UP/SP-22 at 66 (SSW was a 99.9%-owned *direct* subsidiary of SPT, which was itself a 100%-owned *direct* subsidiary of SPR; it was therefore correct to say that SSW was a 99.9%-owned "subsidiary" of SPR, because the word "subsidiary" is generally understood to embrace both a *direct* subsidiary and an *indirect* subsidiary).

(3) In Decision No. 44, slip op. at 63, we inadvertently omitted the period at the end of the page. The last paragraph on page 63, with the missing period included, was intended to read as follows: "LCRA/Austin adds, however, that the BNSF agreement should effectively preserve these trackage rights (section 4b allows BNSF to serve FPP), assuming that BNSF is able to operate efficiently and economically over the trackage rights lines."

(4) In Decision No. 44, slip op. at 198-99 and at 199 n.240, we indicated that applicants had represented that the Sierra Army Depot at Herlong, CA, was covered by Section 8i of the BNSF agreement (the omnibus clause), and we noted that we expected that applicants would adhere to this representation. We added, however, that although Herlong was listed as a 2-to-1 point in Section 8i of the BNSF agreement dated September 25, 1995, it was not listed as a 2-to-1 point in Section 8i as amended by Section 6c of the supplemental agreement dated November 18, 1995, and as further amended by Section 6a of the second supplemental

agreement dated June 27, 1996. We now wish to note that Herlong: (i) is not covered by the Section 8i omnibus clause; but (ii) is covered by Section 1b of the BNSF agreement. See Section 1b of the BNSF agreement, as amended by Section 1b of the second supplemental agreement dated June 27, 1996 ("The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines . . . to . . . '2-to-1' shipper facilities at points listed on Exhibit A to this Agreement."). See also Section 9a of the supplemental agreement dated November 18, 1995 (inserting "Herlong, CA" in the "Points Referred to in Section 1b" category of Exhibit A).

(5) BNSF notes that UP/SP has apparently not challenged the applicability to UP's Placedo-Harlingen line of the build-in/build-out condition, Decision No. 44, slip op. at 146, but adds that if the UP/SP petition "can be read as doing so," we should clarify that BNSF can serve build-ins/build-outs on that line. BN/SF-68 at 11 n.8. We doubt that UP/SP has made any such challenge, but we think it best to note that the build-in/build-out condition is applicable *both* to shippers on the Placedo-Harlingen line that can build out to an SP line *and* to shippers on any SP line that can build out to the Placedo-Harlingen line. See CMA Paragraph 13, which 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; 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. See Decision No. 44, slip op. at 146. But the build-in/build-out condition imposed in Decision No. 44 does not alter the basic framework established by CMA Paragraph 13.³⁵

(6) WCTL asks, among other things, that we "expressly confirm that BNSF is entitled to use its trackage rights over the Placedo-Harlingen line to serve shippers who are presently served by SP and who may desire to obtain UP service at a point on that line via a new or transloading facility." WCTL-24 at 14. As explained elsewhere in this decision, we are denying the relief requested by UP/SP; we think it appropriate to observe that this denial constitutes the "express confirm[ation]" sought by WCTL; but we also think it appropriate to add that the new facilities condition (including the transload condition) provides that BNSF may use its trackage rights over the Placedo-Harlingen line to serve not only the shippers referenced in this paragraph but other shippers as well (e.g., any shipper that locates a "new facility" on the Placedo-Harlingen line).

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

³⁵ CMA Paragraph 13 provides that BNSF will be granted any trackage rights that may be necessary for BNSF to reach the build-in/build-out point. CMA is therefore wrong in suggesting, see CMA-14 at 5, that a build-in/build-out cannot run to a parallel line over which BNSF does not have trackage rights.

It is ordered:

1. The UP/SP-285 motion for leave to file the reply attached thereto is granted.
2. The TFI-2 motion for leave to file the TFI-3 reply is granted.
3. The IP-18 motion for leave to file the IP-18 reply is granted.
4. The UP/SP-275 petition, both as initially filed and as modified by the UP/SP-285 reply, is denied.
5. This decision shall be effective on the date of service.

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

Vernon A. Williams
Secretary