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SERVICE DATE - MAY 7, 1997

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FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 32760 (Sub-No. 21)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

[OVERSIGHT]

AGENCY: Surface Transportation Board.

ACTION: Decision No. 1; Notice of Oversight Proceeding, and Request for Comments from Interested Persons on any Effects of the Merger on Competition and Implementation of the Conditions Imposed to Address Competitive Harms.

SUMMARY: The Board is instituting a proceeding to implement the oversight condition imposed in *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation,*

¹ This decision embraces the proceeding in 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.*

STB Finance Docket No. 32760 (Sub-No. 21)

Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (UP/SP), Finance Docket No. 32760, Decision No. 44 (STB served Aug. 12, 1996), and is seeking comments from interested persons on any effects of the merger on competition and the implementation of the conditions imposed to address competitive harms. The Board is also requesting that persons intending to participate in the oversight proceeding notify the Board of their intent to participate. A separate service list will be issued based on the notices of intent to participate that the Board receives.

DATES: Notices of intent to participate in the oversight proceeding are due on May 27, 1997. Comments on any competitive effects of the merger and the implementation of the conditions imposed to address competitive harms are due on August 1, 1997; replies are due on August 20, 1997.

ADDRESSES: An original plus 25 copies² of all documents, referring to STB Finance Docket No. 32760 (Sub-No. 21), must be sent to the Office of the Secretary, Case Control Unit, ATTN: STB Finance Docket No. 32760 (Sub-No. 21), Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001. Parties are requested also, if possible, to submit all pleadings, and any attachments, on a 3.5-inch diskette which is formatted for WordPerfect 7.0 (or formatted so that it can be converted into WordPerfect 7.0).

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1613. [TDD for

² In order for a document to be considered a formal filing, the Board must receive an original plus 25 copies of the document, which must show that it has been properly served. As in the past, documents transmitted by facsimile (FAX) will not be considered formal filings and thus are not acceptable.

the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: In *UP/SP*, Decision No. 44, served August 12, 1996, the Board 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) (collectively, applicants), subject to various conditions. Common control was consummated on September 11, 1996. The Board imposed a 5-year oversight condition to examine whether the conditions imposed effectively addressed the competitive harms they were intended to remedy, and retained jurisdiction to impose additional remedial conditions if, and to the extent, the Board determines that the conditions already imposed have not effectively addressed the competitive harms caused by the merger. The Board now proposes to initiate an oversight proceeding to take comments from interested persons on the effectiveness and implementation of those conditions.³

Applicants' Progress Reports. On April 1, 1997, applicants submitted their first quarter 1997 progress report. This report follows applicants' January 2, 1997 progress report and their October 1, 1996 progress report and implementing plan with respect to the

³ Under old 49 U.S.C. 11351 and new 11327, the Interstate Commerce Commission, and now the Board, has continuing jurisdiction to enter supplemental orders and to modify decisions entered in proceedings under old 49 U.S.C. 11343 and new 11323. In addition, applicants volunteered to be subject to a 5-year oversight condition that would authorize the Board to enter such orders as it might deem necessary.

conditions imposed on the Board's approval of the *UP/SP* merger. In a preliminary note to the April 1, 1997 progress report, applicants briefly addressed the general status of the merger and implementation of conditions stating that "at the 6-month point following the consummation of UP-SP control, it may be too early to see the full effects of the merger or the conditions."

Applicants note that most merger benefits cannot be realized until labor implementing agreements are in place and UP's Transportation Control System (TCS) and other major systems are installed on SP -- processes that will not be completed for some time. Applicants add that many benefits depend on capital investments that will extend over a 4-year period, and the competition-preserving conditions also necessarily take time to implement, although their full effects will actually be felt well before the full benefits of the merger will be realized. Applicants further state that phasing in trackage rights operations, resolving complex systems issues, and sorting out legal disputes as to the scope of various conditions have greatly occupied the parties for the past 6 months and may continue to do so in the near future. Applicants add, nonetheless, that there is already extensive evidence of the benefits of the merger and of the effectiveness of the competition-preserving conditions.

The Burlington Northern and Santa Fe Railway Company (BNSF) Progress Reports. BNSF submitted its first quarter 1997 progress report on April 1, 1997. This is the third quarterly progress report as it follows BNSF's January 3, 1997 progress report and its October 1, 1996 submission of a progress report and operating plan. In the April 1, 1997 report, BNSF summarized the progress it has made since its last report to the Board on its operations and provision of services to shippers using merger-related rights. It states that

total BNSF traffic, as a result of the trackage rights and other rights granted by Decision No. 44, has continued to grow. BNSF indicated that trackage rights volumes in terms of units handled increased by 225% for the first quarter of 1997 compared to the last quarter of 1996, and this growth is attributed to the increased customer awareness of the BNSF competitive option to the new UP/SP franchise, as well as its transition, begun in the fourth quarter of 1996 but accelerating in the first quarter of 1997, from haulage to trackage rights operations as volumes in key lanes continue to grow. BNSF states that it expects to see these volumes continue to grow through the second quarter of 1997 and beyond, and that, in a number of its UP/SP lanes, it has seen volumes grow to permit daily train service in each direction, which is an important milestone to providing effective competitive rail service.

BNSF notes that capital improvements have already been made to support these new operations and other improvements are planned as part of the 1997 capital budget, and that BNSF has continued its significant efforts to inform existing and potential customers of the available BNSF services, including marketing efforts to attract new customers over its new routes and offers of competitive service to or from customers at two-to-one points. BNSF further adds that, in spite of its continued vigorous efforts to implement operations and market services to shippers to which BNSF has gained access pursuant to Decision No. 44, there are still challenges to the prompt accomplishment of the Board's intention to preserve vigorous competition.

Oversight Proceeding. The oversight effort is intended to allow us to determine whether any problems have developed, with respect to implementation of the merger conditions addressing competitive harms, that require us to take further action. Our

oversight effort will not exclude, related to those conditions, any aspect of the transaction or the existence of any type of anticompetitive effect. In the progress report filed on April 1, 1997, applicants state that they propose to submit with their next quarterly progress report on July 1, 1997, a more in-depth analysis of the effects of the merger and condition implementation. Therefore, we fully expect that the information presented by applicants in their July 1 progress report will be more extensive, including specific details of how each condition has been met, and we will hold them to that commitment. Regarding BNSF's July 1 progress report, we expect that BNSF will provide more detailed information regarding its efforts to be an effective competitor to the applicants. Parties may submit comments on any effects of the merger on competition and implementation of the conditions imposed to address competitive harms by August 1, 1997. Replies are due on August 20, 1997. We will review the comments and replies, and will then determine what further action is appropriate.

Protective Order. Parties may submit filings, as appropriate, under seal marked Confidential or Highly Confidential pursuant to the Protective Order granted in *UP/SP*, Decision No. 2 (ICC served Sept. 1, 1995). Parties will be required to file redacted versions to be placed in the public docket.

Service List. Any person who intends to participate actively in the oversight proceeding as a "party of record" (POR) must notify us of this intent by May 27, 1997. In order to be designated a POR, a person must satisfy the filing requirements discussed above in the ADDRESSES section. We will then compile and issue a final service list for this oversight proceeding as soon as practicable. Copies of decisions, orders, and notices will be

served only on those persons who are designated as POR, MOC (Members of the United States Congress), and GOV (Governors), on the official service list. Copies of filings must be served on all persons who are designated as POR. We note that Members of the United States Congress and Governors, who are designated MOC and GOV, are *not* parties of record and they need *not* be served with copies of filings; however, those who are designated as a POR must be served with copies of filings. All other interested persons are encouraged to make advance arrangements with the Board's copy contractor, DC News & Data, Inc. (DC News), to receive copies of Board decisions, orders, and notices served in this proceeding. DC News will handle the collection of charges and the mailing and/or faxing of decisions to persons who request this service. The telephone number for DC News is: (202) 289-4357.

A copy of this decision is being served on all persons designated as POR, MOC, or GOV on the service list in Finance Docket No. 32760. This decision will serve as notice that persons who were parties of record in Finance Docket No. 32760 will not automatically be placed on the service list as parties of record for this oversight proceeding unless they notify us of their intent to participate further. Applicants and BNSF will be required to serve their July 1, 1997 Progress Report on all PORs on the new service list, and any other interested person who submits a written request to applicants and/or BNSF.

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

Decided: May 1, 1997.

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

commented with a separate expression.

Vernon A. Williams
Secretary

Chairman Morgan, commenting:

In voting to approve the merger of the Union Pacific (UP) and the Southern Pacific (SP) railroad systems, I emphasized that the Board had taken the case very seriously from the beginning and would continue to do so. Consistent with this commitment, the Board is now instituting a proceeding to initiate formal Board oversight with input from all interested parties to ensure, in a timely manner, that the conditions imposed on the merger are effectively addressing the competitive issues that they were intended to remedy.

I view oversight as an essential, ongoing component of the approval process for the UP/SP merger. I believe that we must have a focused, probing and productive process, but one that is not unduly burdensome. Thus, participation by interested parties in this initial phase is important to assist the Board in establishing the appropriate parameters for implementing the oversight condition in a timely and effective manner.