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SEC

SERVICE DATE - MAY 19, 1998

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32760 (Sub-No. 26)

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 RAILWAY COMPANY

[HOUSTON/GULF COAST OVERSIGHT]

Decision No. 2

Decided: May 18, 1998

Pursuant to oversight authority that it retained upon its approval of the UP/SP merger,¹ the Board instituted a proceeding on March 31, 1998,² to consider requests for additional conditions to the merger for the Houston, Texas/Gulf Coast area, including those that seek divestiture of certain of the merged carriers' property. All interested persons were directed to file their requests, along with all supporting evidence, by June 8, 1998.

The Board commenced this proceeding pursuant, *inter alia*, to a joint petition filed February 12, 1998, by the Texas Mexican Railway and the Kansas City Southern Railway Company (Tex Mex/KCS). On April 22, 1998, Tex Mex/KCS asked the Board to (1) adopt discovery guidelines and appoint an Administrative Law Judge to handle all discovery matters and to initially rule on all discovery disputes which the parties cannot mutually resolve; and (2) enter a protective order similar to those in other control proceedings that would facilitate any necessary discovery and protect the confidentiality of materials reflecting the terms of contracts, shipper-specific traffic data, and other confidential and/or proprietary information in the event that parties seek to produce such materials. Petitioner would include in the protective order a provision governing the production of certain

¹ Finance Docket No. 32760, Decision No. 44 (STB served Aug. 12, 1996).

² Finance Docket No. 32760 (Sub-No. 21), Decision No. 12 (STB Mar. 31, 1998), 63 FR 16628 (Apr. 3, 1998). By an order served today, that decision has been corrected and redesignated as Finance Docket No. 32760 (Sub-No. 26), Decision No. 1. Any subsequent reference to the March 31 decision here will be to Decision No. 1.

highly confidential competitive information that would restrict that information to use by outside counsel or outside consultants for the parties.

On reply, UP objects to formal discovery procedures, arguing that Tex Mex/KCS' apparent request for "full-blown" discovery of the kind involved in a primary merger proceeding would be out of place and overly burdensome in the allegedly more narrow oversight context that is involved here, particularly when UP has already publicly provided a great amount of comprehensive data on the most relevant issues in this matter — its service in the Houston/Gulf Coast region. UP also objects to the adoption of a new protective order, arguing that the one in the merger proceeding is already in place.³

In the Decision No. 1, at 8, the Board stated that it would:

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 evidence required for "inconsistent applications" in a merger proceeding; *i.e.*, parties must present probative evidence that discloses 'the full effect of their proposals.' [citation omitted] Divestiture is only available 'when no other less intrusive remedy would suffice,' and we will impose it only upon sufficient evidentiary justification.

While the Board's inquiry here will clearly be more confined than its prior consideration of the merger as a whole, to address this evidentiary burden parties will likely require discovery of relevant matters. As a result, the Board assigns and authorizes Administrative Law Judge Stephen Grossman to handle all discovery matters and to entertain and rule upon all disputes concerning discovery in this proceeding. In addition to filing pleadings with the Board and with UP representatives, parties must send a copy of all filings and documents in this proceeding to Administrative Law Judge Stephen Grossman, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426 [202 219-2538, FAX: (202) 219-3289], and must refer to STB Finance Docket No. 32760 (Sub-No. 26).

If the parties wish to engage in any discovery or establish any discovery guidelines, they are directed to consult with Judge Grossman.⁴ Judge Grossman is authorized to convene a discovery conference, if necessary and as appropriate, in Washington, DC, and to establish such discovery guidelines, if any, as he deems appropriate. However, Judge Grossman is not authorized to make

³ Finance Docket No. 32760, Decision No. 2 (ICC served Sept. 1, 1995).

⁴ Thus, Tex Mex/KCS should re-file its motion to compel discovery, filed with the Board May 4, 1998, with Judge Grossman.

adjustments to, or to modify, the dates in the procedural schedule for the submission of evidence in this matter.

Any interlocutory appeal to a determination by Judge Grossman will be governed by the stringent standard of 49 CFR 1115.1(c): "Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice."⁵ As in prior merger proceedings, we think it appropriate to tighten the deadlines provided by 49 CFR 1115.1(c). Accordingly, notwithstanding the contrary provisions of the second sentence of 49 CFR 1115.1(c), an appeal to a decision issued by Judge Grossman must be filed within 3 working days of the date of his decision, and any response to any such appeal must be filed within 3 working days thereafter. Likewise, any reply to any procedural motion filed with the Board itself in the first instance must also be filed within 3 working days of the date the motion is filed.⁶

Good cause also exists for the Board to enter a protective order, and to avoid any possible confusion, the Board will issue a new one governing this oversight proceeding. Unrestricted disclosure of confidential, proprietary or commercially sensitive information and data could cause serious competitive injury to the parties. Issuance of a protective order ensures that such information and data produced by any party in response to a discovery request or otherwise will be used solely for purposes of this proceeding and not for any other business or commercial use. The protective order will facilitate the prompt and efficient resolution of this proceeding.⁷

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

⁵ See e.g., Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133, Decision No. 17, at 9 (ICC served July 11, 1994).

⁶ To facilitate expedited review of any appeals, should Judge Grossman rule orally from the bench, the date of the hearing at which he announces his decision will be regarded as "the date" of that decision, whether or not Judge Grossman subsequently issues a written decision confirming his oral decision. See CSX/NS/Conrail, Finance Docket No. 33388, Decision No. 16 (STB served July 31, 1997).

⁷ Paragraph 1 of Tex Mex and KCS' proposed protective order contains language that could be construed to permit those carriers, though not seeking to merge themselves, to exchange confidential information on the same basis as the primary merger partners. To avoid that construction, we will not include that language in the protective order.

It is ordered:

1. The petition for a protective order is granted and the parties to this proceeding must comply with the protective order in the Appendix.⁸
2. This proceeding is assigned to Administrative Law Judge Stephen Grossman for handling of all discovery matters and the initial resolution of all discovery disputes.
3. This decision is effective on the service date.
4. A copy of all filings and documents must be sent to Administrative Law Judge Stephen Grossman, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426 and refer to STB Finance Docket No. 32760 (Sub-No. 26).
5. Administrative Law Judge Stephen Grossman shall be added to the service list in this proceeding, and a copy of this decision shall be served on Administrative Law Judge Stephen Grossman at the address listed in the preceding paragraph.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

⁸ This decision protects the information, materials, and data set forth in the attached Appendix whether contained on printed material or in computer-derived memory devices (i.e., floppy diskettes).

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order, “confidential information and data” means traffic data (including but not limited to waybills, abstracts, study movement sheets and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets and cost workpapers), the identification of shippers and receivers in conjunction with shipper-specification traffic data, the confidential terms of contracts with shippers, confidential financial and cost data, and other confidential or proprietary business information.

2. Personnel of Union Pacific Corporation (“UPC”) and Union Pacific Railroad Company (“UPRR”), and their affiliates (collectively, “Union Pacific”), including outside consultants and attorneys, may exchange confidential information and data for the purpose of this and any related proceedings, but not for any other business, commercial or other competitive purpose.

3. At the completion of this and any related proceedings, and any judicial review proceeding arising therefrom, all confidential information and data exchanged by any party with another party or by their representatives, in preparing for this and any related proceedings, will be returned to the originating party or destroyed. However, outside counsel for a party are permitted to retain file copies of all pleadings filed with the Board.

4. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, or traffic data or other confidential or proprietary information are produced pursuant to a request for discovery by any party to this or any related proceedings, or are submitted in pleadings, such materials must be treated as confidential. Such materials, any copies, and any data derived therefrom:

(a) Shall be designated and stamped as “CONFIDENTIAL” and shall be used solely for the purpose of this and any related proceedings, and any judicial review proceeding arising therefrom, and not for any other business, commercial or competitive purpose.

(b) Shall not be disclosed in any way or to any person without the written consent of the party producing the materials or an order of the Board or the Administrative Law Judge presiding in this and any related proceedings, except: (i) to employees, counsel or agents of the party requesting such materials, solely for use in connection with this and any related proceedings, and any judicial review proceeding arising therefrom, provided that such employee, counsel or agent has been given and has read a copy of this Protective Order and agrees to be bound by its terms prior to receiving access to such materials; and (ii) to any participant in this or

any related proceedings who is not an employee, counsel or agent of the requesting party, only in the course of public hearings in such proceedings.

(c) If produced through discovery, must be destroyed, and notice of such destruction served on the Board and the presiding Administrative Law Judge and the party producing the materials, at such time as the party receiving the materials withdraws from this or any related proceedings, or at the completion of this and any related proceedings and any judicial review proceeding arising therefrom, whichever comes first. However, outside counsel for a party are permitted to retain file copies of all pleadings filed with the Board.

(d) If contained in any pleading filed with the Board, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order." See 49 CFR 1104.14.

5. Any party producing material in discovery to another party to this or any related proceedings, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as "HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY." If any party wishes to challenge such designation, the party may bring such matter to the attention of the Administrative Law Judge presiding in this and any related proceedings. Material that is so designated shall not be disclosed except to outside counsel or outside consultants of the party requesting such materials, solely for use in connection with this and any related proceedings, and any judicial review proceeding arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order and agree to be bound by its terms prior to receiving access to such materials. Material designated as "HIGHLY CONFIDENTIAL" and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 4.

6. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material at hearings in this or any related proceedings, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material to the Administrative Law Judge, the Board or the reviewing court, as appropriate, under seal, and shall accompany such submission with a written request to the Administrative Law Judge, the Board or the court to (a) restrict attendance at the hearings during discussion of such "CONFIDENTIAL" and or "HIGHLY CONFIDENTIAL" material, and (b) restrict access to the portion of the record or briefs reflecting discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with this Protective Order.

7. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in the course of any deposition in this or any related proceedings, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent and all other counsel attending the deposition, and all portions of the deposition at which

any such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” materials is used shall be restricted to persons who may review that material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

8. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data or other proprietary information are produced by a party in this or any related proceedings and held and used by the receiving person in compliance with paragraphs 2 or 4 above, such production, disclosure and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11323 or 11904.

9. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, is shown by any party to warrant suspension of any of the provisions herein.

UNDERTAKING
(CONFIDENTIAL MATERIAL)

I, _____, have read the Protective Order served on _____, 1998 (Decision No. xx), governing the production of confidential documents in STB Finance Docket No. 32760 (Sub-No. 26) for the Houston/Gulf Coast oversight proceeding, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in this oversight proceeding, or any judicial review proceedings taken or filed in connection therewith. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form thereof.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Date: _____

UNDERTAKING
(HIGHLY CONFIDENTIAL MATERIAL)

As outside (counsel) (consultant) for _____, for which I am acting in this proceeding, I have read the Protective Order served on _____, 1998 (Decision No. xx), governing the production of confidential documents in STB Finance Docket No. 32760 (Sub-No. 26) for the Houston /Gulf Coast oversight proceeding, understand the same, and agree to be bound by its terms. I also understand and agree that, as a condition precedent to my receiving, reviewing, or using copies of any documents designated “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY,” I will limit my use of those documents and the information they contain to this proceeding and any judicial review thereof, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, that, at the conclusion of this proceeding, I will promptly return or destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me to counsel for the originating party, provided, however, that outside counsel may retain file copies of pleadings filed with the Board. I further understand that I must destroy all other notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY” by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE (COUNSEL) (CONSULTANT)

Dated: _____