

SURFACE TRANSPORTATION BOARD¹

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY--CONTROL AND MERGER--SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[Decision No. 57]²

Decided: November 19, 1996

In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company)³ and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company),⁴ subject to various conditions. Common control was

¹ Proceedings pending before the Interstate Commerce Commission (ICC) on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

² This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; Finance Docket No. 32760 (Sub-No. 12), Responsive Application--Entergy Services, Inc., Arkansas Power & Light Company, and Gulf States Utility Company; and Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company.

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

⁴ Southern Pacific Rail Corporation is referred to as SPR. Southern Pacific Transportation Company, St. Louis Southwestern
(continued...)

consummated on September 11, 1996, when SPR was merged with and into UP Holding Company, Inc., a direct wholly owned subsidiary of UPC. See UP/SP-277 at 1.⁵

Among the conditions we imposed in Decision No. 44 was the *contract modification condition*, which required that, immediately upon consummation of the merger, UP/SP must modify any contracts with shippers at all 2-to-1 points incorporated within the BNSF agreement to allow BNSF access to at least 50% of the volume. See Decision No. 44, slip op. at 106 (third paragraph) and 146 (the "opening contracts at 2-to-1 points" requirement).⁶

Petitions seeking clarification of Decision No. 44 with respect to the contract modification condition have been filed by: BNSF;⁷ Geneva Steel Company (GSC);⁸ the Railroad Commission of Texas (RCT);⁹ the Lower Colorado River Authority and the City of Austin, TX (referred to collectively as LCRA/Austin);¹⁰ and Entergy Services, Inc. (ESI) and its affiliates Arkansas Power & Light Company (AP&L) and Gulf States Utilities Company (GSU).¹¹ Replies have been filed by:¹² UP/SP;¹³ GSC;¹⁴ LCRA/Austin;¹⁵ Dow Chemical Company (Dow);¹⁶ the Chemical Manufacturers Association

⁴(...continued)
Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company are referred to collectively as SP.

⁵ UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

⁶ Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) are referred to collectively as BNSF. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

⁷ BN/SF-65.

⁸ GS-3 and -4.

⁹ RCT-8.

¹⁰ LCRA-4 and -5.

¹¹ ESI-27. ESI, AP&L, and GSU are referred to collectively as Entergy. AP&L's and GSU's names have recently been changed. See Decision No. 44, slip op. at 54 n.67.

¹² We have also received a number of letters supporting the BN/SF-65 petition.

¹³ UP/SP-280 and -288.

¹⁴ GS-6.

¹⁵ LCRA-6.

¹⁶ DOW-29.

(CMA);¹⁷ The National Industrial Transportation League (NITL);¹⁸ The Society of the Plastics Industry, Inc. (SPI);¹⁹ The Western Coal Traffic League (WCTL);²⁰ the Glass Producers Transportation Council (GPTC);²¹ Quantum Chemical Corporation (QCC);²² United States Gypsum Company (USG);²³ Champion International Corporation (CIC); and Kennecott Utah Copper Corporation (KUC).²⁴ Additional replies have been filed by:²⁵ GSC;²⁶ BNSF;²⁷ and UP/SP.²⁸

DISCUSSION AND CONCLUSIONS

APPLICABLE STANDARDS. A prior decision may be clarified in any instance in which there appears to be a need for a more complete explanation of the action taken therein. See, e.g., FRVR Corporation--Exemption Acquisition And Operation--Certain Lines of Chicago And North Western Transportation Company--Petition For Clarification, Finance Docket No. 31205 (ICC served Jan. 29, 1988) (clarifying jurisdiction and other matters); St. Louis Southwestern Ry. Co. Compensation--Trackage Rights, 8 I.C.C.2d 80 (1991) (clarifying four technical issues not explicitly considered in the prior decisions in that proceeding). A decision clarifying a prior decision is, in many respects, the functional equivalent of a declaratory order.

ACTION TAKEN. We are granting in part and denying in part the various petitions, and we are clarifying the contract modification condition to the extent, and in the manner, indicated below.

¹⁷ CMA-14.

¹⁸ NITL-21.

¹⁹ SPI-26.

²⁰ WCTL-25.

²¹ GPTC-2 (although styled a "request for clarification and comments" it is essentially a reply to the BN/SF-65 petition).

²² QCC-7.

²³ USG-4.

²⁴ KENN-22.

²⁵ That we may decide in a fully informed manner the matters raised by the clarification petitions, we have accepted for filing the additional replies filed by GSC, BNSF, and UP/SP. We have also accepted the TFI-3 reply filed by The Fertilizer Institute (TFI), wherein TFI supports the positions taken by NITL and certain other parties.

²⁶ GS-7, -8, and -9.

²⁷ BNSF's "Progress Report and Operating Plan" filed October 1, 1996 (hereinafter referred to as BNSF-PR#1) at 16.

²⁸ UP/SP-286.

BROAD-BASED CONDITIONS. In Decision No. 44 we imposed "a number of broad-based conditions that augment the BNSF agreement to help ensure that the BNSF trackage rights will allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP." Decision No. 44, slip op. at 145. Because the petitions filed by BNSF, GSC, RCT, LCRA/Austin, and Entergy concern one of these broad-based conditions, we will first briefly discuss the concerns that prompted these conditions.

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

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

This disposed of the 3-to-2 problem, but it did not dispose of the 2-to-1 problem; with a 2-to-1 reduction in competitive rail options, post-merger rail vs. rail competition would not only not be stronger, it would be nonexistent. On September 25, 1995, only 7 weeks after the UP/SP merger had first been announced and a full 2 months prior to the actual filing of their application, applicants, in an attempt to craft a solution to the 2-to-1 problem, entered into a settlement with BNSF that purported to resolve the 2-to-1 problem that an unconditioned merger would otherwise have created. The BNSF agreement, applicants insisted, would allow BNSF to replicate the rail vs. rail competition that would otherwise be lost with the merger of SP into UP. The BNSF agreement, which has since been broadened in several important respects, was in the view of applicants, and remains today, the main vehicle for resolving all aspects of the 2-to-1 problem.

Many opponents of the merger, however, argued that the BNSF agreement was insufficient even with respect to the 2-to-1 shippers actually covered by the BNSF agreement. These opponents argued that allowing BNSF to carry only the traffic of these shippers could not really solve even this narrow version of the 2-to-1 problem because the 2-to-1 traffic base, in and of itself, was simply too small to enable BNSF to achieve a critical mass for efficient operations; and, to make matters worse, only a portion of this 2-to-1 traffic base would actually be available to BNSF in the immediate future because, opponents claimed, a

good deal of 2-to-1 traffic had been locked up by UP and SP in long-term contracts. See, e.g., Decision No. 44, slip op. at 41 (arguments of SPI).

In the CMA agreement,²⁹ applicants made certain commitments that went part of the way towards curing this and other deficiencies that certain opponents of the merger had identified in the BNSF agreement. Of particular relevance for present purposes is CMA Paragraph 3, which provided that, effective upon consummation of the merger, UP/SP would modify any contracts with shippers at 2-to-1 points in Texas and Louisiana so that at least 50% of the volume would be open to BNSF. CMA Paragraph 3, however, was clearly an incomplete solution to the problem it purported to solve. In Decision No. 44, therefore, we expanded CMA Paragraph 3 by requiring that it be extended to shippers at all 2-to-1 points incorporated within the BNSF agreement, not just 2-to-1 points in Texas and Louisiana. Decision No. 44, slip op. at 145-46.

GENERAL OBSERVATIONS. We think it appropriate to make a few general observations with respect to the workings of the contract modification condition.

(1) Our contract modification condition responded to the argument that, because UP and SP had locked up so much 2-to-1 traffic in long-term contracts, an insufficient amount of the 2-to-1 traffic supposedly open to BNSF under the BNSF agreement would actually be available to BNSF in the short run. The contract modification condition provides, in essence, that at least 50% of the volume under contract at the 2-to-1 points will be open to BNSF immediately, so that BNSF will be able to compete now for at least 50% of that 2-to-1 traffic.

(2) The contract modification condition opens up traffic to BNSF, but does not guarantee that BNSF will actually receive that traffic. The condition merely allows a 2-to-1 shipper to put up for bidding traffic that had previously been committed by contract either to UP or to SP. The shipper need not tender any traffic to BNSF, and is free to reject the contract modification condition in its entirety. And the shipper is free to allow UP/SP to bid against BNSF in an effort to retain any traffic subject to the contract modification condition.

(3) The contract modification condition provides that UP/SP must release its contractual rights with respect to at least 50% of the volume under contract, but we never envisioned that this condition would allow BNSF automatically to win 50% of the 2-to-1 traffic that was, on the merger effective date, under contract either to UP or to SP. The contract modification condition provides, in essence, that, for half of the volume under contract, the competition provided for in the BNSF agreement will begin earlier than anticipated. We expect that UP/SP will compete for the 50% of the traffic that is opened up to BNSF, and we have no reason to believe that UP/SP will lose every time. In the long run (i.e., after all relevant contracts in effect prior

²⁹ See Decision No. 44, slip op. at 18 (description of the CMA agreement); UP/SP-219 (CMA agreement is an attachment); and UP/SP-230 (same).

to the merger have expired), however, BNSF could win 50% or even more of the traffic at the 2-to-1 points. The entire premise of the BNSF agreement, after all, is that BNSF will be able to provide, with its trackage rights, an effective competitive presence on the trackage rights lines.

(4) Thus, the argument made by BNSF and RCT, and supported by others--that the only way to ensure access by BNSF to at least 50% of the volume under contract at the 2-to-1 points is to provide BNSF access to 100% of the volume under contract at such points--is essentially irrelevant. Proponents of the 100% interpretation argue, and correctly so, that the contract modification condition was intended to allow BNSF to achieve, sooner rather than later, sufficient traffic density on the trackage rights lines; and the 100% interpretation, the proponents also correctly note, would serve this primary purpose by expanding the traffic base immediately available to BNSF. The proponents have neglected to observe, however, that the 50% limitation was intended to serve a secondary purpose: it puts a cap upon the amount of traffic that UP/SP runs the risk of losing immediately upon consummation of the merger. The contract modification condition balances two objectives, and not only the one cited by the proponents of the 100% interpretation.

Allowing shippers the unilateral option of opening up 100% of applicants' contracts at 2-to-1 points would be an overly-intrusive remedy, one not justified by the problem this condition was intended to address. In Decision No. 44, slip op. at 133, we noted the statement of BNSF's counsel at oral argument that "BN/Santa Fe is willing, able, and anxious to compete for this traffic to which it will gain access under those rights." BNSF's counsel went on to say that the traffic densities were sufficient to permit the building of trains to provide quality service. Now that we have given BNSF access to substantial additional traffic that it did not have access to when it made those statements, we question why BNSF now suggests that it needs to open up even more contract volumes to compete effectively. In any event, the relief that BNSF seeks goes well beyond "clarification."

(5) The contract modification condition was not imposed to rectify competitive problems faced by 2-to-1 shippers who are parties to long-term contracts. Rather, that provision amounts to somewhat of a windfall for any shipper whose traffic it covers. That shipper, by definition, is a 2-to-1 shipper; that shipper's traffic has been committed, again by definition, either to UP or to SP under a contract that was formed when two-carrier competition was available. The modification condition allows shippers to opt out of contracts to obtain a better arrangement with BNSF.

2-TO-1 STATUS. We are denying the petitions filed by LCRA/Austin and Entergy insofar as these parties seek a declaration that they are entitled to 2-to-1 status for the purposes of the contract modification condition.

LCRA/Austin. LCRA/Austin was not, immediately prior to the consummation of the merger, a 2-to-1 shipper for purposes of the contract modification condition at its Fayette Power Project coal-fired station at Halsted, TX. It was served by UP and by UP only; it had access to UP and to UP only; it had no access to SP.

Although at a future date its Halsted-West Point trackage rights would have become effective and it would, at that future date, have become a 2-to-1 shipper,³⁰ it was not a 2-to-1 shipper immediately prior to the consummation of the merger or indeed at any time prior to the consummation of the merger. We had in mind, when we imposed the contract modification condition, that this condition would apply to those shippers that had 2-to-1 status immediately prior to the consummation of the merger. We realize, of course, that this condition could conceivably be applied in a broader fashion, but we think that the imposition of a fixed cutoff date is preferable. And we think it appropriate to note that, in taking this approach, we are not depriving any shipper of any right to which it is entitled; rather, we are merely denying a few shippers the windfall that a more elastic approach would have allowed.

LCRA/Austin insists, however, that applicants must be held to their representation, made during the course of the merger proceeding, that LCRA/Austin was to be regarded as a 2-to-1 shipper. We agree that applicants must honor the representations they made during the course of the merger proceeding. See Decision No. 44, slip op. at 12 n.14. Their representation vis-à-vis LCRA/Austin, however, must be taken in the context in which it was made. The BNSF agreement was the main vehicle for resolving the 2-to-1 problem; applicants realized that an unconditioned merger would effectively nullify LCRA/Austin's future TRA trackage rights; and they therefore agreed to preserve those trackage rights by treating LCRA/Austin as one of the many 2-to-1 shippers that would gain access to BNSF under the terms of the BNSF agreement. This is the representation that applicants made and this, therefore, is the representation to which they will be held. Applicants, however, never represented that LCRA/Austin would be treated as a 2-to-1 shipper for the purposes of CMA Paragraph 3.

LCRA/Austin contends that its lack of immediate pre-merger access to SP should not determine its 2-to-1 status for the purposes of the contract modification condition. LCRA/Austin concedes that it lacked the pre-merger ability to tender its traffic to SP, but notes that the contract modification condition applies, by definition, only to shippers that lacked the pre-merger ability to tender traffic to one or the other of the applicants; and LCRA/Austin insists that it is, in this respect, no different than any other shipper that seeks to invoke the contract modification condition. This argument is not persuasive. There *is* a difference between LCRA/Austin, on the one hand, and a pre-merger 2-to-1 shipper, on the other hand: LCRA/Austin's inability to tender freight to SP had two independent causes (its long-term contract with UP and the lack of access by SP); a pre-merger 2-to-1 shipper's inability to

³⁰ As noted in Decision No. 44, slip op. at 63, LCRA/Austin, when it entered into its present contract with UP, also entered into a separate trackage rights agreement (TRA) with UP's Missouri-Kansas-Texas Railroad Company predecessor that provided future access over 18 miles of track between Halsted (the location of the Fayette Power Project) and West Point (the location of a nearby SP-UP junction). The TRA trackage rights were to have become effective at a future date.

tender freight to one or the other of the applicants had only one cause (its long-term contract with the other applicant).

LCRA/Austin further contends that 2-to-1 status would allow it to tender freight to BNSF sooner than it otherwise could, and would therefore serve the contract modification condition's primary purpose of enabling BNSF to achieve, sooner rather than later, sufficient traffic density on the trackage rights line. We think it appropriate to note, however, that every shipper seeking a declaration of 2-to-1 status could make exactly the same argument, and, for this reason, we have conducted our analysis of 2-to-1 status separate and apart from the considerations of increased traffic density that justify the contract modification condition itself. LCRA/Austin was not a 2-to-1 shipper immediately prior to the consummation of the merger, and it will therefore not be regarded as a 2-to-1 shipper for the purposes of the contract modification condition.³¹

Entergy. Entergy (at White Bluff)³² was not, immediately prior to the consummation of the merger, a 2-to-1 shipper for the purposes of the contract modification condition. It was served by UP and by UP only; it had access to UP and to UP only; it had no access to SP. Because Entergy (at White Bluff) was not a 2-to-1 shipper immediately prior to the consummation of the merger, it will not be regarded as a 2-to-1 shipper for the purposes of the contract modification condition.

Entergy's various arguments do not persuade us otherwise. (1) Entergy argues that it had, prior to the merger, a feasible build-out to SP, which, had it ever been constructed, would have made Entergy a 2-to-1 shipper. Feasible or not,³³ the important thing, for present purposes, is that the build-out line was not constructed prior to the merger consummation date. Entergy might

³¹ The LCRA/Austin facility is located in Texas, and therefore comes with the geographical coverage of *both* the Decision No. 44 contract modification condition *and* CMA Paragraph 3. To avoid any confusion, we wish to make it clear that, in denying the LCRA/Austin petition for a declaration of 2-to-1 status for the purposes of the Decision No. 44 contract modification condition, we are also denying this petition insofar as it seeks a declaration of 2-to-1 status for the purposes of CMA Paragraph 3. We recognize the difference in geographical scope (our contract modification condition applies across the entire UP/SP system, whereas CMA Paragraph 3 applies only in Texas and Louisiana), but we think it best that there be, aside from that one difference, a uniform application of our contract modification condition and CMA Paragraph 3.

³² In Decision No. 44, we granted the build-out relief sought by Entergy vis-à-vis White Bluff by requiring that the BNSF agreement be amended to allow BNSF to transport coal trains to and from White Bluff via the White Bluff-Pine Bluff build-out line, if and when that line is ever constructed by any entity other than UP/SP. See Decision No. 44, slip op. at 54-56, 154, and 185.

³³ In the build-in/build-out context, "the only test of feasibility is whether the line is actually constructed." Decision No. 44, slip op. at 146.

or might not have become a 2-to-1 shipper at some future date, but it was not a 2-to-1 shipper immediately prior to the consummation of the merger.³⁴ (2) Entergy argues that Pine Bluff, the point on the SP line to which the build-out line would connect, is a 2-to-1 point. This is true but inconsequential. The key to 2-to-1 status for purposes of the contract modification condition is the status of the shipper, not the status of the point to which the shipper's build-out line might be constructed. (3) Entergy argues that, had the merger not been conditioned, a shipper that was captive to UP but that had a feasible build-out to SP (or vice versa) would have suffered a merger-related loss of competition conceptually similar to the loss of competition suffered by a shipper that was served, prior to the merger, by both UP and SP. This argument, though not entirely wrong, glosses over a real difference between the two shippers. Had the merger not been conditioned, the shipper served by both UP and SP would have lost one of two present competitive options, whereas the build-out shipper would have lost only its build-out potential. The costs of construction, not to mention the delays that all construction necessarily entails, are such that a build-out line must be built before it can provide a competitive option that will match the competition provided by an existing line. (4) Entergy argues that 2-to-1 status would allow it to tender freight to BNSF sooner than it otherwise could, and would therefore increase the tonnage available for movement by BNSF during the early years of operations on the trackage rights lines. This, of course, is true, but, as we noted in connection with the similar argument made by LCRA/Austin, our analysis of 2-to-1 status stands separate and apart from the considerations of increased traffic density that provide the premise for the contract modification condition.

IMPLEMENTATION GUIDELINES. We have prepared a series of guidelines to govern the implementation of the contract modification condition. These guidelines reflect what we think are the best aspects of the implementation proposals advocated by BNSF, GSC, RCT, LCRA/Austin, Entergy, UP/SP, Dow, CMA, NITL, SPI, WCTL, GPTC, QCC, USG, CIC, and KUC.

Guideline #1: General Rule. The contract modification condition applies to every contract entered into prior to the consummation of the merger by a 2-to-1 shipper, on the one hand, and either UP or SP, on the other hand, provided only that such contract (i) was negotiated under the auspices either of old 49 U.S.C. 10713 or of new 49 U.S.C. 10709, and (ii) was in effect at the time the merger was consummated. A 2-to-1 shipper may tender to BNSF, and BNSF may transport, up to 50% of the volume covered by any contract to which the contract modification condition applies; and a shipper's obligation to ship traffic via UP/SP is waived to the extent that traffic is tendered to BNSF under the auspices of the contract modification condition.

³⁴ We need not decide what Entergy's status might have been had the proposed White Bluff-Pine Bluff build-out line been under construction on the merger consummation date. There is no indication that this build-out line has ever progressed beyond relatively preliminary planning stages.

We agree with NITL that the traffic to which the contract modification condition applies includes, but is not limited to, traffic that has been exempted from regulation either under old 49 U.S.C. 10505 or under new 49 U.S.C. 10502.

Guideline #2: Contract-By-Contract Basis. The contract modification condition is to be applied on a contract-by-contract basis.³⁵

Most parties agree that application on a contract-by-contract basis is the preferable approach, mainly because any other approach might allow either UP/SP or the shippers to "game" the system. UP/SP, if allowed to aggregate contracts in any manner, could release the least profitable contracts or those movements for which BNSF would be a relatively ineffective competitor; any shipper, if allowed to pick and choose among its own multiple contracts in the manner suggested by QCC and KUC, could put up for bidding the contract(s) that would generate the most intensive competitive bidding between UP/SP and BNSF. The contract-by-contract approach, we think, is more straightforward and less susceptible to abuse.

Because most (if not all) contracts involve but a single shipper, the "contract-by-contract" approach that we are adopting amounts to the same thing as the "shipper-by-shipper, contract-by-contract" approach that several parties have advocated. If any relevant contracts involve multiple shippers, the contract modification condition should be applied to such contracts on a shipper-by-shipper, contract-by-contract basis. Under this approach, each such contract will be treated as if it were two or more contracts (one per shipper); and the contract modification condition will then be applied, on a contract-by-contract basis, to each of the deemed contracts.

Guideline #3: Volume Determinations. The "50% of volume" determination is to be made by reference to the particular contract subject to the contract modification condition. If a particular contract defines "volume" in terms of tonnage, then tonnage is the appropriate definition for purposes of that particular contract; and, if a particular contract defines "volume" in terms of carloads, revenues, or other measures, then carloads, revenues, or the other measures would be the appropriate definition for purposes of that particular contract.³⁶

The only variation to this rule would occur in those situations in which the contract defines "volume" as a certain percentage less than 100% of the shipper's freight (e.g., 85% of the shipper's freight). In these situations, "50% of volume" will be understood to mean 50% of the shipper's freight, however

³⁵ We are therefore granting in part the following petitions insofar as they advocate the contract-by-contract basis: BN/SF-65 (third alternative clarification request); and ESI-27 (second clarification request).

³⁶ We are therefore granting in part the following petitions insofar as they advocate the rule provided for in Guideline #3: RCT-8 (first clarification request); and LCRA-4/-5 (second clarification request).

that is defined in the contract. This approach might allow BNSF to bid on more than 50% of the volume actually under contract; but we have protected UP/SP's interests in this situation by allowing it to exercise a contract termination option. See Guideline #9.

Guideline #4: Shipper Selection. A shipper using the contract modification condition may select, on a contract-by-contract basis, the portion (not greater than 50%) of its traffic that is open to BNSF.³⁷

Application of the contract modification condition on a contract-by-contract basis necessarily requires a selection, either by the shipper or by UP/SP, of the movements that will be open to competition by BNSF. Interested parties other than UP/SP have generally argued that it is the shipper that should do the selecting. UP/SP itself has disavowed any unilateral selection right of its own, and has indicated that, although it hopes to resolve selection matters on a shipper-by-shipper basis, it will not in any event insist on imposing its preferences on the shipper. We think that UP/SP's disavowal can only be read as an endorsement of a shipper selection right.

Guideline #5: Shipper Timing Right. A shipper using the contract modification condition may do so at any time prior to the expiration of a contract to which the contract modification condition applies.³⁸

All parties that have addressed this question, including UP/SP, have agreed that a shipper should be allowed to assert its rights under the contract modification condition throughout the entire course of a contract that was in effect on the merger consummation date.

Guideline #6: Provisions Continue To Apply. If a shipper uses the contract modification condition and tenders to BNSF freight covered by a UP/SP contract, all terms of the contract continue to apply except as otherwise provided for in Guideline #1 (a shipper's obligation to ship traffic via UP/SP is waived to the extent that traffic is tendered to BNSF under the auspices of the contract modification condition), Guideline #7 (volume incentives must be prorated), and Guideline #9 (UP/SP may exercise a contract termination option).

Guideline #7: Incentives Prorated. If a shipper uses the contract modification condition and tenders to BNSF freight covered by a UP/SP contract, all volume incentives (whether formulated as discounts or as penalties) provided for by the

³⁷ We are therefore granting in part the following petitions insofar as they advocate the shipper selection right provided for in Guideline #4: BN/SF-65 (third alternative clarification request); and GS-3/-4 (second clarification request).

³⁸ We are therefore granting in part the following petition insofar as it advocates the shipper timing right provided for in Guideline #5: GS-3/-4 (third clarification request).

UP/SP contract must be, at the shipper's option, prorated to 50% volumes.³⁹

If left intact, volume incentives, formulated either as discounts for shipping more freight or as penalties for shipping less, might effectively prevent any shipper from invoking its rights under the contract modification condition. The outcome, of course, would depend on the size of the volume incentives: the greater the incentive vis-à-vis the underlying rate, the less likely it would be that BNSF could ever underbid UP/SP on traffic supposedly opened up to immediate competition. The most practical solution to this problem, we think, is simply to require that the incentives be prorated. We realize that this might leave UP/SP with a contract that neither UP nor SP would ever have entered into, but we have protected UP/SP's interests in this situation by allowing it to exercise a contract termination option. See Guideline #9.

For purposes of Guideline #7, a contractual provision that requires a shipper to pay a flat rate for transporting up to a certain number of cars per year, whether it actually ships that number of cars or any lesser number, is to be regarded as a volume incentive provision, and a per car rate is to be determined by dividing the flat rate (e.g., \$100,000 per year) by the maximum number of cars specified in the contract (e.g., 100 cars). Unless UP/SP and the shipper mutually agree otherwise, Guideline #7 will be understood to require that, if (i) the shipper uses the contract modification condition and tenders to BNSF freight covered by the UP/SP contract, and (ii) UP/SP does not exercise the contract termination option provided for in Guideline #9, then (iii) any remaining cars tendered to UP/SP under the contract must be transported at the per car rate determined in the manner indicated in the preceding sentence.

Guideline #8: Competitive Tactics. UP/SP and a shipper may, by mutual agreement, modify any term of any contract subject to the contract modification condition; and a shipper may waive, in whole or in part, its rights under the contract modification condition.⁴⁰

The contract modification condition provides BNSF with an opportunity, not a guarantee. It has an opportunity to bid for traffic prior to the expiration date of the applicable contract, but it has no guarantee that it will receive that traffic. We are sensitive, of course, to BNSF's claim that UP/SP, by spreading concessions across 100% of the traffic, will always be able to underbid BNSF, which will be able to spread concessions across only 50% of the traffic; but we think that the problem is overstated. The 2-to-1 traffic at issue is, by definition,

³⁹ We are therefore granting in part the following petitions insofar as they advocate the rule provided for in Guideline #7: BN/SF-65 (first alternative clarification request); GS-3/-4 (first clarification request); and LCRA-4/-5 (third clarification request).

⁴⁰ We are therefore denying the following petition insofar as it advocates a rule inconsistent with the rule provided for in Guideline #8: BN/SF-65 (second alternative clarification request).

competitive traffic, that was acquired either by UP or by SP in competitive bidding against the other. This is not traffic that was formerly captive to one railroad or the other but that is now open to competitive bidding for the first time; this is traffic that has been open to competitive bidding all along. And, in any event, the competitive bidding that BNSF purports to fear can only benefit the affected shippers.

Guideline #9: Contract Termination Option. If a shipper uses the contract modification condition and tenders to BNSF freight covered by a UP/SP contract, UP/SP may, at its option, release the entire volume under the contract.⁴¹

This contract termination option is, we think, essential to the protection of UP/SP's own interests, given the way we have structured the contract modification condition. Guideline #4 provides that a shipper has the right to select, on a contract-by-contract basis, the portion (not greater than 50%) of its traffic that is open to BNSF; Guideline #5 provides a similar right with respect to timing; and Guidelines #6 and #7, taken together, provide, in essence, that all contractual provisions that burden UP/SP continue to apply, but that volume incentive provisions that burden the shipper must be, at the shipper's option, prorated. UP/SP could easily be left with a fractured loss-generating half-contract that neither UP nor SP would ever have negotiated.

The contract modification condition was intended to allow BNSF to access, sooner rather than later, a substantial volume of traffic at the 2-to-1 points previously open only to UP and SP. We had in mind that UP/SP would be required to release for immediate competition 50% of the traffic that UP and SP had locked up in contracts. We never intended that UP/SP would be required to haul the other 50% of that traffic at a loss.

The contract termination right provided for in Guideline #9 is intended to be exercisable by UP/SP at its option. We therefore will not entertain petitions asking us to review whether, in any particular instance, an exercise of the contract termination option would be, or was, justified by the economics of the relevant contract.

Guideline #10: Request For Advice. A 2-to-1 shipper contemplating use of the contract modification condition with respect to a particular UP/SP contract may formally request that UP/SP advise what action UP/SP will take if the shipper tenders to BNSF certain traffic covered by the UP/SP contract. The request must clearly indicate the contract at issue, the particular traffic that the shipper intends to tender to BNSF, and the time at which such traffic will first be tendered. Upon receipt of such a request, UP/SP must immediately advise the shipper that, if the shipper tenders the traffic as indicated in the request, UP/SP either will or will not exercise its contract termination option. If the shipper thereafter tenders the

⁴¹ We are therefore denying in part the following petition insofar as it advocates a rule inconsistent with the rule provided for in Guideline #9: GS-3/-4 (first clarification request).

traffic as indicated, UP/SP will be bound by the advice it has given unless UP/SP and the shipper mutually agree otherwise.

The advice requirement described in Guideline #10 is necessitated by the contract termination option described in Guideline #9. A shipper tendering freight to BNSF under the auspices of the contract modification condition should have a right to know, in advance, whether the tender will trigger exercise by UP/SP of the contract termination option. That shipper should not have to guess at UP/SP's likely reaction.

Guideline #10 is patterned upon a recently issued regulation respecting disclosures required by new 49 U.S.C. 11101. See 49 CFR 1300.2, as promulgated in Disclosure, Publication and Notice of Change of Rates and Other Service Terms for Rail Common Carriage, STB Ex Parte No. 528, 61 FR 35139, 35140 (July 5, 1996), 1 S.T.B. 153, 164 (1996). We expect that, if a shipper makes a formal request for advice, UP/SP will provide that advice "immediately." As indicated in 49 CFR 1300.2, in this context that means, in most situations, that the advice must be sent within hours, or at least by the next business day.

NOTIFICATION. UP/SP has indicated that it has identified, to the best of its ability, all shippers with outstanding contracts at 2-to-1 points, and has advised those shippers in writing that they are covered by the contract modification condition and that UP/SP stands ready to release to immediate competition by BNSF 50% of their traffic which would otherwise be subject to the contract. See UP/SP-280, V.S. Shattuck at 1-2 (two letters were sent to each shipper; the first letter was sent on September 6th; the second letter, containing a list of all affected contracts, was sent on September 19th).

We are now directing UP/SP to provide written notification to all such shippers, no later than 10 days from the date of service of this decision, that the contract modification condition has been clarified to the extent, and in the manner, indicated in this decision. UP/SP may, if it so chooses, comply with this notification requirement by providing each such shipper with a copy of this decision.⁴²

Without this notification requirement a shipper using the contract modification condition might only learn after having done so that this allowed UP/SP to release the entire volume under the relevant contract. Notification resolves this problem by giving the shipper a choice: *either* accept the contract

⁴² This notification requirement applies only with respect to those shippers that, in UP/SP's opinion, have contracts to which the contract modification condition is applicable. We realize, of course, that, with respect to certain shippers and certain points, BNSF has asserted 2-to-1 status and UP/SP has denied the assertion. See BNSF-PR#1 at 12 n.6 and 13 n.8. The notification requirement imposed herein does not now apply to shippers whose 2-to-1 status is disputed by UP/SP. We note, however, that UP/SP will be expected to provide the notification described herein to any such shipper at such time as UP/SP concedes, or we conclude, that such shipper has, for the purposes of the contract modification condition, 2-to-1 status.

modification condition in its entirety, in which case the shipper will have accepted, among other things, the UP/SP contract termination option, or reject the contract modification condition in its entirety.

REVIEW OF DISPUTES. The contract modification condition, even as clarified in this decision, may pose potential implementation issues that will have to be resolved on a shipper-by-shipper, contract-by-contract basis. We think that the parties might be best advised to submit such disputes to arbitration, see Decision No. 44, slip op. at 156, but we realize that various parties might prefer to submit such disputes to the Board. As SPI has requested, we now affirm our willingness to resolve such disputes if they are brought before us.

SPI, which has noted that such disputes may be complicated by the confidentiality provisions contained in existing contracts, has also asked us to affirm that we will provide, at the request of a shipper, an *in camera* review. An *in camera* procedure, as we understand the term, usually entails an ex parte presentation of documents to a judge "in chambers." The procedure, admittedly, has not been entirely unheard of in the cases handled by administrative law judges (ALJs) for this agency and for its ICC predecessor. This procedure, however, requires an ALJ, and we are reluctant to assign an ALJ to this proceeding simply for the purpose of conducting *in camera* reviews of documents assertedly relevant to disputes arising under the contract modification condition. Any necessary confidentiality can be adequately provided under the auspices of the protective order heretofore entered in this proceeding. See Decision No. 2 (served September 1, 1995) (the protective order is attached thereto).

SPI, which has argued that prompt disposition of disputes arising under the contract modification condition is likely to be necessary inasmuch as the commercial window of opportunity often is short, has also asked us to address these matters on an expedited basis. We will attempt to process as quickly as possible any petitions raising issues that call for prompt resolution. At least part of any delay in issuing a decision in connection with a dispute arising under the contract modification condition may reflect the 20-day time period allowed for filing replies to petitions. SPI and other interested parties may therefore wish to consider filing a petition proposing a specified expedited procedure to be applicable to disputes arising under the contract modification condition.

MATTERS NOT ADDRESSED. BNSF has suggested: that there is some uncertainty as to whether certain shippers are 2-to-1 shippers, see BNSF-PR#1 at 12 n.6; see also BNSF-PR#1, V.S. Brown at 8 (the only shipper named by BNSF is Intermod Industries at Stockton, CA); and that there is likewise some uncertainty as to whether Lake Charles, Westlake, and West Lake Charles are 2-to-1 points, see BNSF-PR#1 at 13 n.8. With respect to the shippers, BNSF indicates that it will ask us to resolve the uncertainty if agreement cannot be reached with UP/SP, see BNSF-PR#1 at 12 n.6. With respect to Lake Charles, Westlake, and West Lake Charles, BNSF asks that we clarify their 2-to-1 status, see BNSF-PR#1 at 13 n.8 (BNSF apparently contends that, at these points, a 3-to-2 or 2-to-2 situation is the functional equivalent of a 2-to-1

situation for the purposes of the contract modification condition). We will not address, in this decision, either the matter of the 2-to-1 shippers or the matter of Lake Charles, Westlake, and West Lake Charles, which were included in footnotes in a lengthy pleading the title of which gives no indication that it contains a clarification request. Nothing said in this decision is intended to prejudge those issues.

ALLEGATIONS RESOLVED. *Allegations and Responses.* (1) BNSF claims that there is at least one identifiable situation in which (i) a shipper whose traffic is important to BNSF's density will have no practical ability to benefit from BNSF competition if the contract modification condition is given a narrow reading, but (ii) UP/SP indicated, in its April 29, 1996, rebuttal submission, that, even without the contract modification condition, this shipper's business would be open to BNSF competition. See BN/SF-65 at 2, 7 n.2, and 12-14. (2) GSC claims that the record compiled in this proceeding prior to the release of Decision No. 44 contains "possible misimpressions" concerning certain contracts involving 2-to-1 points. GS-3 at 9 n.4; GS-4, Exhibit 2B, Page 1. (3) UP/SP denies the allegations made by BNSF and GSC respecting contractual commitments at 2-to-1 points.⁴³

Our Analysis. We accept UP/SP's denial as respects the particular matter addressed both by BNSF and by GSC because we have concluded, for the reason given by UP/SP, see UP/SP-280 at 14-15, that the challenged statement was factually accurate. See also UP/SP-280 at 16 n.9 (we agree with the thought expressed in that footnote). We realize that UP/SP has not provided a complete response to the allegation made by GSC, see GS-3 at 9 n.4; see also GS-4, Exhibit 2B, Page 1 (third paragraph) (discussing the particular matter to which UP/SP has not responded), but we have concluded that a complete response, although it would have been appropriate, is not necessary. GSC has not alleged, with respect to the matter discussed at GS-4, Exhibit 2B, Page 1 (third paragraph), that any particular statement was factually inaccurate; rather, GSC has alleged, in essence, that the particular UP/SP witness's testimony, taken in its entirety, might have created a misimpression as to a certain matter; and we have concluded that, given the context, the allegation is far too vague to pursue any further. We think it appropriate to add that GSC has not cited, and we have been unable to find, any statement in the referenced testimony of the particular UP/SP witness that even names the entity discussed at GS-4, Exhibit 2B, Page 1 (third paragraph).

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

⁴³ Because this matter involves information designated as "Highly Confidential" and submitted pursuant to the protective order in this proceeding, we will attempt in our discussion and resolution of this matter to avoid disclosing any of that information.

It is ordered:

1. The GPTC-1 petition for leave to intervene for the purpose of submitting the GPTC-2 pleading is granted.
2. The UP/SP-286 motion for leave to file the reply attached thereto is granted.
3. The TFI-2 motion for leave to file the TFI-3 reply is granted.
4. Decision No. 44 is clarified to the extent, and in the manner, indicated in this decision.
5. UP/SP shall provide written notification to all 2-to-1 shippers, no later than 10 days from the date of service of this decision, that the contract modification condition has been clarified to the extent, and in the manner, indicated in this decision.
6. The BN/SF-65, GS-3/-4, RCT-8, LCRA-4/-5, and ESI-27 petitions are granted in part and denied in part, as indicated in this decision.
7. This decision shall be effective on the date of service.

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

Vernon A. Williams
Secretary