

29029

SERVICE DATE - MARCH 31, 1998

EB

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. 12; Notice of Oversight Proceeding. Requests for Additional
Conditions to the UP/SP Merger for the Houston, Texas/Gulf Coast Area.

SUMMARY: Pursuant to a petition filed February 12, 1998, by the Texas Mexican Railway
Company and the Kansas City Southern Railway Company (Tex Mex/KCS) and a request
filed March 6, 1998, by the Greater Houston Partnership (GHP), the Board is instituting a
proceeding as part of the 5-year oversight condition that it imposed in *Union Pacific*

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.*

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, SCPSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760 (UP/SP Merger), Decision No. 44 (STB served Aug. 12, 1996), to examine their requests, and others that may be made, for additional remedial conditions to the UP/SP merger as they pertain to rail service in the Houston, Texas/Gulf Coast region. The Board is establishing a procedural schedule (attached) for the submission of evidence, replies, and rebuttal. The Board requests that persons intending to participate in this oversight proceeding notify the agency of that intent. A separate service list will be issued based on the notices of intent to participate that the Board receives.

DATES: The proceeding will commence on June 8, 1998. On that date, all interested parties must file requests for new remedial conditions to the UP/SP merger regarding the Houston/Gulf Coast area, along with all supporting evidence. The Board will publish a notice of acceptance of requests for new conditions in the Federal Register by July 8, 1998. Notices of intent to participate in the oversight proceeding are due July 22, 1998. All comments, evidence, and argument opposing the requested new conditions are due August 10, 1998. Rebuttal in support of the requested conditions is due September 8, 1998. The full procedural schedule is set forth at the end of this decision.

ADDRESSES: An original plus 25 copies² of all documents, referring to STB Finance

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.

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

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.

Electronic Submissions. In addition to an original and 25 copies of all paper documents filed with the Board, the parties shall also submit, on 3.5 inch IBM-compatible diskettes or compact discs, copies all textual materials, electronic workpapers, data bases and spreadsheets used to develop quantitative evidence. Textual material must be in, or convertible by and into, WordPerfect 7.0. Electronic spreadsheets must be in, or convertible by and into, Lotus 1-2-3 97 Edition, Excel Version 7.0, or Quattro Pro Version 7.0.

The data contained on the diskettes or compact discs submitted to the Board may be submitted under seal (to the extent that the corresponding paper copies are submitted under seal), and will be for the exclusive use of Board employees reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by such computer data is necessary for efficient review of these materials by the Board and its staff. The electronic submission requirements set forth in this decision supersede, for the purposes of this proceeding, the otherwise applicable electronic submission requirements set forth in our regulations. See 49 CFR 1104.3(a), as amended in *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*, STB Ex Parte No.

As in the past, documents transmitted by facsimile (FAX) will not be considered formal filings and thus are not acceptable.

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

527, 61 FR 52710, 711 (Oct. 8, 1996), 61 FR 58490, 58491 (Nov. 15, 1996).³

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1600.

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

SUPPLEMENTARY INFORMATION: In UP/SP Merger, 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 UP/SP), 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 on the merger effectively addressed the competitive concerns they were intended to remedy, and retained jurisdiction to impose, as necessary, additional remedial conditions if the Board determined that the conditions already imposed were shown to be insufficient. In its initial oversight proceeding, the Board concluded that, while it was still too early to tell, there was no evidence at the time that the merger, with the conditions that the agency had imposed, had caused any adverse competitive consequences.⁴ Nevertheless,

³ A copy of each diskette or compact disc submitted to the Board should be provided to any other party upon request.

⁴ *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*, Finance Docket No. 32760 (Sub-No. 21), Decision No. 10 (STB served Oct. 27, 1997) (UP/SP

the Board indicated that its oversight would be ongoing, and that it would continue vigilant monitoring.⁵

UP/SP has experienced serious service difficulties since the merger, and the Board has issued a series of orders under 49 U.S.C. 11123, effective through August 2, 1998, to mitigate a rail service crisis in the western United States caused, in large measure, by severely congested UP/SP lines in the Houston/Gulf Coast region.⁶ In acting to relieve some of the congestion, the Board made substantial temporary changes to the way in which service is provided in and around Houston.⁷ The Board found that, although merger implementation issues were involved, a key factor in bringing about the service emergency was the inadequate rail facilities and infrastructure in the region, and, as such, also ordered UP/SP,

Oversight).

⁵ UP/SP Oversight, Decision No. 10, at 2-3.

⁶ STB Service Order No. 1518, *Joint Petition for Service Order* (Service Order No. 1518) (STB served Oct. 31 and Dec. 4, 1997, and Feb. 17 and 25, 1998).

⁷ The Board directed UP/SP to release shippers switched by the Houston Belt & Terminal Railway Company (HB&T) or the Port Terminal Railroad Association (PTRA) from their contracts so that they could immediately route traffic over the Burlington Northern and Santa Fe Railway Company (BNSF) or Tex Mex, in addition to UP/SP. The agency also directed UP/SP to permit BNSF and Tex Mex to modify their operations over UP/SP lines to minimize congestion over UP/SP's "Sunset Line," to move traffic around Houston rather than going through it, and to have full access to UP/SP's Spring, TX dispatching facility as neutral observers. More generally, the Board required UP/SP to cooperate with other railroads and to accept assistance from other railroads able to handle UP/SP traffic.

UP/SP and BNSF recently have agreed to make other changes designed to improve service. In particular, the carriers have agreed to joint ownership of the Sunset Line between Avondale (New Orleans), LA and Houston; joint dispatching in the Houston area; and overhead trackage rights for UP/SP over the BNSF line between Beaumont and Navasota, TX.

BNSF, and other involved railroads to submit to the Board their plans to remedy these inadequacies.⁸

Recognizing the limitations on its authority under the emergency service provisions of the law, the Board rejected proposals offered by certain shipper, carrier, and governmental interests in the Service Order No. 1518 proceeding to force UP/SP to transfer some of its lines to other rail carriers and effect a permanent alteration of the competitive situation in the Houston region; it adopted instead only those measures designed to facilitate short-term solutions to the crisis that did not further aggravate congestion in the area or create additional service disruptions. The Board declared, however, that interested persons could present proposals for longer-term solutions to the service situation — including those seeking structural industry changes based on perceived competitive inadequacies — in formal proceedings outside of section 11123, particularly in the UP/SP merger oversight process.⁹ Tex Mex/KCS has now requested that we invoke our oversight jurisdiction over the merger for the purpose of considering such proposals, including the transfer to it of various UP/SP lines and yards in Texas.¹⁰ GHP has also requested the Board's intervention to provide for Houston's long-term rail service needs, including the establishment of a neutral switching operation.

⁸ Service Order No. 1518, Feb. 17, 1998 decision, at 5-7; Feb. 25, 1998 decision, at 5. The railroads' plans are due May 1, 1998; replies are due June 1.

⁹ Service Order No. 1518, Feb. 17, 1998 decision, at 8; see also Feb. 25, 1998 decision, at 4.

¹⁰ The Railroad Commission of Texas (RCT) has previously announced its intent to seek similar relief. See Service Order No. 1518, Feb. 17, 1998 decision, at 8.

That the service emergency in the Houston/Gulf Coast region remains ongoing is well known.¹¹ Given these circumstances, the Board will invoke its oversight jurisdiction over the UP/SP merger to consider new conditions to the merger of the kind proposed here, and others that may be made. We note that no party as yet has seriously suggested that SP's inadequate infrastructure would not have produced severe service problems in the Houston/Gulf Coast area even if there had been no merger. Nonetheless, the Board believes that, given the gravity of the service situation, it should thoroughly explore anew the legitimacy and viability of longer-term proposals for new conditions to the merger as they pertain to service and competition in that region.

UP/SP and BNSF argue that Tex Mex/KCS' request for conditions that have been previously rejected, without any new evidentiary justification, is insufficient grounds for the Board to begin a new oversight proceeding. We disagree. Our 5-year oversight of the UP/SP merger is not a static process, but a continuing one, so that the Board's prior rejection of Tex Mex/KCS' or any other party's requested conditions — whether in the Board's approval of the merger or in a subsequent oversight proceeding — does not preclude their fresh consideration now. Through our oversight condition, we have retained jurisdiction to monitor the competitive consequences of this merger; to re-examine whether our imposed conditions have effectively addressed the consequences they were intended to remedy; and to

¹¹ In its progress report of March 9, 1998, UP/SP announced that it would take drastic action in 30 days — including the refusal of new business and the transfer of existing business to its competitors — if the steps it has taken to deal with the emergency are not successful. On March 24, 1998, the carrier announced an embargo of a significant portion of its southbound traffic destined for the Laredo, TX gateway to clear a backlog of 5,500 cars waiting to cross into Mexico.

impose additional remedial conditions if those previously afforded prove insufficient, including, if necessary, divestiture of certain of the merged carriers' property.

The virtual shutdown of rail service in the Houston/Gulf Coast area that occurred after the UP/SP merger — and which, after many months, has yet to be normalized — is unprecedented. In our judgment, those circumstances alone are sufficient for the Board to commence this proceeding now. Clearly, our 5-year oversight jurisdiction permits us to examine — and, if necessary, re-examine at any time during this period — whether there is any relationship between the market power gained by UP/SP through the merger and the failure of service that has occurred here, and, if so, whether the situation should be addressed through additional remedial conditions. UP/SP Merger, Decision No. 44, at 100.

We caution, however, that we will not impose conditions requiring UP/SP to divest property that would substantially change the configuration and operations of its existing network in the region in the absence of the type of presentation and evidence required for “inconsistent applications” in a merger proceeding; *i.e.*, parties must present probative evidence that discloses “the full effects of their proposals.” UP/SP Merger, Decision No. 44, at 157. Divestiture is only available “when no other less intrusive remedy would suffice,” and we will impose it only upon sufficient evidentiary justification. *Id.*

The Board will confine this proceeding under its continuing oversight jurisdiction to examining requests for new conditions to the merger relating to rail service in the Houston/Gulf Coast area. As we have noted, the service crisis in this region, and its significant impact on the regional economy, clearly warrant our discrete treatment of these matters now. As a result, the procedures set forth here will be separate from those in the

more general oversight proceeding that, pursuant to UP/SP Oversight, Decision No. 10, will begin July 1, 1998.¹²

As set forth in the attached schedule, parties that wish to request new remedial conditions to the UP/SP merger as they pertain to the Houston/Gulf Coast region must file them, along with their supporting evidence, by June 8, 1998.¹³ The Board will publish a notice in the Federal Register accepting such requests by July 8, 1998. Any person who intends to participate actively in this facet of oversight as a “party of record” (POR) must notify us of this intent by July 22, 1998. 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.

¹² In Decision No. 10, at 18-19, the Board provided that general oversight would commence July 1 upon the filing by UP/SP and BNSF of their quarterly merger progress reports accompanied by comprehensive summary presentations. We provided that, as part of that proceeding, UP/SP and BNSF must make their 100% traffic tapes available by July 15, 1998; that comments of interested parties concerning oversight issues are due August 14, 1998; and that replies are due September 1, 1998. The general oversight proceeding will continue as planned.

¹³ Tex Mex/KCS stated that it would file its supporting evidence 45 days after its petition. Petition at 5. If it does so, it need not file its evidence anew on June 8th, although it may supplement its filing as appropriate. We decline, however, petitioner’s request (Petition at 11 n.6) to incorporate by reference its pleadings in Finance Docket Nos. 33507, 33461, 33462, and 33463 (titles omitted). In those proceedings, Tex Mex/KCS has complained that, after the merger, UP/SP (either singly or jointly with BNSF) unlawfully acquired control of HB&T in violation of 49 U.S.C. 11323, and has petitioned that a series of exemptions the carriers filed to restructure HB&T’s operations leading to that control should be voided and/or revoked. We will proceed to consider the discrete matters in those cases — including Tex Mex/KCS’ petition for consolidation and motion to compel discovery, and UP/SP’s motion to dismiss — separately from our consideration in the oversight proceeding of requests by Tex Mex/KCS and others for new remedial conditions to the merger.

Copies of decisions, orders, and notices will be served only on those persons designated as POR, MOC (Members of 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 (Sub-No. 21). This decision will serve as notice that persons who were parties of record in the previous oversight proceeding (leading to Decision No. 10) will not automatically be placed on the service list as parties of record for this facet of oversight unless they notify us of their intent to participate further.

Finally, while the requested remedial conditions (and those reasonably anticipated from other parties) could, if imposed, result in a transfer of ownership of certain UP/SP rail property or changes in the way that such properties are operated, they appear unlikely to produce the kind of significant operational changes that, under 49 CFR 1105.6(b)(4), requires the filing of a preliminary draft environmental assessment (PDEA).

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

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

Decided: March 30, 1998

By the Board , Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

PROCEDURAL SCHEDULE

June 8, 1998	Requests for new remedial conditions (with supporting evidence) filed.
July 8, 1998	Board notice of acceptance of requests for new conditions published in the Federal Register.
July 22, 1998	Notice of intent to participate in proceeding due.
August 10, 1998	All comments, evidence, and argument opposing requests for new remedial conditions to the merger due. Comments by U.S. Department of Justice and U.S. Department of Transportation due.
September 8, 1998	Rebuttal evidence and argument in support of requests for new conditions due.

The necessity of briefing, oral argument, and voting conference will be determined after the Board's review of the pleadings.