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SERVICE DATE – DECEMBER 20, 2001

SURFACE TRANSPORTATION BOARD

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

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

[GENERAL OVERSIGHT]

Decision No. 20

Decided: December 19, 2001

We address in this decision certain issues—involving the definition of “2-to-1” points, the definition of transload facilities, the Stockton-Elvas trackage rights line, and team tracks—that have been raised in the fifth annual round of the UP/SP “general oversight” proceeding.

### BACKGROUND

On August 12, 1996, we authorized the common control and merger of the rail carriers controlled by Union Pacific Corporation (collectively UP) and the rail carriers controlled by Southern Pacific Rail Corporation (collectively SP), subject to various conditions.<sup>1</sup> Among the conditions attached to that authorization, we required UP to abide by the terms of the BNSF and CMA Agreements<sup>2</sup> under which UP provided BNSF approximately 4,000 miles of trackage

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<sup>1</sup> Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) (Merger Dec. No. 44), aff'd sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999). UP's acquisition of common control was consummated on September 11, 1996, and the merger was completed on February 1, 1998.

<sup>2</sup> BNSF refers to The Burlington Northern and Santa Fe Railway Company. The BNSF Agreement refers to the agreement entered into by the UP/SP applicants and BNSF on September 25, 1995, as modified by the supplemental agreement dated November 18, 1995, and as further modified by the second supplemental agreement dated June 27, 1996. Merger Dec. No. 44, 1 S.T.B. at 247 n.15. The CMA Agreement refers to the agreement that UP and SP

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rights over the merged UP/SP system to preserve, among other things, competitive rail service for “2-to-1” shippers—those shippers that, prior to the merger, were served by both UP and SP, but by no other railroad. Merger Dec. No. 44, 1 S.T.B. at 252.

We also expanded upon those agreements by imposing several other broad-based conditions that afforded BNSF trackage rights to serve shippers that, as a result of the merger, would have been deprived of a “build-in/build-out” option, and to serve new facilities (including transload facilities) on both UP and former SP lines over which BNSF received trackage rights under the BNSF Agreement. Merger Dec. No. 44, 1 S.T.B. at 419-20. These conditions were designed to replicate other, more indirect competitive opportunities that would otherwise have been lost upon SP’s absorption into UP, and to aid BNSF in obtaining sufficient traffic to compete effectively with the merged carriers. Id. at 372-73.

In this fifth round of general oversight, UP and BNSF have jointly submitted for our review and approval a “restated and amended” version of the BNSF Agreement. See UP/SP-386, BNSF-92 (Joint Submission). The carriers indicate that this updated version incorporates the conditions in the BNSF Agreement that we adopted and imposed in Merger Dec. No. 44, as clarified and supplemented in subsequent Board decisions. It also incorporates certain agreements that UP and BNSF have reached relating to those conditions and other matters. But, in addition to the matters on which UP and BNSF have reached agreement, the restated and amended agreement includes conflicting proposals with respect to certain issues on which the carriers do not agree, including: (1) the definition of “2-to-1” points; (2) the definition of “Existing Transload Facilities” and “New Transload Facilities”; (3) BNSF’s access to “new facilities” on the Stockton-Elvas trackage rights line; and (4) BNSF’s right to purchase or lease “team tracks” at 2-to-1 points.<sup>3</sup> We address these issues in turn.<sup>4</sup>

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<sup>2</sup>(...continued)

entered into on April 18, 1996, with BNSF and the Chemical Manufacturers Association (CMA), which amended the BNSF Agreement. Id. at 243, 254-55.

<sup>3</sup> We previously addressed the carriers’ conflicting proposals regarding the scope of BNSF’s trackage rights in the Houston-Memphis-St. Louis corridor. See Union Pacific Corp.—Control & Merger—Southern Pacific Corp., Finance Docket 32760 (Sub No. 21), Decision No. 19 (STB served Nov. 8, 2001). Remaining issues in this round of oversight not resolved in that decision or in our decision here will be addressed in a third decision.

<sup>4</sup> Comments addressing the issues are found in: UP/SP-385, UP’s report on BNSF Agreement issues; BNSF-PR-20, BNSF’s progress report; UP/SP-386, BNSF-92, the carriers’ joint submission of restated and amended BNSF Agreement; UP/SP-387, UP’s opposition to substantive changes to the BNSF Agreement; BNSF-93, BNSF’s comments on unresolved issues  
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## DISCUSSION AND CONCLUSION

**Definition Of 2-to-1 Points.** UP would retain in the restated BNSF Agreement the definition of 2-to-1 points used in this merger proceeding and similar to that used in others—geographic locations at which at least one shipper/receiver had available to it, either directly or from reciprocal switching, service from both UP and SP but no other railroad. BNSF proposes to define 2-to-1 points as locations commonly served by both UP and SP, without regard to “whether any shippers or receivers at those locations were open to or served by both UP and SP.” Under BNSF’s definition, locations would qualify as 2-to-1 points if there was at least one shipper/receiver open to UP and at least one shipper/receiver open to SP, even if no shipper/receiver was open to both merger applicants (or any other railroad).<sup>5</sup> Joint Submission, at 3-4. BNSF’s broader definition of 2-to-1 points would thus allow the carrier to access through the trackage rights additional facilities that we have traditionally considered to be “1-to-1” points (those served only by UP or SP).

BNSF also seeks to serve new shipper facilities and existing transload facilities located on lines over which BNSF was not granted trackage rights under the BNSF Agreement. BNSF asserts that this result is called for by Section 8(i) of the Agreement—the so-called “omnibus clause”—which states the applicants’ intent to preserve two-carrier competition for “all ‘2-to-1’ shipper facilities” and “all other shippers who had direct competition or competition by means of siting, transload, or build-in/build-out from only UP and SP pre-merger” including at “Existing

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<sup>4</sup>(...continued)

relating to the restated and amended BNSF Agreement; the ACC-1 comments filed by the American Chemistry Council (ACC) (formerly CMA); the NITL-27 comments filed by The National Industrial Transportation League (NITL); the DOT-6 and DOT-7 comments filed by the United States Department of Transportation (DOT); UP/SP-389, UP’s reply; BNSF-94, BNSF’s reply (initial reply statement, filed September 19, 2001, as corrected on September 21, 2001); an undesignated UP letter filed September 24, 2001; and BNSF-96, BNSF’s reply.

<sup>5</sup> UP and BNSF would each define 2-to-1 points as of September 25, 1995, the date the BNSF Agreement was initially executed. Joint Submission, at 3-4. BNSF would define geographic locations using six-digit Standard Point Location Codes (SPLCs) and, as provided in Section 9(g) of the agreement, those locations would be deemed to include all areas within the switching limits of the locations. *Id.* at 3. Six-digit SPLCs identify a geographic area with the first number, the State with the second, the county with the third and fourth numbers, and the station in the city or town with the last two numbers. See Merger Dec. No. 44, 1 S.T.B. at 372 n.102.

Transload Facilities and New Shipper Facilities at . . . ‘2-to-1’ Points not along a Trackage Rights Line.”<sup>6</sup>

Section 8(i), however, must be read in concert with the BNSF Agreement as a whole, and when that is done, it is clear that this provision of the agreement was not meant to be read as expansively as BNSF now suggests. This is so because the basic structure of the BNSF Agreement provides BNSF only “overhead” trackage rights (also known as “bridge” trackage rights)—trackage rights that do not allow BNSF to access intermediate points on the trackage rights lines—except insofar as access to such points is expressly provided. See Sections 1(b), 3(c), 4(b), 5(b), and 6(d) of the restated BNSF Agreement, which provide, in identical language, that “[t]he trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, *except for the local access specified herein.*” Joint Submission, at 8, 14, 18, 23, and 27 (emphasis added). As consistently reflected in each of the many iterations of the

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<sup>6</sup> Section 8(i) provides:

It is the intent of the parties that this Agreement result in the preservation of competition by two rail carriers for (a) all “2-to-1” Shipper Facilities at points listed on Exhibit A to this Agreement and (b) all other shippers who had direct competition or competition by means of siting, transload or build-in/build-out from only UP and SP pre-merger.

The parties recognize that some “2-to-1” Shipper Facilities, Existing Transload Facilities, and New Shipper Facilities at “2-to-1” Points will not be able to avail themselves of BNSF service by virtue of the trackage rights and line sales contemplated by this Agreement. For example, “2-to-1” Shipper Facilities, Existing Transload Facilities, and New Shipper Facilities located at points between Niles Junction and the end of the joint track near Midway (including Livermore, CA, Pleasanton, CA, Radum, CA, and Trevarno, CA), Lyoth, CA, Lathrop, CA, Turlock, CA, South Gate, CA, Tyler, TX, Defense, TX, College Station, TX, Great Southwest, TX, Victoria, TX, Sugar Land, TX, points on the former Galveston, Houston & Henderson Railroad served only by UP and SP, Opelousas, LA, and Herington, KS, are not accessible under the trackage rights and line sales covered by this Agreement. Accordingly, UP/SP and BNSF agree to enter into arrangements under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service to “2-to-1” Shipper Facilities, Existing Transload Facilities, and New Shipper Facilities at the foregoing points and at other “2-to-1” Points not along a Trackage Rights Line.

See Joint Submission, at 33.

BNSF Agreement, the most prominent local access-exception specified in the agreement was BNSF's access to traditionally defined 2-to-1 shipper facilities (those served by both UP and SP but no other carrier) at the points specifically "listed on Exhibit A to the Agreement."<sup>7</sup> Id.

Against this framework, Section 8(i) simply recognizes that certain 2-to-1 facilities will be unable to access the trackage rights lines accorded to BNSF under the agreement, lists those points, and provides for UP and BNSF to enter into other kinds of arrangements (such as other trackage rights, haulage rights, rate relief, or other mutually acceptable means) that would allow BNSF to afford competitive service at those facilities. Nowhere does Section 8(i) indicate that it was meant to embrace a trove of points that otherwise would not have been available to BNSF and that would upset the basic "overhead rights/except-where-specified" structure of the BNSF Agreement. As we have previously determined, the omnibus clause was included in the BNSF Agreement only to protect "the relatively few 2-to-1 points that were not explicitly covered by the trackage rights and line sales provided for in that agreement."<sup>8</sup> Union Pacific Corp.—Control & Merger—Southern Pacific Corp., Finance Docket No. 32760, Decision No. 89, slip op. at 2 (STB served June 1, 2000) (Merger Dec. No. 89), citing Merger Dec. No. 44, 1 S.T.B. at 252.

Further, BNSF's proposed definition of 2-to-1 points would improperly expand our already broad, but well-defined, conditions preserving the indirect competition that would otherwise have been lost because of the merger. These conditions address the major weakness of the original version of the BNSF Agreement (September 25, 1995): that it generally provided only for BNSF access to traditionally defined 2-to-1 shippers, doing little to protect shippers who would, in some instances at what would otherwise be 1-to-1 points, lose as a result of the merger the competitive constraints indirectly provided by transloads, build-in/build-outs, or siting competition. See Merger Dec. No. 44, 1 S.T.B. at 372 (under original BNSF Agreement, UP/SP merger "would reduce competition" at points subject to indirect constraints).

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<sup>7</sup> Exhibit A to the revised agreement lists the 2-to-1 points referred to in Sections 1(b), 3(a), 4(b), 5(b), and 6(d) of the agreement.

<sup>8</sup> In fact, the UP/SP applicants indicated early in the merger proceeding that, to the best of their knowledge, only one unlisted 2-to-1 point—Labadie, MO—stood to be covered by Section 8(i). As the merger proceeding progressed, certain other unlisted 2-to-1 points were discovered and added (by name) to the list that appears in Section 8(i), but it remained clear that the applicants did not expect to uncover many more such points. See UP/SP-22 (filed Nov. 30, 1995) at 297 & n.1; see also UP/SP-23 (also filed Nov. 30, 1995) at 166-67 (Section 8(i) was meant for only a "handful of small '2-to-1' points" not covered by the BNSF Agreement which applicants "may not have located."). Neither BNSF nor any other party during the merger proceeding indicated any different intention for Section 8(i).

However, in the CMA Agreement (April 18, 1996) and the second supplemental agreement to the BNSF Agreement (June 27, 1996), the applicants themselves expanded BNSF's access to such shippers by granting BNSF the right to serve any new facilities located post-merger on any SP-owned line over which BNSF was accorded trackage rights, as well as the facilities of CMA members who could establish that the merger would otherwise deprive them of build-in/build-out options. We, in turn, then imposed conditions that expanded these agreed-to additions to BNSF's access by requiring the applicants to permit BNSF to serve: (1) new facilities (including transload facilities) on SP-owned and UP-owned track over which BNSF received trackage rights; and (2) any shipper that, as a result of the merger, would otherwise have suffered the loss of a build-in/build/out option. See Merger Dec. No. 44, 1 S.T.B. at 372-73, 419-20. After having discussed at length and expressly defined the scope of our conditions preserving indirect competition, there is no basis for anyone to expect—nor did we intend—that, without any explanation, these conditions would then be further expanded to permit BNSF access not just to new shipper facilities and existing transload facilities on all of the trackage rights lines, but also to such facilities not along the trackage rights lines.

Finally, we have previously rejected the expanded definition of 2-to-1 points of the kind that BNSF proposes here, determining that:

[r]ather than defining 2-to-1 points as those within some arbitrary proximity to two rail carriers (a BEA<sup>9</sup> or 4-digit SPLC), and thus treating direct and indirect rail competition as equivalent, . . . we have devised specific conditions 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.

Merger Dec. No. 44, 1 S.T.B. at 372-73 (footnote omitted). It was thus clear that, during the merger proceeding and upon the merger's authorization, our conditions preserving indirect competition were designed to reach a set of points separate from, and in addition to, what all concerned parties at the time understood to be 2-to-1 points—locations where a shipper facility had been open to both UP and SP, and to no other railroad.<sup>10</sup> See Merger Dec. No. 44, 1 S.T.B.

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<sup>9</sup> A BEA refers to a Business Economic Area. Usually, BEAs are “collections of counties” that can, in some instances, comprise as much as “two-thirds or more of the area of some western states.” Merger Dec. No. 44, 1 S.T.B. at 372 n.102.

<sup>10</sup> Listed in Exhibit A to the BNSF Agreement are locations (including Reno, NV, and Halsted, Mont Belvieu, and Eldon, TX) that actually did not have any shippers with access to both UP and SP (and no other railroad). Listing these points, however, did not reflect an understanding that a 2-to-1 point was something different than what it was understood to be

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at 393 (where, after discussing our new facilities, transload, and build-in/build-out conditions, we concluded that, with the conditions we were imposing, “BNSF will be an effective replacement for SP at . . . 2-to-1 points *and* affected 1-to-1 points.”) (emphasis added).

In sum, we see no basis to grant the relief sought by BNSF here. The reality is that our conditions preserving direct and indirect competition have together provided enormous competitive opportunities for shippers and, in turn, BNSF on the approximately 4,000 miles of trackage rights that BNSF received. BNSF now seeks to expand these opportunities even further. In our judgment, however, that is an overreach that has no competitive justification in the context of the UP/SP merger, nor support in the BNSF Agreement itself. We therefore reject BNSF’s proposed definition of 2-to-1 points and direct that, in the restated and amended BNSF Agreement, UP and BNSF apply UP’s definition.

**Definition Of Transload Facilities.** As we have observed, our “new facilities” condition requires that BNSF be granted the right to serve new facilities (including transload facilities that include those owned or operated by BNSF) on the trackage rights lines. See Merger Dec. No. 44, 1 S.T.B. at 419-20. Initially, UP and BNSF commonly defined “new transload facilities” as shipper facilities (other than automotive or intermodal facilities or team tracks) that provide transload services, including (though not limited to) commonly recognized transload service providers, at which freight is transferred from one railcar to another or from one mode to another, the construction of improvements to provide such services is required, and operating costs above and beyond the cost of providing direct rail service are incurred.<sup>11</sup> Joint Submission, at 6-7. The only significant distinction between the definitions subsequently proposed by UP and BNSF is that, under UP’s definition, the transload facility must be a public facility (i.e., a facility that offers services to the shipping public) in which the operator of the new transload facility could not have an ownership interest in the product being transloaded, while BNSF would allow for such an interest.<sup>12</sup>

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<sup>10</sup>(...continued)

during the merger proceeding. Rather, these exceptions simply reflected nothing more than agreement on the part of the applicants to provide certain additional relief for those points to address a perceived special competitive impact potentially resulting from the merger.

<sup>11</sup> UP and BNSF each indicate, by way of an example, that BNSF would not be able to construct a new truck transload facility adjacent to an exclusively served coal mine and then truck the coal a short distance (e.g., 100 feet) from the mine to the facility. Joint Submission, at 6-7.

<sup>12</sup> BNSF defines “existing transload facilities” as those in existence on September 25, 1995, with the same qualifications as for new transload facilities, plus the requirement that the  
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After reviewing the comments, however, UP asserts that, for the purpose of defining the scope of the conditions we have imposed in this proceeding, we should not adopt either BNSF's or UP's definition of transload facilities, but, instead, resolve any disputes on a case-by-case basis. UP asserts that most transloads create no conflict between carriers, and those that do arise out of special circumstances. As a result, UP claims that attempts to define transload facilities in the abstract may simply produce additional disputes.<sup>13</sup> UP/SP-389, at 35. DOT concurs. DOT-7, at 8-9.

After considering the comments, we agree with UP and DOT that we should not require in the restated and amended BNSF Agreement a comprehensive definition of the transload facilities to which BNSF will have access. The fact that we have not previously defined qualifying transload facilities with any great precision<sup>14</sup> does not appear to have been overly burdensome on the parties. Accordingly, we believe that we should simply remain available to resolve, on a case-by-case basis, any disputes concerning such qualification.

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<sup>12</sup>(...continued)

existing facilities had been leased, owned, or continuously operated by the same transload operator for at least 12 months. Joint Submission, at 5-6. UP contends that a definition of existing transload facilities is not necessary, *id.* at 5, but submits that, if we elect to define it, we should apply UP's definition for new transload facilities. UP/SP-387, at 21 n.10.

<sup>13</sup> On reply, UP now concedes that, by precluding any ownership interest in the product transloaded, its definition of new transload facilities could be too narrow and might discourage some legitimate transload activity. UP/SP-389, at 37. BNSF has consistently argued that we should reject any effort to restrict "transload facilities" to only public facilities where the operator has no ownership of the product being transloaded; the competition offered by transloading, BNSF maintains, is not dependent on the identity of the party doing the transloading. *See, e.g.*, BNSF-94, at 12-16.

<sup>14</sup> In Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp. Finance Docket No. 32760, Decision No. 61 (STB served Nov. 20, 1996) (Merger Dec. No. 61), we explained that a transload facility must be "legitimate" (i.e., 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), but discussed only the example of a facility that would clearly not be "acceptable" (a truck transload facility within 100 feet of an exclusively served coal mine). Merger Dec. No. 61, slip op. at 12. In addressing this question again in Union Pacific/Southern Pacific Merger, 2 S.T.B. 697 (1997) (Merger Dec. No. 75), we added that a facility cannot be generally regarded as a transload facility for the purposes of our transload condition if the facility is really "a contrivance to obtain a competitive option that was not available to the shipper prior to the merger." Merger Dec. No. 75, 2 S.T.B. at 701.

What we have said with respect to the “new facilities” condition is equally true with respect to that condition’s transload component:

We do not believe that it is necessary or appropriate for us to determine, in advance, the exact parameters of the new facilities condition. As we have noted, the underlying purpose of the condition is to replace competition that would have been lost pursuant to the merger. A determination of whether a new facility such as a transload facility addresses the loss of competition that this condition was intended to remedy, or whether it instead amounts to an overreach, however, is fact-specific; it cannot be made in a vacuum, nor can it be broadly defined. Rather, each determination will no doubt be unique, given the expected differences in each shipper’s circumstances. Thus, in each case, we must examine the particular circumstances to determine whether the condition has been met.

Union Pacific/Southern Pacific Merger, 2 S.T.B. 703, 716 (1997) (General Oversight Dec. No. 10).

Nonetheless, a few matters regarding the transload condition, and the parties’ arguments regarding that condition, merit special attention that should provide some guidance on this issue. First, we reemphasize that the crucial issue in identifying a qualifying transload facility is not whether it is public or private, or whether the operator of the transload facility has an ownership interest in the product being transloaded, but, as we outlined in Merger Dec. No. 61, *supra* note 14, slip op. at 12, whether the facility is “legitimate.” Furthermore, BNSF cannot achieve access to a transload facility merely by showing that such access would satisfy the “traffic density” purpose of the transload condition. While BNSF could cite traffic density with respect to any facility located on the trackage rights lines, traffic density is not relevant to the question of whether a facility is a legitimate transload facility. See Merger Dec. No. 75, *supra* note 14, 2 S.T.B. at 702 n.10. Lastly, we reject UP’s argument that, under the transload condition, a shipper whose facility was served by UP prior to the merger must build its transload facility on a line owned by SP prior to the merger, and vice versa. UP argues that, without this restriction, single-shipper transloads would violate Merger Dec. No. 75 by “giving BNSF direct rail access to shippers that only received direct and exclusive rail service from either UP or SP prior to the merger.” Merger Dec. No. 75, 2 S.T.B. at 699. That argument, however, has already been rejected, and UP cannot relitigate it now.<sup>15</sup>

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<sup>15</sup> In Merger Dec. No. 61, UP asked us to clarify “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,” and “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.” Merger Dec. No. 61, slip op. at 3. UP argued that its proposed clarification was necessary “because the

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We therefore direct BNSF and UP to revise the restated and amended version of the BNSF Agreement so that, if a general definition of the term “transload facility” is included, that definition is consistent with our decision here.

**The Stockton-Elvas Trackage Rights.** Section 1(a) of the current version of the BNSF Agreement lists the “Western Trackage Rights” that UP provided to BNSF, including those over the former SP line between Stockton, CA, and Elvas, CA.<sup>16</sup> UP/SP-266, Exhibit A at 2; see also UP/SP-387, Map #2. Section 1(b) provides that the trackage rights granted in Section 1(a) shall be bridge rights for the movement of overhead traffic only, except for the local access that is specified. As pertinent here, Section 1(b) provides that BNSF shall receive access on the SP-owned lines listed in Section 1(a) to any new shipper facility located subsequent to UP’s acquisition of control of SP at points other than those listed on Exhibit A to the agreement “(except the line between Elvas (Elvas Interlocking) and Stockton.)” UP/SP-266, Exhibit A at 2. Thus, under Section 1(b) of the current agreement, BNSF’s trackage rights on the Stockton-Elvas line are for overhead traffic only, precluding BNSF service to or from new shipper facilities located subsequent to the UP/SP merger at points on the Stockton-Elvas line.

BNSF proposes to revise Sections 1(a) and 1(b) of the restated and amended BNSF Agreement to provide that, although BNSF’s trackage rights on the Stockton-Elvas line are overhead rights, BNSF would receive access to any new shipper facility located “subsequent to UP’s acquisition of control of SP” on the Stockton-Elvas line. Joint Submission, at 8-9. UP would likewise revise Sections 1(a) and 1(b) to reaffirm that BNSF’s trackage rights on the Stockton-Elvas line are overhead rights, but it would further revise Section 1(b) to provide that BNSF could serve Willamette Industries at Elk Grove, CA, and Southdown Cement at Polk, CA. Id. at 9-10.

We agree with BNSF’s proposed revisions to Sections 1(a) and 1(b) and direct BNSF and UP to include, in the final restated and amended version of the BNSF Agreement, BNSF’s

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<sup>15</sup>(...continued)

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).” Id. We rejected UP’s request for clarification, and concluded that the transload condition should 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.” Id., slip op. at 7.

<sup>16</sup> Elvas is also referred to as “Elvas Interlocking” and “Elvas Tower.”

revisions regarding this matter. As we have repeatedly indicated, in authorizing the UP/SP merger we provided that the new facilities provision of the CMA Agreement, which granted BNSF “the right to serve any new facilities located post-merger on any SP-owned line over which BNSF receives trackage rights in the BNSF agreement,” be expanded to require “that BNSF be granted the right to serve new facilities on both SP-owned and UP-owned track over which BNSF will receive trackage rights.” Merger Dec. No. 44, 1 S.T.B. at 419-20; see also Merger Dec. No. 44, 1 S.T.B. at 373; Merger Dec. No. 61, slip op. at 2; General Oversight Dec. No. 10, 2 S.T.B. at 714.

UP argues, however, that, in characterizing the CMA Agreement as providing BNSF access to “any” new facility on SP trackage rights lines, we overlooked the fact that Section 1(b) of the current BNSF Agreement specifically excepts the Elvas-Stockton SP trackage rights line from such access, and we gave no indication in Merger Dec. No. 44 that this provision of the BNSF Agreement would be nullified by our “new facilities” condition. UP argues, in essence, that, because we overlooked the Stockton-Elvas restriction in 1996, we have no choice but to accept it now.

Because the text of the “new facilities” condition requires “that BNSF be granted the right to serve new facilities on both SP-owned and UP-owned track over which BNSF will receive trackage rights,” Merger Dec. No. 44, 1 S.T.B. at 419-20, and because that text makes no exception for the Stockton-Elvas line, BNSF must be granted the right to serve new facilities on the Stockton-Elvas line. In the case of a conflict between the conditions we imposed in Merger Dec. No. 44 and the restrictions BNSF and UP agreed upon in the 1996 version of the BNSF Agreement, the conditions we imposed trump any restrictions that BNSF and UP may have previously agreed upon. Moreover, as we indicated in Merger Dec. No. 61, slip op. at 7:

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.<sup>17</sup>

UP insists, however, that the Stockton-Elvas situation is not like any of the “new facilities” scenarios we considered in Merger Dec. No. 61 because the Stockton-Elvas line was an SP line, not a UP line; because BNSF agreed (in the 1996 version of the BNSF Agreement) to a restriction on its “new facilities” rights on the Stockton-Elvas line; because BNSF was given access to the Stockton-Elvas line as an alternative route, for operating convenience only; and because, in view of BNSF’s access to the Stockton-Haggin Junction line, siting competition in the Stockton-Sacramento corridor can be preserved without affording BNSF

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<sup>17</sup> The “except as otherwise indicated” exception refers to the limitation in our condition that “the term ‘new facilities’ does not include expansions of or additions to existing facilities or load-outs . . . .” Merger Dec. No. 44, 1 S.T.B. at 420.

access to new facilities on the Stockton-Elvas line. Further, UP adds, access by BNSF to new facilities on the Stockton-Elvas line is not necessary to ensure that BNSF has sufficient traffic density on its trackage rights lines.

When we said in Merger Dec. No. 61 that the “new facilities” condition should be read literally, we did not mean that it applied only to situations identical to the situations we addressed in that decision. We meant that the “new facilities” condition should always be read literally, and a literal reading of that condition establishes BNSF’s right to access new facilities on the Stockton-Elvas line.

**Team Tracks.** BNSF proposes to add to the restated and amended BNSF Agreement a new Section 8(p) which would provide that, “[i]f UP no longer uses a team track at a ‘2-to-1’ Point, it agrees to sell or lease the track to BNSF at normal and customary costs and charges.” See Joint Submission, at 35-36.<sup>18</sup> UP objects to that revision. Id.

We agree with UP that it should not be required to sell or lease to BNSF team tracks no longer used as such (or no longer used at all) by UP. A basic premise of the BNSF Agreement was that, aside from the trackage rights lines themselves, BNSF must construct its own facilities unless UP has specifically agreed to provide them. This premise is clearly applicable in the “team tracks” context; Section 9(h) of the restated and amended BNSF Agreement provides that BNSF has a right “to construct, or have constructed for it, for its sole use exclusively owned or leased facilities, including, without limitation, . . . team tracks.” See Joint Submission, at 41-42. Given this background, and given that it could be difficult (particularly years after the fact) to identify which tracks were actually used as team tracks, we see no justification for the new provision proposed by BNSF.

BNSF contends that it must have team tracks if it is to fully replicate the intramodal competition that existed at 2-to-1 points prior to the merger, and that, as a practical matter, it would need to secure UP’s cooperation in the construction of BNSF team tracks. We agree that, if BNSF is to compete effectively, it must have team tracks in appropriate circumstances. However, we believe that the difficulties cited by BNSF are overstated. As UP notes, team tracks are not difficult to construct; they require only a switch, a small area of land, and a short segment of track.

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<sup>18</sup> A “team track” is “a rail-owned track on which the railroad parks a car for a shipper to load or unload.” UP/SP-387, V.S. Rebensdorf at 9. See also UP/SP-387, at 6 n.3 (citation omitted): “‘Team tracks’ are any tracks on which cars are placed for the public’s use in loading or unloading freight using trucks. Decades ago shippers used wagons pulled by ‘teams’ of horses” and that is how the term evolved.

As requested by ACC and DOT, however, we clarify that we expect UP to work cooperatively with BNSF to enable BNSF to construct team tracks and ancillary facilities, including loading facilities and necessary connections with UP/SP tracks, when BNSF notifies UP of its desire to construct team tracks and/or ancillary facilities along a UP/SP line. In this respect, as in so many others, railroads like BNSF and UP must cooperate with each other at the same time they compete with each other. Such cooperation, we think, works best when the details are arrived at privately, rather than in an administrative proceeding.

**Other Arguments.** Finally, UP argues that we should not even consider BNSF's proposals respecting 2-to-1 points, transload facilities, the Stockton-Elvas trackage rights, and team tracks. UP contends that, because a merged railroad must be able to rely on its settlement agreement partners to honor their agreements in the form imposed by the Board, BNSF's proposals contravene our policy favoring private settlement agreements; because BNSF previously agreed "not to seek any conditions in the control case, not to support any requests for conditions filed by others, and not to assist others in pursuing their requests," UP/SP-22 at 338, BNSF's proposals violate the terms of the BNSF Agreement itself; and because BNSF's proposals would expand the conditions on the UP/SP merger 5 years after UP and SP consummated the merger, we lack the power to grant BNSF's proposals. We disagree.

BNSF, however, should be regarded as the guardian of the rights we entrusted to it in Merger Dec. No. 44. BNSF, as the grantee under most of the conditions we imposed when we authorized the UP/SP merger, has a strong incentive to see to it that those conditions are enforced to the fullest, and, as that grantee, is the party best situated to enforce them against UP. BNSF's proposed revisions here reflect its effort to ensure that our conditions are working in the manner intended. This does not mean, of course, that any dispute between BNSF and UP regarding the conditions we imposed in Merger Dec. No. 44 should be resolved in BNSF's favor. But it does mean that a dispute should not be resolved in UP's favor on the ground that BNSF has no right to dispute anything.

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

It is ordered:

1. BNSF and UP shall include, in the final restated and amended version of the BNSF Agreement, the "2-to-1 point" definition advocated by UP.
2. BNSF and UP shall include, in the final restated and amended version of the BNSF Agreement, either: (a) a general "transload facilities" definition upon which BNSF and UP can agree consistent with this decision; or (b) no "transload facilities" definition.

3. BNSF and UP shall include, in the final restated and amended version of the BNSF Agreement, the wording of Sections 1(a) and 1(b) advocated by BNSF regarding access to new shipper facilities on the Stockton-Elvas trackage rights line.

4. BNSF and UP shall not include, in the final restated and amended version of the BNSF Agreement, the Section 8(p) provision advocated by BNSF.

5. The due date for the submission of the final restated and amended version of the BNSF Agreement will be announced in a subsequent decision.

6. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams  
Secretary