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. 44[1]

Decided August 6, 1996

The Board approves, with certain conditions, the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company).[2]

[1] This decision covers the Finance Docket No. 32760 lead proceeding and the embraced proceedings listed in Appendix A.

[2] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), enacted December 29, 1995, and effective January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC at the time of its termination that involve functions transferred to the Board pursuant to the Act shall be decided (1) by the Board, and (2) under the law in effect prior to January 1, 1996. The Finance Docket No. 32760 lead proceeding, the Finance Docket No. 32760 (Sub-Nos. 1 to 9) embraced proceedings, and the 17 embraced abandonment and 4 embraced discontinuance proceedings were pending with the ICC at the time of its termination. The Finance Docket No. 32760 (Sub-Nos. 10, 11, 12, 13, 14, 16, and 17) embraced proceedings were not then pending but will be considered as if they had been because responsive applications that seek to invoke the

(continued...)

TABLE OF CONTENTS

INTRODUCTION 241
THE RECORD 249
APPLICANTS 249
Public Interest Justifications 251
Labor Impact 252
BNSF Agreement 252
CMA Agreement 254
URC Agreement 255

(...continued)

conditioning power of old 49 U.S.C. 11344(c) have never been regarded as independent applications. *See, Burlington Northern et al. -- Merger -- Santa Fe Pacific et al. (BN/ SF),* 10 I.C.C.2d at 729 n.76. Except as noted in the next two paragraphs, all of the proceedings addressed in this decision involve functions that are subject to our jurisdiction pursuant to new 49 U.S.C. 11323-27 (control/merger transactions), new 49 U.S.C. 11102 (terminal facilities), and new 49 U.S.C. 10903-05 (abandonments), and we will therefore decide these proceedings under the law in effect prior to January 1, 1996.

The Finance Docket No. 32760 (Sub-No. 8) proceeding, wherein applicants seek an exemption from the trucking company acquisition requirements of old 49 U.S.C. 11343-44, involves a function that is not subject to our jurisdiction under the law in effect on and after January 1, 1996. We will nevertheless decide this proceeding, and decide it under the law in effect prior to January 1, 1996, in accordance with the special transition rule provided by section 204(b)(3)(C) of the Act (any proceeding involving the "merger" of a motor carrier of property, that was pending before the ICC at the time of its termination, shall be decided by the Board under the law in effect prior to January 1, 1996). The transactions at issue in Finance Docket No. 32760 (Sub-No. 8) are not, in the technical sense, mergers, but prior practice suggests that the word "merger," as used in section 204(b)(3)(C), should be read broadly. *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. 25 (ICC served March 7, 1995) (*UP/CNW*) (slip op. at 56 n.52) (in the context of old 49 U.S.C. 11343-44, the words "merger" and "transaction" have been used almost interchangeably).

Section 204(b)(3)(A) of the Act provides, in general, that in the case of a proceeding under a provision of law repealed and not reenacted by the Act, such proceeding shall be terminated. The Finance Docket No. 32760 lead proceeding includes, among other things, a request that certain securities matters be approved under or exempted from the requirements of old 49 U.S.C. 11301. Because the referenced securities requirements were repealed and not reenacted, the described portion of the Finance Docket No. 32760 lead proceeding was terminated, by force of law, effective January 1, 1996.

As used in this decision, the term "new law" refers to the law in effect on and after January 1, 1996, and the term "old law" refers to the law in effect prior to January 1, 1996. All further references in this decision, except as otherwise specifically indicated, will be to the applicable provisions of the old law.

Terminal/Switching Railroads 255
Motor Carriers 256
Terminal Trackage Rights 256
Abandonments And Discontinuances 257
BNSF 260
RAILROAD PROTESTANTS 261
Consolidated Rail Corporation 261
Kansas City Southern Railway Company 265
Montana Rail Link 268
Texas Mexican Railway Company 271
Capital Metropolitan Transportation Authority 275
Magma Copper Company's Rail Affiliates 277
Yolo Shortline Railroad Company. 278
Keokuk Junction Railway and Pioneer Railcorp 278
Toledo, Peoria, & Western Railway Corporation 280
Southern California Regional Rail Authority 281
SHIPPER ORGANIZATIONS 281
National Industrial Transportation League 281
Society Of The Plastics Industry. 284
Western Coal Traffic League 286
Western Shippers' Coalition 289
Mountain-Plains Communities & Shippers Coalition 290
WSC/MPCSC Joint Shippers' Statement 291
Coalition For Competitive Rail Transportation 291
Corn Refiners Association 292
National Corn Growers Association 293
Institute of Scrap Recycling Industries 293
Montana Wheat and Barley Committee 293
Montana Farmers Union 294
Save The Rock Island Committee 296
Colorado Wheat Administrative Committee 297
Hoisington Chamber of Commerce 298
Enid Board of Trade 299
Kansas-Colorado-Oklahoma Shippers Association 299
Farmers Elevator Association of Minnesota 300
South San Antonio Chamber of Commerce 300
SHIPPERS: COAL 300
Wisconsin Power & Light/Wisconsin Public Service Corp 300
Wisconsin Power & Light Company 301
Wisconsin Public Service Corporation 302
Entergy/Arkansas P&L/Gulf States Utilities 303
The City Public Service Board of San Antonio 305
Texas Utilities Electric Company 307
Sierra Pacific Power/Idaho Power Company 308
Arizona Electric Power Cooperative 310
Wisconsin Electric Power Company 311
Public Service Company of Colorado 312
Illinois Power Company 313

Central Power & Light Company 314
Intermountain Power Agency 314
Lower Colorado River Authority/City of Austin 315
Rio Bravo Poso/Rio Bravo Jasmin 315
IES Utilities 315

SHIPPERS: PLASTICS AND CHEMICALS 316
Dow Chemical Company 316
Montell USA Inc./Olin Corporation 318
Quantum Chemical Corporation 320
Union Carbide Corporation 321
Enterprise Products Company 321
Formosa Plastics Corporation, USA 322
The Geon Company 322
PPG Industries Inc 323
Huntsman Corporation 323
Arizona Chemical Company 323
Monsanto Company 324
Shell Chemical Company 325
Springfield Plastics/Brandt Consolidated 325
SHIPPERS: OTHER 326
International Paper Company 326
United States Gypsum Company 328
North American Logistic Services 330
ASARCO Incorporated 331
CIC International Corporation 332
Weyerhaeuser Company 333
Cargill 333
IBP, Inc 333
Oregon Steel Mills, Inc 334
Stimson Lumber Company 334
STATE & LOCAL GOVERNMENTS AND RELATED INTERESTS 334
Texas 334
California 336
Oregon 338
Montana 339
Idaho 339
Colorado 340
Nevada 340
Kansas 342
Minnesota 342
Arkansas 343
Washington 343
Iowa 343
Utah 343
LABOR PARTIES 344
Allied Rail Unions 344

International Brotherhood of Teamsters 346
Transportation•Communications International Union 347
Transportation Trades Department 348
Union Locals 348
FEDERAL PARTIES 350
United States Department of Justice 350
United States Department of Transportation 351
United States Department of Defense 352
United States Department of Agriculture 353
United States Department of Labor 353
ABANDONMENT FILINGS NOT PREVIOUSLY REFERENCED 353
APPLICABLE STANDARDS 362
PUBLIC INTEREST STANDARD 362
GENERAL POLICY STATEMENT 366
ANTITRUST CONSIDERATIONS 366
DISCUSSION AND CONCLUSIONS 367
OVERVIEW 367
PUBLIC BENEFITS OF THE MERGER 375
Quantifiable Public Benefits 375
Unquantified Benefits 381
More Efficient Routes/Single-Line Service 381
Increased Capacity and Capital Investment 381
Improvement of the Declining SP Service 382
COMPETITIVE HARM 384
Merger Will Result in Rivalry, Not Collusion 384
Competition at 3-to-2 Points Not Diminished 387
Competition at 2-to-1 Points Not Diminished 390
Source And Other Indirect Competition Not Impaired 394
Plastics and Other Chemicals 394
Coal 396
Grain and Lumber 400
TRACKAGE RIGHTS ISSUES AND ALTERNATIVES 403
Trackage Rights Are Operationally Feasible 403
Houston to New Orleans 407
Houston to Memphis/St. *Louis* 408
Houston to Brownsville 409
Houston to San Antonio/Eagle Pass 410
Central Corridor 411
Trackage Rights Compensation Is Reasonable 413
The Level of the Payments 414
Structure of the Payments 416
Conditions Imposed 418
Criteria for Imposing Conditions 418
BNSF agreement 419
CMA agreement 419
Broad-based Conditions 419
New facilities and transloading facilities 419
Build-in/build-out options 420

Opening contracts at 2-to-1 points 420
Oversight 420
South Central Lines/SP East 421
NAFTA/Grain: Tex Mex 421
Plastics/Chemicals: SIT/Lake Charles/Dow/UCC 426
Coal: Entergy/CPSB/TUE 429
Central Corridor 430
Coal: URC agreement/Tennessee Pass 430
Related procedural aspects 432
No Divestiture Needed 433
South Central Lines/SP East 433
Central Corridor 438
EMBRACED CASES AND RELATED MATTERS 442
Trackage Rights 442
Line Sales 443
Terminal Railroad Control Transactions 444
Motor Carrier Control Transactions 445
Terminal Trackage Rights 446
Conditions and Compensation 449
49 U.S.C. 11341(a) 449
LABOR IMPACTS 450
Union Support 450
Protective Conditions: *New York Dock* 452
Protective Conditions: *Norfolk and Western* 453
Protective Conditions: *Oregon Short Line* 453
The Immunity Provision 454
Certain Requests Denied 455
FINANCIAL MATTERS 457
Financial Condition 457
Fixed Charges 459
Fairness Determination 459
CONDITIONS REQUESTED 461
Broad Conditions Requested 461
South Central/SP East Divestiture Conditions 461
Central Corridor Divestiture Conditions 462
Central Kansas-To-Texas Conditions 462
Strengthen BNSF Trackage Rights Conditions 463
Uinta Basin vs. PRB/Hanna Basin Conditions 463
Trackage Rights Compensation Conditions 463
UP/SP Integration Prohibition Conditions 464
Conditions Requested By Individual Parties 464
Railroad Parties 464
Consolidated Rail Corporation 464
Kansas City Southern Railway Company 464
CMTA 465
Magma Copper Company's Rail Affiliates 466
Yolo Shortline Railroad Company 467

KJRY and PRC 467
Shipper Organizations 467
Corn Refiners Association 467
MWBC, MFU, and Governor Racicot 467
Save The Rock Island Committee 468
Hoisington Chamber of Commerce 468
Farmers Elevator Association of Minnesota 468
South San Antonio Chamber of Commerce 469
Shippers: Coal 469
Entergy/Arkansas P&L/Gulf States Utilities 469
City Public Service Board of San Antonio 469
Texas Utilities Electric Company 471
Sierra Pacific Power/Idaho Power Company 471
Arizona Electric Power Cooperative 472
Public Service Company of Colorado 472
Rio Bravo Poso/Rio Bravo Jasmin 473
Shippers: Plastics and Chemicals 473
Dow Chemical Company 473
Montell USA Inc./Olin Corporation 474
Quantum Chemical Corporation 474
Union Carbide Corporation 475
Enterprise Products Company 475
Formosa Plastics Corporation, USA 475
PPG Industries 475
Huntsman Corporation 476
Arizona Chemical Company 476
Monsanto Company 476
Shell Chemical Company 476
Springfield Plastics/Brandt Consolidated 476
Shippers: Other 477
International Paper Company 477
United States Gypsum Company 477
North American Logistic Services 479
ASARCO 479
CIC International Corporation 479
Weyerhaeuser Company 480
Cargill 480
IBP, Inc. 481
Oregon Steel Mills, Inc 481
Stimson Lumber Company 481
State and Local Interests 481
Texas: RCT 481
Texas: Other Parties 481
California: CPUC 482
California: Other Parties 483
Oregon: Or/DOT 484
Idaho: IBC/IWC 484
Nevada 485

Kansas 485
Minnesota: Mn/DOT 485
Washington: Wa/DOT 486
Utah 486
Federal Parties 486
United States Department of Justice 486
United States Department of Transportation 486
United States Department of Defense 487
ABANDONMENTS AND DISCONTINUANCES 487
Notices of Exemption 488
Petitions for Exemption 489
Applications 491
Hope-Bridgeport Line (Kansas) 492
Towner-NA Junction Line (Colorado) 494
Barr-Girard Line (Illinois) 497
Tennessee Pass Line Abandonments 504
Discontinuances granted: 10505 petitions 504
Discontinuances granted: applications 505
Abandonments not granted 507
Public Interest Conditions 508
Trail Use 508
Public Use 508
Other Conditions Requested 509
ENVIRONMENTAL CONSIDERATIONS 510
Extensive Environmental Review Process 512
No Need for Environmental Impact Statement 512
Reno and Wichita 514
Comments of EPA 515
FINDINGS 519
APPENDIX A: EMBRACED PROCEEDINGS 521
APPENDIX B: ABBREVIATIONS 555
APPENDIX C: SUB-NO. 1 TRACKAGE RIGHTS 557
APPENDIX D: DETAILS OF PUBLIC BENEFITS 562
APPENDIX E: DUOPOLY ISSUES 564
APPENDIX F: FINANCIAL RATIOS 570
APPENDIX G: ENVIRONMENTAL MITIGATING CONDITIONS 576
SYSTEMWIDE MITIGATION 578
CORRIDOR MITIGATION 578
RAIL LINE SEGMENT MITIGATION 578
RAIL YARDS AND INTERMODAL FACILITIES 580
ABANDONMENTS 582
CONSTRUCTION PROJECTS 582
APPENDIX H: NET EMISSIONS (AIR QUALITY) 586
590

INTRODUCTION

Applicants. By application filed November 30, 1995, Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW)[3] seek approval under 49 U.S.C. 11343-45 for:[4] the acquisition of control of SPR by a wholly owned UPC subsidiary; the resulting common control of UP and SP by UPC; and the consolidation of the rail operations of UP and SP.[5]

The UPC/SPR Merger Agreement, dated August 3, 1995, provides that, upon the satisfaction of certain conditions, including regulatory approval, a wholly owned UPC subsidiary will acquire all of SPR's common stock and SPR will be merged into UPRR. Applicants note, however, that UP/SP common control may be effected by other means, including, for example, the merger of SPR into MPRR or the lease of all SP properties to UPRR and/or MPRR. Applicants add that they intend to merge SPT, SSW, SPCSL, and DRGW into UPRR, although they also add that these SPR subsidiaries may retain their separate existence for some time and that other means may be used to consolidate these subsidiaries into the merged system. Applicants ask, citing *Schwabacher v. United States*, 334 U.S. 192 (1948), that we determine that the

[3] UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as applicants. UPC, UPRR, and MPRR are referred to collectively as Union Pacific. UPRR and MPRR are referred to collectively as UP. SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as Southern Pacific. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP. These and other abbreviations frequently used in this decision are listed in Appendix B.

[4] The application filed November 30, 1995 (UP/SP-22, -23, -24, -25, -26, -27, and -28), as supplemented on December 21, 1995 (UP/SP-36), March 26, 1996 (UP/SP-188), and March 29, 1996 (UP/SP-194 and -195), consists of the primary application (which seeks approval for the common control and merger of UP and SP, and which was filed in Finance Docket No. 32760) and various ancillary applications, petitions, and notices (which seek approval for or exemption of various merger-related matters).

[5] UPRR and MPRR are wholly owned subsidiaries of UPC. SPT, SPCSL, and DRGW are wholly owned subsidiaries of SPR; SSW is a 99.9%-owned subsidiary of SPR.

Merger Agreement's terms for the purchase of the SPR common stock are fair both to the stockholders of UPC and to the stockholders of SPR.[6]

Applicants also have filed related applications, petitions, and notices. These include a notice of exemption for settlement-related trackage rights, a petition for exemption for settlement-related line sales, five petitions for exemption for control of terminal railroads, a petition for exemption for control of three motor carriers, an application for terminal trackage rights, and several abandonment and discontinuance applications, petitions, and notices.

Settlement Agreements: In General. Settlement agreements have been entered into by applicants and: Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF);[7] Utah Railway Company (URC); Illinois Central Railroad Company (IC); Wisconsin Central Ltd. (WC); The Brownsville and Rio Grande International Railroad (BRGI); Gateway Western Railway Company (GWWR); and CSX Corporation, CSX Transportation, Inc., CSX Intermodal, Inc., and Sea-Land Service, Inc.

---

[6] On August 9, 1995, UP Acquisition Corporation (Acquisition), a wholly owned UPC subsidiary that was later merged into UPRR, *see* UP/SP-269, tendered for up to 25% of SPR common stock at $25.00 per share in cash; on September 7, 1995, the tender offer was completed for 39,034,471 shares; and, on September 15, 1995, Acquisition purchased these shares for approximately $976 million (the shares are being held in a voting trust pending approval of the merger). Applicants indicate that, upon satisfaction of all conditions to the merger, each of SPR's stockholders will have the right to specify the number of shares that such stockholder wishes to have converted into (a) 0.4065 shares of UPC common stock per share, and (b) the right to receive $25.00 per share in cash, without interest. The aggregate number of shares to be converted into cash at the time of the merger, together with shares tendered in the tender offer, will be equal as nearly as practicable to 40% of all shares outstanding as of the date immediately prior to the date on which the merger becomes effective. To the extent that SPR stockholders elect in the aggregate to receive either cash consideration in excess of 40% or stock consideration in excess of 60%, the Merger Agreement requires the cash or stock component to be prorated in order to achieve the specified proportions.

Applicants note that SSW has a small number of minority equity holders, and that the Federal Railroad Administration also holds certain SSW redeemable preference shares. Applicants indicate that they are not now requesting a *Schwabacher* determination with respect to the compensation that might be paid to SSW security holders in connection with a merger of SSW into UPRR or MPRR. Applicants add that, should they determine to carry out such a merger, they will request either a *Schwabacher* determination respecting the terms or a declaratory order that no such determination is required.

[7] BN and SF are referred to collectively as BNSF.

(collectively, CSX).[8] Applicants acknowledge that the BNSF agreement is intended (in large measure, though not in its entirety) to address competitive issues raised by the merger, and they have therefore requested that the terms of this agreement be imposed as a condition to approval of the merger. Applicants maintain, however, that the agreements entered into with URC, IC, WC, BRGI, GWWR, and CSX are not intended to address merger-related competitive issues, and they have therefore not requested the imposition of the terms of these agreements.

BNSF Agreement. At the time the primary application was filed (November 30, 1995), the agreement that applicants entered into with BNSF consisted of an agreement dated September 25, 1995 (UP/SP-22 at 318-347) and a supplemental agreement dated November 18, 1995 (UP/SP-22 at 348-359), and these two agreements were generally referred to in the singular as the BNSF agreement. On April 18, 1996, applicants entered into an additional settlement agreement with BNSF and the Chemical Manufacturers Association (CMA), referred to as the CMA agreement, requiring, among other things, that certain amendments be made to the BNSF agreement. *See,* UP/SP-219. On April 29, 1996, applicants, in their rebuttal filings, represented that they would make various clarifications and amendments to the BNSF agreement. *See* UP/SP-230 at 12-21; UP/SP-231, Part C, Tab 18 at 5-11. *See also,* UP/SP-260 at 8-9 (summary of clarifications and amendments). On June 3, 1996, applicants, in their brief, represented that they would make an additional amendment to the BNSF agreement. *See,* UP/SP-260 at 23 n.9 (referencing West Lake Charles, LA). On June 27, 1996, applicants and BNSF entered into a second supplemental agreement to the BNSF agreement. *See,* UP/SP-266, Exhibit A. This second supplemental agreement purports to reflect the various commitments made subsequent to execution of the agreement dated September 25, 1995 and the supplemental agreement dated November 18, 1995. *See,* UP/SP-266, Exhibit A at 1 (3rd and 4th paragraphs). On June 28, 1996, applicants, in the filing that accompanied the second supplemental agreement, made at least one additional commitment. *See,* UP/SP-266 at 3 (referencing UP/SP-BNSF reciprocal switch charges at points other than 2-to-1 points).

Protestants: Railroads. Submissions opposing the merger and/or urging the imposition of conditions have been filed by Consolidated Rail Corporation (Conrail), The Kansas City Southern Railway Company (KCS), Montana Rail

---

[8] *See,* UP/SP-74 (URC and IC agreements), UP/SP-204 (WC and GWWR agreements), BRGI-3 (BRGI agreement), and UP/SP-238 (CSX agreement).

Link, Inc. (MRL), The Texas Mexican Railway Company (Tex Mex), Capital Metropolitan Transportation Authority (CMTA), The Magma Arizona Railroad Company (MAA), the San Manuel Arizona Railroad Company (SMA),[9] and The Yolo Shortline Railroad Company (Yolo). Other submissions have been filed by Keokuk Junction Railway (KJRY) and its corporate parent, Pioneer Railcorp (PRC), by Toledo, Peoria & Western Railway Corporation (TP&W), by the Southern California Regional Rail Authority (SCRRA), and by Georgetown Railroad Company (GTRR) and its corporate affiliate, Texas Crushed Stone Company (TCSC).[10] A submission also has been filed by the San Diego & Imperial Valley Railroad (SDIV) (in opposition to one of the conditions requested by United States Gypsum Company).

Protestants: Shipper Organizations. Submissions opposing the merger and/or urging the imposition of conditions have been filed by The National Industrial Transportation League (NITL), The Society of the Plastics Industry, Inc. (SPI), The Western Coal Traffic League (WCTL), the Western Shippers Coalition (WSC), the Mountain-Plains Communities & Shippers Coalition (MPCSC), the Coalition for Competitive Rail Transportation (CCRT), The Corn Refiners Association, Inc. (CRA), the National Corn Growers Association (NCGA), the Montana Wheat and Barley Committee (MWBC), the Montana Farmers Union (MFU), Save the Rock Island Committee, Inc. (STRICT), the Colorado Wheat Administrative Committee (CWAC), the Hoisington Chamber of Commerce (HCC), The Enid Board of Trade (EBT), the Kansas-Colorado-Oklahoma Shippers Association (KCOSA), the Farmers Elevator Association of Minnesota (FEAM), and the South San Antonio Chamber of Commerce (SSACC). A submission also has been filed by The Institute of Scrap Recycling Industries, Inc. (ISRI).

Protestants: Coal Shippers. Submissions opposing the merger and/or urging the imposition of conditions have been filed by Wisconsin Power & Light

---

[9] MAA and SMA are wholly owned rail subsidiaries of Magma Copper Company (MCC).

[10] Affiliated carriers Cen-Tex Rail Link, Ltd., and South Orient Railroad Company, Ltd. (referred to collectively as Cen-Tex) filed a request for conditions opposing the merger unless approval thereof was conditioned by requiring applicants to negotiate certain trackage rights. Because Cen-Tex docketed its request for conditions in the manner of a responsive application, we treated it as a responsive application, and we rejected it as incomplete. *See* Decision No. 29 (served April 12, 1996). Because Cen-Tex also had failed to comply with the discovery obligations to which it was subject, we ordered that its request for conditions be stricken from the record. *See* Decision No. 30 (served April 18, 1996).

Company (WP&L), Wisconsin Public Service Corporation (WPS), Entergy Services, Inc. (ESI), Arkansas Power & Light Company (AP&L), Gulf States Utilities Company (GSU),[11] the City Public Service Board of San Antonio (CPSB), Texas Utilities Electric Company (TUE), Sierra Pacific Power Company (SPP), Idaho Power Company (IDPC),[12] Arizona Electric Power Cooperative (AEPCO), Wisconsin Electric Power Company (WEPCO), Public Service Company of Colorado (PSCo), Illinois Power Company (ILP), Central Power & Light Company (CP&L), Intermountain Power Agency (IPA), Lower Colorado River Authority and the City of Austin, TX (referred to collectively as LCRA/Austin), Rio Bravo Poso and Rio Bravo Jasmin (referred to collectively as Rio Bravo), and IES Utilities (IES).

Protestants: Plastic and Chemical Shippers. Submissions opposing the merger and/or urging the imposition of conditions have been filed by The Dow Chemical Company (Dow), Montell USA Inc. (Montell), Olin Corporation (Olin), Quantum Chemical Corporation (QCC), Union Carbide Corporation (UCC), Enterprise Products Company (EPC), Formosa Plastics Corporation, USA (FPC), The Geon Company (Geon), PPG Industries, Inc. (PPG), Huntsman Corporation (HC), Arizona Chemical Company (ACC), Monsanto Company (Monsanto), and Shell Chemical Company (SCC). A submission also has been filed by Springfield Plastics, Inc. and Brandt Consolidated, Inc. (collectively, SPBC) (in opposition to the Barr-Girard abandonment).

Protestants: Other Shippers. Submissions opposing the merger and/or urging the imposition of conditions have been filed by The International Paper Company (IPC), United States Gypsum Company (USG), North American Logistic Services (NALS), ASARCO Incorporated (ASARCO), Champion International Corporation (CIC), Weyerhaeuser Company (Weyerhaeuser), Cargill, Incorporated (Cargill), IBP, Inc. (IBP), Oregon Steel Mills (OSM), and Stimson Lumber Company (SLC).

State/Local Governments and Related Interests. Submissions respecting the merger have been filed by various state and local governments and related interests, including the Railroad Commission of Texas (RCT), the Public Utilities Commission of the State of California (CPUC), the Oregon Department of Transportation (Or/DOT), the Idaho Barley Commission and the Idaho Wheat Commission (IBC/IWC), the Public Service Commission of the State of Nevada (PSCN), the Kansas Department of Transportation (Ka/DOT), the Minnesota

[11] ESI, AP&L, and GSU are referred to collectively as Entergy.
[12] SPP and IDPC are referred to collectively as SPP/IDPC.

Department of Transportation (Mn/DOT), and the Iowa Department of Transportation (Ia/DOT).

Labor Parties. Submissions respecting the merger have been filed by various labor parties, including the Allied Rail Unions (ARU), the International Brotherhood of Teamsters (IBT), the Transportation•Communications International Union (TCU), the Transportation Trades Department (TTD), the United Transportation Union (UTU), and the Brotherhood of Locomotive Engineers (BLE).[13]

Federal Parties. Submissions also have been filed by the United States Department of Justice (DOJ), the United States Department of Transportation (DOT), the United States Department of Defense (DOD), the United States Department of Agriculture (USDA), and the United States Department of Labor (DOL).

Additional Parties. Numerous additional parties, including elected officials, government agencies, shippers, shortline railroads, and labor organizations, have participated in this proceeding. Their submissions have generally been limited to expressions of either support for or opposition to: the UP/SP merger; the trackage rights and line sales provided for in the BNSF agreement; the conditions requested by one or more of the parties urging the imposition of conditions upon any approval of the merger; and/or the abandonment/ discontinuance authorizations sought by applicants.

Summary of Decision. In this decision, we are taking the following action: (1) we are approving common control and merger of UP and SP as proposed in the primary application;[14] (2) we are exempting the transactions at issue in the Sub-Nos. 1, 2, 3, 4, 5, 6, 7, and 8 dockets; (3) we are granting the terminal trackage rights application in the Sub-No. 9 docket; (4) we are directing that class exemption notices covering the trackage rights provided for in the CMA and URC agreements be filed, no later than 7 calendar days prior to the effective date of this decision, (a) by applicants and BNSF, and (b) by applicants and URC, respectively; (5) we are imposing as conditions (a) the terms of the BNSF

[13] TTD is a department of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).

[14] During the course of this proceeding, applicants have made numerous representations to the effect that certain points will be covered, certain services will be provided, and so on. Some of these representations relate to the terms of the BNSF agreement; others do not. Applicants must adhere to all of their representations.

agreement,[15] (b) the terms of the CMA agreement, and (c) the terms of the URC agreement;[16] (6) we are requiring certain modifications to the terms of the BNSF and CMA agreements, particularly respecting new facilities, transloading facilities, build-out/build-in options, contracts at 2-to-1 points, and storage-in-transit (SIT) facilities; (7) we are expanding BNSF's access to certain traffic moving from and to Lake Charles, West Lake Charles, and West Lake, both in single-line service (by removing a proviso restricting BNSF to traffic moving from, to, and via New Orleans, and from and to points in Mexico via certain border crossings, and by eliminating a fee that BNSF otherwise would have had to pay to gain access to much of this traffic) and in joint-line service (by allowing BNSF to interchange this traffic at Shreveport and Texarkana with KCS); (8) we are granting Tex Mex the trackage rights sought in its Sub-No. 13 responsive application and the terminal trackage rights sought in its Sub-No. 14 terminal trackage rights application, but we are restricting these trackage rights to traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line; (9) we are imposing certain conditions with respect to CMTA, Entergy, CPSB, TUE, Dow, and UCC; (10) we are imposing upon BNSF a common carrier obligation with respect to the traffic opened up to it by the BNSF agreement, and we are requiring that BNSF submit a progress report

---

[15] By BNSF agreement, we mean the agreement dated September 25, 1995 (UP/SP-22 at 318-347), as modified by the supplemental agreement dated November 18, 1995 (UP/SP-22 at 348-359), and as further modified by the second supplemental agreement dated June 27, 1996 (UP/SP-266, Exhibit A). We wish to clarify, however, that in imposing the BNSF agreement as a condition to this merger, we will require applicants to honor *all* of the amendments, clarifications, modifications, and extensions thereof described in: (1) the April 18th CMA agreement (UP/SP-219); (2) the April 29th rebuttal filings (UP/SP-230 at 12-21; UP/SP-231, Part C, Tab 18 at 5-11; *see also,* UP/SP-260 at 8-9, summarizing the clarifications and amendments described in the April 29th rebuttal filings); (3) the June 3rd brief (UP/SP-260 at 23 n.9); and (4) the June 28th filing that accompanied the second supplemental agreement (UP/SP-266 at 3).

Section 17 of the BNSF agreement appears to be a standard "no third party beneficiaries" provision; it provides that nothing in the BNSF agreement is intended to give any person other than the signatories any legal or equitable right, remedy or claim. This provision may be standard but it is clearly at odds with the logic of the BNSF agreement, and we therefore wish to clarify that we understand that the BNSF agreement does provide rights and claims (and, by implication, remedies) to persons other than the signatories. We note, by way of illustration, that a shipper at a point opened up to BNSF under the BNSF agreement is such a person; a subsequent UP/SP-BNSF arrangement restricting BNSF's ability to serve that shipper would, among other things, violate that shipper's rights under the BNSF agreement.

[16] What we have said with respect to the "no third party beneficiaries" provision contained in the BNSF agreement applies with equal force to the similar provision set forth in Section 9 of the URC agreement.

and an operating plan on or before October 1, 1996, and further progress reports on a quarterly basis thereafter; (11) we are requiring that applicants submit a progress report and an implementing plan on or before October 1, 1996, and further progress reports on a quarterly basis thereafter; (12) we are establishing oversight for 5 years to examine whether the various conditions we have imposed have effectively addressed the competitive issues they were intended to address, and we are retaining jurisdiction to impose additional remedial conditions if, and to the extent, we determine that the conditions already imposed have not effectively addressed the competitive harms caused by the merger; (13) with respect to the abandonment/discontinuance requests vis-à-vis the two segments of the Tennessee Pass Line, we are denying the abandonments but granting the discontinuances; (14) we are approving all other abandonment/discontinuance requests filed by applicants; (15) we are imposing the standard labor protective conditions;[17] (16) we are imposing certain environmental mitigating conditions; and (17) we are denying all other conditions sought by the various parties in this proceeding.[18]

Preliminary Matter: UP/SP-262. In UP/SP-262, applicants move to strike (and, in one instance, seek other sanctions respecting) material that they regard as "new evidence" that was submitted by certain parties in their briefs. The parties (Conrail, KCS, SPP/IDPC, QCC, and DOJ) have replied to the motion (CR-43, KCS-63, SPP-17, QCC-7, and DOJ-16, respectively). We will deny the motion to strike and the request for sanctions. We find no basis for

[17] With respect to the merger, the line sales, and the terminal railroad control transactions, the standard labor protective conditions are those established in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979) (*New York Dock*). With respect to the trackage rights provided for in the BNSF, CMA, and URC agreements, and with respect to any additional trackage rights imposed as conditions, the standard labor protective conditions are those established in *Norfolk and Western Ry. Co.--Trackage Rights--BN*, 354 I.C.C. 605, 610-615 (1978), as modified in *Mendocino Coast Ry., Inc.--Lease and Operate*, 360 I.C.C. 653, 664 (1980) (*Norfolk and Western*). With respect to the abandonments and the discontinuances, the standard labor protective conditions are those established in *Oregon Short Line R. Co.--Abandonment--Goshen*, 360 I.C.C. 91, 98-103 (1979).

[18] Several parties submitted, after the voting conference held July 3, 1996, requests seeking "clarification" of determinations made at that conference. Nothing in our schedule for this proceeding, our procedural regulations, or our precedents authorizes parties to submit post-voting conference requests for clarification with respect to matters that will or may be discussed in our written decision. We therefore will not address the post-voting conference clarification requests heretofore submitted in this proceeding. Parties must await our written decision before seeking clarification or other forms of appellate relief.

sanctions, and if any of the material assailed by applicants is new evidence, we consider it to be of *de minimis* effect against the background of the enormous evidentiary record previously compiled.

Preliminary Matter: BN/SF-61. In BN/SF-61, BNSF moves to strike from the transcript of the oral argument held July 1, 1996, certain allegedly inflammatory comments made by counsel for SPI to the effect that BNSF (or its officers or executives) "lied" (in written or deposition testimony, public statements, or written discovery) about BNSF's ongoing implementation process with respect to SIT facilities. SPI (SPI-25) stands by the comments of its counsel, and insists that a certain statement made by BNSF in its discovery submission served February 20, 1996, was "erroneous," SPI-25 at 3. We will deny the motion to strike, but we wish to emphasize that we are not deciding the truth or falsity of the subject of the comments made by SPI's counsel.

THE RECORD

The evidence and arguments submitted in this proceeding are extensive, and are summarized for the most part in the briefs. Apart from setting forth the basic aspects of applicants' position, we have chosen not to summarize or otherwise address in this part of our decision the extensive evidence submitted by parties urging approval of the UP/SP merger application. Instead, we have chosen to summarize the essential aspects of the evidence, arguments, and any related requests for affirmative relief submitted primarily by parties opposed in whole or in part to the proposed merger.[19]

APPLICANTS. *UPRR/MPRR.* (1) UPRR operates approximately 13,646 miles of main line and branch line in the West. The main lines run from the Pacific Coast ports/terminals of Seattle, WA, Portland, OR, Oakland, CA, and Los Angeles, CA, to Chicago, IL, and Missouri River gateways including Kansas City, MO, and Omaha, NE/Council Bluffs, IA. Routes over main lines extend from the Pacific Northwest through Washington, Oregon, Idaho, and Utah to Ogden/Salt Lake City, UT, from Northern California through Nevada and Utah to Ogden/Salt Lake City, and from Southern California through

[19] Thus, for example, our summary of the record does not include UTU's strong support for the merger, and sets forth at length the affirmative relief sought by California parties while merely noting their support in passing. In addition, applicants list the numerous shippers, public officials, railroads, unions and others that have submitted support statements in Appendix C to their brief. *See,* UP/SP-260, Appendix C, at 1-103.

Nevada and Utah to Ogden/Salt Lake City. UPRR's double-track main line connects Ogden/Salt Lake City at the west with Omaha/Council Bluffs at the east, and runs through Utah, Wyoming, Colorado, and Nebraska. With the recent merger of the Chicago and North Western Railway Company (CNW) into UPRR, UPRR's lines also run from Chicago to Milwaukee, WI, and then to Winona, WI, and (via trackage rights over WC) to Duluth, MN/Superior, WI, and (via trackage rights over BN) from Duluth/Superior to Minneapolis/St. Paul, MN, and then to Des Moines, IA, and Kansas City. In addition, from the Southern Powder River Basin in Wyoming (PRB and SPRB are the acronyms for the Powder River Basin and the Southern Powder River Basin, respectively), UPRR transports low-sulfur coal principally to electric generating plants in the Southwest and Midwest. A UPRR line extends from a point near Green Bay, WI, to Ishpeming and Escanaba, MI, while UPRR's Milwaukee-to-St. Louis line passes through Chicago. UPRR also has a network of branch lines in Iowa and Southern Minnesota. (2) MPRR operates approximately 8,361 miles of main line and branch line in the Midwest and the Southwest. While UPRR's lines principally form east-west routes, MPRR's lines principally form north-south routes. MPRR's lines connect the major midwest gateways of Chicago, Omaha, St. Louis, MO, Memphis, TN, and Kansas City with the principal ports and the terminals of New Orleans and Lake Charles, LA, and Galveston, Houston, Beaumont, Corpus Christi, Brownsville, and Laredo, TX. MPRR also serves interior Texas points, including Dallas, Fort Worth, San Antonio, Austin, Midland/Odessa, and El Paso. Its lines extend into the grain producing regions of Kansas and Nebraska and as far west as Pueblo, CO.

SPT/SSW/SPCSL/DRGW. (1) SPT operates approximately 11,000 miles of main line and branch line in the West. The main lines run from Portland via Oakland to Los Angeles, and then to San Antonio, Houston, and New Orleans, including physical interchanges at five gateways to Mexico. SPT lines extend from San Antonio and Houston to Fort Worth, with operations over trackage rights from Fort Worth to Pueblo and Kansas City. The Fort Worth-Pueblo line connects with SSW at Stratford and Dalhart, TX, and with DRGW at Pueblo. The Fort Worth-Kansas City line connects with SSW at Kansas City and Hutchinson, KS. SPT's Central Corridor main line runs from Northern California to Ogden, where it connects with DRGW. (2) SSW operates approximately 2,200 miles of main line and branch line in the Central United States. SSW's main line runs from Santa Rosa, NM, to Kansas City and St. Louis. Operations between Topeka, KS, and St. Louis are over trackage rights

on UP. SSW main lines extend from St. Louis south to Shreveport, LA, and Corsicana, TX. SSW's lines connect with SPT in Corsicana, Dalhart, and Stratford, TX, Hutchinson and Kansas City, KS, Shreveport, LA, and Santa Rosa, NM, with DRGW at Herington, KS, and with SPCSL at Kansas City, MO, and East St. Louis, IL. At East St. Louis, Memphis, and Kansas City, SSW connects with major eastern rail carriers. (3) SPCSL, SP's link to Chicago, operates roughly 1,200 miles of main line in Illinois, Iowa, and Missouri, between St. Louis, Chicago, and Kansas City; this mileage includes trackage rights between Kansas City and Chicago on BNSF. (4) DRGW operates roughly 2,300 miles of main line and branch line in Colorado, Utah, and Kansas. The main line runs from Ogden, where it connects with SPT, eastward through Denver and Pueblo, CO, and on to Herington, KS, where it connects with SSW. DRGW has rights to operate between Herington and Kansas City over SSW and UP; and operations between Pueblo and Herington are over UP. DRGW also connects with SPT at Pueblo.

PUBLIC INTEREST JUSTIFICATIONS. Applicants claim that the merger will generate annual quantified public benefits in excess of $750 million, and that a merged UP/SP will be more competitive and efficient, and better able to compete with BNSF. Applicants indicate that the merger will allow UP/SP: to combine the separate routes of UP and SP and to create new routes;[20] to improve operations through terminals, and to avoid delay by eliminating interchanges and combining traffic volumes into new trains and new blocks; to improve service, particularly SP service, through technological support and access to capital; to improve equipment utilization and availability; and to consolidate yards and functions. Applicants expect annual benefits, in a normal year, of $659.1 million, as a result of new traffic ($76.0 million) and efficiencies and cost reductions ($583.1 million). Applicants also expect annual shipper logistics savings of $93.1 million.

Applicants claim that the merger, as conditioned by the BNSF agreement, will greatly intensify rail competition in the West; the BNSF agreement,

[20] Applicants plan to offer UP/SP combined routes between Chicago and Oakland, between Chicago and Los Angeles, and between Memphis and the West Coast via Dallas/Ft. Worth. Applicants plan to form the first direct single-line route between Seattle and Los Angeles, and have agreed to grant BNSF the rights necessary to create a second such route. Applicants indicate that UP/SP will institute directional running on parallel routes in Arkansas and Texas, and will assign most intermodal traffic to one Chicago-Southern California route and most manifest traffic *(i.e.*, traffic in a scheduled train, usually of manufactured commodities) to another, thereby improving the handling of both.

applicants contend, will substitute a stronger competitor (BNSF) for a weaker one (SP), and will create, in some markets, entirely new competition; and only with a merger, applicants insist, will UP and SP be able to provide genuine competition to BNSF. Applicants add that a merger will increase SP's competitiveness by overcoming its service problems and capital constraints and by assuring long-term, high-quality rail service. After the merger, applicants maintain, competition will be stronger not only for shippers who now have rail service from UP and SP and no other railroad (2-to-1 shippers) but also for all other shippers, especially those who go from three serving railroads to two as a result of the merger (3-to-2 shippers).

LABOR IMPACT. Applicants project that the total labor impact of the merger will be 4,909 jobs abolished, 2,132 jobs transferred, and 1,522 jobs created. *See* UP/SP-22 at 34-35; UP/SP-24 at 407-422. Applicants add that other jobs in Denver, Omaha, and St. Louis may be transferred, but that no decision has yet been made regarding these transfers. *See* UP/SP-24 at 422 (these contingent transfers affect 387 non-agreement dispatchers, 1,823 clerks, and 2,637 non-agreement personnel other than dispatchers).

BNSF AGREEMENT. Applicants claim that their basic purpose in entering into the BNSF agreement was to preserve competitive rail service for all 2-to-1 customers of UP and SP. Applicants indicate that, to preserve competitive options for such shippers, they identified all 2-to-1 points (*i.e.*, all points at which service is provided by UP and by SP, but by no other railroad) and then negotiated trackage rights and line sales with BNSF that would provide service to as many of these shippers as possible. Applicants concede that a few 2-to-1 points are not covered by the trackage rights and line sales provided for in the BNSF agreement, but they insist that these points are covered by the agreement's "omnibus" clause (Section 8i), which, they maintain, represents a commitment by UP/SP to enter into arrangements with BNSF under which, "through trackage rights, haulage, ratemaking authority or other mutually acceptable means," BNSF will be able to provide competitive service to all 2-to-1 shippers not covered by the trackage rights and line sales provided for in the agreement. Applicants indicate that the BNSF agreement, in addition to preserving competition for all 2-to-1 customers, also preserves a two-railroad interchange with all shortlines that interchanged with both UP and SP and no other railroad prior to the merger. Applicants note that the BNSF agreement includes, in addition to the rights which address competition at 2-to-1 points, an exchange of various other rights between UP/SP and BNSF. The exchange of these rights,

applicants claim, resulted from demands by BNSF that, in the view of applicants, were not justified by competitive concerns. In those instances, applicants suggest, they negotiated on a quid pro quo basis for something in return. Applicants contend, however, that these "trades" will improve the competitiveness and efficiency of both carriers and will therefore create even more intense competition than exists today.

Trackage Rights. Under the BNSF agreement, BNSF will receive approximately 3,968 miles of trackage rights over UP/SP (1,727 miles on UP and 2,241 miles on SP)[21] and UP/SP will receive or retain approximately 376 miles of trackage rights over BNSF. The trackage rights that BNSF will receive include rights extending between Oakland, CA, and Denver, CO, between Houston (Algoa), TX, and Brownsville, TX, between Houston, TX, and Iowa Junction, LA, and between Houston, TX, and Bridge Jct., AR (just west of Memphis, TN). The trackage rights that UP/SP will receive or retain include rights extending between Bend, OR, and Chemult, OR, between Mojave, CA, and Barstow, CA, and between Iowa Jct., LA, and Avondale, LA. The trackage rights that BNSF will receive and that UP/SP will receive or retain are more fully described in Appendix C.[22]

Line Sales. Under the BNSF agreement, BNSF will purchase: (1) UP's Keddie Line (in California) between Keddie, CA, at MP 0 and Bieber, CA, at MP 111.8, including both legs of the wye at Keddie; (2) UP's Dallas Line (in Texas) between Dallas, TX, at MP 768.9 and Waxahachie, TX, at MP 798.03; and (3) SP's Avondale Line (in Louisiana) between Avondale, LA, at MP 16.9 and Iowa Junction, LA, at MP 205.3.[23]

Proportional Rate Agreement. The BNSF agreement includes, among other things, a proportional rate agreement over the Portland gateway (hereinafter referred to as the BNSF PRA) that will allow UP/SP to participate in joint rates with BNSF for traffic moving between points in an area north of Portland, OR, and west of Billings and Havre, MT, on the one hand, and, on the other, points in an area extending from Oregon to West Texas. The points in the area north

---

[21] These mileage calculations do not include the additional trackage rights provided for in the CMA agreement.

[22] In Finance Docket No. 32760 (Sub-No. 1), applicants have filed a notice of exemption that covers the trackage rights provided for in the BNSF agreement (not including the additional trackage rights provided for in the CMA agreement). This notice invokes the trackage rights class exemption codified at 49 CFR 1180.2(d)(7).

[23] In Finance Docket No. 32760 (Sub-No. 2), applicants have filed a petition for exemption that covers the three line sales provided for in the BNSF agreement.

of Portland and west of Billings and Havre are more particularly described as: Canadian interchanges in the Vancouver area; points north of Seattle and west of the Cascades; points south of and including Seattle and west of the Cascades; Washington points east of the Cascades and west of and including Spokane; and points east of Spokane and west of Billings and Havre. The points in the area from Oregon to West Texas are more particularly described as: points in Oregon, California, Nevada, Utah, Colorado, Arizona, and New Mexico; points in Texas west of Monahans and Sanderson; and connections to Mexico at El Paso and to the west.

CMA AGREEMENT. The CMA agreement provides, among other things, that the BNSF agreement shall be subject to certain amendments, including amendments: (1) to give BNSF overhead trackage rights (for traffic moving from/to points south of Bald Knob and Brinkley, AR) (a) over UP's line between Houston, TX, and Valley Junction, IL, via Palestine, TX, (b) over SP's line between Fair Oaks, AR, and Valley Junction, IL, and (c) over UP's line between Fair Oaks and Bald Knob, AR; (2) to grant BNSF access to any new facilities (not including expansions of or additions to existing facilities or load-outs or transload facilities) located post-merger on any SP-owned line over which BNSF receives trackage rights; (3) to provide BNSF equal access to SP's Dayton Yard (near Baytown, TX) for storage in transit of traffic handled pursuant to the BNSF agreement; (4) to provide that BNSF's trackage rights fees shall be adjusted each year by the difference between that year and the preceding year in UP/SP's system average Uniform Railroad Costing System (URCS) costs for the maintenance and operating costs categories; (5) to give BNSF the right to serve shippers at Lake Charles and West Lake, LA, open to all of UP, SP, and KCS[24] (a) to, from, and via New Orleans, and (b) to and from points in Mexico, with routings via Eagle Pass, Laredo (through interchange with Tex Mex at Corpus Christi or Robstown), or Brownsville, TX; and (6) to specify that, in the Houston-Memphis-St. Louis corridor, BNSF can utilize either the UP line or the SP line, at its discretion, for operating convenience. The CMA agreement further provides, among other things, that applicants will state, in a submission to the Board, that they are agreeable to annual Board oversight proceedings for 5 years, with the Board to examine whether the BNSF

[24] Applicants have further indicated that this aspect of the CMA agreement will be extended to shippers at West Lake Charles, LA, served by SP and KCS. UP/SP-260 at 23 n.9.

agreement has effectively addressed the competitive issues it was intended to address.[25]

URC AGREEMENT. Under the URC agreement, URC will receive access to additional coal sources in Utah and overhead trackage rights between Utah Railway Junction, UT, and Grand Junction, CO. The expanded access to Utah coal consists of joint access with UP/SP to the Savage Coal Terminal coal loading facility located on the CV spur near Price, UT (this is a loadout facility, UP/SP-230 at 166), and exclusive access to the Willow Creek Mine located adjacent to the SP main line near Castle Gate, UT; and this expanded access, combined with URC's present access to coal mines on its own line between Utah Railway Junction and Mohrland, will give URC access to nearly a third of total Utah/Colorado coal production, UP/SP-260 at 39. Applicants insist that they entered into the URC agreement merely to resolve a dispute respecting their ability to grant trackage rights to BNSF over the joint SP/URC track that forms a portion of the SP main line between Salt Lake City and Denver, but they add that the URC agreement will enhance competition by expanding the coal sources available to BNSF through interchange with URC (under the BNSF agreement, BNSF, which will have the right to interchange with URC at Provo, Utah Railway Junction, and Grand Junction, will be able to move URC-originated coal both to end markets west of Provo and also to end markets east of Grand Junction).

TERMINAL/SWITCHING RAILROADS. A combined UP/SP will control five terminal and/or switching railroads in which UP and SP presently have non-controlling interests: The Alton & Southern Railway Company (A&S), Central California Traction Company (CCT), The Ogden Union Railway & Depot Company (OURD), Portland Terminal Railroad Company (PTRR), and Portland Traction Company (PTRC). In Finance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6, and 7), applicants have filed petitions to exempt their control of A&S, CCT, OURD, PTRR, and PTRC, respectively.[26]

---

[25] Applicants have made the required submission, *see* UP/SP-230 at 21, and CMA has withdrawn its opposition to the merger in reliance upon (1) our adoption of the BNSF and CMA agreements, (2) BNSF's assurances that it will enter the markets opened up under the BNSF agreement, and compete vigorously for the traffic of CMA members, and (3) our agreement to institute annual oversight proceedings to examine the effects of the merger on competition, *see* CMA-12 at 4-5.

[26] A&S, which owns some 33 miles of main line track and 108 miles of yard track in the St. Louis area, is owned by MPRR and SSW, each holding a 50% stock interest therein. CCT, which

(continued...)

MOTOR CARRIERS. UPC holds a 100% stock interest in motor carrier Overnite Transportation Company (Overnite); SPT holds a 100% stock interest in both Pacific Motor Transport Company (PMT) and Southern Pacific Motor Trucking Company (SPMT); and a UP/SP merger will therefore result in (1) common control of SP and Overnite and (2) common control of UP and PMT/SPMT. In Finance Docket No. 32760 (Sub-No. 8), applicants have filed a petition to exempt this common control.

TERMINAL TRACKAGE RIGHTS. In Finance Docket No. 32760 (Sub-No. 9), applicants and BNSF have filed an application for an order under 49 U.S.C. 11103 permitting BNSF to use two segments of KCS track in Shreveport, LA, and one segment of KCS track in Beaumont, TX. Applicants contend that the use of these segments is necessary for BNSF to provide, under the BNSF agreement, stronger competition to UP/SP in the Houston-Memphis and Houston-New Orleans corridors. Applicants indicate that, although SP has trackage rights over the three segments and MPRR has trackage rights over the Beaumont segment, they have filed their Sub-No. 9 application because the underlying trackage rights agreements "arguably" require consent by KCS to the use of the trackage rights by BNSF.[27] The Shreveport trackage (two segments totaling 3.52 miles in length) is a portion of SP's Houston-Memphis route, and applicants claim that the two segments are used also for interchange with connecting railroads and for access to a nearby industrial area jointly served by SP, UP, and KCS.[28] The Beaumont trackage (roughly 1.8 miles between

---

(...continued)

owns some 45 miles of track between Stockton and Polk, CA, and between Lodi and Lodi Junction, CA, is owned by UPRR, SPT, and BNSF, each holding a one-third stock interest therein. OURD, a terminal carrier located in Ogden, is owned by UPRR and SPT, each holding a 50% stock interest therein. PTRR, which operates over some 58 miles of track in Portland, is owned by UPRR (40% stock interest), SPT (20% stock interest), and BNSF (40% stock interest), each of which has two members on PTRR's six-member board. PTRC, an inactive entity with neither employees nor facilities, is owned by UPRR and SPT, each holding a 50% stock interest therein.

[27] Applicants, citing 49 U.S.C. 11341(a), claim that approval of the merger, conditioned by the BNSF agreement, should give BNSF authority to use the subject tracks with or without the consent of KCS. Applicants indicate, however, that they have filed their Sub-No. 9 application because there is ICC precedent to the effect that 49 U.S.C. 11341(a) might not achieve an override of a consent requirement in a joint facility agreement. UP/SP-26 at 123 n.2.

[28] SP has rights to use this trackage under agreements with KCS and a predecessor dated May 8, 1933, and December 17, 1980. The 1933 agreement covers a 1.32-mile segment of track

(continued...)

KCS MP's 764.9 and 766.7, including the Neches River Bridge, KCS-32 at 1) is a portion of separate UP and SP Houston-New Orleans routes, and applicants claim that this trackage also is used for switching and interchange purposes and for access to facilities of the Port of Beaumont.[29]

ABANDONMENTS AND DISCONTINUANCES. Applicants seek authorization to abandon, or to abandon and to discontinue operations over, 17 line segments that total approximately 584 miles. Authorization is sought by application, by petition, and by notice.[30]

The Towner-NA Junction Line (Colorado). In Docket Nos. AB-3 (Sub-No. 130) and AB-8 (Sub-No. 38), respectively, MPRR seeks by application approval to abandon, and DRGW seeks by application approval to discontinue its overhead trackage rights operations over, MPRR's Towner-NA Junction Line, which extends between MP 747.0 near Towner, CO, and MP 869.4 near NA (North Avondale) Junction, CO, a distance of approximately 122.4 miles in Pueblo, Crowley, and Kiowa Counties, CO. The abandonment/discontinuance does not include active industries at NA Junction or at Towner.

The Sage-Malta-Leadville Line (Colorado). In Docket Nos. AB-8 (Sub-No. 36X) and AB-12 (Sub-No. 189X), respectively, DRGW seeks by petition to exempt its discontinuance of operations over, and SPT seeks by petition to exempt its abandonment of, SP's Sage-Malta-Leadville Line, which extends a distance of approximately 69.1 miles in Eagle and Lake Counties, CO, (1) between MP 335.0 near Sage, CO, and MP 271.0 near Malta, CO, and (2) between MP 271.0 near Malta, CO, and MP 276.1 near Leadville, CO.

The Malta-Cañon City Line (Colorado). In Docket Nos. AB-8 (Sub-No. 39) and AB-12 (Sub-No. 188), respectively, DRGW seeks by application approval to discontinue its operations over, and SPT seeks by application approval to abandon, SP's Malta-Cañon City Line, which extends between MP 271.0 near

---

(...continued)
between engineering stations 8872+81 and 8941+24 (no mileposts have been assigned). The 1980 agreement covers approximately 2.2 miles of track between KCS MP's 559 and 671.2 (or, by KCS' calculations, approximately 2.1 miles of track between KCS MP's 559 and 561.2, *see* KCS-32 at 1).

[29] MPRR and SP obtained rights to use this trackage pursuant to an agreement dated July 1, 1965, among KCS, MPRR, SP, SF, and the City of Beaumont. SF, however, did not acquire, under the 1965 agreement, the rights sought in the Sub-No. 9 application.

[30] Of the 17 lines for which abandonment authorizations are sought, 4 lines involve both abandonment by one carrier (either MPRR or SPT) and discontinuance by another carrier (DRGW).

Malta, CO, and MP 162.0 near Cañon City, CO, a distance of approximately 109.0 miles in Lake, Chaffee, and Fremont Counties, CO.[31]

The Hope-Bridgeport Line (Kansas). In Docket Nos. AB-3 (Sub-No. 131) and AB-8 (Sub-No. 37), respectively, MPRR seeks by application approval to abandon, and DRGW seeks by application approval to discontinue its overhead trackage rights operations over, MPRR's Hope-Bridgeport Line, which extends between MP 459.20 near Hope, KS, and MP 491.20 near Bridgeport, KS, a distance of approximately 31.24 miles in Dickinson and Saline Counties, KS (MP 478.05 = MP 478.81; *see,* UP/SP-26 at 208). The abandonment and discontinuance do not include active industries at Hope and Bridgeport.

The Barr-Girard Line (Illinois). In Docket No. AB-33 (Sub-No. 96), UPRR seeks by application approval to abandon its Barr-Girard Line, which extends between MP 51.0 near Barr, IL, and MP 89.4 near Girard, IL, a distance of approximately 38.4 miles in Menard, Sangamon, and Macoupin Counties, IL. The abandonment does not include active industries at Barr and Girard. UPRR indicates that a superior post-merger route will be achieved by exiting this line at Barr, operating over the Illinois & Midland line (formerly the Chicago & Illinois Midland line) from Barr to Springfield, and then operating over the SP line from Springfield to St. Louis; and UPRR therefore notes that this abandonment is contingent upon acquisition of trackage rights over the Illinois & Midland (I&M) line.

The Gurdon-Camden Line (Arkansas). In Docket No. AB-3 (Sub-No. 129X), MPRR seeks by petition to exempt the abandonment of its Gurdon-Camden Line between MP 428.3 near Gurdon, AR, and MP 457.0 near Camden, AR, a distance of approximately 28.7 miles in Clark, Nevada, and Ouachita Counties, AR. The abandonment does not include active industries at Gurdon or Camden.

The Iowa Junction-Manchester Line (Louisiana). In Docket No. AB-3 (Sub-No. 133X), MPRR seeks by petition to exempt the abandonment of its Iowa Junction-Manchester Line between MP 680.0 near Iowa Junction, LA, and MP 688.5 near Manchester, LA, a distance of approximately 8.5 miles in Jefferson Davis and Calcasieu Parishes, LA.

The Wendel-Alturas Line (California). In Docket No. AB-12 (Sub-No. 184X), SPT seeks by petition to exempt the abandonment of its Wendel-Alturas

[31] The Sage-Malta-Leadville Line connects with the Malta-Cañon City Line at Malta. We shall on occasion refer to the two lines collectively as the Tennessee Pass Line.

Line between MP 360.1 near Wendel, CA, and MP 445.6 near Alturas, CA, a distance of approximately 85.5 miles in Modoc and Lassen Counties, CA.

The Suman-Bryan Line (a portion) (Texas). In Docket No. AB-12 (Sub-No. 185X), SPT seeks by petition to exempt the abandonment of the portion of its Suman-Bryan Line that lies between MP 117.6 near Suman, TX, and MP 105.07 near Benchley, TX, a distance of approximately 12.53 miles in Robertson County, TX.[32]

The Edwardsville-Madison Line (Illinois). In Docket No. AB-33 (Sub-No. 98X), UPRR seeks by petition to exempt the abandonment of its Edwardsville-Madison Line between MP 133.8 near Edwardsville, IL, and MP 148.78 near Madison, IL, a distance of approximately 14.98 miles in Madison County, IL. The abandonment does not include active industries at Madison.

The Newton-Whitewater Line (Kansas). In Docket No. AB-3 (Sub-No. 132X), MPRR seeks by notice to exempt the abandonment of its Newton-Whitewater Line between MP 485.0 near Newton, KS, and MP 476.0 near Whitewater, KS, a distance of approximately 9.0 miles in Butler and Harvey Counties, KS. The abandonment does not include active industries at Newton or Whitewater.

The Troup-Whitehouse Line (Texas). In Docket No. AB-3 (Sub-No. 134X), MPRR seeks by notice to exempt the abandonment of its Troup-Whitehouse Line between MP 0.50 near Troup, TX, and MP 8.0 near Whitehouse, TX, a distance of approximately 7.5 miles in Smith County, TX. The abandonment does not include active industries at Troup or Whitehouse.

The Seabrook-San Leon Line (Texas). In Docket No. AB-12 (Sub-No. 187X), SPT seeks by notice to exempt the abandonment of its Seabrook-San Leon Line between MP 30.0 near Seabrook, TX, and MP 40.5 near San Leon, TX, a distance of approximately 10.5 miles in Galveston and Harris Counties, TX.

---

[32] SPT originally petitioned to abandon the entire Suman-Bryan Line, between MP 117.6 near Suman, TX, and MP 101.4 near Bryan, TX, a distance of approximately 16.2 miles in Brazos and Robertson Counties, TX. *See*, UP/SP-26 at 362-371. SPT later modified the petition by excluding the segment between MP 101.4 and MP 105.07 from the scope of the abandonment, noting that VTI Industries, the sole shipper on the line (located near MP 104.5), will continue to be served by UP/SP. SPT now seeks to abandon only the portion of the line between MP 117.6 near Suman and MP 105.07 near Benchley, which it calculated to be a distance of approximately 13.1 miles. *See* UP/SP-57. The distance between MP's 117.6 and 104.5 (where VTI Industries is located) is 13.1 miles; however, by our calculations, the distance between MP's 117.6 and 105.07 is approximately 12.53 miles.

The Whittier Junction-Colima Junction Line (California). In Docket No. AB-33 (Sub-No. 93X), UPRR seeks by notice to exempt the abandonment of its Whittier Junction-Colima Junction Line between MP 0.0 near Whittier Junction, CA, and MP 5.18 near Colima Junction, CA, a distance of approximately 5.18 miles in Los Angeles County, CA. The abandonment does not include active industries at Whittier Junction or Colima Junction.

The Magnolia Tower-Melrose Line (California). In Docket No. AB-33 (Sub-No. 94X), UPRR seeks by notice to exempt the abandonment of its Magnolia Tower-Melrose Line between MP 5.8 near Magnolia Tower, CA, and MP 10.7 near Melrose, CA, a distance of approximately 4.9 miles in Alameda County, CA. The abandonment does not include active industries at Magnolia Tower or Melrose.

The DeCamp-Edwardsville Line (Illinois). In Docket No. AB-33 (Sub-No. 97X), UPRR seeks by notice to exempt the abandonment of its DeCamp-Edwardsville Line between MP 119.2 near DeCamp, IL, and MP 133.8 near Edwardsville, IL, a distance of approximately 14.6 miles in Madison County, IL. The abandonment does not include active industries at DeCamp or Edwardsville.

The Little Mountain Junction-Little Mountain Line (Utah). In Docket No. AB-33 (Sub-No. 99X), UPRR seeks by notice to exempt the abandonment of its Little Mountain Junction-Little Mountain Line between MP 0.0 near Little Mountain Junction, UT, and MP 12.0 near Little Mountain, UT, a distance of approximately 12.0 miles in Box Elder and Weber Counties, UT. The abandonment does not include active industries at Little Mountain Junction or Little Mountain.

BNSF. BNSF takes no position on the merger, but insists that it is the only railroad that can ensure strong competition to a merged UP/SP because no other railroad has the financial strength, operational capabilities, marketing expertise, and range of origins and destinations to serve the long routes in the Western United States. The BNSF agreement, BNSF contends, will preserve effective competition for shippers served only by UP and SP today, and BNSF therefore argues that, if the merger is approved, the BNSF agreement must be imposed as a condition. BNSF insists that it will receive, under the BNSF agreement, adequate access to regions, routes, and stations on appropriate terms and conditions, including compensation levels, that will allow it to compete vigorously. Recognizing that most of its operations under the agreement will be conducted pursuant to trackage rights, BNSF notes that the agreement

requires that BNSF's trains be given equal dispatch without any discrimination in favor of comparable UP/SP trains, and BNSF insists that it will accept nothing less.

RAILROAD PROTESTANTS. Concerns that a UP/SP merger would have anticompetitive impacts in the transportation marketplace have been expressed by several railroad protestants.

CONSOLIDATED RAIL CORPORATION. Conrail urges us to deny the merger unless conditioned on divestiture of what Conrail calls the "SP East:"[33] (1) SP's lines from Chicago and St. Louis to Galveston, TX, and Brownsville, TX, and from New Orleans to Spofford, TX, Eagle Pass, TX, and El Paso, TX, including all connecting trackage and spur lines serving Alton, IL, New Madrid, MO, Memphis, TN, Little Rock, AR, Indiana, AR, Breaux Bridge, LA, and all intermediate Texas points; (2) all trackage, haulage, and access rights associated with these lines and SP's ownership of, and rights in, the jointly used UP-SP line extending from East St. Louis to Jonesboro, AR; (3) SP's interest in the A&S, the Terminal Railroad Association of St. Louis (TRRA), and any other terminal railroad serving traffic originating/terminating on the acquired lines; (4) SP's interest in various bridge companies necessary to the effective operation of the acquired lines; and (5) all other assets (including yards, storage facilities, and sidings), options for same, or other facilities used or held by SP or its affiliates for the maintenance, operation, and efficient use of the acquired lines and assets. Conrail also asks that the Finance Docket No. 32760 (Sub-No. 1) class exemption be revoked (the request for revocation is referred to as a "petition," CR-21 at 10-11), and that the Finance Docket No. 32760 (Sub-No. 2) petition for exemption be denied. The trackage rights and line sales provided for in the BNSF agreement, Conrail insists, require a responsive application to allow us to determine whether these trackage rights and line sales cure the anticompetitive harms threatened by the merger.[34]

---

[33] Conrail uses the terms "SP East" or "SP East lines" to mean SP's properties in Texas, Louisiana, and Arkansas, SP's eastern main line in Missouri and Illinois, all access rights associated with these lines, and all other assets held by SP or its affiliates that are used or useful for the maintenance and operation of these lines. Conrail uses the terms "SP West" or "SP West lines" to mean all other SP lines and facilities. As Conrail uses these terms, the region where SP East operates is the SP East region and the region where SP West operates is the SP West region.

[34] In its BN/SF-53 reply to Conrail's "petition" for revocation of the Sub-No. 1 class exemption, BNSF contends that Conrail's "petition" is premature (because the class exemption has not yet become effective with respect to the trackage rights), at odds with our regulations (because

(continued...)

Competitive Harm in the SP East Region. Conrail claims that, in the SP East region, the trackage rights provided in the BNSF agreement will not avert the anticompetitive harms threatened by what is essentially a parallel merger. The problems with these trackage rights, Conrail asserts, cannot be remedied; their flaws relate primarily to the physical route structure and infrastructure available to BNSF in the SP East region. By Conrail's calculations, BNSF would capture only a trivial share (less than 4%) of new traffic originating or terminating in Texas, Louisiana, and Arkansas and moving over major SP East corridors from/to the North or Northeast or Mexico, and Conrail insists that this small market share would prevent BNSF from attaining economies of density and scale comparable to UP/SP's. Conrail concedes that the BNSF agreement attempts to address competition at 2-to-1 points (*i.e.*, points at which shippers now have access to both UP and SP and to no other railroad), but claims that the agreement does not address either the loss of potential competition provided by build-ins or transloads or the loss of source competition. And Conrail insists that SP could continue to compete effectively as an independent railroad; SP, Conrail argues, has the financial resources to make the investments that would enable it to keep pace with the other western railroads.

Houston. In Houston, Conrail claims, BNSF would generally be required to use one (and sometimes two) terminal carriers, thereby adding cost and time to a BNSF haul as compared to a pre-merger SP haul and a post-merger UP/SP haul. All BNSF traffic to the East and Northeast, Conrail indicates, would be delivered to the New South Yard of the Houston Belt & Terminal Railway (HB&T), and would exit the Houston switching district via the HB&T. Some BNSF traffic, Conrail adds, also would be switched via the Port Terminal Railway Association (PTRA).

South Texas/Gulf Coast-St. Louis. Conrail claims that, for 2-to-1 shippers in the SP East region, most traffic goes north to the St. Louis gateway (or gateways in Southern Illinois) for a further haul by an eastern railroad to its ultimate destination. BNSF, Conrail contends, would face obstacles that SP generally does not face pre-merger and that UP/SP would not face post-merger; and this, Conrail adds, would be true whether this traffic is routed (1) via

---

(...continued)

the trackage rights have not been sought in a responsive application), and inconsistent with ICC practice. *BN/SF*, 10 I.C.C.2d at 768 n.116.

BNSF's Houston-Memphis trackage rights, and then via BNSF's own Memphis-St. Louis track, or (2) via BNSF's own Houston-Tulsa-St. Louis track. Conrail notes, with respect to the routing via Memphis, that SP's Houston-Shreveport "Rabbit" line is single-track, undulates, lacks Centralized Traffic Control (CTC), has a 49 mile-per-hour speed limit, and has few sidings. Conrail concedes that SP offers service on this line but notes that SP developed that service over a long history, and argues that BNSF would lack SP's knowledge of the line and its customer base. And, Conrail asserts, BNSF service on the Houston-Memphis line also would be disadvantaged by UP/SP's "primarily directional" southbound routings. The routing via Tulsa, Conrail concedes, would fix these problems, but only at the expense of added circuity. Besides, Conrail argues, via either routing BNSF would have to travel across the Mississippi River and through St. Louis from the west to connect with eastern railroads in East St. Louis or farther east in Southern Illinois; and, in St. Louis, BNSF would require switching service from TRRA.

Houston-New Orleans. Conrail claims that BNSF recognizes that the Houston-New Orleans corridor is the one corridor provided for in the BNSF agreement in which traffic density may increase, and this, Conrail adds, may explain why BNSF has proposed to provide service in this corridor through a combination of trackage rights and, at its election, acquisition of a portion of the line. Conrail indicates, however, that BNSF has not analyzed the cost of required capacity-related improvements or the lead time needed to construct such improvements.

Mexican Gateway Traffic. Conrail notes that UP and SP currently compete head-to-head at El Paso, Laredo, and Brownsville, the principal eastern gateways into Mexico. The BNSF agreement purports to allow BNSF to replicate this competition, with access to Eagle Pass (via trackage rights that would replace the haulage rights it has now), to Laredo (via trackage rights to Robstown, and via a junction at Robstown with Tex Mex), and to Brownsville (via trackage rights).[35] Conrail contends that shippers fear that BNSF will not be able to use these trackage rights effectively, and that BNSF's actions suggest that it is not interested in developing Mexican traffic.

BNSF Options. Under the BNSF agreement, Conrail notes, BNSF must choose whether to provide service by means of direct service, switching, or use of a third carrier for local service; and, under the agreement, once it makes that

[35] Conrail notes that BNSF already has access to El Paso, but from the north and west, not from the east.

election, it can change only once, and then cannot change for 5 years. Therefore, Conrail asserts, if BNSF, a newcomer to the 2-to-1 shippers, makes a choice that is uneconomic, operationally infeasible, or competitively unattractive, 5 years would pass before its competitive disadvantage could be rectified.

BNSF Access to Necessary Facilities. Conrail asserts that, after the merger, BNSF would have access to only 12% of the switching and classification yard facilities in the Texas-Louisiana Gulf Coast. And, Conrail adds, BNSF would have access to only 16% of SIT capacity in the Texas-Louisiana Gulf Coast; but SIT capacity, Conrail notes, is vital to providing competitive rail service to plastics shippers.

Other Considerations. Conrail contends that the BNSF agreement does not embody an enforceable commitment to provide competitive service, although Conrail concedes that the imposition of the agreement as a condition will create a common carrier obligation. Conrail claims, however, that there would still be uncertainties as to the extent of BNSF's obligations because, among other things, BNSF has not provided: details about local service; the costs of providing such service, whether direct, by switch, or by third carrier; specific schedules for through trains; specific information about yard capacity available for BNSF operations; details about costs, delays, and extra handlings involved in relying on terminal carriers; specific plans for capacity improvements on the trackage rights lines; and specific plans for provision of SIT capacity.

Benefits of the Proposed Merger. Conrail insists that the primary efficiencies claimed for the merger, including line consolidations, reduced circuity, and increased direct and single-line service, are in the West; the SP East region accounts for less than 5% of the total projected merger-related route mile savings. Conrail further insists that the public benefits of the merger (an improved competitive posture vis-à-vis BNSF) and the principal investments that would be made by UP/SP after the merger (corridor upgrades, terminal improvements, improved track connections, and intermodal terminals) are likewise in the West. And, Conrail asserts, the claimed public benefits in the SP East region (*e.g.*, alleviation of capacity constraints through directional routing and increased blocking and classifying) could be achieved without a merger.

Benefits of Divestiture. Divestiture, Conrail argues, would solve the anticompetitive harms threatened by the merger, and would be, for various reasons, preferable to trackage rights. An owner, Conrail insists, has economic

incentives that a tenant lacks; trackage rights do not always assure the tenant access to the yards, storage facilities, and infrastructure necessary to assure on-time, consistent, and reliable service; a landlord may discriminate against a tenant; and, when the landlord's operations encounter problems, the tenant's operations go awry as well. Conrail envisions that divestiture would be accomplished in an auction-like process. Each bid would reflect the value of the lines to the bidder (Conrail has stated in the record that it is willing to pay $1.5 billion for the SP East properties);[36] each carrier would attempt to demonstrate how its bid would maximize the public benefits of the divestiture operation; and each also could demonstrate how its bid would allow the benefits of the UP/SP West consolidation to be realized. And, Conrail contends, there would be a substantial benefit in the divestiture of SP East lines to an eastern railroad; a Conrail-SP East system, by way of example, would be an end-to-end combination yielding new single-line opportunities, faster transit times, lower costs, fewer handlings, and generally better service.

CMA Agreement. The CMA agreement, Conrail insists, does not remedy merger-related competitive harms in the SP East region. Conrail claims that the BNSF agreement, even as modified by the amendments required by the CMA agreement, still does not address the service problems that will impede BNSF's operations in Houston; still does not address the problems created by BNSF's access to a mere 12% of the switching and classification yard facilities in the Texas-Louisiana Gulf Coast; does not meaningfully address the problems created by BNSF's access to a mere 16% of SIT capacity in the Texas-Louisiana Gulf Coast; and does nothing to alter the traffic predicted to be available to BNSF. Conrail concedes that the BNSF agreement, as modified by the amendments required by the CMA agreement, provides BNSF access to any new facility located on any SP-owned line over which BNSF receives trackage rights. Conrail claims, however, that this is largely illusory because "new facility" is narrowly defined to exclude "expansions of or additions to existing facilities," and also because BNSF, if it elects to serve a new facility, is required to share equally "in any capital investment necessary to provide rail service to the facility" (irrespective of the amount of traffic it may be able to capture).

KANSAS CITY SOUTHERN RAILWAY COMPANY. KCS contends that the merger will cause unprecedented competitive harm and should therefore be

[36] We note that press reports have indicated that Conrail has increased the amount it is willing to pay to $1.9 billion. *Wall Street Journal*, June 6, 1996, at B10; *Traffic World*, June 17, 1996, at 40.

denied, and asks, in the alternative, that we order divestiture of parallel lines and duplicate facilities, including: (1) lines between St. Louis and Memphis, on the one hand, and, on the other, Houston; (2) SP's Houston-New Orleans line; and (3) SP's Houston-Brownsville line. KCS adds that, where UP and SP now share lines and facilities, divestiture should consist of a grant of trackage rights over such lines and access rights to such facilities. KCS adds that, to remedy cumulative effects of the BN/SF merger and the proposed merger, a third carrier should be given access to the Central Kansas rights granted to SP in connection with the BN/SF merger, including access to Wichita, Topeka, and Hutchinson, and the trackage rights over BNSF to Ft. Worth. And, KCS concludes, we should order a Central Corridor divestiture similar to the one proposed by MRL.

The BNSF Agreement; Discovery; Due Process; and the First Amendment. KCS contends that the BNSF agreement will not solve the competitive problems the proposed merger would cause, and that we cannot fully evaluate the agreement's competitive impact because applicants have refused to disclose critical aspects of its negotiation. KCS also contends that applicants have abused the discovery process, and it maintains that their abuse of that process should not be condoned. KCS-33 at 117-124. KCS further contends that applicants, by their overuse of the "Highly Confidential" designation, have hindered participation in this proceeding by opponents of the merger, have violated opponents' procedural due process rights (because certain matters could not be discussed with inside counsel), and have even violated opponents' First Amendment right to "petition the government for a redress of grievances" (because opponents and inside counsel, were unable to look at material stamped "Highly Confidential"). KCS also contends, among other things, that because the merger involves commerce to and through Mexico and would have a substantial impact on American foreign policy, there is some doubt as to our jurisdiction in this matter. KCS-33 at 83-84.

2-to-1 Shippers. KCS notes that, under the BNSF agreement, only 2-to-1 shippers at points served by UP and SP and no other carrier will gain access to BNSF. KCS argues, however, that there are other 2-to-1 shippers as well. (1) Applicants, KCS claims, did not consider a shipper to be a 2-to-1 shipper if that shipper had access, either directly or via reciprocal switching, to two carriers, the first being either UP or SP and the second being another Class I carrier (such as KCS or BNSF). KCS maintains, however, that any such shipper should qualify as a 2-to-1 shipper if, by way of example, it can presently route a shipment either joint-line by KCS-UP or single-line by SP; post-merger, KCS

asserts, there will no longer be two independent routing alternatives. (2) KCS also asserts that the BNSF agreement provides no relief to a shipper that has a plant served both by UP and SP, either directly or via reciprocal switching, and also by another Class I carrier (such as KCS). KCS claims, however, that any such shipper should qualify as a 2-to-1 shipper if that shipper can presently route either single-line by UP or single-line by SP, but cannot route single-line by KCS because KCS does not serve the destination. (3) KCS further asserts that the BNSF agreement provides no relief to a shipper that has a plant served exclusively by SP, where the shipper can route a shipment either single-line by SP or joint-line by SP-UP. That shipper, KCS claims, may have sufficient leverage to "short haul" SP by using SP as a switch carrier to switch the traffic to UP.

2-to-1 Corridors. KCS warns that shippers located in 2-to-1 corridors will suffer reduced competition because, for most UP or SP shippers in a given corridor who are not directly served by both carriers, the presence of the other carrier nevertheless provides a competitive restraint. That restraint, which would be eliminated by the merger, takes many forms: potential build-outs or build-ins; the potential to truck transload; the potential to use joint truck/rail or barge/rail movements; the ability to shift production among numerous plants located on UP and SP; the ability to relocate plant facilities; the ability to play UP and SP against each other in deciding where to locate new facilities; the use of package bidding; and source and product competition between shippers located on UP and shippers located on SP.

Trackage Rights; Package Deal; Operating Costs. Trackage rights, KCS claims, inherently present many problems involving labor, equipment, dispatching, maintenance, and derailments; a landlord, KCS contends, has no incentive to provide essential maintenance to tracks used primarily by a tenant. The BNSF agreement, KCS further contends, was a package deal, and BNSF had to accept trackage rights it did not want in order to obtain those that it did, primarily in the West.[37] BNSF's lack of interest, KCS claims, is reflected in its

[37] KCS, citing a document submitted under seal, claims, among other things, that BNSF, despite its lack of interest in Mexico, had no choice but to accept South Texas trackage rights as part of a package. KCS-33 at 72. BNSF insists that the confidential document upon which KCS has relied lacks probative value, is not admissible in evidence, and should be stricken from the record. BN/SF-54 at 32-33. KCS, responding to BNSF's request to strike, maintains that there is no basis not to consider this document, which, KCS adds, provides a glimpse at the motivations of applicants and BNSF in regard to South Texas. KCS-52 at 2. We think that the document

(continued...)

failure to provide operating details, management plans, diversion studies, market analyses, financial information, or environmental documentation with respect to the line sales and trackage rights provided for in the BNSF agreement. KCS argues that BNSF's operating costs will be significantly higher than UP/SP's and, as a result, BNSF will not be an effective competitor. KCS therefore argues that the trackage rights fees provided for in the agreement must be adjusted to provide competitive relief.

Antitrust Violations. KCS, arguing that, in recent years, BN, SF, UP, and SP may have cooperated in violation of the antitrust laws and that this cooperation may have produced the BNSF agreement, requests that we "establish" that our rulings in this proceeding neither condone nor insulate violations of the antitrust laws. KCS-33 at 82. KCS adds that, because some form of anticompetitive behavior may have occurred between BN, SF, UP, and SP during the BN/SF merger proceeding, we should consider reopening the record in that proceeding in order to fully analyze the trackage rights given in that proceeding. KCS-33 at 82 n.41.

Terminal Trackage Rights. KCS claims that, even if we impose the BNSF agreement as a condition, BNSF will not be able to implement its trackage rights absent approval of the Finance Docket No. 32760 (Sub-No. 9) terminal trackage rights application. KCS, urging denial of that application, contends that the relevant rail segments are not terminal facilities within the meaning of 49 U.S.C. 11103(a). KCS claims that the two agreements applicable to the Shreveport trackage are standard trackage rights agreements, confining SP's use of the trackage to main-line, through-train operations, and that the agreement applicable to the Beaumont trackage prohibits terminal activities on the trackage. And, KCS contends, the requested trackage rights are not practicable and would interfere with the operations of the current users of the lines.

MONTANA RAIL LINK. MRL, a regional carrier that has filed a responsive application in Finance Docket No. 32760 (Sub-No. 11), operates a 632-mile main line between Laurel, MT, and Sandpoint, ID, with trackage rights on BN between Sandpoint, ID, and Spokane, WA, and with 200 miles of branch lines in Montana. MRL insists that the trackage rights provided for in the BNSF agreement will not preserve or promote competition in the Central Corridor

---

(...continued)
relied upon by KCS has been properly introduced into evidence, and we will therefore deny BNSF's request that it be stricken.

because: BNSF will have no investment in that corridor, and will pay fees for the trackage rights only to the extent that it uses them; BNSF does not need these trackage rights to protect any of its existing long-haul traffic, or to enhance service to its existing customers; the trackage rights do not provide BNSF with access to any significant new markets, given the narrow definition of 2-to-1 shippers; the requirement that BNSF share Central Corridor capital expenditures, based upon its relative use of that route, will operate as a disincentive to BNSF usage of the trackage rights; and it is unlikely that BNSF would make much use of a lengthy route over which it would be subject to the dispatching and operational priorities of UP/SP.

Coal. Bituminous coal, MRL notes, is mined in Southern Wyoming, the Central Rockies, Four Corners, and Raton; subbituminous coal is mined in the PRB. The four bituminous reserves are served predominantly by three railroads: Southern Wyoming by UP, the Central Rockies by SP, and Four Corners and Raton by BNSF; UP handles 21% of the rail transportation market for western bituminous coal, SP handles 42%, and BNSF handles 25% (and URC handles the remaining 12%). The PRB subbituminous coal reserves are served by two railroads: UP and BNSF. SP's share of the transportation market for shipments to traditional customers of western bituminous coal, MRL indicates, has held steady at about 45% since 1989. MRL adds, however, that, as to new markets, SP's share has grown from 7% in 1989 to 64% in 1995, due to aggressive pricing and innovative marketing practices. UP's market share for emerging and new markets of bituminous coal, MRL claims, has declined to 18%, and MRL claims that the decline in UP's share of the emerging markets for western bituminous coal may reflect UP's dedication to developing the growth of PRB coal. MRL notes that SP, with no access to PRB coal, has had to focus its efforts on developing western bituminous coal, particularly from the SP-served Central Rockies mines; and MRL fears that a combined UP/SP will neglect bituminous coal in favor of PRB coal.

Relief Requested: In General. MRL suggests that, to mitigate the adverse consequences of the merger in the Central Corridor, we should authorize a to-be-formed affiliate (Acquisition Company, hereinafter referred to as MRLAC) to acquire certain Central Corridor rail lines and incidental trackage rights. MRLAC, MRL insists, would compete vigorously for traffic (overhead and local) in the Central Corridor because the value of its franchise would depend on its capturing a share of this market. MRLAC, MRL adds, would grant overhead trackage rights to UP/SP and BNSF over the lines it acquires, to address capacity concerns that may arise in the future and to allow UP/SP to

achieve many of the operating efficiencies tied to the merger. And, MRL adds, the proposed acquisitions would advance the public interest by preserving existing routes in the Central Corridor, thereby forestalling five of the abandonments proposed by applicants (respecting the Wendel-Alturas Line, the Sage-Malta-Leadville Line, the Malta-Cañon City Line, the Towner-NA Junction Line, and the Hope-Bridgeport Line).[38]

Relief Requested: Line Sales. MRLAC would acquire: (1) the UP lines in California from Stockton through Sacramento to Marysville, along with the branch lines to Read and Sutter, north through Keddie, CA, to Flanigan, NV, including the branch line from Reno Junction, CA, south to Reno, NV, and the branch line from Hawley, CA, to Loyalton, CA; (2) the SP line running north from Flanigan, NV, to Alturas, CA, and then northwest to Klamath Falls, OR (the Modoc Line); (3) the UP route from Flanigan, NV, to Winnemucca, NV, and the SP route from Winnemucca, NV, to Wells, NV, and Ogden, UT; (4) from Ogden, all of the DRGW lines, and their contiguous branches, to Salt Lake City, UT, and on to Provo, UT, and then east on DRGW to Denver, CO, including the branches to Potash, Sunnyside, Clear Creek, Copperton, and Garfield, UT; (5) all of the DRGW lines in Colorado, from the Utah border east to Dotsero, including the branches to Montrose, Oliver, and Woody Creek, and, from Dotsero, the line northeast to Denver (including the branches to Craig and Energy Fuels via Steamboat Springs) and the line southeast to Pueblo (the Tennessee Pass Line); (6) the DRGW line between Denver and Pueblo, extending south of Pueblo to Antonito, CO, including the branch line to Creede, CO, and DRGW's rights, if any, to Trinidad, CO; (7) east of Pueblo, the rights and ownership of the former MPRR line between Pueblo, CO, and Herington, KS; (8) SP's ownership in and access to the Kansas City Terminal; and (9) the UP line from Silver Bow, MT, to Pocatello, ID, and the contiguous branches to Arco, Aberdeen, and Gay, ID.

Relief Requested: Equipment; Trackage Rights; Interchange Rights; Proportional Rate Agreement. MRLAC also would acquire all the rolling stock and equipment owned and leased by UP/SP, including locomotives, cars, cabooses and equipment, roadway maintenance equipment, and other vehicles currently used on the subject lines. MRLAC also would acquire certain trackage rights: (1) overhead trackage rights on the UP line between Pocatello, ID, and

[38] MRLAC would be controlled by MRL's majority shareholder. MRL indicates that it has proposed to pay $615,115,059 for the property to be acquired by MRLAC.

Ogden, UT; (2) overhead trackage rights on the UP line between Lindsborg, KS, and Salina, KS, and between Salina and Solomon, KS, with access to a direct interchange with Kyle Railways at Solomon; (3) local trackage rights on the SSW line between Herington, KS, and Topeka, KS; (4) overhead trackage rights on the UP line between Topeka and Kansas City; and (5) SP's rights on the BNSF line between Topeka and Kansas City. MRLAC would be entitled to full access to interchange with connecting carriers (including shortlines) at all common points, and would be entitled also to quote rates to and from SP stations in California and Oregon for traffic moving, respectively, via Stockton, CA, and Klamath Falls, OR.

TEXAS MEXICAN RAILWAY COMPANY. Tex Mex, which operates over its 157-mile Laredo-Robstown-Corpus Christi line, indicates that Laredo, the principal gateway for rail traffic between Mexico and the United States, is served by two railroads on the American side of the International Bridge (UP via its Laredo-San Antonio line, and Tex Mex via its Laredo-Robstown-Corpus Christi line).[39] Tex Mex adds that UP's Brownsville line runs along the Gulf of Mexico from Algoa (just south of Houston) to Brownsville (another, but less important, gateway into Mexico); that UP connects with Tex Mex at Robstown (on the Brownsville line) and at Corpus Christi (on the Odem-Corpus Christi branch line); that SP connects with Tex Mex at Corpus Christi, via trackage rights over portions of UP's Brownsville line and the related Odem-Corpus Christi branch line; but that, although Tex Mex can interchange traffic with both UP and SP, very little traffic has been interchanged with UP either at Robstown or at Corpus Christi, and nearly all of the traffic that Tex Mex has interchanged at either point has been interchanged at Corpus Christi with SP. Tex Mex asserts that, for international rail traffic moving over the Laredo gateway, the SP-Tex Mex routing via Corpus Christi has provided the alternative to UP's San Antonio-Laredo routing.

The BNSF agreement, Tex Mex claims, does not preserve the existing competition for rail movements between the United States and Mexico. Tex Mex insists that, even if BNSF would be as effective a competitor for that traffic as SP is today, a 3-to-2 reduction in the number of Class I carriers providing rail

[39] On the Mexican side of the International Bridge, service is provided by the state-owned railroad, Ferrocarriles Nacionale de Mexico (FNM). Tex Mex insists, however, that FNM sets its rates for the Mexican portion of an international movement without regard to the rates for the American portion, and that, in consequence, the vigorous competition that now exists for the American portion of the movement directly benefits shippers.

service to Mexican gateways would amount to an unacceptable reduction in competition. Tex Mex asserts that, in any event, BNSF's probable share of the market for U.S.-Mexico traffic would be so small that BNSF would not devote the resources necessary to compete effectively, so that most shippers would end up having no choice but to ship via the UP/SP routing. The loss of competition for U.S.-Mexico traffic, Tex Mex warns, will undermine the anticipated benefits of the North American Free Trade Agreement (NAFTA), and also may undermine Mexico's efforts to make its rail system more efficient and competitive through privatization.[40] Tex Mex also argues that the merger, minus the conditions sought by Tex Mex, will thwart the efforts that Tex Mex's ultimate parent, Transportacion Maritima Mexicana (TMM), is making, in partnership with Kansas City Southern Industries, Inc. (KCSI), to create a rail network between central Mexico and the Central United States that will provide a strong alternative to a merged UP/SP for rail traffic between Mexico and the United States and between Mexico and Canada.[41]

Tex Mex also claims that it simply cannot survive the merger as currently structured. Tex Mex alleges that the merger, even as conditioned by the BNSF agreement, would result in a 34% decline in Tex Mex's revenues. Tex Mex insists that it currently is operating at close to maximum efficiency and that revenue losses of the projected magnitude could not be absorbed without significant service reductions; Tex Mex is adamant that it could not survive solely on the traffic of its local shippers; and Tex Mex adds that, if it were unable to continue operating, a number of its shippers would be significantly harmed because they are dependent on Tex Mex for their transportation needs and cannot practically use other modes of transport.

Relief Requested: In General. Tex Mex requests certain rights that it insists are necessary both to address the competitive problems not remedied by the BNSF agreement and to permit Tex Mex to survive and to provide shippers on its line access to the essential services that would otherwise be lost. In Finance Docket No. 32760 (Sub-No. 13), Tex Mex seeks trackage rights over UP/SP lines from Robstown and Corpus Christi to Houston, and on to a

---

[40] Efforts are underway to privatize FNM. *See*, TM-23 at 148-150.

[41] Tex Mex is a wholly owned subsidiary of Mexrail, Inc., which is itself owned 51% by TMM (a Mexican company that intends to participate in the Mexican rail privatization process) and 49% by KCSI (the corporate parent of KCS). The strong competitive alternative that Tex Mex has in mind would involve a TMM-Tex Mex-KCS routing.

connection with KCS at Beaumont. The sought trackage rights would allow Tex Mex both to transport overhead traffic and to serve all local shippers currently capable of receiving service from both UP and SP, directly or through reciprocal switching.[42] The sought trackage rights also would include full rights to interchange traffic at Houston (with UP/SP, BNSF, HB&T, and PTRA) and at Beaumont (with UP/SP, BNSF, and KCS). In Finance Docket No. 32760 (Sub-No. 14), Tex Mex, invoking 49 U.S.C. 11103, seeks related terminal trackage rights on HB&T. Tex Mex claims that the rights it seeks would free it from dependence on a doubtful connection with BNSF, and would enable Tex Mex, in conjunction with KCS, to offer shippers served by KCS or KCS' eastern connections a third alternative for traffic from/to Mexico and southeast Texas.[43]

Relief Requested: Main Line Trackage Rights. Tex Mex requests trackage rights over: (1) the UP line between Robstown and Placedo; (2) the UP line between Corpus Christi and Odem, via Savage Lane to Viola Yard; (3) the SP line between Placedo and Victoria;[44] (4) the SP line between Victoria and Flatonia; (5) the SP line between Flatonia and West Junction; (6) either (a) the UP line from Gulf Coast Junction through Settegast Junction to Amelia (the "UP main line option"), or (b) the SP line from Tower 87 to Amelia (the "SP main line option");[45] and (7) the joint UP/SP line from Amelia to Beaumont, and the connection with KCS at the Neches River Draw Bridge in Beaumont.[46]

Relief Requested: Houston Trackage Rights On SP. Tex Mex requests trackage rights in Houston over: (1) the SP line from West Junction through Bellaire Junction to Eureka at SP MP 5.37 (Chaney Junction); (2) the SP line from SP MP 5.37 to SP MP 360.7 near Tower 26 via the Houston Passenger station; (3) the SP line from SP MP 5.37 to SP MP 360.7 near Tower 26 via the Hardy Street yard; (4) if the UP main line option is elected, the SP line from SP MP 360.7 near Tower 26 to the connection with HB&T at Quitman Street near

---

[42] Tex Mex concedes that, in certain markets, the local trackage rights it seeks would introduce added competition. TM-34 at 7. Tex Mex insists, however, that it does not support or endorse any limitation of the trackage rights sought in its responsive application. TM-35 at 1-2.

[43] Tex Mex indicates that, if we approve its Sub-No. 13 responsive application and its Sub-No. 14 terminal trackage rights application, it will file a construction application seeking the right to construct improved connections at Robstown and Flatonia.

[44] Tex Mex seeks, in the alternative, to purchase the Placedo-Victoria line, if (a) we approve its responsive application, but (b) UP/SP chooses to divest the Placedo-Victoria line and retain the Bloomington-Victoria line.

[45] Tex Mex requests that UP/SP be required to elect which option it would prefer Tex Mex to operate.

[46] All points referenced in this paragraph are in Texas.

SP MP 1.5; (5) if the SP main line option is elected, the SP line from Tower 26 through Tower 87 to the SP main line to Amelia; and (6) the SP line from West Junction to the connection with PTRA at Katy Neck (GH&H Junction), by way of Pierce Junction.

Relief Requested: Terminal Trackage Rights On HB&T. In Finance Docket No. 32760 (Sub-No. 14), Tex Mex requests terminal trackage rights over the following terminal tracks of HB&T in Houston: (1) if the UP main line option is elected, the HB&T line from the Quitman Street connection with SP to the Gulf Coast Junction connection with UP, a distance of 2.1 miles; and (2) the HB&T line from its connection with SP at T. & N.O. Junction (Tower 81) to its connection with UP at Settegast Junction, a distance of 13.4 miles. Tex Mex indicates that the sought rights: (a) will bridge a gap between the Corpus Christi/Robstown-Houston trackage rights and the Houston-Beaumont trackage rights; (b) will provide an alternative route through Houston in the event of congestion on the main east-west SP route through Houston (over which Tex Mex is seeking trackage rights); and (c) will permit Tex Mex to utilize HB&T as its switching carrier in Houston and to gain access to HB&T's New South yard.[47]

Relief Requested: Terminal Facilities In Houston. Tex Mex requests the right to use the following yards and other terminal facilities of SP, UP, and HB&T: (1) SP's Glidden Yard; (2) interchanges with PTRA at the North Yard, Manchester Yard, and Pasadena Yard; and (3) interchanges with HB&T at HB&T's New South Yard.

Relief Requested: Trackage Rights Compensation. Tex Mex requests that the sought trackage rights be granted at the compensation level provided for in the BNSF agreement, with one exception: that compensation level, Tex Mex insists, should be subject to quarterly adjustments for changes in railroad productivity. Tex Mex further notes that, although 49 U.S.C. 11103 provides that compensation is to be paid or secured before terminal trackage rights operations start, it is asking that we not require that the compensation terms be established before Tex Mex begins use of the HB&T track; such a requirement, Tex Mex claims, would simply delay the pro-competitive public benefits of the

[47] Tex Mex, which claims that, under 49 U.S.C. 11341, approval of its responsive application should enable it to use the described HB&T tracks with or without the consent of HB&T, indicates that it filed its Sub-No. 14 terminal trackage rights application out of an abundance of caution. TM-24 at 2-3.

conditions Tex Mex seeks. Tex Mex agrees, however, that any compensation later established either by agreement of the parties or by order of the Board will accrue from the initiation of operations over the terminal trackage, and will be payable after final determination of the terms thereof. TM-24 at 5-6.

CAPITAL METROPOLITAN TRANSPORTATION AUTHORITY. CMTA holds a mass transit easement over a segment of the 162-mile Giddings-Llano line, which runs in a generally east-west direction from Llano (in the west) to Giddings (in the east).[48] The line, which in 1986 was acquired by the City of Austin from SPT (SPT retained a 20-year trackage rights option over the Manor-Giddings portion), is currently divided into three segments: a western segment between Llano and Scobee; a middle segment between Scobee and Smoot; and an eastern segment between Smoot and Giddings (included within which is the Manor-Giddings portion). The former operator of the line, Austin Railroad Company d/b/a Austin Northwest Railroad (AUNW), discontinued service on the Llano-Scobee and Smoot-Giddings segments in February 1994 and May 1995, respectively; service has continued to be provided on the Scobee-Smoot segment; and, in April 1996, we granted a new operator, Central of Tennessee Railway & Navigation Company Incorporated, d/b/a The Longhorn Railway Company (Longhorn), an exemption from the prior approval requirements otherwise applicable to its operation of the line. CMTA, which plans to purchase the line by year's end, anticipates that service will soon be restored by Longhorn on the two segments over which service was discontinued by AUNW.

Because the line has two Class I connections (UP at McNeil and Elgin, and SP at Giddings), the proposed merger will effect a 2-to-1 reduction in the line's "potential" Class I connections. At the present time, the line's only Class I connection is with UP at McNeil; Elgin and Giddings are located on the Smoot-Giddings segment over which service has been discontinued.[49] CMTA contends that we should nevertheless regard this as a 2-to-1 situation, (a) because shippers on the line have traditionally had access to both UP and SP, (b) because SP has an option to exercise trackage rights on the Manor-Giddings portion, and (c) because Longhorn plans to reopen the Smoot-Giddings segment as soon as reasonably practicable. CMTA notes that the BNSF trackage rights provided for in the BNSF agreement (to Kerr, via Round Rock; and to Elgin)

[48] All points referenced in connection with the Giddings-Llano line are in Texas.

[49] SP, as previously noted, also has a trackage rights option on the Manor-Giddings portion, which would allow SP to move its connection as far west as Manor; but SP has not exercised this option.

will not enable BNSF to access the Giddings-Llano line. Round Rock, CMTA notes, is located 4.4 miles north of McNeil; and Elgin is located on the Smoot-Giddings segment over which service has been discontinued (and, CMTA adds, the BNSF agreement does not grant interchange rights for BNSF at Elgin). And CMTA's interests are not limited to freight service but include passenger service as well; CMTA notes that its plans include passenger operations over much of the Scobee-Smoot segment, and that the most active segment of its planned passenger rail system will be east of McNeil.

Relief Requested. In Finance Docket No. 32760 (Sub-No. 10), CMTA seeks, on behalf of an unnamed rail carrier unaffiliated with applicants, trackage rights over UP's track between McNeil and Kerr, with interchange rights with BNSF either at McNeil or at Kerr, as appropriate. CMTA also requests that we direct applicants to cooperate in good faith with CMTA in all phases of the development of its passenger rail service, with particular emphasis on accommodating freight and passenger traffic at the McNeil interchange, and that we retain jurisdiction over these matters (CMTA envisions that we would exercise this retained jurisdiction in the event CMTA and UP/SP were unable to resolve these matters on their own).[50]

CMTA intends that the recipient of the trackage rights would be either BNSF, Longhorn, or Georgetown Railroad (GTRR). BNSF could extend its Taylor-Kerr trackage rights south from Round Rock to McNeil (a distance of 4.4 miles); Longhorn could obtain rights from McNeil north to Kerr (a distance of 6.4 miles), with an interchange with BNSF at Kerr (a Round Rock interchange would not be practical); and GTRR, which operates between Kerr and Granger, could obtain trackage rights between Kerr and McNeil, and could interchange with Giddings-Llano shippers at McNeil and with BNSF at Kerr. CMTA emphasizes that the competitive alternative it seeks should be provided at McNeil, not at Elgin or Giddings. The McNeil interchange, CMTA contends, would provide an adequate competitive alternative, and, more to the point, would restrict most freight traffic on the line to the portion of the line west of McNeil. CMTA indicates that, to minimize the interactions between freight trains and passenger trains, it is important to minimize the mileage that freight

[50] CMTA insists that its negotiations with UP are currently at a standstill, perhaps because UP has an interest in offering its own commuter operations in the Austin metropolitan area. And, CMTA adds, if a contract to operate a passenger rail service is ever put out for bidding, the merger of UP and SP will mean that UP/SP will submit only one bid (and not the two competitive bids that might well have been submitted absent the merger).

traffic must travel on the Giddings-Llano line. And, CMTA adds, because 80% of Giddings-Llano freight traffic originates west of McNeil whereas the most active segment of CMTA's planned passenger rail system will be east of McNeil, the best approach would be to route freight traffic north at McNeil.

Response by Georgetown Railroad Company and Texas Crushed Stone Company. GTRR originates crushed stone shipments, most of which are produced by its corporate affiliate, TCSC. GTRR and TCSC contend that CMTA's responsive application should be denied because, among other reasons, no matter where the interchange occurs, the additional traffic generated by the Giddings-Llano line would impose an intolerable burden on the already taxed track between McNeil and Round Rock and would occasion delays for the traffic entering or leaving Kerr.

MAGMA COPPER COMPANY'S RAIL AFFILIATES. The Magma Arizona Railroad Company (MAA) and the San Manuel Arizona Railroad Company (SMA) are rail subsidiaries of Magma Copper Company (MCC). MAA operates a line between Superior, AZ, and Magma, AZ; this line serves one of MCC's mines, apparently located in the vicinity of Superior; and traffic moving from this mine is routed MAA-SP (the MAA-SP junction is at Magma). SMA operates a line between San Manuel, AZ, and Hayden, AZ; this line serves MCC's only plant, which is located at San Manuel; and traffic moving from/to this plant is routed SMA-CBRY-SP (CBRY, the Copper Basin Railway Company, is a switching carrier for SP and operates a line between Hayden and Magma; the SMA-CBRY junction is at Hayden, and the CBRY-SP junction is at Magma). MCC indicates that its MAA-served mine and its SMA-served plant are currently captive to SP; no railroad other than SP (other than its switching carrier, CBRY) connects with MAA or SMA; and MCC is therefore dependent on SP for its transportation needs respecting bulk commodities. MCC contends that SP has taken advantage of MCC's captivity: (a) by holding on to all shipments which it was capable of handling, either all the way to destination (if the destinations were SP stations) or to the most distant junctions with connecting carriers (if delivery of the shipments required interlining); and (b) by allowing service to deteriorate. MCC fears that the merger will exacerbate this situation. MCC indicates that shipments moving beyond Portland and Denver can be routed either SP-UP or SP-BNSF; but MCC fears that this choice will disappear with the merger, and that its shipments will then be captive to UP/SP from origin to destination. MCC also fears that UP/SP pricing practices will continue to be a problem because UP/SP will have even less incentive than SP to price its services aggressively.

Relief Requested. MCC seeks overhead trackage rights over SP lines: (1) for MAA, between Magma, on the one hand, and, on the other, Phoenix and Nogales, AZ; and (2) for SMA, between Hayden, on the one hand, and, on the other, Phoenix and Nogales. MCC indicates that the trackage rights would be for a distance of approximately 36 miles to Phoenix and approximately 142 miles to Nogales. The requested trackage rights, MCC notes, would give MAA and SMA direct access to BNSF at Phoenix and to Ferrocarriles Nacionales de Mexico - Region Pacifico (FCP) at Nogales; and MAA and SMA would continue to have access to SP (now UP/SP) at Magma.

YOLO SHORTLINE RAILROAD COMPANY. Yolo, a shortline located near Sacramento, CA, with two branch lines that it purchased from UP, interchanges all of its traffic with UP in UP's West Sacramento yard; although it shares trackage rights in the yard with SP, its agreement with UP prevents Yolo from interchanging directly with SP; thus, to use SP routes, Yolo must, at a minimum, use a UP switch to move cars within the yard from the Yolo track to the SP track, and must pay the corresponding switch fee; and this, Yolo alleges, has been uneconomic and inefficient. Yolo, noting that SP has superior routes to various points, supports the merger, but adds that the benefits of the merger would be enhanced by granting BNSF access to Yolo, which, Yolo indicates, would place Yolo in the same position as other West Sacramento customers that provide carloads to UP and that will gain access to BNSF under the BNSF agreement. Yolo further adds that, to increase efficiencies and cut costs, it has offered to provide service on branch lines in areas jointly served by UP and SP, but it claims that UP and SP could never agree on how to arrange for the transfer of the trackage and service. Yolo alleges that it could provide better service to West Sacramento switching area customers while interchanging with the Class I carriers at convenient points on their main lines; and, Yolo believes that this would alleviate congestion in the yard and switching area. Yolo therefore requests that we impose these conditions: (1) to provide Yolo and its customers competitive access to alternative carriers, a condition granting Yolo the right to interchange with UP/SP, BNSF, and any other carrier that has access to customers in the West Sacramento area; and (2) to create a safer, more efficient, and more economical means of serving customers in the West Sacramento area, a condition requiring UP/SP and BNSF (and any other carrier with access to that area as a result of the merger) to enter into good faith negotiations with Yolo with the object of allowing Yolo to operate the West Sacramento area.

KEOKUK JUNCTION RAILWAY AND PIONEER RAILCORP. KJRY operates between Keokuk, IA, where KJRY connects with BNSF, and La Harpe, IL, where KJRY connects with the Toledo, Peoria & Western Railway (TP&W). TP&W's line, as relevant, extends from Lomax, IL, on the west (the connection with the former SF Chicago-Kansas City main line), southeast to La Harpe, and then east to Bushnell, IL (the connection with the former BN Chicago-Kansas City main line); and, at Bushnell, TP&W can interchange with SP, which conducts trackage rights operations over the former BN Chicago-Kansas City main line.[51] Prior to the BN/SF merger, shippers in the Keokuk area had access to two Class I carriers: BN (via BN's line through Keokuk); and SF (via a KJRY-TP&W-SF routing; KJRY moved the traffic from Keokuk to La Harpe, and TP&W moved the traffic from La Harpe to Lomax on its own line and then from Lomax to Fort Madison, IA, via trackage rights on the SF line; the TP&W-SF connection was at Fort Madison). In the BN/SF merger proceeding, the ICC, in denying certain condition sought by KJRY, indicated that, because TP&W was gaining the right to interchange with SP at Bushnell, the BN/SF merger would not eliminate intramodal competition at Keokuk, and KJRY would not experience any appreciable traffic diversions; the existing competitive situation, the ICC found, would be preserved. Post-merger, the ICC indicated, Keokuk shippers would still have two alternative western routings: BNSF single-line and KJRY-TP&W-SP joint-line. SP, the ICC reasoned, would simply replace SF as part of the KJRY joint-line routing, and the KJRY-TP&W joint-line routing would remain an important competitive factor in Keokuk.

In its comments filed in the UP/SP proceeding, KJRY, now joined by its corporate parent, Pioneer Railcorp (PRC), which recently acquired control of KJRY, indicates that it would still be pessimistic but for three recent developments: (1) the acquisition of KJRY by PRC because PRC, the owner of nine shortlines, has bargaining power with the Class I railroads; (2) the acquisition of TP&W by Delaware Otsego Corp. (DO) because this acquisition will likewise give TP&W strengths it did not have as an independent railroad; and (3) the proposed UP/SP merger, which, by providing SP with resources it currently lacks, changes the prospects for competitive rail service in many markets, perhaps including Keokuk. KJRY insists, however, that UP

[51] Prior to the BN/SF merger, SP held only overhead trackage rights through Bushnell over the former BN Chicago-Kansas City main line; but, in agreements BNSF entered into with NITL and SP in connection with the BN/SF merger proceeding, SP gained the right to interchange traffic at Bushnell with TP&W.

must assume SP's obligations to serve the Bushnell interchange with TP&W, must continue to use the SP trackage rights through Bushnell to interchange with TP&W (and KJRY), and must aggressively price and market Keokuk traffic. KJRY and PRC therefore request that we condition the UP/SP merger: (1) upon UP/SP's acceptance of the terms of the settlement agreement entered into by SP in the BN/SF merger proceeding; (2) upon continued use by UP/SP of the SP trackage rights through Bushnell for the purpose of interchange with TP&W (and KJRY); and (3) upon UP/SP's willingness to price and market a competitive service to Keokuk area shippers.

TOLEDO, PEORIA, & WESTERN RAILWAY CORPORATION. TP&W, a regional railroad of 284 route miles extending from Fort Madison, IA, in the west, to Logansport, IN, in the east, interchanges with BNSF, UP, SP, IC, Conrail, CSX, and Norfolk Southern Corporation (NS), and with regional carriers as well, and thereby provides traffic moving between the western and eastern regions of the country a way to bypass Chicago and St. Louis. TP&W indicates that the recent UP/CNW and BN/SF mergers, and the proposed UP/SP merger, have affected the future of its connections with applicants. Before the BN/SF merger, TP&W's only interchange with SP was with SP's Chicago-St. Louis line at Chenoa, IL. In the BN/SF proceeding, however, TP&W gained connections with SP at Bushnell, IL, and Lomax, IL,[52] to offset the anticompetitive consequences that would have resulted from an unconditioned merger. TP&W claims, however, that the anticipated competitive benefits of the Bushnell interchange have not been realized. TP&W expected that the Bushnell interchange would enable it to continue, and even to increase, its participation in traffic originating at Keokuk and destined to Kansas City and beyond. TP&W reports, however, that Bushnell is not a priority stop for SP's fast, heavy tonnage trains; for operational reasons, these trains usually make only a single stop in the area, and this is normally at Galesburg, IL; and thus, TP&W states, for traffic moving from/to Keokuk, the KJRY-TP&W-SP routing is simply not competitive with the BNSF routing. The UP/SP merger, TP&W adds, comes at a time when TP&W is beginning to experience traffic losses to BNSF that cannot be offset by the competitive options created by the agreements endorsed in the BN/SF proceeding. TP&W indicates that it has arranged to confer with

[52] The TP&W-SP interchange at Lomax applies only to high speed automotive and intermodal trains, *BN/SF*, 10 I.C.C.2d at 811, and therefore does not allow a KJRY-TP&W-SP routing via Lomax.

UP so that it might propose areas where TP&W's ability to offer cooperative routing would be enhanced by minor commitments from UP; and TP&W further indicates that it supports the UP/SP merger based on its expectation that applicants will negotiate in good faith to achieve the cooperative arrangements that will enable TP&W to maintain its role as an effective participant in joint routes with UP/SP and its competitors.

SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY. SCRRA, a joint powers authority comprised of five members (each member is an agency of a local county), administers the "Metrolink" rail passenger service in Southern California. SCRRA indicates that, in the early 1990s, its member agencies acquired property or rights to use property from UP, SP, and SF; that these carriers (now UP, SP, and BNSF) and SCRRA's member agencies now operate jointly over specific lines; and that agreements with each carrier govern the operations and priorities of freight and passenger service over each line. SCRRA indicates that the merger will affect freight traffic moving over lines now operated jointly by SCRRA's member agencies, on the one hand, and, on the other, UP or SP; and, for this reason, SCRRA is concerned that the merger may have an adverse impact on the commuter operations SCRRA administers. SCRRA also indicates, however, that, although applicants have been forthcoming in providing details on their post-merger operations, SCRRA does not now have sufficient information to conclude that its operations will not be adversely impacted by the merger. SCRRA therefore indicates that it reserves the right to reopen this proceeding to request conditions or other appropriate relief if and when it determines that the UP/SP merger is adversely impacting the provision of commuter service in Southern California.

SHIPPER ORGANIZATIONS. Concerns that a UP/SP merger would have anticompetitive impacts in the transportation marketplace have been expressed by several shipper organizations.

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE. NITL, an organization of shippers conducting industrial and/or commercial enterprises, fears that a UP/SP merger would have broad anticompetitive effects. UP and SP, NITL relates, compete across important corridors (particularly the corridor between southern Texas/Louisiana and key Midwest gateways, and the California-Kansas Central Corridor), and NITL warns that, post-merger, many points served by both carriers will be captive to the merged carrier, and numerous competitive rail routings will disappear. And the "problem areas," NITL adds, involve many commodities that are clearly rail-dependent (such commodities as bituminous coal, plastic resins, lumber, and crushed stone).

BNSF Agreement. NITL contends that the BNSF agreement simply will not permit BNSF to be an effective competitor. NITL claims that BNSF, in conducting operations over UP/SP's lines, will incur costs significantly higher than those incurred by UP/SP in conducting its own operations over these lines. By NITL's calculations: on the Houston-Memphis route, BNSF's cost will be $13.69 per ton, whereas UP/SP's cost will be only $11.57 per ton; and, in the Central Corridor, BNSF's cost will be $23.62 per ton, whereas UP/SP's cost will be only $20.09 per ton.[53] NITL further claims that BNSF will be unable to achieve the traffic densities required for competitive operations. BNSF, NITL calculates, will have competitive access to a mere $258 million in traffic (NITL-10 at 35), not the "well over $1 billion" in traffic asserted by applicants (UP/SP-22 at 20), and certainly not the $1.8 billion in traffic asserted by BNSF itself (BN/SF-1, VS Lawrence, at 3-5). NITL also claims that BNSF's competitive efforts will be seriously impaired by various operational barriers, including UP/SP's directional routing on its Houston-Memphis lines. NITL asserts that BNSF's competitive efforts will be further impaired by a need for substantial investment in infrastructure that the traffic densities will be unable to justify. By NITL's calculations, BNSF would have to make a $97,500,000 infrastructure investment to operate over the Houston-Memphis route, and an additional $183,000,000 infrastructure investment to operate over the Central Corridor. The traffic levels available to BNSF, NITL insists, are simply not sufficient to justify infrastructure investments of these magnitudes. NITL further argues that a merger conditioned by that agreement alone would allow UP/SP and BNSF to dominate the market for rail transportation in the Western United States.

2-to-1 Shippers. NITL claims that the 2-to-1 shipper concept, as provided for in the BNSF agreement, is exceedingly narrow; even though the merger might cause a 2-to-1 reduction in the number of rail carriers at a particular point (*e.g.*, San Antonio), the 2-to-1 shippers protected by the BNSF agreement include only those shippers presently receiving service from both UP and SP (and no other carrier). NITL further claims that, although the agreement was supposedly intended to preserve two-railroad competition for all 2-to-1

[53] NITL adds that these cost handicaps will be exacerbated as time goes by because the adjustment procedures provided for in the BNSF agreement (which are based on 70% of the Rail Cost Adjustment Factor, unadjusted for productivity) fail to track the gains in productivity that will be experienced by UP/SP.

customers, there are 25 stations listed in the Standard Point Location Code (SPLC) data that were not specifically addressed in the agreement. NITL adds that the agreement identifies 23 rail stations which are 2-to-1 locations for which BNSF is not provided trackage rights.[54]

CMA Agreement. The CMA agreement, NITL argues, fails to cure the problems inherent in the BNSF agreement. (1) NITL concedes that the CMA agreement, by granting BNSF the right to operate with the primary traffic flows in the Houston-Memphis corridor, solves the key operational problem previously inherent in the BNSF agreement. NITL claims, however, that this solution exacerbates the problem created by BNSF's lack of access to sufficient traffic. Under the CMA agreement, NITL contends, BNSF's traffic will be divided between two lines, necessitating increased investments on both lines (*e.g.*, fueling facilities on both lines) for the same amount of traffic. (2) NITL claims that the CMA agreement, by allowing BNSF access to St. Louis via trackage rights over the UP line, will require BNSF to incur additional infrastructure costs at St. Louis; all of BNSF's existing terminal facilities in St. Louis, NITL contends, are on the west side of the Mississippi River, whereas the trackage rights line lies on the east side of the river. (3) NITL insists that the provision in the CMA Agreement requiring UP/SP to modify contracts with 2-to-1 chemical shippers in Texas and Louisiana so that at least 50% of the volume is open to BNSF does nothing to cure the cost disadvantage under which BNSF will operate as a result of the trackage rights fee. (4) NITL claims that several provisions in the CMA agreement accomplish little or nothing of substance. The provision requiring applicants to accept oversight, NITL claims, is meaningless, because the Board has, as a matter of law, continuing jurisdiction over its decisions approving or conditioning a merger. And, NITL adds, with or without the provision requiring that the trackage rights fees be placed in segregated funds, such fees will still be excessive.

Relief Requested. NITL contends that the merger should be denied, and asks that any approval be conditioned by requiring: (A) the divestiture of SP's lines (1) between Houston and New Orleans (including the Iowa Jct.-Avondale segment, and also including access to related terminal facilities in the New Orleans area), (2) between Houston and St. Louis (this would include SP's

[54] NITL concedes that the agreement indicates that UP/SP and BNSF will provide for customers located at 2-to-1 points that are not specifically referred to, and that "alternative arrangements" will be provided at the 23 stations. NITL contends, however, that UP/SP and BNSF should be required to address these matters now.

Houston-Memphis and Brinkley-North Jct. lines, and its North Jct.-East St. Louis trackage rights), and (3) between Houston and Brownsville (this would include SP's Houston-Placedo line via Flatonia, its Placedo-Brownsville trackage rights, and its Flatonia-Eagle Pass line, with BNSF retaining its haulage rights to Eagle Pass); (B) the divestiture of SP's lines between Stockton/Oakland and Denver/Pueblo, including its Kansas City-Pueblo (via Herington) track or trackage rights; and (C) the retention by UP/SP of (1) overhead trackage rights over all divested lines, and (2) full service trackage rights at any point where UP or SP and the acquiring carrier both can serve existing shippers or could serve new shippers.

SOCIETY OF THE PLASTICS INDUSTRY. SPI, the major trade association of the plastics industry, claims that plastics resins[55] are transported mainly by rail for several reasons: the integration of the hopper car with the shipper's production feeding lines; the volume of resin production (36 billion pounds in 1994); the average length of haul (approximately 1,000 miles); the cost advantage of rail vs. truck; and the need to maintain product integrity. The proposed merger, SPI maintains, is of great interest to the plastics industry because a large majority of plastics resins production occurs in the Texas/Louisiana Gulf Coast "petrochemical belt" between Galveston, TX, and Baton Rouge/New Orleans, LA, and because UP and SP, which operate parallel lines throughout the belt, are the main railroads connecting production facilities in the belt with markets in the Northeast, Midwest, and Southeast through the Chicago, St. Louis, Memphis, and New Orleans gateways.

SPI asserts that UP and SP dominate the plastics resins transportation market today. According to SPI, in excess of 92% of all domestic PE and PP production occurs in the Texas Gulf Coast region; UP and SP have access to nearly 90% of Gulf Coast plastics resins production capability; 64% of the plastics resins market for PE and PP is served exclusively by UP and/or SP, and no other carrier; the combined shares of UP and SP of the Gulf Coast PE/PP markets are 71% and 74%, respectively; and UP and SP dominate the principal transportation corridors for plastics traffic (Houston-Memphis/St. Louis and Houston-New Orleans). SPI claims that, even with the BNSF agreement, a combined UP/SP, by virtue of pre-merger exclusive service arrangements,

---

[55] Plastics resins (STCC 28211), as SPI uses the term, means polyethylene (PE) and polypropylene (PP), the two resins that constitute the majority of the production of plastics resins, other than liquid.

would control almost 40% of plastics resins production capacity without facing potential BNSF competition. The BNSF agreement, SPI notes, gives BNSF access to specified plants only (increasing its market access from 23% to 47% of Gulf Coast producers), but does not reduce UP/SP's access. The merger, SPI warns, would result in a loss of existing competition at currently served 2-to-1 points; it would result in a loss of the potential competition posed by build-in/build-out opportunities; and it would result in the loss of geographic or source competition (to the extent that UP and SP now serve different customers). And BNSF, SPI argues, would not be an effective competitor in any event: BNSF would lack the necessary physical capacity (*i.e.*, infrastructure); it would face material market barriers (including long-term contracts, renewal options, and tying arrangements) in competing for plastics traffic, and particularly in competing for traffic newly opened by virtue of the agreement; and it would not have a corporate commitment to compete. SPI adds that BNSF also would suffer additional handicaps: the traffic base available to BNSF under the agreement would be inadequate to enable BNSF to achieve a critical mass for efficient operations; BNSF would be handicapped in the Houston-Memphis/St. Louis corridor by virtue of UP/SP's intentions with respect to directional flow in that corridor; and the trackage rights fee provided for in the agreement will place BNSF at a cost disadvantage as compared to UP/SP. SPI adds that, to the extent BNSF elects to utilize UP/SP for switching or haulage, it will have relegated itself to second class status by yielding both operational and economic control over its customer service.

Relief Requested. SPI asks that the merger be denied, and that any approval be conditioned by requiring that UP/SP divest one of the two parallel networks serving Texas and Louisiana industries, which SPI takes to mean the UP/SP tracks running from the border points at Eagle Pass, Laredo, and Brownsville, through Houston and Ft. Worth, to New Orleans, Memphis, St. Louis, and Chicago. All extant trackage rights, SPI adds, should be preserved and either honored or transferred. The railroad acquiring this network, SPI suggests, should be either Conrail, KCS, IC, or BNSF.[56] SPI adds that a less desirable alternative would be to condition the merger on a strengthening of BNSF's rights under the BNSF agreement, including: (1) increasing BNSF's service opportunities by opening additional points, and (2) rendering voidable, at the

[56] SPI indicates that divestiture would resolve the deficiencies in the BNSF agreement because divestiture would entail storage tracks and other infrastructure and would make the purchaser an owner rather than a tenant.

shipper's option, any contractually based market foreclosure tactics (such as long-term contracts) employed by applicants. SPI suggests, however, that we should adopt this alternative only if we are presented with evidence that BNSF will in fact undertake the necessary capital investments and commit to full and vigorous competition.

CMA Agreement. SPI insists that plastics and chemicals are separate product groups, that the constituencies represented by SPI and CMA overlap only in part, and that, for the shippers represented by SPI, the CMA agreement does not change the basic anticompetitive implications of the merger. The CMA agreement, SPI argues, contains provisions that appear to be beneficial but that are largely illusory. (1) The CMA agreement provides that UP/SP shall modify contracts with shippers at Texas/Louisiana 2-to-1 points so that at least 50% of the volume is open to BNSF. SPI insists, however, that the extent to which this will provide BNSF with market opportunities is unknown. (2) The CMA agreement provides that BNSF shall have equal access to SP's Dayton Yard for storage in transit of traffic handled by BNSF. SPI notes, however, that whereas UP/SP will have access to six Gulf Coast storage locations, BNSF will have access only to one. (3) The CMA agreement allows BNSF to move its traffic in the Houston-Memphis-St. Louis corridor over either the UP line or the SP line. SPI insists, however, that the impact on BNSF of dual track operations and the effects on fueling, maintenance, crewing and other facilities, training, etc., have not been evaluated. (4) The CMA agreement provides that UP/SP shall place the fees received with respect to lines in Texas, Louisiana, Arkansas, and Missouri in a segregated fund, and also provides that BNSF's trackage rights fees shall be adjusted each year by the difference between that year and the preceding year in UP/SP's system average URCS maintenance/operating costs. SPI insists, however, that a segregated fund changes nothing, and that, besides, the fund would accrue to UP/SP to the extent used to offset depreciation costs. And the change in the escalation feature, SPI adds, does not change the fee itself. (5) The CMA agreement provides a limited cure respecting build-out options that might otherwise be lost with the merger. SPI insists, however, that this cure is quite limited because, among other things, it applies to CMA members only.

WESTERN COAL TRAFFIC LEAGUE. WCTL, an association of shippers and receivers of coal mined west of the Mississippi River, contends that the UP/SP merger must be considered in the context of the recent BN/SF merger. The BN/SF merger reduced the number of western coal railroads from four to

three; a UP/SP merger would reduce that number to two; and the cumulative effects, WCTL warns, would threaten the foundations of the competitive forces affecting western coal transportation. The pre-merger western coal transportation market, WCTL argues, is extremely concentrated: three railroads originate 96.4% of all coal moved in that market (BNSF, 57.7%; UP, 30.3%; SP, 8.4%), and the pre-merger Herfindahl-Hirschman Index (HHI) is 4322. The post-merger market, WCTL notes, would be even more concentrated (two railroads would control 96.4% of all western coal traffic), and the post-merger HHI would be 4831 (an increase of 509 index points). Such an enormous increase in concentration in an already highly concentrated market, WCTL contends, is a matter of great concern because increases in concentration in highly concentrated markets are likely to lead to anticompetitive price increases. WCTL fears that, after the merger, UP/SP and BNSF will reduce the level of competition between them in order to extract the maximum possible profit, and that each will be comfortable in the knowledge that the lack of competitive alternatives assures their mutual success. WCTL maintains that, because so much information regarding electric utilities is publicly available at the Federal Energy Regulatory Commission (FERC), coal-hauling railroads like UP/SP and BNSF can engage in something akin to parallel pricing. They can do this, WCTL continues, by "market-probing" (raising rates on a case-by-case basis, to see what the market will bear).

Source Competition. SP, WCTL claims, controls most of the coal originating in Utah and Colorado; UP controls at least half (with BNSF controlling the other half) of the coal originating at jointly-served mines in the SPRB of Wyoming; but, because many utilities are capable of burning either Utah/Colorado coal or SPRB coal, UP and SP have been forced to compete, to the benefit of utilities able to burn both Utah/Colorado coal and SPRB coal. WCTL further asserts that SP has aggressively pursued its Utah/Colorado coal traffic opportunities, and has even established a "reload" or "backhaul" program in order to keep its rates for Utah/Colorado coal transportation competitive with SPRB rates. The benefits of this source competition, WCTL argues, will disappear post-merger because UP/SP would lack the incentive to replicate the UP vs. SP competition between Utah/Colorado coals and SPRB coals, and, to maximize its revenues, would favor SPRB coal origins over Utah/Colorado coal origins because transportation costs for SPRB coal origins are lower.

SP's Aggressive Pricing; Its Financial Soundness; UP's Service Problems. WCTL claims that SPRB vs. Utah/Colorado source competition has fostered aggressive pricing by SP for the transportation of Utah/Colorado coals, and has

thereby served to regulate rail rates for western coal traffic. WCTL claims that SP is viable, competitive, and financially sound; that, in recent years, SP's competitive strength has been increasing; that, in future years, an independent SP would be a viable competitor for western coal traffic; and that an independent SP could survive. WCTL also fears that the merger, in addition to eliminating Utah/Colorado vs. SPRB source competition, will increase UP's Central Corridor service and operating problems. That corridor, WCTL contends, is already congested, and more traffic can only make matters worse.

BNSF Agreement. WCTL contends that the BNSF agreement is deficient in at least two respects: the trackage rights compensation for unit-train coal traffic is excessive; and shippers who currently are served by either UP or SP and are in a position to build out to the other, but whose potential build-outs are not "active" or "on-going," are not afforded protected 2-to-1 status. (1) WCTL contends that the trackage rights compensation level set in the BNSF agreement does not ensure that the anticompetitive effects of the merger will be alleviated. WCTL argues that, because the trackage rights fee is so high, and because UP/SP will have knowledge of BNSF's costs for the traffic, UP/SP will be able to raise its rates for the traffic to a level which reflects the resulting higher cost of the service for BNSF. Trackage rights fees intended to enable a tenant railroad to compete on equal terms, WCTL contends, should cover the landlord carrier's "below-the-wheel" costs (*i.e.*, maintenance of way, dispatching, and return on road investment), and WCTL insists that the unit-train coal fee provided for in the agreement (3.0 mills per gross ton-mile, or 5.0 mills per revenue or net ton-mile) is far in excess of UP/SP's below-the-wheel costs. WCTL adds that, in addition to the excessive base fee for the trackage rights, the adjustment mechanism will increase UP/SP's profits over time. (2) WCTL claims that, in general, the BNSF agreement does not protect shippers who, absent the UP/SP merger, could build out to either UP or SP to obtain competitive rail options. WCTL maintains that 2-to-1 status has been conferred only on a very limited subset of shippers with build-out options.

Relief Requested. WCTL urges the denial of the merger, but asks, in the alternative, that any approval be subject to these conditions: (1) divestiture (to a railroad other than BNSF) of SP's lines from Provo, serving coal mines in Utah and Colorado, through Pueblo to Kansas City, and either its lines from Kansas City through St. Louis to Chicago, or its trackage rights over BNSF from Kansas City to Chicago; (2) in lieu of divestiture of these lines, a grant of unrestricted trackage rights in favor of a railroad such as WC or MRL; (3) a

prohibition against the integration of UP and SP Central Corridor rail operations until UP can certify that it has been in full compliance, for a period of 12 consecutive months, with its service commitments under its coal transportation contracts; (4) the imposition of a trackage rights compensation fee for unit-train coal traffic under the BNSF agreement in the amount of 1.48 mills per gross ton-mile (or, in the alternative, 1.8 mills per ton-mile);[57] (5) the inclusion of shippers with build-out options as protected 2-to-1 shippers under the BNSF agreement; and (6) the extension of the CMA agreement's arbitration remedy to non-CMA members with build-out options, provided that a shipper need make only a reasonable *prima facie* showing of feasibility.

WESTERN SHIPPER'S COALITION. WSC, a coalition of shippers on UP and SP lines in Nevada, Utah, Colorado, and other Western States, fears that the proposed merger will allow UP/SP to dominate the Central Corridor (effectively controlling nearly 80% of the traffic in Nevada, Utah, and Colorado), and will eliminate the competition that has developed between SP- and UP-origin coals, competition that (in WSC's view) has placed a cap on the price UP can charge for coal from its PRB origins in Wyoming. WSC therefore opposes the merger unless MRL or another carrier not affiliated with applicants is awarded divestiture of (or, though less preferable, trackage rights over) (a) one of UP/SP's lines between Oakland/Stockton and Ogden/Salt Lake City, (b) all of DRGW's lines, and (c) one of UP/SP's lines between Denver/Pueblo and Kansas City. WSC claims that divestiture (or, to a lesser extent, trackage rights) would maintain the balance between SP- and UP-origin coals and would eliminate the detrimental impact of the merger in the Central Corridor. In the event we impose neither of these conditions, WSC asks that we alter the terms of the BNSF agreement (a) to allow BNSF additional access points (perhaps by expanding the concept of a 2-to-1 shipper), (b) to reduce the trackage rights fee to 2.0 mills or less per gross ton-mile, and (c) to adopt certain other conditions, including a requirement that BNSF pay an annual upfront fee for use of the Central Corridor, a mechanism for imposing penalties on UP/SP upon failure to maintain appropriate service standards, and a reduction in the trackage rights fees provided for in the URC agreement.

[57] WCTL indicates that its calculations rely upon a fair market valuation of SP road property investment derived from UP's acquisition cost. WCTL suggests that, because there is no comparable basis for estimating fair market value for the UP lines covered by the agreement, 1.8 mills per gross ton-mile should be applied to all the trackage rights lines, although WCTL would permit UP to challenge this calculation with evidence as to its actual costs and fair market value.

Western coal, WSC notes, involves two major types of low-sulfur coal: subbituminous (8,000 to 9,500 BTU/lb.) and bituminous (in excess of 10,000 BTU/lb.). WSC indicates that subbituminous coal is mined mostly in the PRB, which is served by both UP and BNSF, and that bituminous coal is mined mostly in four regions: the Southern Wyoming region, served by UP; the Utah/Colorado Uinta Basin, served largely by SP; the Raton Basin in Southeast Colorado and Northeast New Mexico, served by BNSF; and the Four Corners region in Southwest Colorado and Northern Arizona, served by BNSF. WSC maintains that the heating value, ash, and sulfur content of coal largely determines its value (coals with high heat content and low ash and sulfur contents command the highest value), and that, in general, Raton Basin coal is the most highly valued, followed in order by Uinta Basin coal, Southern Wyoming coal, and Four Corners coal. WSC insists, however, that all western coal constitutes one integrated product market because the different coals can be used interchangeably, to a greater or lesser extent, by many electric utilities. A UP/SP merger, in WSC's view, would allow UP/SP to dominate the western bituminous coal industry (the UP/SP market share for western bituminous coal would exceed 63%, but UP/SP's effective control would be even greater, due to limitations in URC's trackage and interconnection options and in the production capacity of BNSF-served mines). WSC claims that BNSF will not be an effective competitor in the Central Corridor because its access to shippers in that corridor will be severely limited, it will have no investment or presence in that corridor, its trackage rights fees will be too high, it would lack control over dispatching and switching, and, in any event, operational changes envisioned by applicants will alter the economics of east-bound coal shipments in such a way as to make it impossible for BNSF to offer the competitive rates offered by an independent SP.

MOUNTAIN-PLAINS COMMUNITIES & SHIPPERS COALITION. MPCSC, an association of shippers, counties, municipalities, and others located in the area of MPRR's Pueblo-Herington Line, opposes the proposed merger unless conditioned as requested by MRL. MPCSC, claiming that the proposed BNSF Oakland-Denver trackage rights do not resolve the threatened anticompetitive impacts, contends: that BNSF's interests would best be served by routing traffic onto its own Southern Corridor and Northern Corridor routes; that BNSF would be more likely to join with UP/SP in exploiting their duopoly, and less likely to compete with UP/SP for Central Corridor traffic; and that even if BNSF were motivated to compete, the cost and service impediments

associated with trackage rights would prevent it from doing so. MPCSC argues that, to alleviate the threatened anticompetitive impacts, an independent carrier like MRL should be allowed to provide a competitive alternative in the Central Corridor. MPCSC adds that another public interest benefit favoring MRL is the superior local service that MRL would provide for shippers located on, or in the territory adjacent to, MPRR's Pueblo-Herington Line. MRL's independent status and route structure, MPCSC claims, would provide maximum opportunity for grain to flow freely either (1) west to Stockton, or to Pacific Northwest ports for export via Klamath Falls, or (2) south to Gulf ports for export via coordinated service with KCS, or (3) east to Kansas flour mills or to points beyond Kansas City via other friendly connections. MPCSC also opposes the abandonment of any segment of the old WPRR/DRGW/MPRR transcontinental route via Salt Lake City and Pueblo (this has reference to the Tennessee Pass Line west of Pueblo and the Towner-NA Junction and Hope-Bridgeport Lines east of Pueblo). This route, MPCSC argues, should be preserved, not broken up by abandonments; and the acquisition sought by MRL would preserve the route and moot the abandonments. MPCSC adds that such factors as operating losses or opportunity costs that might warrant abandonment of a branch line should not be dispositive of abandonment of segments of a transcontinental main line.

WSC/MPCSC JOINT SHIPPERS' STATEMENT. A pleading referred to as the "joint shippers' statement" was submitted jointly by Western Shippers' Coalition, Mountain-Plains Communities & Shippers Coalition, the South Dakota Wheat Growers Association, and nine individual shippers, all of whom shall be referred to collectively as the Joint Shippers Coalition (JSC). JSC contends that there is a broad public consensus that the proposed merger should be denied as anticompetitive in the Central Corridor unless it is conditioned as proposed by MRL. JSC adds that it also supports the conditions sought by KCS that would further the effectiveness of competition via the Central Corridor.

COALITION FOR COMPETITIVE RAIL TRANSPORTATION. CCRT, a shipper organization created to oppose the merger, claims that shippers throughout the country fear that a UP/SP merger will have anticompetitive effects. A UP/SP merger, CCRT indicates, would occur in an environment already characterized by shrinking shipping alternatives and a narrow concentration of economic power. Shippers large and small, CCRT contends, benefit from competition between UP and SP, and CCRT warns that, if the merger is approved, shippers will no longer experience UP vs. SP competition, which will inevitably lead to increased costs and decreased service quality. CCRT therefore urges that the merger be denied, and that any approval be

conditioned by divestiture of lines in the Houston-St. Louis, Houston-New Orleans, Houston-Brownsville, and Stockton/Oakland-Denver/Pueblo corridors, and by providing for a third independent line in the Oklahoma region.

Adverse Impacts. The anticompetitive impact feared by CCRT is clear enough for 2-to-1 shippers, but, in CCRT's view, 3-to-2 shippers and even 1-to-1 shippers also will experience such impacts. With respect to 3-to-2 shippers, CCRT contends that, in many cases, UP, SP, and BNSF compete for shipper traffic, and that the elimination of SP (which, in CCRT's view, is usually the low cost competitor) will make prices increase and service quality decline. With respect to 1-to-1 shippers, CCRT contends that even though a shipper may be captive to either UP or SP, the shipper may be able to transload (or threaten to transload) or build out (or threaten to build out) to the other railroad, and a multi-facility shipper may be able to switch production (or threaten to switch production) from a UP-served facility to an SP-served facility. CCRT also fears that many localities will lose millions in tax revenues, both directly (abandoned lines) and indirectly (shippers whose operations decline because a loss of rail competition makes their products less competitive). CCRT warns that job losses among UP/SP employees will run in the thousands, and that, in future years, a merged UP/SP will abandon many redundant local lines. CCRT adds that, in certain are as where rail tracks cross highways at grade level, rail traffic increases will disrupt highway traffic.

BNSF Agreement; Duopoly. CCRT claims that a trackage rights tenant cannot be a true competitor of the trackage rights landlord. The landlord, by discriminating in favor of itself, will guarantee that its own cars receive priority in movement; the landlord can set the trackage rights fee so high that the tenant cannot compete effectively; the tenant is not always given full access to service shippers and industries; and, because trackage rights must actually be exercised in order to provide a second carrier, disinterest or inability on the part of the tenant means that the trackage rights will do little to preserve competition. CCRT fears that, as a practical matter, UP/SP and BNSF will be less likely to compete effectively against each other and more likely to work together to divide up all rail traffic in the Western United States (and thereby to reap the benefits of a duopoly).

CORN REFINERS ASSOCIATION. CRA, the national trade association for the corn wet milling industry, indicates that this industry's inbound corn and outbound processed corn products travel mostly by rail to/from the 25 plants operated by CRA's members. CRA asserts that, with the proposed merger,

competitive rail service will be lost by 2-to-1 shippers in various areas, including the San Francisco Bay area and the Los Angeles area. CRA argues that the trackage rights provided for in the BNSF agreement may not provide an adequate solution because BNSF may be unwilling and/or unable to provide competitive service at some locations. CRA accordingly requests: (1) that we compel UP/SP and the recipients of trackage rights over UP/SP to justify the economic viability of their trackage rights arrangements; (2) that we retain jurisdiction to ensure the competitiveness of trackage rights service through regular periodic oversight of the rates the trackage rights tenants must pay; and (3) in instances where the number of carriers available to a shipper would drop from two to one, either directly (if no trackage rights are provided for) or indirectly (if the rental rate charged the trackage rights tenant is too high), (a) that we grant reciprocal switching rights to the nearest available competitor, or (b) alternatively, wherever another competitor has requested trackage rights, that we grant such additional trackage rights, or (c) alternatively, that we impose special rate caps to offset the harm caused by such a significant reduction in competition.

NATIONAL CORN GROWERS ASSOCIATION. NCGA, which fears that the increasing consolidation of America's railroads has resulted in higher shipping prices and decreased availability of adequate service to grain producing areas, asks that we closely examine the repercussions that the proposed merger and any future mergers will have on the economics of the agricultural sector and on that sector's ability to meet global market demands for high-quality American agricultural products.

INSTITUTE OF SCRAP RECYCLING INDUSTRIES. ISRI, whose member companies process, broker, and consume recyclable materials, warns that SP's ability to compete effectively has declined drastically over the last few years. Its services, ISRI claims, have become unreliable; its ability to supply rail equipment has been questionable; and its responsiveness to needed capital improvements on its system has been ineffective. The decline, ISRI claims, has become more noticeable in the wake of the BN/SF merger, and ISRI has concluded that something must be done before SP suffers a total collapse. ISRI therefore supports the proposed UP/SP merger as conditioned by the BNSF agreement. ISRI adds, however, that its support for the merger is contingent upon a determination (which ISRI has asked us to make) that BNSF will be allowed to compete freely and effectively with UP/SP in all regions and markets opened to BNSF under the BNSF agreement.

MONTANA WHEAT AND BARLEY COMMITTEE. Montana wheat and barley producers, MWBC claims, are today captive to BNSF (BNSF and MRL,

MWBC notes, move more than 98% of all Montana wheat shipments),[58] and the proposed merger, MWBC warns, will further exacerbate the captive shipper status of Montana farmers. MWBC's concern, however, is focused less on the merger itself (UP has only a limited presence in Montana, and SP has no presence at all) and more on the BNSF PRA that, MWBC fears, by altering existing competitive relationships between Montana and nearby jurisdictions, could further increase BNSF's monopoly power in Montana. Montana grain, MWBC indicates, is marketed entirely to the west or the south (and, because Montana grain is marketed principally to the Pacific Northwest markets, its pricing is determined on the Portland Grain Exchange), and MWBC warns that the BNSF PRA, because it does not apply to points east of Billings and Havre, will have an anticompetitive impact on Montana farmers located east of the Billings-Havre line. Farmers with access to BNSF stations located in or west of Billings and Havre (including such farmers in Western Montana, Northern Idaho, Washington, and Western Canada) will have access to UP/SP service under the BNSF PRA; but farmers located too far to the east of Billings and Havre will have no such access to UP/SP service, and they will therefore be, as MWBC sees matters, relatively worse off than they are today. The BNSF PRA, MWBC adds, has other defects as well. The establishment of Portland as the only gateway, MWBC insists, is artificial because it requires excessive circuity for Montana traffic; for traffic originating in Montana, the Silver Bow gateway provides, to destinations in California and Arizona, much shorter distances, which are more in line with the distances for traffic originating in Washington and Northern Idaho. MWBC asserts that Montana farmers should be allowed to utilize the Portland gateway for grain moving to Portland itself, and that access to local markets might offset the anticompetitive impact of the excessive circuity required by the Portland gateway. The BNSF PRA, MWBC further contends, should be extended to all agricultural commodities; an arbitrary commodity limitation, MWBC warns, would disrupt established traffic patterns.[59]

---

[58] MRL is included in this calculation, MWBC indicates, in view of MRL's inability to reach any market for Montana grain without BNSF participation. UP, MWBC concedes, can provide some competition via the Pocatello-Silver Bow Line, but this competition, MWBC adds, benefits only a limited region.

[59] MWBC is under the impression that the BNSF PRA does not apply: (1) to traffic moving from points in Western Montana to Portland; and (2) to certain commodities. These impressions, however, may not even be correct. *See, e.g.*, UP/SP-22 at 343 (indicating that the traffic covered by the PRA includes traffic moving between points in Western Montana, on the one hand, and, on

(continued...)

Relief Requested. MWBC requests that the BNSF PRA be modified by adding Silver Bow as an alternative gateway (in addition to Portland) and by requiring UP/SP to guarantee its service intentions on the Pocatello-Silver Bow Line for 20 years. MWBC also requests that we retain oversight of the UP/SP merger for 20 years, in order to protect the last vestiges of intramodal competition in Montana. MWBC further requests, as an alternative to the two previous requests, that the Pocatello-Silver Bow Line be sold to MRL, subject to an MRL-BNSF PRA (similar to the UP/SP-BNSF PRA) for all traffic moving over Silver Bow from all Montana origins to Portland and to points south of Portland. MWBC further requests that the BNSF PRA be modified: to allow UP/SP access to all traffic (not limited by commodity description) originating in Montana; to allow UP/SP access to traffic originating at all points in Montana (not just points west of Billings and Havre); and to allow UP/SP access to traffic originating in Montana and destined to Portland.

MONTANA FARMERS UNION. MFU, which represents agricultural producers and other rural residents of Montana, argues that the merger will further exacerbate the captive shipper status of Montana farm producers. In Montana today, MFU contends, there is one major railroad (BNSF) that monopolizes the transportation of bulk commodities, and the BNSF PRA will further disadvantage Montana producers vis-à-vis producers in Oregon, Western Canada, Washington, and Northern Idaho. MFU indicates that, by artificially establishing Portland as the only gateway, and by requiring Montana shipments to travel 40+% more mileage than is necessary, the BNSF PRA will effectively preclude Montana producers from participating in the markets they participate in today. MFU therefore urges that we consider the development of an alternative gateway at Silver Bow, both to shorten the distances to California and Arizona markets for Montana farm producers and to equalize farm producers in Montana vis-à-vis farm producers in Washington and Northern Idaho. MFU requests conditions similar to those requested by MWBC, with two notable exceptions: MFU requests that the Salt Lake City-Silver Bow Line (not merely the Pocatello-Silver Bow Line) be sold to MRL; and MFU further requests that the Stockton-Kansas City Line also be sold to MRL.

(...continued)
the other, points in Oregon; and all commodities (carload, intermodal, and bulk) moving both southbound and northbound).

SAVE THE ROCK ISLAND COMMITTEE. STRICT, which represents rail shippers, potential rail shippers, and local governments located in central Missouri in the Kansas City-St. Louis corridor, has an interest in the Kansas City-St. Louis line (hereinafter referred to as the Rock Island line) now owned by SSW but formerly owned by the now defunct Chicago, Rock Island and Pacific Railroad Company (Rock Island). The Rock Island line was the eastern segment of Rock Island's Tucumcari line, which extended from Santa Rosa, NM, through Kansas City to St. Louis; the ICC, in approving (in 1980) SSW's acquisition of the Tucumcari line, noted that this acquisition would enable affiliated carriers SSW and SPT to provide single-system service from Southern California to Kansas City and St. Louis; SP, however, never upgraded the Rock Island line to operating condition; and when the ICC, in approving (in 1982) the UP/SP/MP merger, awarded SSW trackage rights over MPRR's parallel Kansas City-St. Louis line, SP lost all interest in rehabilitating the Rock Island line. STRICT claims, however, that SP, though it has had no interest in operating the line itself, has been determined to prevent operation by anyone else, and has therefore engaged in a scheme to segment the line, providing service over short segments at both ends (or at least over a short segment at the eastern end) but discontinuing service over the middle segment.[60] The proposed merger will adversely affect competition in the Kansas City-St. Louis corridor, STRICT maintains, because UP and SP have parallel lines in that corridor. UP (*i.e.*, MPRR) has a line between Kansas City and St. Louis, and SP conducts its overhead trackage rights operations over this line. But SP, STRICT notes, also has a line of its own between Kansas City and St. Louis (the Rock Island line), and, in STRICT's view, it is the common ownership of the MPRR line and the Rock Island line that would adversely affect competition. STRICT proposes to restore competition in the Kansas City-St. Louis corridor by transferring the Rock Island line to a new operator.[61]

---

[60] Related matters, which have been held in abeyance pending negotiations between STRICT and SP, are pending in Finance Docket No. 30000 (Sub-No. 16) (STRICT's petition to revoke SSW's trackage rights over MPRR's Kansas City-St. Louis line), Docket No. AB-39 (Sub-No. 18X) (SSW's petition to exempt the abandonment of a portion of the Rock Island line), and Nos. 41195 and 41195 (Sub-No. 1) (STRICT's bifurcated complaint respecting SP's failure to operate the Rock Island line).

[61] Common ownership of the two parallel Kansas City-St. Louis lines, STRICT maintains, would be blatantly anticompetitive and would therefore require divestiture of one line or the other.

(continued...)

Relief Requested. STRICT asks that any approval of the merger be conditioned upon divestiture of the entire Rock Island line, including appurtenant real estate, between Leeds Junction (at or near MP 288.3) and Rock Island Junction (at or near MP 10.3), at a price to be mutually agreed, failing which it will be set by the Board; that divestiture must be to a single entity unaffiliated with applicants which certifies in writing that it intends to reactivate rail service with a single operator providing local service over the entire line within 3 years of taking possession, and that, prior to an abandonment or sale (except in connection with a financing transaction) of less than the entire line, it will attempt for a reasonable period of time to sell the entire line as a single unit and assign to the purchaser thereof any trackage rights acquired in connection with ownership of the line; and that divestiture must include an assignment of all of SSW's rights under agreements granting to SSW or any predecessor trackage and similar rights that have been, are, or could be used by a rail carrier in connection with the operation of any part of the line.

COLORADO WHEAT ADMINISTRATIVE COMMITTEE. CWAC, a marketing order representing Colorado wheat producers, opposes the proposed merger unless conditioned upon a divestiture to a major carrier (such as MRL) qualified to provide for Central Corridor transcontinental traffic. CWAC warns that the proposed merger and the incidental abandonment of the Towner-NA Junction Line would reduce the options available to Colorado wheat producers for transporting their product to market. The impact, CWAC adds, would be substantial, both for Colorado wheat producers and for the State's diversified economy; CWAC calculates that 12.6 million bushels of wheat are potentially affected by the closure of the Towner-NA Junction Line. The Tennessee Pass Line and the Towner-NA Junction Line, CWAC insists, do not need to be abandoned; there is a much higher demand for local shipping services on these

---

(...continued)

And STRICT contends that, because this very issue has already been decided by the ICC, the doctrines of res judicata and collateral estoppel are applicable. STRICT cites the ICC's 1980 decision approving SSW's Tucumcari purchase, in the course of which the ICC, in denying MPRR's inconsistent application to purchase the Rock Island line, noted:

> MP's proposal is clearly anticompetitive. MP already has excellent lines between Kansas City and St. Louis. MP's lines, along with those of BN and Norfolk & Western Railway Company (N&W), are the best lines between those cities. The corridor also is served by four other carriers (excluding RI), but their routes are more circuitous and less competitive. The removal of a rehabilitated RI route would thus result in the elimination of a potentially competitive route.

St. Louis S. W. Ry.--Pur.--Rock Island (Tucumcari), 363 I.C.C. 323, 327 (1980).

lines than current traffic indicates;[62] traffic on the Towner-NA Junction Line, CWAC claims, is low because UP has chosen to keep it that way. CWAC adds that the interest shown by potential carriers seeking to operate in the Central Corridor is strong testimony to the economic viability and potential of the Towner-NA Junction Line.[63]

HOISINGTON CHAMBER OF COMMERCE. HCC contends that the proposed merger will have a dramatic impact on the Hoisington community, particularly given the cumulative impact and crossover effects of the 1982 UP/MP/WP merger. In that merger, HCC notes, the ICC, seeking to preserve competition in the Central Corridor, awarded DRGW trackage rights over MPRR's Pueblo-Kansas City Line. It was anticipated at the time, HCC indicates, that DRGW would implement these trackage rights in the usual manner, using its own crews and its own equipment. Such implementation, by HCC's calculations, would have created 108 positions in Hoisington and 70 positions in Osawatomie (and HCC claims that the jobs that would have been created in Hoisington would have generated between $40,000,000 and $50,000,000 to the local economy). These jobs, however, were never created because DRGW and UP entered into an agreement that lasted until 1995 pursuant to which DRGW used UP crews and UP equipment between Pueblo and Kansas City. In June 1995, HCC continues, it was announced that DRGW would finally commence its own trackage rights operations on the Pueblo-Herington Line.

HCC warns that the adverse consequences of the merger and the related Colorado/Kansas abandonments will be staggering. The long-awaited utilization of DRGW crews and DRGW equipment in the DRGW trackage rights operations will never occur; all of the crew positions used to perform the DRGW trackage rights operations will be abolished; Hoisington will lose 70 jobs, with an annual payroll of approximately $3,000,000; the school district

---

[62] By CWAC's calculations: on the NA Junction-Towner Line, potential revenue per year over and above operating costs is $435,500; on the Haswell-Towner segment of the NA Junction-Towner Line (Haswell lies about half way between NA Junction and Towner), potential revenue per year over and above operating costs is $928,000; and, on the Tennessee Pass (Sage-Malta-Cañon City) Line, potential revenue per year over and above operating costs is $2,993,000. And these revenue estimates, CWAC notes, do not include possible income from bridge traffic, scenic rail, or commuter rail.

[63] The arguments advanced by CWAC are supported by the Colorado Farm Bureau, the Rocky Mountain Farmers Union, the Colorado Association of Wheat Growers, the Colorado Corn Administrative Committee, and the Kiowa County Farm Service Agency, and by several wheat producers, farmers, and ranchers.

will sustain an annual loss of approximately $300,000; farmers will find their transportation options reduced; local communities on the Pueblo-Herington Line will experience losses in property tax revenues and sales tax revenues; and the Central Corridor will be obliterated by selective abandonments. HCC therefore opposes the merger, and supports KCS, MRL, WSC, and MPCSC in their efforts to retain a competitive third carrier in the Central Corridor and elsewhere. HCC further insists that, to preclude any sweetheart deals, any transactions necessary to implement divestiture and trackage rights requirements should be entered into openly and at arm's length. HCC also asks that all MPRR employee positions, that were used for 13 years to carry out the DRGW trackage rights across the MPRR line, be integrated into the UP system.

ENID BOARD OF TRADE. EBT is concerned with the lack of rail-to-rail competition that exists in Oklahoma today, and fears that the proposed merger can only make matters worse. The service provided by BNSF, EBT claims, has deteriorated since the BN/SF merger, and EBT fears that the service provided by UP/SP will deteriorate in the wake of the proposed merger. A big railroad, EBT maintains, gives priority to coal and intermodal, but takes grain for granted. EBT opposes the merger, and urges that any approval thereof be conditioned by allowing KCS to operate: over BNSF's Fort Worth-Herington line; over BNSF's Enid-Perry line (Perry is on the Fort Worth-Herington line); and over the Geneseo-Wichita line (in Kansas). Operation by KCS over these lines, EBT indicates, would provide additional competition in both Kansas and Oklahoma.

KANSAS-COLORADO-OKLAHOMA SHIPPERS ASSOCIATION. KCOSA is concerned by, among other things, the grant of extensive trackage rights to BNSF; its members, KCOSA notes, opposed the BN/SF merger; and KCOSA fears that the BNSF trackage rights provided for in the BNSF agreement will narrow the competitiveness of KCOSA's members (by broadening the competitiveness of the shippers that can benefit from the BNSF trackage rights). KCOSA adds that its members located on UP or SSW are opposed to the UP car ordering system, and fear the loss of local service. Its members located on shortlines, KCOSA indicates, are concerned that the UP/SP merger, like the BN/SF merger before it, will lead to equipment shortages. KCS, KCOSA contends, should be allowed to operate in the North-South Corridor (as a replacement for SP). KCOSA also would support alternative purchase plans, including the purchase by KCS of BNSF's line between Wichita, KS, and Joplin, MO. KCOSA is particularly concerned by the 3-to-2 reduction in the number of railroads at Hutchinson and Wichita, and it adds that, at Enid, the problem is

that two railroads can provide service but that only one railroad actually does. KCOSA urges that we either provide for added competition in Kansas, Colorado, and Oklahoma, or, in the alternative, deny the merger.[64]

FARMERS ELEVATOR ASSOCIATION OF MINNESOTA. FEAM, which indicates that its misgivings respecting the proposed merger reflect the difficulties its members experienced in the wake of the UP/CNW merger, suggests that UP should be required (1) to demonstrate its ability to operate the system it already has before it is allowed to expand, and (2) to develop an operating plan to address service problems on the former CNW.

SOUTH SAN ANTONIO CHAMBER OF COMMERCE. SSACC, to further San Antonio's development, seeks commitments addressing: the construction of an intermodal facility with emphasis on its connection to the redevelopment of Kelly Air Force Base; the development of an enhanced commuter/freight rail linkage in the San Antonio-Austin corridor; the removal of existing rail lines from the central business district; the relocation of the staging area to San Antonio to facilitate an efficient flow of traffic between Mexico and the United States; and a grant to BNSF of trackage rights from San Antonio to the CPS plant at Calaveras Lake, to allow for future competition in the transportation of coal.

SHIPPERS: COAL. Denial of the merger and/or the imposition of conditions have been sought by a number of coal shippers.

WISCONSIN POWER & LIGHT/WISCONSIN PUBLIC SERVICE CORP. WP&L and WPS contend that the merger should be disapproved, and that any approval should be subject to: (1) divestiture of SP's lines from Provo, serving coal mines in Colorado and Utah, to Kansas City, and either its lines from Kansas City through St. Louis to Chicago, or its trackage rights over BNSF from Kansas City to Chicago, to a carrier other than BNSF, or, alternatively, a requirement that applicants grant unrestricted trackage rights over such lines to such a carrier; and (2) a prohibition of UP/SP's consolidation of or changes in the present UP and SP rail operations over their central east-west lines until they

[64] By joint motion dated May 10, 1996, EBT and KCOSA ask that we accept as new evidence Central Kansas Railway Tariff 8000-A and Santa Fe Rate Book 4100-B. The new evidence, EBT and KCOSA indicate, substantiates their argument that merged railroads like UP/SP and BNSF control the destiny of small shippers located on shortlines by publishing non-competitive through rates. Applicants, in their UP/SP-248 reply, contend that the tendered new evidence is, at best, cumulative, and, in any event, has no probative value. We will grant the motion filed by EBT and KCOSA, and accept the tendered new evidence.

have certified their full compliance, for a period of 12 consecutive months, with all service standards or similar provisions contained in contracts to which either is a party that apply to the transportation of coal for the account of an electric utility or seller of coal.

Wisconsin Power & Light Company. WP&L operates four coal-fired power plants: the Rock River Station near Beloit, WI; the Columbia Energy Center at Portage, WI; the Edgewater Station near Sheboygan, WI; and the Nelson Dewey Station at Cassville, WI. (1) Since 1993, Rock River Station has blended compliance sulphur subbituminous western coals (secured from a mine in Montana) with low fusion, higher BTU bituminous coals from midwestern and western sources (secured from various sources, including mines in Illinois, Indiana, and Utah). The coal is originated by BNSF, IC, UP, and SP, depending on the source; it is interchanged to CP[65] at various points; and it is delivered by CP (only CP serves Rock River Station).[66] (2) Units 1 and 2 of the Columbia Energy Center burn low sulphur, subbituminous PRB coal originated in Montana (by BNSF) and Wyoming (by BNSF or UP), and delivered by CP (only CP serves Columbia Energy Center). (3) Edgewater Station includes three coal-fired units, two running on blends of bituminous and subbituminous coals, and one running on low sulphur subbituminous coal only. Bituminous coal sources include mines in Illinois, Indiana, Utah, and the Hanna Basin in Wyoming; subbituminous coal sources are located in the SPRB of Wyoming. Edgewater Station coal is originated by UP (in the SPRB), CP (in Indiana), IC (in Illinois), and SP (in Utah), and is delivered by UP (only UP serves Edgewater Station). (4) Nelson Dewey Station, which burns a blend of bituminous and subbituminous coals, receives coal via barge, usually transloaded through East Dubuque, IA, or Kellogg, IL. Montana PRB coal is hauled by BNSF to Omaha, for movement by CC&P to the river. Wyoming PRB coal is hauled either via the BNSF-CC&P routing (over Omaha) or via a UP-CC&P routing (over Council Bluffs), which is used also for Hanna Basin blend coals. Midwestern bituminous coal also is hauled by UP to the river for transloading.

---

[65] Canadian Pacific Limited and its subsidiaries, including Soo Line Railroad Company (Soo), are referred to collectively as CP.

[66] The Rock River Station coal originated by SP is Utah coal that is hauled in cars that otherwise would move empty eastbound, after unloading iron ore at Geneva Steel's facility near Provo. WP&L indicates that this backhaul arrangement has allowed SP to establish eastbound rates which make Utah bituminous coals competitive with midwestern bituminous coals.

Impacts of UP/SP Merger. WP&L fears that the loss of an independent SP will reduce competition in the bituminous coal market, and may reduce the competitive pressure otherwise felt by all participants in the utility coal market. WP&L argues that, although Utah and Colorado are farther from Wisconsin than Illinois is, SP's backhaul rates have made these sources competitive with midwestern coal. WP&L indicates that, in contrast to SP, UP coal sources include not only the subbituminous reserves in the SPRB but also higher BTU coals in Wyoming's Hanna Basin. WP&L contends that these latter coals compete directly with Utah and midwestern bituminous coals in meeting WP&L's needs for Rock River Station and Edgewater Station, and WP&L fears that a combined UP/SP will favor the sources in which it has the largest investments. WP&L is skeptical that the BNSF trackage rights will alleviate coal source competition problems. These rights, WP&L notes, do not give BNSF direct access to any SP-served mines in Utah and Colorado; BNSF would be able to carry that coal only after an origin movement over either UP/SP or URC. Besides, WP&L adds, even if BNSF could reach the SP mines, it, much like UP, has large investments in facilities serving other coal sources; and WP&L also questions whether the trackage rights compensation levels provided for in the BNSF agreement will allow BNSF to offer competitive rates. WP&L also fears that the operating changes envisioned by applicants (in particular, the shift of some SP coal traffic to the UP main line) will worsen service problems that have already affected operations at Columbia Energy Center and Edgewater Station.

Wisconsin Public Service Corporation. WPS has two multi-unit electric generating stations: the Weston Generating Station near Wausau, WI, and the Pulliam Station in Green Bay, WI. (1) Weston Generating Station has three coal-fired generating units. The two older units have converted from midwestern bituminous coal to western low-sulphur subbituminous coal; Unit No. 3 has always burned 100% PRB coal. Coal delivered to Weston Generating Station can be originated either by UP or by BNSF, although the preponderance of this coal has been hauled either UP-WC or UP-CP. (2) By 1995, Pulliam Station had been converted entirely to western subbituminous coal, which is (WPS indicates) the current and forecasted fuel of choice. Depending upon price and quality factors, however, Pulliam Station remains capable of using coal from several different producing regions, including Appalachia, the Illinois Basin, and the Uinta and Raton Basins. In 1995, all Pulliam Station coal was obtained from sources in the Wyoming SPRB, and was hauled UP-WC.

Impacts of UP/SP Merger. WPS alleges that during the past 18-24 months the service provided by UP has not allowed WPS to move all of its scheduled tonnage with its existing railcar fleet, and that WPS has therefore been forced to lease additional trainsets to meet its coal inventory targets. Further, according to WPS, UP has not shown signs of significant improvement in 1996. WPS fears that, if the post-merger traffic routing shifts envisioned by applicants are implemented, WPS will suffer continued or additional slowdowns and service quality reductions along the UP east-west corridor.

ENTERGY/ARKANSAS P&L/GULF STATES UTILITIES. Entergy Services, Inc. (ESI) and its affiliates Arkansas Power & Light Company (AP&L) and Gulf States Utilities Company (GSU)[67] fear that the merger will eliminate UP vs. SP competition for the movement of coal to AP&L's White Bluff Steam Electric Station near Redfield, AR (White Bluff) and to GSU's Roy S. Nelson Generating Station near Mossville, LA (Nelson), both of which use coal originated at SPRB mines served by both UP and BNSF.

White Bluff Station. White Bluff, located on UP's line between North Little Rock and Pine Bluff, is presently served exclusively by UP, which hauls coal to White Bluff via a single-line routing from the SPRB. Entergy insists, however, that White Bluff is a 2-to-1 point because a build-out to a nearby SP line, located about 21 miles away at Pine Bluff, would enable White Bluff to enjoy a BNSF-SP routing from the SPRB.

Nelson Station. Nelson, located on a KCS line about 6 miles northwest of Lake Charles, is presently served exclusively by KCS, which hauls SPRB coal to Nelson in a joint-line BNSF-KCS routing (via Kansas City). Entergy insists, however, that Nelson will soon not be captive to KCS because a build-out to a nearby SP line, located about 4 miles away, is now under construction; and completion of the "Nelson spur" build-out by the Southern Gulf Railway Company (SGR), a GSU subsidiary, is scheduled for October 1996. With the Nelson spur, Entergy notes, Nelson hoped to enjoy both the origin competition that already existed (between UP and BN in the SPRB) and the destination competition that had not previously existed (between SP and KCS at Mossville). Entergy concedes that, even with the merger, the Nelson spur will allow Nelson to enjoy destination competition (between UP/SP and KCS), but Nelson fears that most of the competitive benefits it would have obtained from the Nelson

[67] ESI is a fuel procurement company; AP&L and GSU are electric utilities; and ESI, AP&L, and GSU are referred to collectively as Entergy. AP&L's and GSU's names have recently been changed, but, to avoid confusion, we will use the old names.

spur will vanish with the merger. Entergy notes that, rather than having four routings (four, because both UP and BNSF can reach both Fort Worth and Kansas City), it will have only two routings (BNSF-KCS via Kansas City and UP/SP single-line via Fort Worth). These will be the only practicable routings, Entergy maintains, because UP/SP will favor a UP/SP single-line routing in preference to an interline routing either with BNSF via Fort Worth (with UP/SP the destination carrier) or with KCS via Kansas City (with UP/SP the originating carrier).

Relief Requested: White Bluff. Entergy insists that the pre-merger status quo at White Bluff can be preserved only by granting trackage rights to BNSF (or another independent carrier) over SP's line between Pine Bluff (the point of connection with a White Bluff build-out) and West Memphis, AR (the point of connection with BNSF's own line), limited to the transportation of coal trains to/from White Bluff via the White Bluff-Pine Bluff build-out line.

Relief Requested: Nelson. Entergy insists that, because the pre-merger status quo at Nelson cannot survive a UP/SP merger, Entergy's interests can best be protected by granting trackage rights to BNSF (or another independent carrier) over SP's line between Beaumont and the point of connection with SGR near Lake Charles, limited to the movement of coal trains to/from Nelson via the SGR line. The pre-merger status quo cannot be preserved, Entergy claims, because the merger will effectively eliminate the BNSF-SP routing (via Fort Worth) and the UP-KCS routing (via Kansas City). The trackage rights sought by Entergy, would, in Entergy's view, level the playing field and preserve the efficient BNSF-SP (via Fort Worth) routing by creating a BNSF single-line routing to match the UP/SP single-line routing. And, Entergy notes, even with these trackage rights there would still be only two practicable routings, apparently because, in Entergy's view, the trackage rights it seeks would effectively eliminate the BNSF-KCS joint-line routing. Entergy adds that a less preferable alternative for the trackage rights it seeks would be a requirement that UP/SP establish a Fort Worth-Nelson proportional rate (at an initial level set by a bid made by SP in August 1995) that could be used in conjunction with any future BNSF rate from the SPRB to Fort Worth. Entergy suggests that another alternative would be a requirement that UP/SP offer the same rate per ton-mile from Fort Worth to Nelson that it offers for its single-line route.

Relief Requested: BNSF Agreement. The BNSF agreement, Entergy suggests, is the best vehicle for the trackage rights Entergy seeks because the agreement provides BNSF with overhead trackage rights over the very lines that

Entergy's trackage rights would run over. Entergy therefore suggests that we require that the BNSF agreement be amended to permit BNSF to serve White Bluff and Nelson via their respective build-outs (if and when completed) rather than requiring the negotiation of separate trackage rights agreements. Entergy adds, however, that we should require the compensation terms of the BNSF agreement to be amended, insofar as they would apply to Entergy's traffic, to approximate more closely UP/SP's relevant costs incurred with respect to BNSF operations over the relevant line segments. Entergy argues that, to put the tenant in the same position as the landlord, trackage rights compensation should reflect the landlord's variable costs, and, as respects Entergy's traffic, should be set at 1.48 mills per gross ton-mile. Entergy adds that, if we set compensation by reference to the fair market value of the SP roadway assets, the compensation respecting Entergy's traffic should be set at 1.8 mills per gross ton-mile.

The CITY PUBLIC SERVICE BOARD OF SAN ANTONIO. CPSB's two plants in Elmendorf, TX, are served by a single rail line, owned by SP. CPSB began receiving coal at Elmendorf in 1975, and, for some years thereafter, all Elmendorf coal was originated by BN and delivered by SP. In the mid-1980s, following the entry of CNW into the PRB, CPSB solicited competitive bids from two carrier pairs: CNW and UP, on the one hand; and BN and SP, on the other hand. CNW and UP won the competition, and CPSB then executed a long-term (through 2004) contract with CNW and UP covering transportation of most (though not all) of its coal receipts at Elmendorf. As noted, however, the line into Elmendorf is owned by SP, and CPSB therefore found it necessary to enter into an agreement with SP, pursuant to which SP granted CPSB trackage rights over SP's Elmendorf Line (approximately 12 miles in length) between Elmendorf and a nearby UP-SP junction known as "SP Junction (Tower 112);" and the agreement also provides that CPSB can permit UP and other third-party carriers to use the Elmendorf Line provided that CPSB makes specified payments to SP. CPSB notes that, as a result of these trackage rights, CPSB now has destination competition at Elmendorf: SP can deliver coal via the SP-owned Elmendorf Line; and UP can deliver coal via CPSB's trackage rights over the SP-owned Elmendorf Line.

CPSB adds that, in the SP settlement agreement entered into in connection with the BN/SF merger, SP agreed to provide haulage services to BNSF (1) between Caldwell, TX, and Eagle Pass, and (2) between Caldwell and Elmendorf. CPSB suggests that the Elmendorf haulage rights, which have never been used by BNSF, were designed to permit BNSF to transport coal to Elmendorf (moving via BNSF's own lines to Caldwell, and then via BNSF's

haulage rights over SP's lines to Elmendorf). CPSB notes that, in the BNSF agreement entered into in connection with the UP/SP proceeding, section 4a provides BNSF with trackage rights over SP's line between San Antonio and Eagle Pass, and section 4h provides that upon the effectiveness of those trackage rights the Eagle Pass haulage rights granted to BNSF in the BN/SF proceeding shall no longer apply. CPSB alleges that it has been advised by applicants that section 4a is intended to allow BNSF to serve CPSB's Elmendorf Station. The BNSF trackage rights envisioned by applicants, CPSB indicates, will originate at the BNSF-UP interchange at Temple, TX, and will terminate on SP's line at Elmendorf. CPSB further alleges that applicants have represented that BNSF will be entitled to serve the Elmendorf facilities directly, using its own trains, and subject to the compensation terms set forth in the agreement.

BNSF Agreement: Its Deficiencies. CPSB claims that, whatever applicants may intend, the trackage rights provided for in the BNSF agreement will not permit BNSF to access Elmendorf because two line segments are missing: (1) UP's line from Ajax to SP Junction (Tower 112);[68] and (2) SP's line from SP Junction (Tower 112) to Elmendorf. CPSB also claims that the BNSF agreement contains trackage rights fee payments that vastly exceed UP/SP's service costs. CPSB further claims that the BNSF agreement does not even preserve CPSB's existing trackage rights over the Elmendorf Line, which, in CPSB's view, is critical because CPSB predicts that the fees required by CPSB's existing trackage rights should be lower than the fees required by the BNSF agreement. CPSB notes, in addition, that its agreement with SP allows third-party carriers to serve other CPSB facilities that may be built along the Elmendorf Line, a right which BNSF does not receive under the BNSF agreement.

Relief Requested. CPSB requests that, if the merger is approved, we require that UP/SP provide, either by amendments to the BNSF agreement or otherwise: (i) that BNSF can serve CPSB's Elmendorf Station via trackage rights over UP/SP lines between Temple and Elmendorf; (ii) that BNSF can serve any new CPSB facilities located along SP lines over which BNSF obtains trackage rights

[68] The trackage rights provided for in the BNSF agreement include trackage rights over UP's line between San Antonio and Ajax. It so happens, however, that UP has two lines between San Antonio and Ajax, and the trackage rights provided for in the agreement appear to run over the wrong (from CPSB's view) line.

in this proceeding;[69] (iii) that BNSF can serve CPSB's Elmendorf Station, at CPSB's option, via CPSB's existing trackage rights agreement with SP;[70] (iv) that CPSB shall be deemed a "2-to-1" shipper;[71] and (v) that the trackage rights compensation BNSF must pay UP/SP shall be set at the levels requested by WCTL. CPSB further requests that we order that these conditions be implemented under the 10/30-days implementation procedure provided for in *BN/SF,* 10 I.C.C.2d at 778 n.128.

TEXAS UTILITIES ELECTRIC COMPANY. The generating units at TUE's Martin Lake Station near Henderson, TX, are currently fueled by lignite mined nearby and hauled to Martin Lake over a private rail line operated by an affiliate, Texas Utilities Mining Company (TUMC), and the merger will have no impact on the transportation of this lignite. TUE notes, however, that, in the year 2000, it will begin to supplement lignite receipts with Wyoming PRB coal receipts, with Wyoming PRB coal receipts to continue over the remaining 20-year life of Martin Lake. TUE envisions that this coal will be delivered to Martin Lake by BNSF (which can access Martin Lake today) and by UP (which will be able to access Martin Lake with the construction of a 6-mile connection between the UP line at Henderson and the TUMC line), and TUE claims to have identified two efficient routings: a 1,510-mile UP single-line routing (via Kansas City and Little Rock); and a 1,480-mile BNSF-KCS-SP-BNSF joint-line routing (with a BNSF-KCS junction at Kansas City, a KCS-SP junction at Shreveport, and an SP-BNSF junction at Tenaha). TUE fears, however, that the merger will eliminate the BNSF-KCS-SP-BNSF joint-line routing as a competitive

---

[69] The context indicates that the only SP line referenced in condition (ii) is the Elmendorf Line.

[70] CPSB envisions that conditions (i) and (iii), taken together, will allow BNSF to operate between Elmendorf and SP Junction (Tower 112) using either its own trackage rights (provided for in this proceeding) or CPSB's trackage rights (provided for in CPSB's 1985 agreement with SP). Between Temple and SP Junction (Tower 112), however, BNSF would operate pursuant to the trackage rights provided for in this proceeding.

[71] CPSB claims that it has 2-to-1 status because it can now be served by both UP and SP. Applicants have suggested that CPSB also has access to BNSF, which can access Elmendorf via the haulage rights acquired in the BN/SF merger proceeding. The three-carrier approach might make CPSB a 3-to-1 shipper (because the haulage rights are being terminated), but CPSB, which notes that it is "presently served by both UP and SP and no other railroad" (BNSF agreement, section 8i) and that the haulage rights have never been exercised, insists that it should be accorded 2-to-1 status for purposes of, among other things, paragraph 3 of the CMA agreement (which provides that, effective upon consummation of the merger, UP/SP shall modify any contracts with shippers at 2-to-1 points in Texas and Louisiana so that at least 50% of the volume is open to BNSF).

alternative because UP/SP will exercise bottleneck power over the Shreveport-Tenaha segment. TUE concedes that there are two other possible routings (a 1,749-mile BNSF single-line routing via Denver, Fort Worth, Silsbee, and Tenaha, and a 1,721-mile BNSF-SP-BNSF joint-line routing via Memphis and Tenaha), but maintains that these routings are extremely circuitous and, therefore, substantially more expensive. And, TUE adds, the merger will in any event effectively eliminate the BNSF-SP-BNSF joint-line routing as a competitive alternative because UP/SP will exercise bottleneck power over the Memphis-Tenaha segment. TUE therefore concludes that, post-merger, its only real competitive options will be the 1,510-mile UP single-line routing and the substantially more expensive 1,749-mile BNSF single-line routing.

Relief Requested. TUE contends that the merger should be denied unless the following conditions are imposed: (1) the BNSF agreement, as amended in the manner requested by TUE, should be imposed as a condition; (2) the BNSF agreement should be amended to permit KCS to interchange TUE trains at Shreveport with BNSF, for movement by BNSF over SP's line between Shreveport and Tenaha; and (3) the trackage rights compensation provided for in the BNSF agreement should be reduced to the 1.48 mills per gross ton-mile level advocated by WCTL.

SIERRA PACIFIC POWER/IDAHO POWER COMPANY. SPP and IDPC (referred to collectively as SPP/IDPC) jointly own the North Valmy Station (NVS), a generating plant located between the UP and SP lines between Winnemucca and Battle Mountain, NV. NVS, SPP/IDPC notes, has access to mines in the Colorado/Utah Uinta Basin (low-sulphur high-BTU coal is the primary fuel burned at NVS) and also to mines in the southern Wyoming Hanna Basin (Hanna Basin coal is also within the design parameters of the boilers at NVS). Coal from New Mexico and PRB mines, SPP/IDPC further notes, is incompatible with the NVS boilers, and, in any event, the distance from those mines makes use of their coal impracticable. The merger, SPP/IDPC warns, will eliminate the intramodal competition on which it has long relied.

The BNSF Agreement. SPP/IDPC contends that the BNSF agreement will not preserve UP vs. SP competition at NVS. SPP/IDPC concedes that the agreement allows BNSF to serve NVS via trackage rights, but notes that the agreement does not grant BNSF access to the SP-served mines in the Uinta Basin. SPP/IDPC concedes that, under the agreement, it will have access to a URC-BNSF joint-line routing, but maintains that this routing, which will be limited to the few mines directly served by URC and which will entail a two-

carrier haul, will not amount to a meaningful option. SPP/IDPC concedes that BNSF can itself originate coal, but maintains that BNSF's own coal origins are too far away to allow BNSF to provide competitive service to NVS, and notes that, in any event, the quality of most coal originated by BNSF is incompatible with the NVS boilers. SPP/IDPC also argues: that the Central Corridor traffic available to BNSF (less than one loaded train per day, by SPP/IDPC's calculations) is too limited to support a viable operation; that BNSF will be disadvantaged by UP/SP's ability to control operations over the trackage rights line, and will lack the infrastructure to operate successfully over the Central Corridor; and that the excessive trackage rights compensation provided for in the BNSF agreement will raise the floor for establishing rates.

The URC Agreement. SPP/IDPC also maintains that the rail competition available to NVS will not be preserved by the URC agreement, the benefits of which, SPP/IDPC contends, are limited in three respects. First, a URC-BNSF routing is only as good as its weakest link, and the weak link here, SPP/IDPC maintains, is BNSF (not enough traffic and not enough infrastructure). Second, whereas NVS currently can obtain coal from 25 mines in the Uinta and Hanna Basins,[72] a URC-BNSF routing would access only five mines not under the exclusive control of UP/SP;[73] and this, SPP/IDPC insists, would be devastating to its ability to transport competitive coal to NVS. Third, because the rates for a URC-BNSF routing would necessarily reflect the cost/profit expectations of URC and BNSF, the rates required by a URC-BNSF routing would likely be higher than the rates required by a UP/SP single-line routing, which would almost guarantee that the rates presently available to SPP/IDPC will be increased.

Relief Requested. SPP/IDPC requests that we require UP/SP to provide another rail carrier (to be selected by SPP/IDPC) with trackage rights enabling that carrier to transport coal to NVS in single-line service from all mines in Colorado and Utah now served by SP for compensation no greater than 1.48 mills per gross ton-mile, adjusted quarterly beginning in the first quarter of 1996 based on changes in the Rail Cost Adjustment Factor (RCAF), adjusted for productivity, from and after that time.

---

[72] A few of these mines are actually located in the Wyoming/Colorado Green River Basin. SPP-10, VS Crowley, at 45.

[73] SPP/IDPC insists that a URC-BNSF routing would have access only to five mines not under the exclusive control of UP/SP. *See* SPP-10 at 21; SPP-10, VS Hill, at 16; and SPP-10, VS Crowley, at 45. *But see* SPP-10, VS Hill, at 5 n.5 (URC presently has exclusive access to three mines, and, under the URC agreement, will receive access to four additional mines).

ARIZONA ELECTRIC POWER COOPERATIVE. The coal burned by AEPCO at its SP-served Apache Generating Station near Cochise, AZ, is currently purchased from the BNSF-served McKinley Mine near Gallup, NM, and is transported via a BNSF-SP routing that is captive to BNSF at origin and to SP at destination. AEPCO contends, however, that Apache Station could be modified to burn coal originated at other sources (including Colorado, Utah, and, especially, the PRB), and AEPCO insists that, in spite of SP's destination monopoly, competition between coal suppliers and/or rail carriers can have some impact on AEPCO's delivered cost. AEPCO fears, however, that a merged UP/SP, as a destination monopolist able to originate PRB coal, would be able to exclude BNSF from participating in PRB movements to AEPCO. Currently, either UP or BNSF could originate PRB coal for AEPCO (UP-SP via Denver; BNSF-SP via Deming, NM), but AEPCO fears that a merged UP/SP would decline to accept traffic in interchange with BNSF at Deming. Rate reasonableness litigation, AEPCO notes, is a key part of its efforts to obtain the benefits of competition, but the prospects for such litigation are clearer when SP cannot originate the traffic. With the merger, AEPCO notes, AEPCO's existing destination monopolist would gain the ability to originate PRB traffic, potentially affecting the outcome of rate reasonableness litigation (because UP/SP, AEPCO fears, would raise "short-haul" arguments to thwart any complaint seeking a rate for the movement of coal between Deming and Apache Station).

AEPCO also fears that, with the merger, it will lose the benefit of source competition between Uinta Basin coal (originated by SP) and PRB coal (originated by UP and BNSF). A combined UP/SP, AEPCO warns, would have direct control over Uinta Basin coal (because only UP/SP could originate that coal) and indirect control over PRB coal (because UP/SP could use its destination monopoly to exclude BNSF from originating PRB coal bound to AEPCO), and AEPCO fears that UP/SP would be able to appropriate the savings generated by producer competition in a way that SP alone cannot. AEPCO also fears that approval of the merger will lead to excessive congestion on the Moffat Tunnel Line through Colorado, which provides the routing for a large portion of coal from western Colorado mines. Traffic over the Moffat Tunnel Line, AEPCO warns, will double if the merger is approved (because UP/SP will abandon the Tennessee Pass Line and divert traffic to the Moffat Tunnel Line, and because BNSF will add its own trains to the Moffat Tunnel Line), but applicants have not committed to add capacity to the line, and the terrain in the area may render such improvements infeasible.

Relief Requested. AEPCO, which adopts WCTL's comments, requests that the merger not be approved. If the merger is approved, AEPCO recommends: (1) that we impose a condition granting AEPCO the right to obtain, and to contest the reasonableness of, a UP/SP rate for the movement of unit trains from Deming to Apache Station, for coal originated on another carrier; (2) that we require the divestiture of most of SP's Colorado lines (Grand Junction-Dotsero; Dotsero-Denver; Dotsero-Pueblo; Denver-Pueblo; and the branch lines to the Craig and Montrose coal areas) or, in the alternative, that we require a grant of trackage rights over those lines to an independent carrier; (3) that we disapprove the abandonment of the Tennessee Pass Line; and (4) that we clarify that the "short-haul" defense neither removes a carrier's obligation to quote rates over bottleneck segments nor prohibits rate reasonableness litigation pertaining to such rates.

WISCONSIN ELECTRIC POWER COMPANY. WEPCO contends that bituminous coal from Uinta Basin mines served by SP is competitive with subbituminous coal from PRB mines jointly served by UP and BNSF; WEPCO alleges that it has benefitted from Uinta Basin vs. PRB competition by virtue of actual receipt of Uinta Basin coal or its prominence in the bidding process; and WEPCO therefore fears that the merger will have an adverse impact at WEPCO's UP-served Oak Creek Power Plant at Oak Creek, WI. WEPCO concedes that it has most recently burned bituminous coal from the BNSF-served Raton Basin in New Mexico, but alleges that this coal is virtually the same quality as Uinta Basin coal, and that Uinta and Raton coals compete directly on a delivered price basis into midwestern and eastern markets. WEPCO warns that a combined UP/SP would control virtually all western low-sulfur bituminous coal and about 50% of all western subbituminous coal, and therefore would control about 75% of the coals that are the probable future sources for Oak Creek. UP/SP, WEPCO argues, would be the dominant rail carrier at origin and the sole rail carrier at destination, and would therefore be able to use its market power to determine the origin from which WEPCO would be able to receive coal.

Relief Requested. As a condition to merger approval, WEPCO seeks a grant of overhead trackage rights on behalf of WC or CP over UP's lines: (1) between Chicago, IL, Milwaukee, WI, and Cleveland, WI, on the one hand, and on the other, WEPCO's Oak Creek Power Plant at Oak Creek, WI;[74] (2) between the Oak Creek Power Plant and Cudahy Shop, Inc., a railcar repair facility located

[74] WEPCO indicates that it has requested trackage rights from Chicago, Milwaukee, and Cleveland because it does not know the precise routing that WC or CP would utilize.

at Cudahy, WI; and (3) in the terminal areas of Chicago and Milwaukee, as may be necessary or desirable to implement the operations described in (1) and (2) above. WEPCO indicates that these trackage rights would offset the 2-to-1 reduction in rail carrier competition at the origin coal mines with a 1-to-2 increase in rail carrier competition at the destination power plant, by allowing WC or CP, in addition to UP, to provide rail service to the Oak Creek Power Plant and to the Cudahy car repair shop. WEPCO emphasizes that, because it is requesting a trackage rights carrier that does not serve origin coal mines, UP would continue to be the only carrier that could transport coal to Oak Creek in single-line service.

PUBLIC SERVICE COMPANY OF COLORADO. Three coal-fired power plants (Cherokee, Arapaho, and Valmont) operated by PSCo in the Denver area presently burn SP-originated Colorado coal hauled over SP's Moffat Tunnel Line. Cherokee is served exclusively by SP; Arapaho is served exclusively by BNSF, but is within the Denver switching limits; and Valmont is served by UP and BNSF. PSCo notes that, although the three plants now burn only Uinta Basin coal, they were designed to burn a variety of coals, and PSCo adds that it has already begun evaluating PRB coal, which can be originated either by UP or by BNSF. PSCo maintains that an independent SP has a strong incentive to promote the use of Uinta Basin coal, the only coal that SP can originate, and PSCo therefore fears that the merger could reduce competition between Uinta Basin coal originated by SP and PRB coal originated by UP and BNSF. A combined UP/SP, PSCo fears, would prefer to increase business for its more profitable PRB service, thus causing PSCo to lose the benefits of source competition between the two coal regions. PSCo also fears that the merger will result in a deterioration in the quality of the service it receives for the movement of western Colorado coal to Denver via SP's Moffat Tunnel Line. PSCo fears a merger-related doubling of daily train movements over this line, and insists that the Moffat Tunnel Line lacks the capacity to absorb this increased traffic volume.

Relief Requested. PSCo argues that, if the merger is approved, it should be conditioned either upon divestiture to an independent carrier of the SP lines necessary to transport western Colorado coal to the Denver/Pueblo area (Grand Junction-Dotsero, Dotsero-Denver, Dotsero-Pueblo, Denver-Pueblo, and the Craig and Montrose/Oliver branch lines) or upon a grant to an independent carrier of trackage rights over these lines. Either such condition, PSCo claims, would maintain existing competitive options for the transportation of Colorado

coal. PSCo suggests, alternatively, two conditions designed to ensure that coal shippers do not suffer a merger-related deterioration in the level of service provided by SP: (1) that UP/SP be prohibited from abandoning, or discontinuing service on, any portion of the Tennessee Pass Line (Dotsero-Pueblo); or (2) that, for 3 years after the merger is consummated, UP/SP be permitted to discontinue service on, but not to abandon, the Tennessee Pass Line. The second alternative, PSCo adds, would provide shippers an opportunity to determine whether UP/SP is able to provide, using the Moffat Tunnel Line only, the level of service that SP provided in 1995 with respect to Colorado coal tonnage.

ILLINOIS POWER COMPANY. The high-BTU, low-sulphur coal burned at ILP's Wood River and Havana power plants is transported by SP from Uinta Basin mines to Illinois, and, at each plant, the final leg of the haul is made either by another railroad or by barge. ILP indicates that the coal it currently purchases is transported by SP as part of a backhaul arrangement whereby SP transports taconite from the midwest to Geneva Steel and then backhauls coal to ILP. Destination competition, ILP notes, is not now a problem because each plant can receive coal both by barge and by rail; and origin competition, ILP adds, is not now a problem either because coal with the characteristics ILP requires can be originated both in the Uinta Basin (served by SP and URC) and in the Hanna Basin (served by UP). ILP fears, however, that the merger threatens this origin competition, which, ILP insists, cannot be replaced by competition from other origins: PRB coal cannot be used by ILP because the lower BTU content would require expensive plant modifications; and eastern coal cannot be used either because, at current prices, it is not an option. And, though URC has access to some Uinta Basin mines, ILP notes: that coal from these mines may not be available, or, if available, may not be competitively priced; that, under the terms of the BNSF agreement, BNSF cannot offer competitive rates; and that BNSF, without access to appropriate backhaul shippers, may not be able to offer competitive backhaul rates.

Relief Requested. ILP requests that the merger be denied unless conditions are imposed to maintain effective competition for the movement of coal from western mines to ILP's plants. ILP suggests three conditions: (1) a grant to BNSF of trackage rights to appropriate western mines currently served directly by UP and/or SP, with compensation set at a level that would enable BNSF to offer competitive rates for coal moving to ILP and for any traffic moving to Geneva Steel or any other backhaul shipper; (2) a grant to another carrier of ownership of, or trackage rights over, Central Corridor lines from the

appropriate mines to the current SP destinations, with access to a suitable backhaul shipper and with compensation set at a level that would enable the new carrier to offer competitive rates for coal moving to ILP; and (3) a grant to ILP of an option, exercisable at ILP's discretion, to have coal move at current backhaul rates (adjusted by a suitable index and with the same service provisions) for the years 2000-2020 (the current SP contract goes through 1999; the useful lives of the two relevant plants will end about 2020).

CENTRAL POWER & LIGHT COMPANY. CP&L's SP-served Coleto Creek Station near Fannin, TX, has historically burned Colorado coal originated by SP but can now burn PRB coal originated by UP or by BNSF. CP&L notes that it supports WCTL's comments, but adds that its principal interest vis-à-vis the UP/SP merger arises from its concern that the merger might impact, in a negative way, its pending rate litigation, wherein it is seeking the prescription of a maximum reasonable rate for the 16-mile SP movement between Victoria (an SPT/MPRR junction) and Coleto Creek. *See, Central Power & Light Company v. Southern Pacific Transportation Company,* No. 41242 (ICC served April 21, 1994) (notice of complaint). CP&L anticipates that, if the outcome of the litigation is favorable, it will have two options for PRB coal movements: a UP-SP routing, with the SP move between Victoria and Coleto Creek subject to the prescribed rate; and a BNSF-SP routing. CP&L indicates that its concerns relative to the No. 41242 litigation have been addressed by applicants, who have agreed that the merger will neither moot the litigation, nor allow applicants to assert therein defenses that would not exist in the absence of the merger, nor otherwise influence the outcome of the litigation; and CP&L adds that it has been assured by applicants that, if the litigation results in a Victoria-Coleto Creek rate, CP&L will be regarded, under the BNSF agreement, as a 2-to-1 shipper.

INTERMOUNTAIN POWER AGENCY. IPA's plant at Lynndyl, UT, burns Utah coal transported by three carriers: DRGW, which transports coal from DRGW sources to Provo; URC, which transports coal from URC sources to Provo; and UP, which transports coal from Provo to Lynndyl. The merger, IPA warns, will impact its present arrangements: pre-merger, neither DRGW nor URC can provide single-line service; post-merger, however, DRGW (*i.e.*, UP/SP) will be able to provide single-line service; and this, IPA fears, will tilt the balance in favor of UP/SP, and will give UP/SP an incentive to price movements from DRGW coal sources more favorably than movements from URC coal sources. IPA indicates, however, that, because the URC agreement resolves some of IPA's competitive concerns (by providing URC access to additional sources of coal), IPA will not object to the merger, provided that the

URC agreement is not challenged and that the rights granted to URC thereunder are not adversely affected by a grant of any of the responsive applications. IPA adds, however, that it reserves the right to reopen this proceeding and to request conditions if and when it determines that the merger is adversely impacting competition and that the URC agreement has failed to ameliorate IPA's competitive concerns.

LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN. LCRA and the City of Austin (referred to collectively as LCRA/Austin) are joint owners of the Fayette Power Project (FPP), a coal-fired station at Halsted, TX, that burns PRB coal transported by UP in a single-line haul. When it entered into its present contract with UP, LCRA/Austin also entered into a separate trackage rights agreement (TRA) with UP's MKT predecessor that provides future access over 18 miles of track between Halsted (the location of the FPP) and West Point (the location of a nearby SP-UP junction). One of the purposes of the TRA, LCRA/Austin indicates, was to allow LCRA/Austin to receive coal from the PRB via a BN-SP routing. LCRA/Austin notes that it supports WCTL's comments, but adds that its principal interest vis-à-vis the UP/SP merger arises from its concern that the merger might effectively nullify the trackage rights provided for in the TRA. LCRA/Austin adds, however, that the BNSF agreement should effectively preserve these trackage rights (section 4b allows BNSF to serve FPP), assuming that BNSF is able to operate efficiently and economically over the trackage rights lines

RIO BRAVO POSO/RIO BRAVO JASMIN. The coal burned at Rio Bravo's two cogeneration plants near Bakersfield, CA, is originated in Utah and transported by rail to an unloading facility in Wasco, CA. The coal can be originated by SP and URC; from Provo, the coal can be routed either by UP-BNSF (via Barstow, CA) or SP-BNSF (via Stockton, CA); and, although BNSF is a necessary part of each routing (apparently because only BNSF has access to the Wasco unloading facility), Rio Bravo insists that the existence of UP vs. SP competitive alternatives keeps rail rates down. Rio Bravo, warning that UP vs. SP competition will cease with the merger, and fearing that the current level of competition will not be preserved by the BNSF and URC agreements, opposes the merger unless the current level of rail competition at its two plants can be maintained.

IES UTILITIES. IES, an Iowa utility company with interests in five coal-fired generating stations, opposes the merger. IES indicates that roughly 90% of the fossil fuel it burns originates in the PRB, and that its two primary carriers are therefore UP and BNSF. IES further indicates, however, that it is potentially

interested in coal originated by SP in Utah and Colorado, and IES fears that a combined UP/SP will favor coal originated by UP in the PRB and the Hanna River Basin. IES adds that its three UP-served coal-fired stations suffered significant increases in cycle times during 1995, and IES fears that, if Utah/Colorado coal is shifted to UP's main west-east corridor, service to these plants will continue to deteriorate.

SHIPPERS: PLASTICS AND CHEMICALS. Denial of the merger and/or the imposition of conditions have been sought by a number of plastic and chemical shippers.

DOW CHEMICAL COMPANY. Dow, which manufactures chemicals, plastics, and hydrocarbons, fears that the merger will adversely impact competition along the Texas Gulf Coast and, in particular, will eliminate a build-in opportunity currently available to Dow at its chemical/plastics production facility at Freeport, TX. The Freeport facility is rail-served solely by UP, which accesses the facility via a 10-mile branch line that connects with the UP main line at Angleton, TX. Dow notes, however, that both BNSF and SP operate lines between Houston and Galveston; that these lines pass through Texas City; that, at their closest points, these lines are only 35-40 miles from Freeport; and that the merger will therefore eliminate horizontal competition (a prospective build-in from SP) for Dow traffic at Freeport.[75]

Freeport, Dow concedes, has the appearance of a 3-to-2 situation because a UP/SP merger, though it would eliminate the SP build-in option, would appear to leave the BNSF build-in option intact. Dow argues, however, that, as a practical matter, Freeport is more akin to a 2-to-1 situation. Economic research, Dow claims, teaches that a 3-to-2 reduction in the number of competitors often represents the threshold at which the surviving firms can exercise market power; and Dow adds that, in any event, of the three carriers that can now compete for

[75] Information respecting a potential connection between Dow at Freeport and either BNSF or SP at Texas City was submitted, for the most part, under seal. By and large, this information relates to confidential business matters and therefore was properly redacted from the public record. We find, however, that at least some of this information should have been submitted on the public record, and, in discussing this information, we have had to put on the public record certain details that were submitted under seal. We see no justification for redacting from the public record the facts that BNSF and SP operate lines between Houston and Galveston via Texas City, and that these lines, at their closest points, are only 35-40 miles from Freeport. DOW-12 (Tab A) at 5. Although Dow may have been trying to keep confidential the fact that it has contemplated a Freeport-Texas City connection, we cannot both discuss, in a comprehensible manner, the conditions requested by Dow and keep this particular fact out of our discussion.

chemicals/plastics traffic on the Texas Gulf Coast, the two most aggressive competitors have been UP and SP, and, as between SP and BNSF, the carrier that could conceivably terminate more Dow traffic and obtain more Dow long-hauls is SP. Intermodal competition, Dow contends, cannot replace the competitive constraint now provided by SP (trucks, Dow insists, cannot compete for the majority of Dow traffic; barge and ocean transport can impact only a small fraction of Dow's rail traffic lanes; and a roll-on, roll-off barge service is simply not a competitive option at Freeport). Source competition, Dow adds, is likewise not an effective substitute for intramodal competition. A fundamental lack of fungibility, Dow contends, renders a seven digit Standard Transportation Commodity Code (STCC) analysis meaningless; a further limitation upon source competition is production capacity constraints because chemicals/plastics producers generally operate close to capacity; and product swapping among competitors raises significant concerns (including the need for long term commitments, the need to agree on contractual liability issues, and the need to resolve potential antitrust implications) that make it a less than ideal competitive alternative.

Relief Requested. To ameliorate the anticompetitive effects of the merger upon Dow's Freeport facility (effects, Dow claims, that are not ameliorated at all by the arrangements provided for in the CMA agreement), Dow asks that we impose either the conditions contained in its Primary Request or, in the alternative and at the very least, the conditions contained in its Alternative Request.[76]

Relief Requested: Primary Request. Dow seeks trackage rights: (1) for BNSF, over UP's line between Algoa and Angleton, with the right to connect to new line construction to serve Dow at Freeport and any other shippers located along the new line; and (2) for a second carrier (to be determined by Dow) (a) over SP's line between Houston and New Orleans, (b) over SP's line between Houston and Memphis, (c) over UP's line between Houston and Algoa (including the portion of the BNSF line over which UP now operates pursuant to trackage rights), and (d) over UP's line between Algoa and Angleton, with the right to connect to new line construction to serve Dow at Freeport and any other shippers located along the new line. The new line referenced in this paragraph

[76] Certain aspects of these conditions, which we have put in the public record, were submitted under seal. *See* DOW-12 (Tab A) at 3-4 and at 36-37. Dow also has requested, with respect to potential industry-wide and region-wide anticompetitive effects, the divestiture of parallel lines in Texas and Louisiana and parallel lines to the Midwest.

would run between Freeport and a point, not yet determined, on UP's Angleton-Algoa line. Dow contends that the conditions contained in its Primary Request would simply restore the pre-merger status quo. Dow now has potential build-in options to BNSF and SP; with these conditions, Dow would still have potential build-in options to BNSF and a second carrier (*e.g.*, IC or KCS); and, because the benefits of a Texas City build-in to SP exceed the benefits of a Texas City build-in to any other carrier, the status quo can best be preserved by minimizing the costs of the build-in, which can be done by moving the build-in connection southwest towards Angleton.

Relief Requested: Alternative Request. Dow seeks trackage rights for a carrier other than BNSF, to be named by Dow, (a) over SP's line between Houston and New Orleans, (b) over SP's line between Houston and Memphis, and (c) over UP's line between Houston and Texas City, with the right to connect to new line construction in the vicinity of Texas City in order to serve Dow at Freeport and any other shippers located along the new line. The new line referenced in this paragraph would run between Freeport and a point in the vicinity of Texas City. Dow contends that, at the very least, it is entitled to the conditions contained in its Alternative Request, which will allow a second carrier to connect to a build-in in exactly the same area as the formerly possible SP build-in. The only variation is that trackage rights are requested over UP's Houston-Texas City line in view of the proposed abandonment of a portion of SP's Houston-Texas City line.

MONTELL USA INC./OLIN CORPORATION. At separate plants in the West Lake Charles, LA, area, Montell produces primarily polypropylene and polyethylene, and Olin produces a variety of chemical products. Both companies rely almost exclusively on rail to ship their products to market, both rely on rail for the storage of their products, and both rely on rail for the receipt of raw materials. Both ship most of their outbound freight to points in the Eastern United States via four "Eastern Gateways" (Chicago, St. Louis, Memphis, and New Orleans). In addition, Montell ships some of its outbound freight to Houston, and Olin expects that it will have shipments to Mexico as business develops in response to NAFTA.

Montell's plant is currently served by an SP single-line routing (to the Eastern Gateways and Houston) and a KCS-UP joint-line routing (KCS offers single-line service to New Orleans by an indirect route, but can provide competitive routings to the Eastern Gateways and Houston with a KCS-UP joint-line routing via DeQuincy to Houston and New Orleans, and via

Texarkana to Chicago, St. Louis, and Memphis). Olin's plant is currently served by UP (via KCS tracks, under a long-standing contractual agreement) and SP; both UP and SP offer single-line competitive service to New Orleans and St. Louis; and KCS (which offers single-line service to New Orleans by an indirect route, and which, due to contractual limitations, cannot interchange Olin's freight with UP) is simply not a significant competitive factor. Both Montell and Olin fear that the UP vs. SP competition that exists today for traffic moving to, from, or via the four Eastern Gateways and Houston (including traffic moving to Mexico) will cease to exist post-merger, leaving them captive to UP/SP. They note that the BNSF agreement does not provide for BNSF interchange line haul rights at West Lake Charles, and they add that the KCS-BNSF joint-line routings that exist today are too circuitous to provide effective competition to the single-line routings of a merged UP/SP.

Montell and Olin therefore request that we condition the merger by requiring UP/SP (1) to grant interchange rights at West Lake Charles to BNSF (or to whichever carrier obtains trackage rights over SP's Houston-New Orleans line),[77] and (2) to grant interchange rights with KCS at Shreveport to BNSF (or to whichever carrier obtains trackage rights over SP's Houston-Memphis line). The first condition would allow BNSF (or the alternate carrier) to compete with UP/SP for Montell's and Olin's traffic moving in the Houston-New Orleans corridor. The second condition, which has reference to traffic moving to, from, or via Chicago, St. Louis, and Memphis, would allow BNSF (or the alternate carrier) and KCS to create joint-line routings via Shreveport that would replace the present KCS-UP joint-line routings via Texarkana.

Montell notes that the CMA agreement purports to address competitive problems in the Lake Charles area, but insists that the CMA solution is deficient: (a) BNSF is granted access to shippers at Lake Charles and West Lake, but not to Montell at West Lake Charles; (b) BNSF is granted access only to facilities now open to three carriers (UP, SP, and KCS), whereas Montell's facility is now open only to two carriers (SP and KCS); (c) BNSF is allowed to handle traffic moving between the covered points, on the one hand, and, on the other, New Orleans or the Mexican border, but is not allowed to handle traffic that now moves KCS-UP from/to Houston, Chicago, St. Louis, or Memphis; and (d) for some traffic (traffic at West Lake), BNSF is subject to an "access fee" that appears to amount to a "phantom" charge that would apply even if BNSF

[77] Montell indicates that the interchange line haul traffic rights it seeks at West Lake Charles would allow a "KCS/BNSF interline interexchange at Lake Charles." MONT-9 at 2.

were to provide direct service. Montell adds, in its brief, that we should at the very least condition the merger by granting BNSF a right of access to Montell's West Lake Charles plant similar to that offered shippers in West Lake and Lake Charles, with the further condition that BNSF be allowed to deliver Montell's traffic to Houston.

QUANTUM CHEMICAL CORPORATION. QCC, which manufactures polyolefin resins and petrochemicals, fears that the proposed merger will have negative effects (not fully addressed by the CMA agreement) with respect to traffic at Chocolate Bayou, Williams, Baytown, and Strang, TX. (1) QCC's Chocolate Bayou plant is served solely by UP, but QCC indicates that prior to the announcement of the merger it had discussed with SP a Galveston-Chocolate Bayou build-out, which would have served the Chocolate Bayou facilities of QCC and Amoco as well as the Freeport facilities of Dow. QCC fears that the competition represented by the build-out will vanish with the merger because BNSF sees exercise of its trackage rights under the BNSF agreement as a cost-effective alternative to the construction of new rail lines. (2) QCC's Chocolate Bayou plant, which produces polyethylene products, is served solely by UP; its Williams plant, which produces similar products, is served solely by SP; and QCC indicates that, by leveraging its ability to swing production capacity between the two plants, it has been able to take advantage of UP vs. SP competition, which, of course, will cease with the merger. (3) QCC indicates that certain facilities at Baytown now have access both to UP (which serves these facilities directly) and SP (which serves these facilities via Econorail, a captive switching carrier). One such Baytown facility is Seapac, a commercial warehouse used by QCC. QCC notes that the UP vs. SP competition now available to QCC's Seapac traffic will end with the merger, and QCC fears that Seapac (in essence, a 2-to-1 point) may not be covered by the BNSF agreement. (4) Prior to 1995, QCC's Strang facility (in the Houston area) had access to four Class I railroads: BN, SF, UP, and SP. The BN/SF merger, QCC notes, reduced the number of railroads to three, and the UP/SP merger will reduce the number to two. QCC claims that, in the wake of the BN/SF merger, BNSF's rates tended to increase, and it fears that UP/SP's rates will likewise tend to increase in the wake of a UP/SP merger.

Requested Relief. QCC suggests four conditions: (1) that Chocolate Bayou be opened to access by a competing Class I rail carrier (*e.g.*, BNSF or IC), or, in the alternative, that the BNSF agreement be modified to allow BNSF trackage rights access to Chocolate Bayou; (2) that Williams be opened to access by a

competing Class I rail carrier; (3) that Baytown industries, specifically Seapac, be opened to access by another Class I carrier, or, in the alternative, that the BNSF agreement be clarified with respect to granting access rights to BNSF for service to Seapac and Econorail; and (4) that another Class I rail carrier (such as IC) be granted access to Strang.

UNION CARBIDE CORPORATION. UCC's chemicals/plastics plant at Seadrift, TX, is rail-served solely by UP, but UCC claims that it determined in the late 1980s that a build-out to SP's Victoria-Port Lavaca line at Kamey (within 10 miles of the plant) would be feasible. UCC indicates that SP agreed and, in 1989, offered UCC attractive discounts off of its standard rates (contingent upon construction of the build-out); and UCC claims that, with this build-out threat, it was able to negotiate its current contract with UP. The merger, UCC warns, would eliminate its build-out potential, and would thereby eliminate present competition by reducing UCC's rail options from two to one. The effects might not be felt during the life of the present UCC-UP contract, but the important point, UCC claims, is that the leverage provided by the build-out would be gone, and UCC would be captive to UP. UCC therefore requests that we preserve the status quo by requiring UP/SP to allow BNSF to serve UCC's Seadrift plant either (1) by trackage rights at competitive costs over UP's Bloomington-Seadrift line (this would allow BNSF to serve Seadrift via the existing UP line), or (2) by trackage rights (and concomitant stop-off rights) at competitive costs over SP's Victoria-Port Lavaca line between the UP main line and a point near Kamey (this would allow BNSF to serve Seadrift via the potential build-out route).

ENTERPRISE PRODUCTS COMPANY. EPC, which produces hydrocarbon products at its Mont Belvieu, TX, facilities, concedes that Mont Belvieu has heretofore been rail-served solely by SP (via its Baytown Branch), but notes that, in 1995, UP announced the construction of a new Mont Belvieu Branch, which would extend 10½ miles from the UP line at McNair and would directly serve several major plastics and petrochemicals plants on SP's Baytown Branch. EPC concedes that the Mont Belvieu Branch was not proposed to serve EPC initially, but maintains that, because the Exxon plant that the Mont Belvieu Branch would serve is less than a mile from EPC's facilities, the short extension that would be needed to reach EPC could be justified on economic grounds at an early date. EPC contends that the merger should be denied because the merger will eliminate the competitive option that the Mont Belvieu Branch would have created. EPC further contends that, if the merger is approved, it should be conditioned by requiring that UP/SP either (1) build the Mont Belvieu

Branch as proposed and grant trackage rights upon it to a competing carrier (BNSF) with no limitations on providing service to additional customers at Mont Belvieu, or (2) authorize a shortline to operate the Baytown Branch and grant trackage rights for multiple railroads to access it at Dayton along the SP Houston-New Orleans main line and through the interchange point with the UP line at the southern terminus.

FORMOSA PLASTICS CORPORATION, USA. At its facility at Point Comfort, TX (rail-served only by UP, off of UP's Houston-Brownsville line), FPC manufactures plastics components for shipment to various western points, including three California points (Stockton, City of Commerce, and Lindsay) served by three carriers (UP, SP, and BNSF). FPC concedes that it is captive to UP at origin, but claims that the existence of competitive routes to California enables FPC to bargain more effectively for rates (because FPC can deny UP its long-haul). The merger, FPC fears, will eliminate the competition that exists today because the merged system will control FPC's traffic at origin and/or at destination. FPC concedes that its Baton Rouge facility is served by three railroads (UP, IC, and KCS), but claims that Baton Rouge is not a competitive alternative to Point Comfort on plastics components moving to California, either because most such components are not manufactured in Baton Rouge or because only limited quantities of the one that is manufactured are available for shipment to points west. FPC notes that several of its competitors (Dow at Freeport, QCC at Chocolate Bayou, and UCC at Seadrift) are, like FPC, captive to UP's Houston-Brownsville line, and FPC supports the pro-competitive solutions urged by its competitors. FPC adds, however, that pro-competitive relief should not be granted selectively, and it contends that, if we condition the merger by requiring new competitive service at points in Texas originating or terminating plastics/chemical traffic, we should do so evenhandedly with respect to all shippers in the same industries.

The GEON COMPANY. Geon, which produces vinyl products, fears that the merger would adversely impact its facilities at LaPorte, TX (served by PTRA and accessible by SP), at Deer Park, TX (served only by PTRA), at Plaquemine, LA (served only by UP), and at Long Beach, CA (served only by SP). Two years ago, Geon notes, four railroads (BN, SF, UP, and SP) were available to it at LaPorte and Deer Park (either directly or via PTRA). Approval of the pending merger, Geon adds, will reduce that number to two, and Geon fears that, as the number of competitors decreases, rates rise and service deteriorates. Geon argues that an SP break-up solution dictated by the marketplace would be

preferable to the anticompetitive consequences of the merger, and Geon therefore urges the denial of the merger.

PPG INDUSTRIES INC. PPG, which manufactures chemicals, fears that the proposed merger would adversely impact its Westlake, LA, facility, which is served by three railroads (SP and KCS directly, and UP by reciprocal switch). Post-merger, PPG warns, only UP/SP and KCS would serve Westlake, but, due to the limitations of the KCS route structure, much traffic at Westlake would be captive to UP/SP. The BNSF agreement, PPG adds, is not a satisfactory solution to this problem (PPG claims to have heard that BNSF will not serve PPG's Westlake plant). Shipments from/to Mexico, PPG also warns, would be monopolized by a merged UP/SP, thus jeopardizing the existence of the Tex Mex. PPG therefore suggests that the merger should be denied, or, alternatively, that we should order a divestiture of parallel lines in Texas and Louisiana and allow Tex Mex to connect with other railroads. PPG also asks that we consider requiring additional interchanges at certain other points. In Texas, PPG mentions its plant at Bacon, which is currently served by the Wichita, Tillman & Jackson Railway (WT&J). Service to that plant, PPG indicates, is restricted to a WT&J-UP interchange, even though BNSF has a physical connection with the WT&J. In Oregon, PPG mentions two customers, one located at Lebanon and served by the Willamette Valley Railroad (WVRR), and the other located at Corvallis and served by the Willamette Pacific Railroad (WLPRR). Service to the two customers, PPG indicates, is limited to a WVRR-SP interchange and a WLPRR-SP interchange, respectively, even though BNSF has physical connections with WVRR and WLPRR.

HUNTSMAN CORPORATION. HC, which produces chemicals and plastics, fears that the merger will result in a loss of rail-to-rail competition at three of its Texas facilities: its Longview facility, which is now served by a UP single-line routing and a BNSF-SP joint-line routing (via a junction at Tenaha); its Laredo facility, which can now access both a UP single-line routing and a Tex Mex-SP joint-line routing; and its Brownsville facility, which now has access to both UP and SP. HC recommends: (1) that DOJ conduct a complete review of the anticompetitive impacts of the merger; (2) that UP/SP be required to divest itself of rail segments over which it would have sole supplier status or unacceptable market power; and (3) that the merger review process provide ample time for all shippers, state governments, and the Congress to determine fully the impact of this merger.

ARIZONA CHEMICAL COMPANY. ACC, which operates a chemical plant in Springhill, LA, served exclusively by KCS, fears that the merger will

eliminate UP vs. SP competition it now enjoys. ACC notes that, for traffic moving to Houston, Mexico, and the Western United States, KCS interchanges with both UP and SP at Shreveport; ACC adds that it now has annual contracts with both UP and SP for the portion of the haul beyond Shreveport; and ACC fears that the merger will end the competition now provided by UP and SP at Shreveport. ACC insists, for this reason, that it is a 2-to-1 shipper, but it notes that its interests have not been provided for in the BNSF agreement and, for the most part, have not been provided for in the CMA agreement either. ACC therefore asks that the BNSF agreement be modified as urged by CMA prior to execution of the CMA agreement, by: (1) giving BNSF access to all 2-to-1 points regardless of whether any traffic has moved from/to these points in the past; (2) giving BNSF access to all 3-to-2 points for which, on a "defined" route to/from a particular destination/origin, there would be no alternative other than UP/SP; (3) giving BNSF access to Brownsville/Laredo on the same terms that SP currently has; (4) giving BNSF access to all new (post-merger) facilities built on the lines over which BNSF will have trackage rights; (5) providing detailed assurances and supporting operating and capital investment plans for the services that BNSF will provide under its trackage rights; (6) providing a detailed plan to ensure equal dispatching of trains; (7) renegotiating (lower) the trackage rights fees or establishing a trust fund to provide for shared maintenance costs, rather than subsidization of UP/SP's operations; and (8) providing BNSF the right to operate its trains in the same direction as UP/SP's trains over UP/SP tracks wherever UP/SP has or may have instituted directional operations (for the same length of time provided for in the agreement).

MONSANTO COMPANY. Monsanto, which produces chemicals, fibers, and food additives, fears that the merger will have serious anticompetitive effects. Monsanto notes, by way of example, that its Luling, LA, facility is served by both UP and SP, and Monsanto claims that the BNSF agreement will not cure the loss of competition if BNSF chooses not to operate or is slow to start up its operations. Monsanto therefore supports certain conditions: (1) the conditions formerly requested by CMA; (2) a condition that would require a sale of UP/SP's Houston-St. Louis, Houston-New Orleans, and Houston-Eagle Pass lines if BNSF fails to exercise its trackage rights within 90 days; (3) a condition that would require a divestiture of UP/SP's Oakland-Pueblo Central Corridor; and (4) a condition that would require the adoption of a non-coal rate

reasonableness methodology prior to any granting of track sales or trackage rights, or any additional mergers.

SHELL CHEMICAL COMPANY. SCC fears that the merger would reduce its rail alternatives because UP/SP would control over 70% of Gulf Coast petrochemical shipments, over 85% of Gulf Coast plastics shipments, and over 90% of shipments from/to Mexico. The BNSF agreement, SCC claims, does not resolve SCC's concerns; with trackage rights, SCC notes, the owning railroad establishes the charges and controls track access and dispatching, which hampers the tenant's ability to compete. SCC therefore urges that we reject the merger or, in the alternative, impose a market dominance condition (SCC seeks a finding of market dominance for all locations served only by UP/SP and/or BNSF) and/or a divestiture condition (SCC seeks the divestiture to a third carrier of SP's Chicago-St. Louis, Houston-St. Louis, Houston-Memphis, Houston-New Orleans, and Houston-Corpus Christi lines).

SPRINGFIELD PLASTICS/BRANDT CONSOLIDATED. The only shippers located on the Barr-Girard Line are two affiliates, Springfield Plastics, Inc. and Brandt Consolidated, Inc. (collectively, SPBC), which receive inbound rail shipments of plastic pellets and fertilizer at their Compro, IL, facilities, and which fear added annual transportation costs of more than $110,000 if they must utilize substitute truck-rail service. SPBC urges that the Barr-Girard abandonment be denied in its entirety, or, in the alternative, that the abandonment be denied as to the 26.7-mile Barr-Compro segment. (1) *Procedural Argument.* SPBC contends that the abandonment must be denied because there is no evidence of record, and none has been made available in discovery, that UP has acquired trackage rights over I&M between Barr and Springfield (and because, without such trackage rights, UP cannot divert overhead traffic off the Barr-Girard Line). Because evidence of such trackage rights, SPBC adds, should have been submitted as part of UP's case-in-chief, the time for submitting such evidence has come and gone. (2) *Alternative Approach.* SPBC contends that the Barr-Girard Line should be segmented, and that the 26.7-mile Barr-Compro segment should be kept in service. Aside from the procedural argument respecting the I&M trackage rights, SPBC does not contest the abandonment of the 11.7-mile Compro-Girard segment.[78] (3) *SPBC's*

[78] The Barr-Compro segment is more than twice as long as the Compro-Girard segment. Nevertheless, because UP has proposed to abandon other tracks south of Girard (in particular, the DeCamp-Edwardsville and Edwardsville-Madison Lines), SPBC would prefer to be served from (continued...)

Calculations. With respect to the Barr-Compro segment, SPBC claims: that forecast year operation would result in an operating profit greater than $20,334 (the exact amount would depend on UP's trackage rights payment for the Barr-Springfield operation over I&M); that no track rehabilitation cost is required (because the line is in much better condition than required by the forecast year traffic volume); and that no opportunity cost would be involved in continued operation (because the cost to upgrade track connections with I&M exceeds the value of track materials in the line, and because the land is not entitled to valuation due to UP's failure to prove marketable title or to independently establish any value assuming good title).

SHIPPERS: OTHER. Shippers of a wide range of commodities, including grain, forest products, food products, and minerals, have asked that we either deny the merger or impose conditions.

INTERNATIONAL PAPER COMPANY. IPC, which manufactures paper and paper products, fears that the merger would adversely affect competition at eight of its plants. Seven of these plants, located in the Arkansas/Louisiana/East Texas "southwest" region, are the plants at Pine Bluff and Camden, AR, Mansfield, Pineville, and Bastrop, LA, and S. Texarkana and Nacogdoches, TX. The Pine Bluff plant is served by UP and SP; the Camden plant is likewise served by UP and SP; the Mansfield plant is served by UP and KCS; the Pineville plant is served by UP (via reciprocal switch) and KCS; the Bastrop plant is served by UP and the Alabama, Louisiana and Mississippi Railroad (AL&M); the S. Texarkana plant is served by UP and KCS; and the Nacogdoches plant is served by SP. IPC indicates that the Pine Bluff and Camden plants benefit from head-to-head competition between UP and SP in the Houston-Memphis corridor, and that the Mansfield, Pineville, Bastrop, S. Texarkana, and Nacogdoches plants also benefit from competition because, in each instance, either UP or SP is an essential part of the rail movement; SP, IPC notes, is today a friendly connection for KCS for traffic at Mansfield, Pineville, and S. Texarkana, and for AL&M for traffic at Bastrop. IPC's eighth plant, located at Gardiner, OR, is served by the Longview, Portland & Northern Railroad (LP&N), an IPC-owned shortline that connects with the Central Oregon & Pacific Railroad (CO&PR), which in turn connects with SP. This, IPC claims,

---

(...continued)
the 26.7-mile Barr-Compro segment to the north, and would not dispute UP's abandonment of the 11.7-mile Compro-Girard segment to the south.

is not entirely satisfactory: at Gardiner, all traffic originating or terminating beyond CO&PR moves at SP's whim.

Adverse Impacts Post-Merger: Trackage Rights Compensation. IPC contends that the compensation arrangement applicable to the trackage rights provided for in the BNSF agreement would defeat any competitive alternative that BNSF might otherwise present. The trackage rights compensation level, IPC claims, would be a serious and immediate impediment to rate competition from BNSF, and this problem, IPC adds, would be compounded in future years.

Adverse Impacts Post-Merger: Pine Bluff and Camden. IPC fears that its plants in Arkansas, Louisiana and Texas will lose the benefits now provided by two strong competing railroads, and will have to rely on competition between a merged UP/SP and a disadvantaged BNSF, which would be hamstrung by operational difficulties, inadequate traffic volumes, and arbitrarily high operating costs. Competition at points opened to BNSF will be weaker than it is today, IPC contends, because there will not be sufficient volume available at the few points that BNSF will be permitted to serve to warrant it doing anything more than moving through traffic over the corridor. And, IPC adds, even if there were sufficient volumes at these points, any BNSF operation on SP's Houston-Memphis line would suffer from an absence of rail facilities, an overwhelming directional flow of UP/SP's traffic, a lack of adequate sidings, a lack of storage facilities required for plastic and chemical traffic, a lack of computerized traffic control, a lack of facilities for crew changes, a lack of car repair facilities, a lack of boxcars, and so on. IPC maintains that, at best, BNSF service at Pine Bluff and Camden will be provided via haulage agreements; and this, IPC claims, would amount to UP/SP service at higher rates.

Adverse Impacts Post-Merger: Mansfield, Pineville, Bastrop, S. Texarkana, and Nacogdoches. IPC indicates that, because SP is today a friendly connection for KCS and AL&M, SP has no incentive to treat KCS and AL&M less favorably than UP. The merger, IPC fears, will alter this incentive; a merged UP/SP will have an incentive to treat KCS and AL&M less favorably than itself. Traffic at Mansfield, Pineville, S. Texarkana, and Bastrop, IPC warns, will therefore lose the benefit of UP vs. SP competition. IPC, which recognizes that the vertical market foreclosure it fears is at odds with the "one-lump" approach long accepted by the ICC, insists that the one-lump approach is simply wrong (or at the very least inapplicable here). That theory, IPC contends, does not address the issue of the fixed or sunk costs of the serving carriers, and ignores the fact that a bottleneck carrier's pricing and service practices may be constrained by outside factors, which necessarily means that a bottleneck rail

carrier will not always be able to capture the preponderance of the economic rents of any given move. There is no evidence, IPC argues, that SP has ever exercised "one-lump" power on its connections.

Adverse Impacts Post-Merger: Gardiner. The BNSF agreement, IPC notes, will allow both UP/SP and BNSF to provide new service alternatives in the I-5 corridor. The problem here, from IPC's perspective, is that although some shippers (including certain IPC competitors) currently local either to BNSF or UP will have access to these new alternatives, IPC (which is captive at Gardiner to SP, via CO&PR) will not.

Relief Requested. IPC opposes the merger and urges that any approval be conditioned by requirements: (1) that UP/SP divest (to a neutral carrier) SP's Houston-St. Louis lines and related facilities; (2) that UP/SP keep open all routes, at competitive rates with service no less favorable than will be accorded UP/SP traffic, via the existing KCS-SP junctions at Beaumont, Houston, Dallas, and Shreveport, on traffic to/from competitively served points (including AL&M originations/terminations at Bastrop), so as to maintain the friendly connection on traffic destined to or originated at SP-served points; (3) that UP/SP grant Tex Mex "trackage" between Corpus Christi and Beaumont, or, in the alternative, grant KCS the opportunity to acquire trackage to Corpus Christi; (4) that UP/SP permit a direct interchange between BNSF and CO&PR at Eugene; and, to allow BNSF to handle IPC's southbound traffic, that UP/SP either grant BNSF trackage rights between Eugene and Chemult or allow a free interchange between SP and BNSF at Chemult; (5) that UP/SP ensure that a viable, competitive routing exists over the Central Corridor; and (6) that UP/SP grant BNSF trackage rights to Turlock, CA (a major destination for IPC paper products) from either Stockton or Merced, CA.

UNITED STATES GYPSUM COMPANY. USG, which produces gypsum wallboard products, gypsum rock and plasters, joint compounds, and gypsum board paper, fears that the merger will have serious impacts with respect to traffic involving its plants at Empire, NV, Plaster City, CA, Southard, OK, and Fort Dodge, IA.

Empire, NV. USG's Empire plant manufactures gypsum wallboard, etc., for shipment by rail to various points, one of which is USG's Fremont, CA, wallboard plant. Traffic moving outbound from the Empire plant is handled by UP from its Gerlach, NV, station, but service, USG reports, has been poor, and, on occasion, delays in the Gerlach-Fremont haul have forced the Fremont plant to shut down. The problem, in USG's view, is that UP's westbound manifest trains ordinarily "fill up" prior to reaching Gerlach, forcing USG's shipments to

wait while full UP trains run past Gerlach. The merger, USG asserts, will only make matters worse if UP/SP implements its plans to run fewer trains past Gerlach and/or if BNSF uses UP/SP crews to move its own trains past Gerlach. USG therefore urges us to require that the BNSF agreement be amended to allow BNSF access to serve and switch USG's rail movements from and to the Gerlach station.

Plaster City, CA. USG's Plaster City plant (served and switched solely by SP) manufactures gypsum wallboard, etc., for shipment by rail to various points, one of which is USG's Santa Fe Springs, CA, plant (served by SP's Los Nietos station). SP service, USG reports, has been poor; delayed shipments have resulted in shutdowns and slowdowns at Santa Fe Springs. There is presently no rail competition at Plaster City (only SP provides service). Although a line, which is now operated by the San Diego & Imperial Valley Railroad (SDIV), runs west from Plaster City and (after passing through Mexico between Division, CA, and San Ysidro, CA) connects with BNSF in the San Diego area, since 1976 this line has been out of service for some distance west of Plaster City, and it will not return to service until certain repairs can be made. USG fears that, lacking rail-to-rail competition, UP/SP service at Plaster City can only get worse, as new traffic flows result in even greater congestion on SP lines. The merger, USG adds, also threatens to worsen USG's standing vis-à-vis its competitors in current Plaster City rail-served markets, due to the opening of single-line rail routings from multiple competitor locations. USG therefore urges us to require (1) that BNSF be granted haulage rights to serve and switch USG's rail movements (a) between Plaster City and Santa Fe Springs, on SP's route via Niland, City of Industry, Bartolo, and Los Nietos, and (b) between Plaster City and the UP/SP-BNSF junction at West Colton, on SP's route via Niland, and (2) that BNSF be granted trackage rights over SDIV between Plaster City and the BNSF-SDIV interchange in San Diego.[79]

Southard, OK. USG's Southard plant manufactures gypsum wallboard, etc., for shipment by rail throughout the United States. Rail service at Southard is provided by Grainbelt Corporation (GNBC), which accesses BNSF and UP (at Enid, OK) and SP (at Quanah, TX). USG notes that, prior to the BN/SF merger, GNBC had access to BN, SF, and UP, and that the ICC, in its decision

[79] SDIV urges the denial of USG's second Plaster City condition. SDIV notes, among other things, that we lack authority to impose conditions on a non-applicant carrier (except in connection with terminal trackage, which SDIV's 129.61-mile line, SDIV insists, is not) and that we likewise lack authority to impose conditions respecting track located in Mexico.

approving the BN/SF merger, granted GNBC access to SP at Quanah so that GNBC would continue to have three Class I connections. The merger would reduce GNBC's Class I connections from three to two, and USG maintains that we should follow the ICC's lead and impose a condition granting GNBC a third Class I connection. USG therefore urges us to require that CSX be granted overhead trackage rights, terminal trackage rights, and/or reciprocal switching trackage rights over UP/SP between Enid and St. Louis, for USG's loaded or empty rail movements originating or terminating on GNBC.

Fort Dodge, IA. USG's Fort Dodge plant manufactures gypsum wallboard, etc., for shipment by rail to various destinations, and receives by rail limestone from Illinois. Fort Dodge is switched and served by UP (formerly CNW) and by the Chicago Central & Pacific Railroad Company (CC&P). USG indicates that, prior to the UP/CNW merger, Fort Dodge could access BN, SF, and UP, and all other Class I railroads via both CNW and CC&P. The UP/CNW merger, USG contends, changed matters for the worse. The service provided by UP has been poor, and the balance of rail competition has been skewed by having UP single-line routings in competition with CC&P-BNSF joint-line routings; a two-line haul, USG suggests, is necessarily inferior to a single-line haul. USG is particularly concerned by the settlement agreement entered into by applicants and IC (the IC agreement). For one thing, references in the IC agreement to IC, USG suggests, may mean either IC or IC/CC&P (we recently approved an IC/CC&P merger), and USG indicates that this uncertainty clouds its ability to analyze the combined impact of the UP/SP merger, the IC/CC&P merger, and the IC agreement. For another thing, USG is alarmed by the provision in the IC agreement that makes IC UP/SP's first negotiating partner respecting imposed conditions in addition to or in lieu of the BNSF agreement. This provision, USG claims, effectively limits rail competition at Fort Dodge, and would reduce rail access at Fort Dodge from two railroads (UP and CC&P) to one (UP). USG therefore urges us to require that BNSF be granted haulage rights to serve and switch USG's freight from/to Fort Dodge over the UP and former CNW track between USG's Fort Dodge plant, on the one hand, and, on the other, the BNSF yards in Minneapolis, MN (via Mason City, IA), Council Bluffs, IA, and Sioux City, IA. USG further urges us to require that the IC agreement be clarified with respect to USG's Fort Dodge plant, and that the IC agreement's anticompetitive impact vis-à-vis competitive rail access at Fort Dodge be eliminated.

NORTH AMERICAN LOGISTIC SERVICES. NALS, a Division of Mars, Incorporated (Mars), arranges transportation at various Mars production units,

one of which (Kal Kan Foods, Inc., known as Kal Kan) will begin operations at a new SP-served plant at Wunotoo, NV, later this year. The pet food produced at this plant will be trucked outbound, but the grain and animal by-products used at this plant will be hauled inbound by rail. NALS notes that, although its inbound traffic can be terminated only by SP, it can be originated by other railroads (in particular, UP and BNSF), and NALS intends that, at least initially, its grain will be originated either by UP or by BNSF. And, NALS adds, although only SP can serve the plant, UP can serve Reno (30 miles away), and inbound freight can be trucked from Reno to the plant. The merger, NALS warns, will destroy competition both at destination (because there will no longer be a UP/truck option) and at origin (because, once any existing contracts expire, a merged UP/SP is unlikely to participate with BNSF in a joint rate that would allow a BNSF-UP/SP joint-line haul to compete with a UP/SP single-line haul). NALS insists that the 2-to-1 provisions of the BNSF agreement will not protect Kal Kan: although Kal Kan is clearly (as NALS sees matters) a 2-to-1 shipper, nothing in the agreement would allow BNSF to handle traffic destined to Wunotoo. Reno, NALS indicates, is provided for in the agreement, but the rights granted to BNSF at Reno, NALS insists, will not allow BNSF to provide the rail/motor service required to serve Kal Kan. NALS therefore asks that UP/SP be required to grant BNSF trackage rights either (1) over the SP line serving the Kal Kan plant (along with all necessary stop-off and switching rights), or (2) over the UP line at Reno (and, if trackage rights are granted over the UP line at Reno and if the Kal Kan plant is included within the Reno switching district, NALS also asks that UP/SP be required to grant BNSF reciprocal switching rights into the plant).

ASARCO INCORPORATED. ASARCO, which produces nonferrous and precious metals, opposes the merger out of fear that there will be serious anticompetitive impacts at its facilities at El Paso, TX, Hayden, AZ, Corpus Christi, TX, and Leadville, CO, and also with respect to traffic moving from/to Mexico. (1) ASARCO's El Paso copper smelter is currently served by three carriers: SP; BNSF; and UP (via a reciprocal switch over BNSF). ASARCO indicates, however, that, due to the nature of ASARCO's customer base and the circuity of a BNSF haul, two carriers (SP and UP) handle almost all of ASARCO's El Paso traffic. The merger, ASARCO therefore fears, will effectively leave ASARCO with but a single carrier at El Paso. (2) ASARCO's Hayden copper smelter is captive to SP, which accesses Hayden via CBRY (the Copper Basin Railway Company). ASARCO claims, however, that it has packaged its captive Hayden traffic with its competitive El Paso traffic to secure

competitive rates for both, and ASARCO therefore fears that the 3-to-2 reduction at El Paso will impact its competitive options at Hayden. (3) At Corpus Christi, ASARCO's Encycle subsidiary is served by UP but is open to reciprocal switching by SP, and ASARCO therefore fears that Encycle will experience a 2-to-1 reduction in competitive options; and, ASARCO adds, the Port of Corpus Christi, through which ASARCO imports on a spot basis, also will experience a 2-to-1 competitive reduction. ASARCO recognizes that these impacts might be alleviated by the BNSF agreement, but claims that the charges provided for in that agreement are such that BNSF will not be competitive. (4) ASARCO's Leadville lead/zinc mine is served by SP at Malta (via a 7-mile truck haul), which means that the Tennessee Pass abandonment will force ASARCO to set up another loading site, probably over 100 miles from the mine. Applicants, ASARCO claims, have given no indication how ASARCO's increased costs might be handled. (5) ASARCO, which has in the past bid its Mexican traffic between the different border crossings, warns that the impacts of the merger include a reduction in the number of railroads serving these border crossings.

CIC INTERNATIONAL CORPORATION. CIC, which produces paper, plywood, lumber, and forest products, has four East Texas plants (at Corrigan, Sheldon, Camden, and Herty) that rely, either directly or via a shortline connection, on SP's Houston, TX-Fair Oaks, AR line. In recent years, CIC indicates, SP's service has been inadequate, and CIC allows that the merger may result in improved service. CIC adds, however, that the merger may also cause certain problems: service on the Houston-Fair Oaks line may deteriorate further, if applicants use that line for south-bound traffic and if BNSF puts its own overhead trains on that line; and the merger also endangers intramodal competition now provided via both a UP reload at Palestine, TX (which will clearly be eliminated as a post-merger alternative) and a BNSF reload at Cleveland, TX (which may be eliminated as a post-merger alternative in the wake of the various realignments triggered by the BNSF agreement). CIC therefore requests that we condition the merger (1) by granting BNSF access to all Class III railroads and their customers who are dependent on the Houston-Fair Oaks line (to counterbalance the service problems that will accrue from added traffic), and (2) by preserving the pre-merger competitive status quo vis-à-vis CIC's customers in Arizona, California, Colorado, Missouri, Nebraska, New Mexico, Nevada, Oregon, Washington, and Wyoming (to ensure that the competitive alternatives created by existing reload operations are not eliminated by the merger).

WEYERHAEUSER COMPANY. Weyerhaeuser, a forest products company, fears that the merger will adversely impact the transportation of all goods across North America, and it therefore urges denial; healthy competition, Weyerhaeuser claims, requires a minimum of three rail carriers. Weyerhaeuser adds that, in any event, because the trackage rights provided for in the BNSF agreement will not give BNSF a real competitive opportunity, BNSF will be unable to provide a real competitive choice even in the limited 2-to-1 context. Weyerhaeuser urges that we condition any approval of the merger on: (1) divestiture to create a three-railroad option in the Central Corridor; (2) divestiture to create a three-railroad option in the Texas Gulf Coast region (from the Gulf Coast to Memphis and St. Louis); (3) trackage rights to provide a third rail carrier option from/to Mexico; (4) trackage rights (or a similar arrangement) that would allow MRL to access the Eugene, OR, market by operating between Klamath Falls and Eugene, OR, and open interchange with the Central Oregon and Pacific Railroad (CO&PR, which serves two Weyerhaeuser facilities in Oregon); and (5) competitive conditions in the Pacific Coast Corridor (Weyerhaeuser supports the provisions in the BNSF agreement that enhance rail-to-rail competition in that corridor).

CARGILL. Cargill, which merchandises agricultural and other bulk commodities, contends that the merger threatens to create significant competitive pitfalls, and therefore urges that if we approve the merger: (1) to ensure that the trackage rights provided for in the BNSF agreement will allow effective competition, we should examine the costs that BNSF will incur; (2) to ensure reasonable access to competitive rail options, we should require that all UP/SP stations/junctions be open to reciprocal switching; (3) to preserve pre-merger joint-line movements, we should establish a rate guideline making presumptively unreasonable the increase of any UP/SP segment of a joint movement to a rate (revenue-variable cost) exceeding 180%; (4) to ensure that gateways now open remain open, we should order that no gateways now open can be closed by UP/SP post-merger; and (5) to ensure that UP/SP does not unreasonably refuse access to privately owned cars, we should require that UP/SP maintain the present status of private cars on UP and SP.

IBP, INC. IBP, a meat packing company with shipping origins in Iowa and Nebraska formerly served by CNW, claims that service declined and rates increased after the UP/CNW merger. The CNW lines serving these points, IBP claims, have been marginalized by UP; these lines, IBP suggests, were significant to CNW but are not significant to UP given UP's emphasis on long-haul, bulk-loading, multiple-car traffic. IBP fears that, because similar

problems will follow a UP/SP merger, that merger will lessen the adequacy of transportation to the public at IBP shipping origins in Iowa and Nebraska. IBP therefore requests that we grant CC&P reciprocal switching rights at six IBP shipping origins in Iowa and Nebraska located on former CNW lines.

OREGON STEEL MILLS, INC. OSM, which contends that, due to inadequate infrastructure and the way reciprocal switching charges are structured, Portland, OR, is a railroad interchange nightmare, urges that we require (1) that all rail interchanges in Portland be open to all shippers (including shippers located on shortlines) and (2) that all reciprocal switching charges be reasonable between all carriers.

STIMSON LUMBER COMPANY. SLC, which manufactures lumber, plywood, and hardboard products in Oregon and Montana, seeks to establish a competitive rail environment that will benefit the forest products industry and the Pacific Northwest, and therefore urges us to require: (1) that UP/SP ensure the competitive posture of Portland area (north of Eugene) shippers relative to pricing; (2) that UP/SP not immediately abandon or downsize any yard that currently offers a means of flexibility; (3) that the BNSF agreement be expanded to include open interchange for traffic moving from origins served by SP (either directly or via a shortline) to destinations served by BNSF; and (4) that UP/SP continue UP's reasonable switching agreement with BNSF.

STATE & LOCAL GOVERNMENTS AND RELATED INTERESTS. Pleadings have been filed by a number of state and local governments and related interests.

TEXAS. *Attorney General Morales* requests that the merger be denied, and contends: that only three Class I railroads serve the majority of Texas, which has more shippers captive to rail than any other state affected by the merger, and also has more shippers served exclusively by either UP or SP; and that the merger would reduce (either 3-to-2 or 2-to-1) Class I railroad competition for a significant volume of traffic involving origins and destinations in Texas and at the Texas-Mexico gateways. Texas, the Attorney General claims, has more 2-to-1 customers than any other state, and the Attorney General insists that applicants' definition of 2-to-1 shippers, using points rather than areas, is too restrictive. The Attorney General asserts, however, that economic studies suggest that competitive harm exists even in 3-to-2 markets. The Attorney General argues that combining the monopoly customers of SP with those of UP will eliminate the potential competition that often exists between nearby railroads, and he also argues that intermodal and source competition are unlikely

to be effective checks on a merged UP/SP. The Attorney General contends that the BNSF agreement does not address the competitive problems that the merger will create, and he suggests that BNSF, as a tenant railroad, would be at a competitive disadvantage and would be further hampered by operational difficulties.

The Railroad Commission of Texas (RCT), which claims that the BNSF agreement does not protect competition in parallel UP/SP Texas markets, recommends that we deny the merger and asks that, if the merger is approved, we: (1) grant to Tex Mex Corpus Christi-Beaumont trackage rights to allow it to connect with KCS; (2) order (a) the divestiture of SP lines in the Houston to Chicago, St. Louis, and Memphis corridor, the Dallas/Fort Worth to Chicago, St. Louis, and Memphis corridor, the Dallas/Fort Worth to Houston and South Texas corridor, and the New Orleans to Houston, San Antonio, and Eagle Pass corridor, and (b) the divestiture of related SP terminals, yards, and other facilities; (3) require that UP/SP agree to the creation of neutral terminal railroads serving Houston, Corpus Christi, Beaumont/Port Arthur/Orange, Dallas/Fort Worth, El Paso, and the Rio Grande Valley; and (4) require that UP/SP, if it proposes a post-merger Texas abandonment, include all trackage necessary to ensure the acquiring entity access to rail junction points. RCT, which also is concerned that increases in rail traffic may impact public safety, requests that a merged UP/SP be required (5) to confer with law enforcement officials, traffic engineers, and public officials in cities and counties that experience a substantial increase in the number of daily trains, and (6) to install flashers, bells, and gates at all grade crossings where the maximum train speed is great enough to present a hazard to motorists.

The Port of Corpus Christi, noting that UP and SP account for 80% of the Port's rail business and that the SP-Tex Mex routing (via Corpus Christi) is competitive with the UP single-line routing for traffic moving over the Laredo gateway, supports the merger but requests: (1) that we impose the BNSF agreement as a condition; and (2) that, if we determine that the BNSF agreement does not adequately resolve competitive issues, we grant a third Class I carrier access to Corpus Christi, including access to Tex Mex and the Port.

Texas State Representatives Robert Junell, John R. Cook, and Robert Saunders, believing that the merger will reduce rail competition in Texas and fearing that the BNSF agreement does not adequately address this competitive harm, oppose the merger unless certain conditions are imposed: (1) divestiture, to an unnamed rail carrier(s) unaffiliated with applicants, of numerous SP lines, including SP's Houston-Memphis, Houston-New Orleans, Houston-Eagle Pass,

and Fort Worth-Galveston lines; (2) trackage rights, marketing rights, and divestiture of certain UP/SP Corpus Christi-Beaumont lines on behalf of Tex Mex; (3) trackage rights on certain UP lines on behalf of South Orient Railroad Company; and (4) the conditions requested by RCT.

Texas State Representative John R. Cook, claiming that UP has ignored a recently enacted Texas statute limiting certain liabilities that might arise in connection with excursion train operations, requests that we: (1) affirm that Texas has jurisdiction to limit the liability of railroads operating in Texas; and (2) require UP, SP, and BNSF to remove, from any trackage rights agreement with an excursion train operator certified under Texas law, any provision requiring the maintenance of liability insurance in excess of the amount specified by Texas law.

CALIFORNIA. *The Public Utilities Commission of the State of California (CPUC)* supports the merger but asks that we require: (1a) that the term of the BNSF agreement be perpetual; (1b) that, upon a finding that BNSF has provided inadequate competition in any corridor or at any California station, the Board will be empowered to order appropriate corrective action; (2) that BNSF receive access to all future industries located on the lines which the BNSF agreement permits it to serve; (3) that there be either a finding that BNSF is committed to providing adequate competition in the Central Corridor, or an order requiring UP/SP to divest a Central Corridor route, facilities, trackage, and traffic base to a carrier other than BNSF (although CPUC, in its brief, appears to have withdrawn its divestiture alternative); (4) that BNSF be granted a perpetual option to acquire UP's Keddie-Stockton Line, exercisable upon a finding that UP has failed to provide on that line either (a) nondiscriminatory dispatching or (b) adequate roadway maintenance or capital improvements; (5) that UP/SP (or, at UP/SP's option, another operator) be required to operate the entire Modoc Line (Klamath Falls, OR, to Flanigan, NV) for at least 5 years, without any traffic surcharges, with any financial losses paid for by UP/SP, and with full and unrestricted interchange rights with BNSF at Klamath Falls, at Flanigan, and at such other locations as the carrier may elect (CPUC, though it concedes that local traffic on the Wendel-Alturas portion of the Modoc Line is presently negligible, claims that the line serves as an important resource for attracting new industry, and therefore opposes the Wendel-Alturas abandonment); and (6) that the North Coast Railroad Authority (NCRA), which now operates the 160-mile North Coast Railroad between the Eureka-Arcata-Korbel area and Willits and which has recently negotiated the purchase of an additional 140-mile line

between Willits and Lombard, be granted competitive access to BNSF via bridge trackage rights over UP/SP lines between Lombard and either Suisun-Fairfield or Richmond, under terms identical to those in the BNSF agreement. CPUC further requests: (7) that we require UP/SP to assume SP's obligations respecting (a) rail passenger service in the Capitol Corridor between San Jose and Sacramento, and (b) the construction and operation of the Alameda Corridor between the Ports of Los Angeles and Long Beach; (8) that we stress the importance of developing the Calexico-Mexicali gateway to its fullest potential, and urge UP/SP either to develop this gateway or to divest it to another carrier; and (9) that we require UP/SP (a) to offer fair settlement amounts to employees who choose not to relocate, and (b) to provide job training and outplacement programs for employees whose jobs are abolished or transferred.

The City of Industry, through the Industry Urban-Development Agency (IUDA), claiming that two contiguous parcels owned by IUDA and located between UP and SP main line tracks should have 2-to-1 status, requests that we condition the merger by requiring (1) that the two parcels be regarded as a 2-to-1 customer, or, alternatively, (2) that, within 90 days after approval of the merger, UP/SP grant BNSF trackage rights to the two parcels.

The City of Susanville (Susanville) and the County of Lassen (Lassen) oppose the merger and the Wendel-Alturas abandonment and support the MRL responsive application, and contend that the Modoc Line (of which the Wendel-Alturas Line is a portion), though underused, is an important part of the national rail system. Susanville and Lassen indicate that, after the Base Realignment and Closure Commission realigned (in 1995) the Sierra Army Depot, which is located in Herlong (in Lassen County), by removing one of its missions, a local reuse committee was established to investigate potential reuses for the depot. Susanville and Lassen fear that the work of the reuse committee could be hindered by the proposed abandonment.

The County of Modoc (Modoc) and the City of Alturas (Alturas) also oppose the merger and the Wendel-Alturas abandonment. They state that Modoc and Alturas are currently under consideration as a location for several plants, but that the plants will be located elsewhere if rail service is discontinued. Further, Modoc and Alturas state that, in 1917, Alturas "gifted" several blocks of land in the center of the city to the N.C.O. railroad, subsequently SP. Noting that the site was used as a maintenance/repair facility and is now on California's hazardous sites list, Modoc and Alturas request that,

if the Modoc Line is abandoned, the land be remediated for hazardous waste and returned to the city for redevelopment.

The County of Placer (Placer), which is concerned that increased train traffic on the Roseville-Sparks and Roseville- Marysville routes will generate various adverse impacts (including at-grade crossing delays, air pollution, increased transport of hazardous materials, and an increase in the number of "transient" criminals), asks that we consider these impacts and require mitigating conditions on any approval of the merger.

The East Bay Regional Park District (East Bay District), which maintains parks and trails within Alameda and Contra Costa Counties, fears that increased train traffic on adjacent UP/SP lines will generate various adverse impacts (including increased obstructions at crossings, increased noise, and increased air pollution), and asks that we impose conditions requiring: a grade separation at Ferry Street (Martinez), and the implementation of dispatching procedures to reduce obstructions at the Ferry Street crossing; overhead crossings at Wilson Point (Pinole), Gately (Pinole), Lone Tree Point (Rodeo), and City Cemetery/Nejedly Staging Area (Martinez), and at-grade crossings at Eckley, White's Resort, and Port Costa; an at-grade trail crossing for Neroly Road (Oakley); appropriate conditions such as crossings (either grade separated or at-grade) and/or lateral encroachments, if any of the District's paved trails are affected by the merger; and noise abatement conditions, particularly in the Pinole area.

The City of Sacramento (Sacramento) has indicated concern respecting UP's 19th Street Line, which bisects Sacramento and which will be opened up to BNSF under the BNSF agreement. Sacramento, which alleges that UP's heavy use of the line has impacted daily traffic movements and has forced the city to maintain emergency services on both sides of the line, and which therefore wishes to transfer UP (and BNSF) freight trains to alternative trackage, has an alternative in mind: SP's Elvas Line, which, Sacramento indicates, runs parallel to the 19th Street Line but is more removed from the central part of the city. Sacramento therefore requests that we impose a condition that will assure that Sacramento will be able to conduct negotiations with UP/SP and BNSF regarding the abatement of traffic on the 19th Street Line.

OREGON. *The Oregon Department of Transportation (Or/DOT)* supports the merger but asks that we monitor Central Corridor competition, and suggests that, at the end of this proceeding, we commence an investigation respecting open access (Or/DOT has in mind that all Oregon shippers should have access

to both BNSF and UP/SP). Or/DOT apparently continues to oppose the Wendel-Alturas abandonment, which, Or/DOT fears, may harm Southern Oregon shippers by reducing their ability to compete effectively in eastern markets (Or/DOT fears that the alternative route, via Roseville, CA, may not be a competitive alternative for many Southern Oregon shippers). Or/DOT adds that the Wendel-Alturas Line should be retained at least until UP/SP has had a chance to implement infrastructure and operating improvements needed to serve all customers in a competitive manner.

MONTANA. *Governor Racicot,* noting that BNSF monopolizes the transportation of bulk commodities from Montana farms to market, fears that the BNSF PRA, which will be limited to traffic moving from/to points west of the Billings-Havre line, will have an anticompetitive impact on farmers located east of the Billings-Havre line (who account for 45% of all Montana grain). Governor Racicot therefore requests: (1) the modification of the BNSF PRA to allow UP to handle (a) all commodities originating in Montana, and not just a limited number of commodities, and (b) traffic moving from/to all points in Montana, and not just points in the western half of the state; (2) the expansion of the BNSF PRA, as thus modified, to allow UP to handle all Montana traffic via the Silver Bow gateway (which provides a much shorter route to the Southwest and the Central West), and not just via the Portland gateway; and (3) either (a) a guarantee by UP of the continued integrity and operation of the Butte-Pocatello Line, with 20-year Board oversight to ensure that the guarantee is honored and that UP's competitive position is adequately maintained, or (b) the sale of the Silver Bow-Pocatello line to MRL, together with a PRA (similar to the BNSF PRA) for all traffic moving over Silver Bow from all Montana origins, with the same guarantee of continued service.

IDAHO. *The Idaho Barley Commission and the Idaho Wheat Commission (IBC/IWC),* noting that UP handles the major portion of outbound Idaho rail freight, fears that the merger will worsen the captive shipper status of Idaho farmers by increasing the monopolistic control UP already has in Southern Idaho. IBC/IWC asserts that, under the BNSF PRA, grain producers in other states will receive access to competitive rail service, but most Idaho grain producers will not (the BNSF PRA will benefit only those Idaho grain producers with access to BNSF points in Northern Idaho). IBC/IWC asserts that the BNSF PRA will create a more competitive rate structure for Canadian grain moving to Portland than is available for Southern Idaho grain moving to Portland, and may result in increased north-south traffic to the detriment of Idaho's east-west traffic. IBC/IWC adds that, because Idaho grain shippers have

no alternative rail options, UP/SP may switch hopper cars to accommodate north-south grain movements at the expense of Idaho's traditional east-west grain movements. IBC/IWC therefore urges: (1) that we grant the MRL responsive application, including the sale of the Pocatello-Silver Bow line, and impose a PRA (similar to the BNSF PRA) for all traffic moving from all Idaho origins to Portland and points south of Portland; (2) that we grant BNSF trackage rights to haul, under a competitive PRA, all traffic originated in Idaho; and (3) that, to monitor long-term anticompetitive effects on captive shippers, particularly regarding car supply and rates, we retain oversight of the merger, and require UP/SP to report grain movements from/to Canada and Mexico, for 20 years.

COLORADO. *Governor Romer* supports the merger, and indicates that UP has made commitments respecting: employee impact; the timing for actual discontinuance of service on Colorado lines targeted for abandonment; the timing for removal of abandoned track; the sale, to Colorado or its designee, of part or all of the abandoned track for its net liquidation value within the first 12 months after the merger; the possible conversion of abandoned corridors to trails; and the identification of environmental issues in the corridors targeted for abandonment.

The City of Pueblo (Pueblo) opposes the three proposed Colorado abandonments (Sage-Malta-Leadville, Malta-Cañon City, and Towner-NA Junction) which, it fears, would deprive Pueblo of access to transcontinental rail service, would increase truck traffic on roads serving Pueblo and neighboring communities, would result in the elimination or transfer of 139 full-time jobs in the Pueblo area, and could place Pueblo at a disadvantage in competing for future industrial development projects because of the loss of access to direct east-west service via SP's line. Pueblo asks that we condition any approval of the merger by requiring UP/SP to sell SP's east-west route to MRL for continued freight operations.

The Associated Governments of Northwest Colorado (AGNC), composed of Moffat, Routt, Rio Blanco, Garfield, and Mesa Counties, fears that the merger, by allowing UP/SP to favor PRB coal vis-à-vis Northwest Colorado coal, will jeopardize the economic underpinnings of Northwest Colorado. AGNC therefore opposes the merger unless UP/SP makes a commitment to maintain competitive coal hauling rates for Colorado coal.

NEVADA. *The Public Service Commission of the State of Nevada (PSCN),* concerned that Nevada utilities will not benefit from, and indeed may be

negatively impacted by, the merger and the related BNSF and URC agreements, contends that the merger should be conditioned (1) with "open access" provisions that would require UP/SP to grant to third-party railroads such as URC trackage rights to provide single-line service to existing and new utility stations. PSCN, noting that the BNSF agreement will allow BNSF to interchange with the Nevada Northern Railway near Shafter, insists (2) that UP/SP should not be allowed to charge trackage rights compensation fees that would inhibit competition for the interchange traffic. PSCN maintains that Nevada shippers on lines served by both UP/SP and BNSF should be able to access either railroad, and PSCN therefore suggests (3) that, after operating experience has been gained with the BNSF agreement, but in no more than 3 years, we examine the competitive access issue to ascertain the level of shipper interest and evaluate the prospect of expanding competitive opportunities through trackage rights agreements. PSCN also suggests (4) that UP/SP should be required (a) to establish systems to provide timely responses to inquiries from shippers, local governments, and the general public, and (b) to provide, to local governments and local emergency response agencies, information and response plans pertaining to hazardous materials incidents. PSCN also requests (5) that we impose conditions to mitigate the impact of increased rail traffic through Reno, Lovelock, Winnemucca, Carlin, Elko, and Wells.

The City of Reno (Reno), which fears that the merger will result in a substantial increase in traffic on the SP line through Reno and will therefore have substantial adverse impacts on Reno (including highway delays, noise pollution, effects on air and water quality, and increased potential for pedestrian accidents), contends that, without specific conditions to mitigate adverse environmental impacts, the merger should be denied.

The Town of Fernley (Fernley), which notes that the SP line runs the length of the town and that there are only two crossings in the town, indicates that it would like to be included in consultations and negotiations involving the UP/SP merger.

The City of Winnemucca (Winnemucca) and the County of Humboldt (Humboldt), which fear that the anticipated increase in train movements on the SP line through Winnemucca will result in increased delays at crossing gates, increased potential for pedestrian injury, increased air pollution, and increased noise pollution, have suggested two mitigation alternatives: (1) construction of a grade separation at Bridge Street, the street that intersects with SP in downtown Winnemucca; or (2) rerouting of traffic from the SP line (which bisects the central core of Winnemucca) to the UP line (which skirts the

northern edge of the city), which would require a new UP-SP connection near Rose Creek.

KANSAS. *The Kansas Department of Transportation (Ka/DOT)* supports the merger, provided that certain problems can be resolved. (1) To ensure that rail service will remain available on the Pueblo-Herington line, Ka/DOT would support a lease or sale of this line to another Class I railroad. In the event the line is sold or leased to a shortline, Ka/DOT asks that we ensure that the new operator has a good operating history and that it has competitive access to Class I connections and markets in Salina, Hutchinson, and Wichita. (2) Because Wichita will suffer a 3-to-2 reduction in rail competition, Ka/DOT requests that a third Class I railroad be brought into the Wichita market. (3) Ka/DOT, which fears that increased UP/SP traffic density will worsen historic problems with rail crossings in Wichita, requests that we attempt to craft a solution to this problem.

Sedgwick County (Sedgwick) and the City of Wichita (Wichita) fear that UP/SP will reroute trains via the north-south line through Sedgwick/Wichita, thus increasing the occasions on which highway traffic is blocked at 26 grade crossings on busy arterial streets in Sedgwick County, and particularly in Furley, Kechi, Wichita, and Haysville. Sedgwick/Wichita, which claims that the cost of constructing over/under-passes is prohibitive and which asks that we impose a condition barring any increase in the number of trains operating daily through Sedgwick/Wichita, suggests two alternative routings that UP/SP could utilize. One alternative would require UP/SP to secure trackage rights over BNSF's Topeka-Wellington (via Emporia, Ellinor, El Dorado, and Mulvane) line, which connects with UP at Topeka and Wellington but which bypasses Furley, Kechi, Wichita, and Haysville. A second alternative would require UP/SP to continue to route UP's trains via Kansas City, thereby avoiding Sedgwick/Wichita altogether.

The City of Abilene (Abilene) is concerned that it will be negatively impacted by an anticipated post-merger increase in UP train traffic passing through Abilene.

MINNESOTA. *The Minnesota Department of Transportation (Mn/DOT)* supports the merger provided that UP provides assurances: (1) that the car supply to shippers on UP lines and shortlines in Minnesota will be improved and given special consideration during each harvest season; (2) that switching at Winona, MN, will be improved, preferably by giving DM&E switching rights or the right to buy the trackage to serve the Winona grain elevators; (3) that certain geographic restrictions on traffic in the Roseport Terminal will be lifted;

(4) that, to alleviate competitive problems in Minnesota, the Southwest, and the West, and on routes to Mexico, additional agreements, including agreements respecting joint track ownership with other carriers, will be negotiated; and (5) that UP will honor its commitments regarding line sales, abandonments, and employment in Minnesota.

ARKANSAS. *Attorney General Bryant* is concerned that Arkansas will experience competitive problems due to a 2-to-1 reduction in the number of Class I railroads serving the vast majority of the state, and also will lose jobs on account of the shutdown of redundant lines, reductions in service on other lines, and the closing of machine shops, yards, and car and locomotive facilities. The Attorney General, arguing that the BNSF agreement does not solve the competitive problems that the merger would create, contends that UP/SP should be required either to divest certain lines, particularly the line between Chicago and Texas, or to reach another arrangement whereby a competing Class I railroad will have access to those lines.

WASHINGTON. *The Washington Department of Transportation (Wa/DOT)* is skeptical that BNSF will be a viable competitor in the Central Corridor, and contends that acquisition of a Central Corridor line by a regional or a shortline may produce more effective competition, prevent abandonments, and offer Washington shippers an alternative route. Wa/DOT therefore suggests that we consider a conditional grant of the BNSF agreement's Central Corridor trackage rights, and that we retain jurisdiction to order divestiture, joint ownership, or third carrier trackage rights if BNSF fails to provide adequate competition.

IOWA. *The Iowa Department of Transportation (Ia/DOT)* fears that there will be a reduction in competition in the corridor connecting Iowa to Gulf Coast ports and Mexican gateways, and claims that, even with the BNSF and IC agreements, UP/SP will still dominate the corridor for many types of freight movements important to Iowa. Ia/DOT therefore supports the merger provided that conditions are imposed requiring the grant of further trackage rights or line sales to a third Class I carrier to reduce potential UP/SP market dominance in that corridor.

UTAH. *Governor Leavitt* supports the merger but seeks certain conditions: (1) to create a competitive environment, a reduction in the BNSF trackage rights fee from 3.0 mills to 2.5 mills; (2) to emulate (or provide a surrogate for) a competitive environment, a requirement that there be an annual audit, paid for by UP/SP, of rail rates in similar rail markets that enjoy the benefits of intramodal competition (it being understood that, if the audit reveals that rates charged shippers in similar markets are higher than UP/SP rates charged Utah

shippers, UP/SP would be required to provide refunds to affected Utah shippers); and (3) to preserve our jurisdiction in this matter, the establishment of oversight for at least 15 years.

LABOR PARTIES. Statements respecting the proposed merger have been filed by various labor parties.

ALLIED RAIL UNIONS. The American Train Dispatchers Department (ATDD),[80] the Brotherhood of Maintenance of Way Employees (BMWE), and the Brotherhood of Railroad Signalmen (BRS), participating collectively as the Allied Rail Unions (ARU), contend that the merger should be rejected for a variety of reasons: because thousands of jobs will be lost; because applicants intend to abrogate or modify existing collective bargaining agreements (CBAs), and thereby to effect massive changes in the rules and working conditions of UP/SP employees, by bypassing the procedures required by the Railway Labor Act (RLA); because the merger will reduce competition, and allow UP/SP and BNSF to engage in collusive behavior, throughout the West; and because, given the impact on workers and on competition, SP's financial problems do not justify approval. ARU asks that we condition any approval of the merger by imposing both the conditions set forth in *New York Dock,* 360 I.C.C. at 84-90, and the additional conditions described below.

Conditions Requested: Scope of 49 U.S.C. 11341(a). ARU asks us to hold that the scope of the immunity applicable to the merger is limited to actions taken to actually consummate the financial aspects of the merger (the acquisition of control of SP, the common control of UP and SP, and the merger of UP and SP), and that Article I, Section 2 of the *New York Dock* conditions will prevent UP/SP from using 49 U.S.C. 11341(a) to abrogate, modify, or "rationalize" existing CBAs. Alternatively, ARU asks us to hold that the scope of the immunity applicable to the merger is limited to actions specifically set forth in the application and the proposed operating plan. In either instance, ARU also asks us to state specifically that approval of the merger does not amount to approval of applicants' plans to abrogate, modify, or "rationalize" existing CBAs.

Conditions Requested: Cherry-Picking. ARU suggests that, if we believe that "rationalization" of CBAs is inherently a part of our approval of the merger, we should order that any such "rationalization" should be accomplished by allowing UP/SP's unions to "cherry-pick" from existing UP or SP agreements

[80] ATDD is a Department of the Brotherhood of Locomotive Engineers (BLE).

(*i.e.*, by allowing the unions to select from among the provisions in the CBAs now in effect on the railroads involved in the merger).

Conditions Requested: Reimbursements To SP Employees. ARU, noting that between 1991 and 1995 various SP unions made wage concessions in connection with SP's financial difficulties, and further noting that SP wages did not return to the national levels until after 1995, maintains that, if shareholders are to be rewarded for their investments in SP, it is only fair that union members should similarly benefit from the merger at least to the extent of repayment of their investments (their forgone lump sum payments and their deferred wage increases).

Conditions Requested: Pre-Implementation Agreement. ARU, viewing the BNSF agreement as a part of the merger, contends that we should require BNSF to be made a co-applicant in the Finance Docket No. 32760 lead proceeding, or, in the alternative, that we should impose the *New York Dock* conditions on the trackage rights provided for in the BNSF agreement. ARU insists that only imposition of the *New York Dock* conditions on the trackage rights provided for in the BNSF agreement will provide full protection for employees, by allowing for a comprehensive implementing arrangement prior to implementation of the trackage rights.[81]

Conditions Requested: Hiring Preference. ARU suggests that, if we do not impose the *New York Dock* conditions on the trackage rights provided for in the BNSF agreement, we should at least modify the hiring preference provision in the BNSF agreement (which provides for a form of hiring preference for work on, or related to, the trackage rights lines and the acquired lines). The modifications ARU has in mind would be patterned upon the *New York Dock* conditions, and would make the preference mandatory and subject to negotiations with the unions.

Conditions Requested: Contracting Out. ARU also asks that we require UP/SP and BNSF to utilize bargaining unit maintenance of way employees and signalmen for all merger-related track, right-of-way, and signal construction and rehabilitation work. This is work, ARU claims, that employees represented by BMWE and BRS historically have done and that they are fully capable of doing; but ARU fears that, although such work is required to be done by such

[81] In Decision No. 30 (served April 18, 1996), we denied ARU's ARU-8 motion seeking the designation of BNSF as a co-applicant, but without prejudice to ARU's right to continue to argue that the *New York Dock* conditions should be imposed on the trackage rights provided for in the BNSF agreement.

employees under their scope rules and past practice, applicants may nevertheless attempt to contract out such work.

Conditions Requested: Annual Reports. ARU, noting that applicants claim that the merger will generate public benefits, asks that we require UP/SP to submit annual reports demonstrating how the forecast benefits in the area of cost-savings (including labor costs) are utilized, and how much is either (a) passed on to shippers through rate reductions or deferred rate increases, (b) reinvested, (c) distributed to shareholders, (d) paid in executive salaries and bonuses, or (e) shared with employees.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS. IBT requests that any approval of the merger be conditioned by requiring UP/SP to divest three subsidiaries, to grant *New York Dock* protection to the employees of a fourth subsidiary, and to file semi-annual reports regarding diversion of truck cargoes.

Overnite Transportation Company, Pacific Motor Transport Company, and Southern Pacific Motor Trucking Company. IBT notes that 49 U.S.C. 11344(c) provides, in part, that we can approve a 49 U.S.C. 11343 transaction in which a railroad or an affiliate is an applicant and in which a motor carrier is involved only if, among other things, the transaction will enable the rail carrier to use motor carrier transportation to public advantage in its operations. IBT therefore contends that we cannot approve common control of UP/SP and the three motor carrier subsidiaries because applicants, having indicated that they intend to keep Overnite and PMT independent and SPMT inactive, have made clear that they will not use these motor carriers in furtherance of UP/SP's rail operations. IBT adds that, because such common control cannot be approved under 49 U.S.C. 11344, it certainly cannot be exempted under 49 U.S.C. 10505; 49 U.S.C. 10505(g), IBT notes, provides that the 49 U.S.C. 10505 exemption authority cannot be used to authorize intermodal ownership that is otherwise prohibited. IBT therefore concludes that we must either disapprove the UP/SP merger or order the pre-merger divestiture of the three motor carriers (although IBT allows that, inasmuch as SPMT is currently inactive, we could condition UP/SPMT common control by requiring that any future SPMT operations be auxiliary to UP/SP rail operations).

Union Pacific Motor Freight Corporation. IBT, noting that applicants have not sought authorization for common control of SP and Union Pacific Motor Freight Corporation (UPMF, an MPRR subsidiary), concludes that applicants must believe that UPMF is a railroad company rather than a motor carrier company, which would mean (IBT indicates) that UPMF employees would be

entitled to mandatory labor protection under 49 U.S.C. 11347. UPMF employees, IBT adds, should be entitled to mandatory labor protection because they are engaged almost exclusively in supporting rail operations within rail yards, and they are therefore "rail employees" for the purposes of 49 U.S.C. 11347. The tasks performed by these employees, IBT maintains, fall into three basic categories: (1) ramp drivers ("hostlers") and groundmen who move trailers and containers within rail yards and assist with such movements; (2) crane operators who load and unload containers from trains; and (3) mechanics who repair trailers and other UP equipment. IBT insists that, because the jobs currently performed by UPMF employees are unique to the railroad industry, these employees (unlike over-the-road truck drivers) possess skills that are not generally marketable outside the railroad industry and would therefore have difficulty finding comparable employment elsewhere. Recognizing that we may determine that UPMF employees are not entitled to mandatory *New York Dock* labor protection under 49 U.S.C. 11347, IBT asks in the alternative that we impose *New York Dock* protection in favor of UPMF employees as an exercise of our discretionary power under 49 U.S.C. 11344(c).

Diversion Reports. Applicants, IBT notes, claim that UP/SP will divert significant volumes of cargo from over-the-road truck carriage to rail. These diversions, IBT insists, may harm the public interest because they may be obtained in part by non-compensatory pricing, and because, even if not so obtained, they will result in significant job losses in the motor carrier industry. To provide a mechanism for monitoring competitive impacts on the rail and motor carrier industries and on services to shippers, IBT requests that we condition any merger approval by requiring UP/SP to file semi-annual public reports indicating the volume of traffic diverted from truck carriage and the rate of return (ratio of revenue to fixed costs) for such cargo.

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION. TCU fears that the merger will have broad anticompetitive effects; a merged UP/SP, TCU claims, will monopolize rail traffic in much of the West, will control virtually all traffic to and from Mexico, and will dominate the transportation of particular products including coal, plastics, and petrochemicals. The claim that SP will fail without the merger, TCU insists, is not valid; SP, in TCU's view, simply does not face the distinct likelihood of insolvency. With respect to labor impacts, TCU contends that the merger should be denied on account of the disproportionate impact it will have on employees who either work in certain crafts (especially the clerical craft) or reside in certain states (in particular, California). And experience teaches, TCU adds, that the actual

number of jobs lost will far exceed the estimates provided by applicants. TCU insists that, if the merger is approved, it should be made subject to the standard *New York Dock* conditions.

TRANSPORTATION TRADES DEPARTMENT. The Transportation Trades Department (TTD) opposes the merger, which it asserts: threatens competition, represents an unnecessary consolidation of market power, and will result in significant job losses and dislocation within and outside the rail and motor carrier industries. The merger, TTD adds, will not only combine the rail components of UP and SP, it also will combine their motor subsidiaries, which will lead to the overall consolidation of the motor carrier industry in the West as well as possible collusive behavior by and between UP/SP rail and trucking interests. TTD, which supports the conditions requested by ARU, IBT, and TCU, insists that we should condition any approval of the merger with adequate labor protections. In many instances, TTD adds, *New York Dock* benefits are not sufficient (TTD mentions in particular the case where an employee chooses not to accept a transfer assignment), and TTD therefore contends that we should award UP/SP's rail and motor employees protective conditions that go beyond *New York Dock*. And, TTD adds, we should not allow applicants to abrogate or modify CBAs through the misapplication of 49 U.S.C. 11341(a). That, TTD maintains, would amount to a seizure of private contract rights under the pretense that CBAs are an impediment to the successful consummation of an approved railroad transaction.

UNION LOCALS. *John D. Fitzgerald,* a United Transportation Union (UTU) general chairman for certain BN lines, opposes the merger movement in the Western District (the consolidation of the four major carriers into two, BNSF and UP/SP), and urges us to consider the UP/SP merger on a consolidated basis with a reopened BN/SF merger proceeding. Mr. Fitzgerald also opposes the provision in the BNSF agreement in the present proceeding that involves the grant to UP/SP of trackage rights between Saunders, WI, and Superior, WI (overhead rights only, with access to MERC Dock in Superior), and over the Pokegama connection at Saunders. These rights, Mr. Fitzgerald fears, will enable UP/SP to divert traffic from BNSF, and will therefore adversely affect BN employees; and he therefore requests that BN employees adversely affected by the Sub-No. 1 trackage rights receive full *New York Dock* protection, including an implementing agreement with UP/SP and its employee organizations.

Charles W. Downey, a UTU general chairman for lines of SPCSL and GWWR,[82] fears that the agreement applicants entered into with GWWR, by altering radically the present work arrangements applicable to SPCSL and GWWR operations, will wreak havoc upon the rights of persons employed by SPCSL and GWWR in the Chicago-St. Louis territory of the former Chicago, Missouri & Western Railway Company (CMW).[83] Mr. Downey, fearing that certain work now performed by SPCSL employees will be transferred to GWWR, insists that fairness to employees of both carriers requires that an implementing agreement be arrived at for the GWWR agreement prior to consummation of the UP/SP merger, and that the GWWR agreement be subject to the full reach of the *New York Dock* conditions.[84]

Clarence R. Ponsler, a UTU general chairman for the Alton & Southern, fearing that the operations envisioned by applicants would create havoc for personnel employed by the A&S, urges the denial of the merger and the Sub-No. 3 petition.

Joseph C. Szabo, UTU's Illinois legislative director, urges denial of the three proposed Illinois abandonments.

---

[82] Mr. Downey's late-filed statement was accompanied by his CWD-1 petition for leave to intervene and to become a party of record. The petition will be granted.

[83] Mr. Downey contends, among other things, that the present work arrangements were "passed upon" by the ICC in its decision in *Rio Grande Industries, Inc. et al.--Purchase and Trackage Rights--Chicago, Missouri & Western Railway Company Line Between St. Louis, MO and Chicago, IL,* Finance Docket No. 31522 (ICC served October 31, 1989) (slip op. at 2-3). "Passed upon" is not an accurate characterization; the ICC simply noted that certain arrangements were consistent with the conditions it had imposed in approving the acquisition, by SPCSL, of CMW's Chicago-St. Louis line.

[84] In their UP/SP-250 response to Mr. Downey's comments, applicants contend: that nothing in the GWWR agreement alters the allocation of switching responsibility between GWWR and SPCSL in the Granite City, IL, area; that the GWWR agreement does not transfer to GWWR responsibility for serving the Alton Branch, but merely commits the parties to evaluate such a transfer, and that SPCSL personnel affected by any such future transfer will receive labor protection; and that the GWWR agreement merely preserves the status quo by nullifying a provision of the 1989 GWWR/SPCSL arrangement under which operating responsibilities would change if GWWR were acquired by a Class I railroad. With respect to Mr. Downey's request that we require that an implementing agreement be arrived at for the GWWR agreement prior to consummation of the UP/SP merger, applicants contend that no implementing agreement is needed at all because nothing in the GWWR agreement will change existing operations. And, with respect to Mr. Downey's request that New York Dock be applied to the GWWR agreement, applicants contend that, if any of the operating changes that concern Mr. Downey are ever implemented, adversely affected SPCSL employees will be fully covered pursuant to the standard labor protective conditions that applicants expect will be imposed in this proceeding.

Dan Potoshnik, the secretary of BLE's Division 892 (UP lines in the Seattle area), fears that, in connection with the merger, work that could be done by Division 892's members will be diverted to BNSF.

FEDERAL PARTIES. DOJ, DOT, DOD, USDA, and DOL have submitted comments in this proceeding.

UNITED STATES DEPARTMENT OF JUSTICE. DOJ contends that the merger would have 3-to-2 or 2-to-1 impacts in hundreds of traffic corridors throughout the West, involving such commodities as wood products, intermodal freight, agricultural products, iron and steel, and plastics. The BNSF agreement, DOJ notes, will not remedy the loss of competition in any 3-to-2 market, and, DOJ adds, for various reasons (including an excessive compensation rate, inadequate guarantees to ensure service quality, and other factors that reduce BNSF's incentive to compete using the trackage rights provided for in the BNSF agreement), BNSF is unlikely to be an effective competitor even in the 2-to-1 corridors. The BNSF agreement, DOJ insists, is simply an inadequate remedy, and its flaws cannot be corrected by imposing oversight conditions or monitoring. And the merger-related efficiencies claimed by applicants, DOJ adds, are vastly overstated, and, in any event, are not enough to outweigh the probable anticompetitive effects of the merger. The claims that an independent SP would not be a viable competitor, DOJ argues, are unfounded. SP, DOJ claims, is not a failing firm within the well-established antitrust definition; it has successfully raised capital in recent years; its operations have already shown some improvement; and, absent a merger, it is likely to have other sources of funding for capital expenditures, including improved cash flow from operations, potential additional borrowing and lease financing, and additional real estate sales proceeds. And, DOJ adds, there are alternatives to the proposed merger that SP has not even explored, including a sale of itself in whole or in pieces to a company other than UP. DOJ therefore concludes that the merger should be denied.

DOJ asserts that, if the merger is approved, the competitive problems that will result can be adequately remedied only with extensive divestitures that will allow a new competitor access to markets where shippers would otherwise face a monopoly or a duopoly. DOJ insists that the divestitures must include, at the very least: (1) one of the two parallel north/south routes from the Gulf Coast to the eastern gateways, specifically the routes radiating from Houston, north through Little Rock and Memphis to St. Louis; east to New Orleans; west to San Antonio; and south to Brownsville; (2) one of the two Central Corridor routes

from Oakland through Salt Lake City and Denver to Kansas City; and (3) sufficient lines to preserve a third independent competitor between Los Angeles and the eastern gateways, particularly Chicago. And, DOJ adds, all of these divestitures must be to a carrier other than BNSF, which otherwise would be the only competitor of the merged UP/SP throughout the West.

UNITED STATES DEPARTMENT OF TRANSPORTATION. DOT believes that the largely "parallel" UP/SP merger will substantially reduce competition in large regions of the country. DOT's concern, however, is not with anticompetitive harms of the 3-to-2 variety; two independent railroads, DOT believes, are usually sufficient to maintain vigorous competition. DOT's concern, rather, is with anticompetitive harms of the 2-to-1 variety. The BNSF agreement, DOT concedes, addresses such harms, but DOT contends that the agreement is flawed because the trackage rights provided for in the agreement will not allow BNSF to conduct a completely independent operation on an equal footing. Trackage rights, DOT acknowledges, may allow for two-railroad competition in other circumstances (if traffic volumes are lower and distances are shorter, and if there are, ultimately, other suitable railroads), but DOT insists that, in the circumstances of this case (where the traffic volumes are huge and the distances involved are enormous, and where there is no other remotely comparable railroad in the West), the trackage rights provided for in the BNSF agreement are simply inadequate. And, DOT adds, BNSF's stance in this proceeding raises questions about the seriousness of its intentions to compete aggressively. DOT therefore opposes the merger unless we impose conditions to require: in the Texas Corridors (from Houston west to Eagle Pass, north to Memphis, east to New Orleans, and south to Brownsville; and from Dallas south to San Antonio), that one of the parallel lines be divested.[85] DOT's preferred solution in the Central Corridor (from the Bay Area to west of Denver) is to strengthen the BNSF trackage rights rather than requiring divestiture of one of the parallel lines.[86]

---

[85] The divestiture DOT envisions will require that UP/SP retain access from San Antonio to Eagle Pass through haulage or trackage rights and, on the Placedo-Brownsville segment, will require only the transfer of SP's trackage rights.

[86] DOT contends that divestiture is not the optimal solution in the Central Corridor principally because the segment from the Bay Area to Salt Lake City generates relatively little traffic of its own, and is thus dependent on overhead freight. DOT argues that only applicants and BNSF, and not MRL, have sufficient gathering lines to operate as effective Central Corridor competitors. DOT therefore argues against Central Corridor divestiture and urges that, if the

(continued...)

UNITED STATES DEPARTMENT OF DEFENSE. DOD notes that the American rail network is an important element of the national defense transportation infrastructure, and that UP and SP (which together serve 46 DOD facilities) are two of the railroads whose lines have been included in the Strategic Rail Corridor Network (the network of commercial rail lines that have been deemed important to national defense). DOD, noting that UP/SP would continue to provide rail service to these DOD facilities, indicates that the merger would therefore be compatible with a strong national defense transportation infrastructure. DOD further indicates that the proposed abandonments would not adversely impact either specific DOD installations or the Strategic Rail Corridor Network. DOD, however, is concerned about the 2-to-1 impact at six DOD installations: Pine Bluff Arsenal, at Pine Bluff, AR; Red River Army Depot, at Defense, TX; Lone Star Army Ammunition Plant, at Defense, TX; Sierra Army Depot, at Herlong, CA; Sharpe Army Depot, at Lyoth, CA; and Defense Depot Tracy, at Lathrop, CA. DOD concedes that the BNSF agreement provides that BNSF will be able to provide competitive service to all 2-to-1 customers, via either trackage rights, haulage, ratemaking authority, or other mutually acceptable means, and DOD further concedes that the BNSF agreement allows BNSF to serve the Pine Bluff Arsenal. DOD claims, however, that the BNSF agreement specifically precludes BNSF access via trackage rights to Defense, TX, and Herlong, CA, and that the agreement appears not to include the trackage rights necessary for BNSF to serve Sharpe Army Depot and Defense Depot Tracy. DOD adds that it has not yet worked out with UP/SP the specifics of how BNSF (or another railroad) will actually provide competitive access at the five installations not provided for in the BNSF agreement. Such specifics, DOD insists, should be in place prior to approval of the merger.

(...continued)

merger is approved, the BNSF Central Corridor trackage rights be strengthened in a fashion that will make BNSF less of a "tenant" and more of a "landlord." DOT suggests, in particular, that the BNSF trackage rights be modified by: establishing a two-tier trackage rights fee, with both an up-front "fixed fee" (for fixed costs) and a usage fee (for variable costs); preserving build-in/build-out and transloading options along the entire stretch of trackage rights without time limit; and requiring UP/SP to open its contracts with Central Corridor shippers at 2-to-1 points until BNSF has access to 50% of the traffic. DOT also suggests that we should establish in advance formal annual procedures to review the effectiveness of the trackage rights so modified, and be prepared to order divestiture or transfer of the modified trackage rights to another railroad.

UNITED STATES DEPARTMENT OF AGRICULTURE. USDA is concerned that the merger will allow UP/SP and BNSF to dominate the West, and is concerned in particular that these two railroads will control all movements of wheat from the Lower Plains States (Kansas, Oklahoma, and Texas) to Gulf ports and Mexican gateways. The BN/SF merger, USDA claims, reduced competition for many shippers in the Lower Plains, and USDA fears that a UP/SP merger also will reduce competitive options and alternatives for many shippers in this region. A UP/SP merger, USDA adds, also has the potential to affect adversely U.S. competitiveness in foreign trade, particularly to export points on the Gulf, Pacific Coast, and Mexican gateways. USDA therefore opposes the merger.

UNITED STATES DEPARTMENT OF LABOR. Preserving competition in the already concentrated rail industry, DOL indicates, is vital to businesses and communities and ensures continued job opportunities for railroad employees, and DOL therefore urges us to examine the impact that the merger will have on rail, motor, and other employees and on the communities in which they live.

ABANDONMENT FILINGS NOT PREVIOUSLY REFERENCED. We turn now to filings not previously referenced respecting the 17 line segments for which applicants seek abandonment (in some instances, abandonment and discontinuance) authorization.

General Comments: RTC. Rails to Trails Conservancy (RTC) asks that we impose: conditions to maximize opportunities to preserve rail corridors for rail banking, interim trail use, and other compatible public uses; and appropriate public interest, public use, environmental, and historic preservation conditions as well. Without such conditions, RTC warns, approval of the merger would constitute a major federal action with significant adverse environmental impacts, and would therefore require the preparation of an environmental impact statement (EIS). RTC also suggests that, because operations are likely to continue for some time on many of the lines for which abandonment authorization has been sought, it would be prudent to issue CITUs and NITUs (Certificates and Notices of Interim Trail Use or Abandonment) not for the customary 180 days (subject to extension) but instead for a 2-year period. RTC therefore requests that we impose on all merger-related abandonments two conditions, each effective for a period of 180 days following the date UP/SP actually ceases to use the relevant line and otherwise consummates an abandonment: (1) a condition preserving our jurisdiction to issue rail banking or other appropriate orders; and (2) a condition barring UP/SP from disposing

of or otherwise transferring (other than for public use) any real estate interests, bridges, culverts, or similar structures.[87]

General Comments: Applicants. With respect to the Colorado abandonments, applicants state that they are willing to negotiate trail use (i) with the State of Colorado or its designees, and (ii) with any other parties that have filed trail use requests, so long as the State of Colorado is agreeable to negotiations with such parties. With respect to the non-Colorado abandonments, applicants state that they are willing to negotiate trail use for all of the lines covered by trail use requests with any or all of the parties that have made the requests.

Colorado Abandonments. Statements respecting the Towner-NA Junction, Sage-Malta-Leadville, and Malta-Cañon City abandonments have been submitted by various parties. The City of Florence, the Transportation Committee of Colorado Counties, Inc., and CLUB 20 (a Western Colorado coalition of counties, communities, businesses, and individuals) claim that these abandonments would have a devastating impact in an area that relies heavily on rail. The City of Florence therefore requests that we condition any approval of the merger by requiring: (1) that the transcontinental main line through this corridor be retained (perhaps by divestiture to another railroad); (2) that UP/SP provide a 24-month period following final merger approval to allow state, local, and private entities to formulate a plan for the corridor and to secure financing for the purchase of the track and improvements; and (3) that UP/SP grant the State of Colorado or its subdivisions a right of first refusal for the purchase of the corridor. The City of Fruita, which is concerned that the abandonments will result in a massive loss of railroad and related jobs now based out of Grand Junction, asks that we reject the merger unless UP/SP retains all existing jobs and rail service in the Mesa County/Grand Junction area. The Colorado Rail Passenger Association supports the merger but opposes the Colorado abandonments, and asks that we require UP/SP to sell the abandonment lines to interested buyers.

A statement respecting the three Colorado abandonments was submitted jointly by the U.S. Department of Agriculture, Rocky Mountain Region, and the U.S. Department of the Interior, Bureau of Land Management, Colorado State Office (collectively, the Agencies). The Agencies note that, upon abandonment,

---

[87] Madison County Transit (MCT) supports the two public interest conditions requested by RTC.

the United States will acquire, by reversion, much of the right-of-way of the three Colorado lines. The Agencies therefore request that we impose on these abandonments certain conditions requiring the Railroad: (1) to resolve title encumbrances (*i.e.*, clouds on title) unacceptable to the United States; (2) to inventory all utilities, fiber optic cables, and other linear uses within the rights-of-way, and to notify the owners/managers of these uses that they must apply for authorization for any portion of the right-of-way crossing National Forest System lands or Public Lands; (3) to assess and remediate hazardous materials and toxic spills along the three corridors, as necessary; (4) to clear the rights-of-way of any trash and discarded or abandoned equipment, including railroad ties, lights, and switches; (5) to inventory and classify, in consultation with the Agencies, all bridges, crossings, and culverts for retention for public use or removal by the Railroad; (6) to include a statement in any deed or transfer of property to a salvage operator or entity, that the transfer does not include any lands or interest in lands owned by the United States; and (7) to obtain concurrence from the State Historic Preservation Officer or provide a formal Determination of Eligibility for historic site evaluation.

Towner-NA Junction Line (Colorado). Of all the abandonments proposed in this proceeding, the Towner-NA Junction abandonment has generated by far the most intense opposition, and the intensity of this opposition has been greatest in Kiowa County. Statements protesting the Towner-NA Junction abandonment have been filed by, among others, the Kiowa County Board of County Commissioners, Kiowa School District No. Re-2, the Town of Eads, the Town of Haswell, and numerous individuals, including, but by no means limited to, many members of Kiowa County WIFE (Women Involved in Farm Economics) Chapter #124. The abandonment, it is argued, will have a devastating effect on economic activity in Kiowa County because farmers and grain elevators rely entirely upon this line for shipment of grain to market. The direct loss of tax revenue, it is further argued, will severely cripple all local government operations, including the schools (Plainview School, for example, which is one of only two schools in Kiowa County and which has an enrollment, for kindergarten through 12th grade, of approximately 86 students, stands to lose $75,288 annually if the Towner-NA Junction Line is abandoned). Roughly 20% of Kiowa County's tax revenue is derived from the rail line and rail usage, and other local governments within the County also are funded, in some measure, by the rail line (the Town of Haswell, for example, which has an annual budget of $35,000, fears the loss of its $1,000 annual rail assessment). Parties in Kiowa County generally urge the denial of both the merger and the abandonment,

although a few ask, in the alternative, that the abandonment, if approved, be delayed to allow local communities time to respond to the loss of rail service and tax revenue.

Opposition to the Towner-NA Junction abandonment also has been expressed by parties based in Crowley County, including the Crowley County Board of County Commissioners and the Towns of Crowley and Olney Springs. These parties argue that the abandonment will have a devastating economic impact in Crowley County, both in terms of rail service (because local feedyards depend on rail) and in terms of tax revenue (Crowley County fears the loss of the roughly 15% of its tax revenue that is derived from this line; the Town of Crowley fears the loss of 36% of its own tax base). Opposition to the Towner-NA Junction abandonment also has been expressed by parties based outside of Kiowa and Crowley Counties, including the Prowers County Board of County Commissioners, which maintains that the rail line is a vital economic link for all of Southeast Colorado. The abandonment of the line, it is argued, will lead to a decline in economic activity, which will cause at least some local businesses to close and some local residents to leave, and the loss of even a part of the tax base may cause a deterioration of the services provided by local governments at all levels.

Trails Act statements[88] respecting the Towner-NA Junction Line have been filed by RTC and by the State of Colorado, acting by and through its Parks and Recreation Department.

Tennessee Pass Line (Colorado). Applicants generally address the Sage-Malta-Leadville and Malta-Cañon City Lines separately (and have filed a petition respecting the former and an application respecting the latter), but numerous parties have addressed them as a package. As previously noted, we refer to the two lines collectively as the Tennessee Pass Line.

The Town of Avon insists: that the Tennessee Pass Line is a single continuous line; that segmentation of the administrative process into a petition and an application is artificial and serves only to subject the Sage-Malta-Leadville abandonment to less vigorous scrutiny than the Malta-Cañon City abandonment; and that less vigorous scrutiny of the former is not in the public interest because that segment is the more environmentally sensitive of the two. The Town of Avon further insists that parties: should be permitted to produce

---

[88] A "Trails Act statement" is a 49 CFR 1152.29 statement of willingness to assume financial responsibility for interim trail use.

evidence concerning the impact on state and local highways and roads that will result from rail-to-truck diversions caused by the Sage-Malta-Leadville abandonment; and should be afforded the opportunity to contravene the claims made by SPT and DRGW that the Sage-Malta-Leadville Line is economically non-viable. The Town of Avon therefore urges that the Sage-Malta-Leadville petition be denied, that the Tennessee Pass Line be treated as the single entity that it is, and that the entire line be the subject of the application heretofore filed with respect to the Malta-Cañon City segment.

The Upper Arkansas Area Council of Governments, composed of Chaffee, Lake, Fremont, and Custer Counties and all local municipalities, opposes the Tennessee Pass abandonment and asks that we condition any approval thereof by requiring UP/SP: to offer the entire line for sale as a unit; if negotiations for sale are unsuccessful, to rail bank the line; and to leave the track in place (on the Tennessee Pass Line and also on the Towner-NA Junction Line) for 24 months after approval of the merger. Similar positions have been taken separately by Fremont and Chaffee Counties, although Chaffee County also has requested: if the Tennessee Pass Line is either abandoned or rail banked, that UP/SP be required to perform an Environmental Assessment and to implement a plan for removal of all hazardous waste, and that bonding be required in connection therewith; and, in order to replace lost property taxes, that UP/SP be required to establish a trust fund of not less than $1,750,000, with the revenue therefrom to be apportioned to Chaffee County, the Town of Buena Vista, the City of Salida, and all affected special districts.

Abandonment of the Tennessee Pass Line is opposed also by various additional parties, including E.R. Jacobson (co-owner of the family ranching enterprise known as Deep Creek Ranch) and AA#1 Limited Liability Company, who contend that local traffic does in fact move on the Tennessee Pass Line and that an abandonment will therefore hurt local shippers. The Tennessee Pass abandonment is opposed also by E.W. Wotipka, who concedes that local traffic is probably insufficient to justify the line's continued existence but who contends that it is unwise to destroy a viable alternative main line on short-term grounds in the face of rapidly changing and unpredictable economic conditions. The Tennessee Pass Line, he argues, is a well-maintained, fully-signalled, CTC controlled main line that has operated, 3% grade and all, in competition with UPRR for more than a century. Eagle County, Lake County, and the Towns of Red Cliff, Minturn, Vail, Avon, Eagle, and Gypsum state that they will make an Offer of Financial Assistance (OFA) to purchase the Tennessee Pass Line.

RTC notes that there are two Superfund sites along or near the Sage-Malta-Leadville Line (the California Gulch Superfund Site in Leadville, and the Eagle Mine Superfund Site in Minturn) and another Superfund site along or near the Malta-Cañon City Line (the Smeltertown Superfund Site in Salida). RTC further notes that UP/SP will own an interest in certain slag piles at Leadville which may contain toxic material, and that some material from the slag piles may have been used as ballast on the line. RTC maintains that, because the presence of Superfund sites or known toxic contamination can be detrimental (in terms of the legal implications) to all parties in the context of an abandonment proceeding, some baseline information is vital to ensure that a timely rail banking arrangement can be reached. RTC therefore requests the issuance of a condition to require that UP/SP, within 180 days of abandonment authorization, provide the State of Colorado and RTC a Phase I environmental survey (prepared by an independent third entity) identifying all possible toxic contamination on the corridor. RTC adds that, should the Phase I survey report indicate potential problems, further site-specific sampling may be necessary to characterize such problems as exist or to verify that no problems exist.

The Colorado Department of Public Health and Environment (CDPHE) and the United States Environmental Protection Agency, Region VIII (Region VIII or EPA Region VIII), which, like RTC, are interested in Tennessee Pass environmental matters, request that UP/SP be required to perform, prior to approval of the abandonment, a "remedial investigation" to determine the nature and extent of contamination at and emanating from the line along the entire Tennessee Pass corridor.

The Leadville Coalition, representing the Lake County Board of Commissioners, the City of Leadville, and various other local interests, has indicated its concerns regarding the California Gulch Superfund Site and other sites as well. The Coalition, believing that further risk assessment addressing contemplated uses of the Tennessee Pass Line is necessary, asks that we defer a decision on the merger and the abandonments until a complete Consent Decree and a Final Record of Decision are entered by the Environmental Protection Agency (EPA).

Sage-Malta-Leadville Line (Colorado). Trails Act statements respecting the Sage-Malta-Leadville Line have been filed by RTC and by the State of Colorado, acting by and through its Parks and Recreation Department. Vail Associates, Inc. (Vail), which operates ski resorts in the vicinity of the Sage-Malta-Leadville Line, envisions that the line might be used, in whole or in part,

for passenger service and/or as a trail; and, to this end, Vail has filed a Trails Act statement and also has indicated an intent to acquire the line, in whole or in part, under OFA procedures.

Viacom International Inc. (Viacom) indicates that it is performing an environmental cleanup at the Eagle Mine site, several portions of which are adjacent to the Sage-Malta-Leadville Line. Because of the proximity of the line to the site, and Viacom's need to use and/or cross DRGW/SPT property to access the site, Viacom requests that certain conditions be imposed on any abandonment or discontinuance (and also on any divestiture or sale to another railroad). (1) Viacom indicates that any action we take must be conditioned to preserve Viacom's access to the Eagle Mine site as well as its ability to perform required sampling and monitoring. Viacom also requests the opportunity to participate in any discussions concerning the final disposition of the railroad property in the area of the Eagle Mine site. (2) Viacom believes that any trail use in the Eagle Mine site area must be conditioned so that the remedial actions that have been accomplished at that site are protected from public interference. There are, Viacom notes, numerous pumps, culverts, and other water management facilities located in the Eagle River Canyon in and near Belden, and it is critically important that these facilities not be disturbed or interfered with by curious hikers. The most practical solution, Viacom indicates, would be to avoid placing a public access trail along the right-of-way in the canyon.

Malta-Cañon City Line (Colorado). The Malta-Cañon City abandonment has been protested by Colorado State Rep. Ken Chlouber, who fears that this abandonment will have an adverse impact on the economy in the region as well as in the State of Colorado as a whole. Rep. Chlouber indicates that the rail line provides the only practical means for transporting ore out of the mountains; the local two-lane highway, he adds, is not large enough to accommodate truckloads of ore; and the abandonment of this line will thus cripple the local mining industry. Royal Gorge Scenic Railway, a narrow gauge tourist railway, has indicated its interest in running a tourist railroad along the 10-mile route from Cañon City through the Royal Gorge to the Parkdale Siding. Trails Act statements respecting the Malta-Cañon City Line have been filed by RTC and by the State of Colorado, acting by and through its Parks and Recreation Department.

Hope-Bridgeport Line (Kansas). The Hope-Bridgeport abandonment has been protested by William Schwarz, who asks that a public hearing be held in the Salina area, and who notes that, if the line is abandoned, farmers will no longer be able to ship by rail from the local elevator. Trails Act statements

respecting the Hope-Bridgeport Line have been filed by RTC and by the Serenata Farms Equestrian Therapy Foundation (SFETF).

Barr-Girard Line (Illinois). The Barr-Girard abandonment has been protested by COGA Industries, L.L.C. (COGA), the Economic Development Council for Greater Springfield (EDC), Central Illinois Public Service Company (CIPSC), and Freeman United Coal Mining Company (Freeman). COGA indicates that it is developing a coal gasification agricultural chemical processing facility on the line, in the Girard area; that the facility will create 1,300 permanent jobs; that, although the area is served also by another railroad, the two railroads are not redundant for COGA's purposes; and that the continued operation of the line may well be critical in encouraging the introduction of coal gasification/chemicals technology to the region. EDC claims that the abandonment would cause negative economic impacts for any business that relies heavily on rail service, and would have a negative impact on future economic growth; and EDC suggests that, if rail service is discontinued, UP/SP should compensate firms which are affected negatively, and should allow other rail service providers a chance to operate the line economically. CIPSC contends that abandonment of the Barr-Girard Line would potentially affect the employment base in the territory adjacent to the line. The Illinois Department of Transportation, which also has addressed the Barr-Girard abandonment, concedes that traffic volumes are probably not large enough to warrant continued operation of the line. A 180-day public use condition respecting the Barr-Girard Line has been requested by the City of Springfield. Trails Act statements respecting the Barr-Girard Line have been filed by the City of Springfield and by RTC.

Gurdon-Camden Line (Arkansas). The Gurdon-Camden abandonment has been protested by Reader Industries, Inc., which indicates that it is served by Reader Railroad, which connects to the line at Reader, AR, between MPs 435 and 436. Reader Industries notes that, on or about June 30, 1995, it received a shipment over this line, and adds that it expects to continue to use this line on a more frequent basis in the future.

Iowa Junction-Manchester Line (Louisiana). The Calcasieu Parish Police Jury has requested a 180-day public use condition and also has filed a Trails Act statement.

Wendel-Alturas Line (California). The Feather River Rail Society submitted a statement indicating that it favors retention of the track and roadbed on this historically significant and scenic line, which has the potential to be developed

into an operation for tourism, directly benefitting the cities of Alturas and Susanville as well as Lassen and Modoc Counties. A 180-day public use condition respecting the Wendel-Alturas Line has been requested by the United States Department of the Interior, Bureau of Land Management, Eagle Lake Resource Area (the Bureau of Land Management, or simply the Bureau). Trails Act statements respecting the Wendel-Alturas Line have been filed by the Bureau and by RTC.

Suman-Bryan Line (a portion) (Texas). The City of College Station submitted a statement indicating that the Suman-Bryan abandonment will have a negative impact on economic activity in Brazos County. A 90-day public use condition respecting the Suman-Bryan Line has been requested by the Texas Department of Transportation and the Texas Parks and Wildlife Department.

Edwardsville-Madison Line (Illinois). A 180-day public use condition respecting the Edwardsville-Madison Line has been requested by the Village of Glen Carbon. Trails Act statements respecting the Edwardsville-Madison Line have been filed by the Village of Glen Carbon and by Madison County Transit (MCT, a local government agency in Madison County). RTC filed a statement indicating that it supports the issuance of a NITU to MCT.

Newton-Whitewater Line (Kansas). The Newton-Whitewater abandonment between MP 485.0 near Newton (in Harvey County) and MP 476.0 near Whitewater (in Butler County) has been protested (in part) by the Harvey County Board of County Commissioners, which indicates that: at MP 485.0 near Newton, the line ends in an industrial area; that the Greater Newton Chamber of Commerce is marketing an industrial park in this area; that this park is already partially occupied, and that rail spur access is an important tool in developing the remaining sites; that the park would have no rail access if the line were abandoned; that growth is expected to extend at least to MP 482, which is near a road that connects to a nearby interstate highway interchange; and that the line should therefore be kept intact at least to MP 483. The Harvey County Board, which refers to MP 483 and MP 482 almost interchangeably, protests the abandonment of the line between MP 485 and MP 482. The Newton-Whitewater abandonment also has been protested by the Harvey County Jobs Development Council, Inc. (HCJDC) and by Kansas State Rep. Garry Boston, for reasons much the same as those advanced by the Harvey County Board. HCJDC protests the abandonment of the line between MP 485 and MP 482.

Rep. Boston, without specifying a milepost, suggests that the park should be allowed leeway for future growth.[89]

Troup-Whitehouse Line (Texas). A 90-day public use condition respecting the Troup-Whitehouse Line has been requested by the Texas Department of Transportation and the Texas Parks and Wildlife Department.

Seabrook-San Leon Line (Texas). A 90-day public use condition respecting the Seabrook-San Leon Line has been requested by the Texas Department of Transportation and the Texas Parks and Wildlife Department.

Magnolia Tower-Melrose Line (California). Respecting that portion of the Magnolia Tower-Melrose Line that lies between MPs 7.6 and 7.1 (this portion, which is roughly 2,400 feet in length, extends between 5th Avenue and Oak Street in the City of Oakland, and includes the rail bridge crossing the Lake Merritt Channel), a 180-day public use condition has been requested by the City of Oakland and the San Francisco Bay Trail Project, and a Trails Act statement has been filed by the City of Oakland.

DeCamp-Edwardsville Line (Illinois). A Trails Act statement respecting the DeCamp-Edwardsville Line has been filed by Madison County Transit (MCT). RTC filed a statement indicating that it supports the issuance of a NITU to MCT.

Little Mountain Junction-Little Mountain Line (Utah). The Weber County Commission has requested a 180-day public use condition and also has filed a Trails Act statement.

APPLICABLE STANDARDS

We turn first to the decisional standards under which we must judge the control application and the many conditions requested by parties.

PUBLIC INTEREST STANDARD. The applicable statutory provisions are codified at 49 U.S.C. 11341-51.[90] "The Act's single and essential standard of

---

[89] The milepost references used by HCJDC suggest that the Harvey County Board's references to MP 483 were meant to be references to MP 482.

[90] These provisions have been recodified as 49 U.S.C. 11321-27. A new factor has been added requiring us to consider whether the transaction will have an adverse impact upon competition "in the national rail system." 49 U.S.C. 11324(b)(5). Although this post-application amendment technically does not apply to this case, the ICC long considered this issue to be an

(continued...)

approval is that the [Board] find the [transaction] to be 'consistent with the public interest.'" *Missouri-Kansas-Texas R. Co. v. United States,* 632 F.2d 392, 395 (5th Cir. 1980), *cert. denied,* 451 U.S. 1017 (1981). *Accord Penn-Central Merger and N & W Inclusion Cases,* 389 U.S. 486, 498-99 (1968) (*Penn-Central Merger Cases*). To determine the public interest, we balance the benefits of the merger against any competitive harm that cannot be mitigated by conditions.

Section 11344(b)(1) provides that, in a proceeding involving the merger or control of at least two Class I railroads, five factors must be considered: (1) the effect of the proposed transaction on the adequacy of transportation to the public; (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (3) the total fixed charges that result from the proposed transaction; (4) the interest of carrier employees affected by the proposed transaction; and (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

Public Benefits. Section 11344(b)(1)(A) requires that, in determining whether a proposed transaction is consistent with the public interest, we must examine its effect on the adequacy of transportation to the public. This necessarily involves an examination of the public benefits that will result from the transaction.

Public benefits may be defined as efficiency gains such as cost reductions, cost savings, and service improvements. Cost reductions are public benefits because they permit a railroad to provide the same level of rail services with fewer resources or a greater level of rail services with the same resources. An integrated railroad can realize additional benefits by capitalizing on the economies of scale, scope, and density which stem from expanded operations. Cost savings in rail consolidations can come from a variety of sources, including elimination of interchanges, internal reroutes, more efficient movements between the two merging parties, reduced overhead, and elimination of redundant facilities. These benefits, in varying degrees depending on competitive conditions, are passed on to most shippers as reduced rates and/or improved services. When cost reductions from the merger are passed on to shippers, public benefits are extended and shipper benefits are increased.

(...continued)
important part of its analysis in consolidation cases, and the Board continues to apply the legal precedents of the ICC consistent with the Act.

Benefits to the combining carriers that are the result of increased market power, such as the ability to increase rates at the same or reduced service levels, are exclusively private benefits that detract from any public benefits associated with a control transaction. *See, CSX Corp.--Control--Chessie and Seaboard C.L.I.*, 363 I.C.C. 518, 551-52 (1980) (*CSX Control*); *Union Pacific--Control--Missouri Pacific; Western Pacific*, 366 I.C.C. 462, 487-89 (1982) (*UP/MP/WP); Union Pacific Corp. et al.--Cont.--MO-KS-TX R. Co. et al.*, 4 I.C.C.2d 409, 428-29 (1988) (*UP/MKT*); and *Rio Grande Industries, et al.--Control--SPT Co., et al.*, 4 I.C.C.2d 834, 875 (1988) (*DRGW/SP*).

Competitive Effects. Section 11344(b)(1)(E), dealing with competitive effects on other railroads, was added by section 228(a)(2) of the Staggers Rail Act of 1980, Pub. L. No. 96-448 (Staggers Act). In evaluating "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region," 49 U.S.C. 11344(b)(1)(E), we do not limit our consideration of competition to rail carriers alone, but examine the total transportation market(s).[91]

We are also guided by the rail transportation policy, 49 U.S.C. 10101a, added by the Staggers Act. *See, Norfolk Southern Corp.--Control--Norfolk & W. Ry Co.*, 366 I.C.C. 171, 190 (1982) (*NS Control*). The 15 elements of that policy set forth in section 10101a, taken as a whole, emphasize reliance on competitive forces, not government regulation, to modernize railroad operations and to promote efficiency. H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 88 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4110, 4119.

Competitive Harm. Competitive harm results from a merger to the extent the merging parties gain sufficient market power to raise rates or reduce service (or both), and to do so profitably, relative to premerger levels. In evaluating whether a merger is in the public interest, we seek to determine what competitive harm is directly and causally related to the merger and to distinguish that harm from any pre-existing, anticompetitive condition or disadvantage that other railroads, shippers, or communities may have been experiencing. We attempt to ameliorate harm that is caused by the merger with conditions.

We examine several criteria in assessing whether markets served by the merging parties will suffer competitive harm. The commodity in question and length of haul provide an indication of the effectiveness of truck competition. The reduction in independent rail routings or the increase in concentration or

[91] *See, Central Vermont Ry. v. ICC*, 711 F.2d 331, 335-37 (D.C. Cir. 1983).

shares of relevant traffic flows indicate to some extent the likelihood of adverse change in post-merger market power. Where most or all of the firms in the market have sufficient capacity to serve a significant amount of the total market without any significant disadvantage, the analysis considers the number of competitors rather than their market shares. The determination of competitive harm is more evident where the possible routing options on a rail-bound commodity drop from two originating or terminating railroads to one. Even in these situations, geographic or product competition may be sufficient to act as a constraint to prevent competitive harm.

We evaluate whether effects are horizontal or vertical in nature or whether both types of effects are present. Horizontal effects occur where applicant carriers currently offer competing service within a defined market. These effects can range from loss of direct, head-to-head competition between two railroads serving the same origin/destination pair to loss of geographic competition between railroads, as would occur if each of the merging parties exclusively serves a different competing port from the same origin. Vertical effects occur where the merging parties connect end-to-end or form alternative routings for interline movements in which a single railroad controls a "bottleneck" at origin or destination.[92] The key test for competitive harm remains the same for both horizontal and vertical effects: will the merger result in increased rates or deteriorated service or both?

Special Public Interest Factors. The Board is also required by 49 U.S.C. 11344(c) to make special, narrowly focused public interest findings (where applicable) on the following aspects of any major rail consolidation: (1) a guaranty or assumption of the payment of dividends or of fixed charges, or an increase of total fixed charges (the transaction may be approved only if we find that the guaranty, assumption, or increase is consistent with the public interest); (2) rail acquisitions of motor carriers (the transaction may be approved only if we find, among other things, that the transaction will enable the rail carrier to use motor carrier transportation to public advantage in its operations); and (3) inclusion of other rail carriers located in the area (we may require inclusion of such other rail carriers in the transaction if they apply for inclusion and we find their inclusion to be consistent with the public interest). The assumption of fixed charges and increase of total fixed charges are discussed elsewhere in the decision. Applicants' request that certain trucking company acquisitions be

[92] The situation where the merger would *create* a bottleneck properly is treated as a horizontal issue.

exempted from the requirements of 49 U.S.C. 11343-44 is also discussed below. No other rail carriers have sought inclusion in the transaction.

GENERAL POLICY STATEMENT. The ICC's general policy statement on rail consolidations was issued in *Railroad Consolidation Procedures*, 363 I.C.C. 784 (1981), and codified at 49 CFR 1180.1, in regulations adopted by the ICC and applicable to this proceeding. It indicates how we incorporate the numerous elements of the public interest in evaluating specific consolidation proposals. In essence, we perform a balancing test, weighing "the potential benefits to applicants and the public against the potential harm to the public." 49 CFR 1180.1(c).

Generally, benefits are realized from operating efficiencies and marketing opportunities that can make the consolidated carrier financially stronger and, therefore, a better competitor that can more easily provide adequate service on demand. 49 CFR 1180.1(c)(1). Operating efficiencies often result from elimination of duplicative facilities and the use of more direct routings.

We recognize, of course, that the consolidation of two carriers serving the same market might be contrary to the public interest. In evaluating the effect of the consolidation on long-haul movements of bulk commodities, the focus may be on retaining effective intramodal competition. 49 CFR 1180.1(c)(2)(i).

Potential harm from a proposed consolidation may occur from a reduction in competition, 49 CFR 1180.1(c)(2)(i), or from harm to a competing carrier's ability to provide essential services, 49 CFR 1180.1(c)(2)(ii). In assessing the effects of a rail merger, we must evaluate whether opposing railroads will be financially and competitively able to withstand the projected loss of traffic to the consolidated system. In assessing the probable impacts and determining whether to impose conditions, however, our concern is the preservation of essential services, not the survival of particular carriers. It is not our duty to ensure preconsolidation levels of traffic or the survival of competitors; we are concerned only with the preservation of the essential services they provide. An essential service, for this purpose, is a service for which there is a sufficient public need, but for which adequate alternative transportation is not available. 49 CFR 1180.1(c)(2)(ii).

ANTITRUST CONSIDERATIONS. Our statutory mandate, which requires us to balance efficiency gains against competitive harm, sharply contrasts with the approach to mergers taken by DOJ and the Federal Trade Commission

(FTC).[93] The policies embodied in the antitrust laws provide guidance, but are not determinative. As the Supreme Court noted in *McLean Trucking Co. v. United States*, 321 U.S. 67, 87-88 (1944):

> In short, the [Board] must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operations, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy * * *. "The wisdom and experience of that [Board]," not of the courts, must determine whether the proposed consolidation is "consistent with the public interest."[94]

Thus, we can disapprove transactions that would not violate the antitrust laws and approve transactions even if they otherwise would violate the antitrust laws. *Northern Lines Merger Cases*, 396 U.S. at 511-14. Moreover, because of our broad conditioning power and our continuing oversight, it is possible for us to approve transactions with conditions in cases where the antitrust enforcement agencies would either disapprove or approve only following substantial divestiture.

DISCUSSION AND CONCLUSIONS

OVERVIEW. By purchasing approximately $1 billion of SPR common stock,[95] UP Acquisition Corporation initiated this transaction that will result in the nation's largest rail merger in geographic scope, encompassing the western

---

[93] The FTC has recently issued a report that recommends revising the merger guidelines used by FTC and DOJ that would make their antitrust enforcement more consistent with our approach to judging rail mergers. *See, Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, a report by the Federal Trade Commission Staff (May 1996) (FTC 1996 Staff Report). The FTC has proposed that antitrust enforcers be required to give greater weight to arguments that cost savings justify mergers that otherwise might be viewed as anticompetitive. Under this proposal, companies would have more ince ntive to seek combinations that offer production, distribution, promotion, and other efficiencies that reduce prices to consumers.

FTC Chairman Robert Pitofsky said, in an interview, that antitrust enforcers must be more willing to consider when the cost savings of a merger, even i n a highly concentrated industry, can increase competition and benefit consumers. *Wall Street Journal*, June 3, 1996, at A3.

[94] *Accord Minneapolis & St. L. Ry. Co. v. United States*, 361 U.S. 173 (1959); *Bowman Transportation v. Arkansas-Best Freight*, 419 U.S. 281, 298 (1974); *Port of Portland v. United States*, 408 U.S. 811, 841 (1972); *United States v. Interstate Commerce Comm'n*, 396 U.S. 491, 514 (1970) *(Northern Lines Merger Cases)*; *Denver & R.G.W.R. Co. v. United States*, 387 U.S. 485 (1967).

[95] The stock is being held in a voting trust.

two-thirds of the United States. Like the SF/SP merger that the ICC disapproved in 1986,[96] this merger contains areas where the service provided by one of the merging carriers, UP, now overlaps with that provided by the other, SP. Unlike that case, where those applicants had initially maintained that imposition of any substantial conditions aimed at mitigating competitive harm would frustrate the transaction, applicants here have offered approximately 4,000 miles of trackage rights, and will sell about 330 miles of trackage, to their most able and aggressive competitor, BNSF, in an attempt to redress competitive problem areas. In a nutshell, this includes trackage rights over the Central Corridor in the West; Houston to St. Louis via Memphis; Houston to New Orleans; and Houston to Brownsville.

A number of parties have presented evidence and arguments as to those rail movements that this merger might subject to competitive harm. Only DOJ has attempted to quantify the overall harm, claiming that the merger will result in over $800 million per year in harm to shippers due to increased rail rates for shippers who depend solely on UP and SP for actual or potential rail service (2-to-1 shippers) and shippers who depend on UP, SP, and one other rail carrier for actual or potential rail service (3-to-2 shippers). DOJ's claim of harm is totally without foundation, as we will explain.

Harm to 2-to-1 shippers from the merger as conditioned will be negligible. The BNSF agreement permits BNSF to serve all shippers who would otherwise go from two directly serving carriers to one. In essence, the BNSF agreement will permit BNSF to replace, to a large extent, the competitive service that is lost when SP is absorbed into UP. DOJ's projection of harm for 2-to-1 shippers is based on the premise that BNSF will not have *any* competitive impact on rates charged these shippers. But, with certain exceptions that we have remedied with additional conditions, the BNSF agreement will effectively replace the competition that would otherwise be lost.[97]

---

[96] *Santa Fe Southern Pacific Corp.--Control--SPT Co.*, 2 I.C.C.2d 709 (1986), and 3 I.C.C.2d 926 (1987) (*reopening denied*) (*SF/SP*).

[97] Some of the key issues that we have examined in reaching our conclusion include whether the BNSF agreement really allows BNSF to serve all shippers whose direct access to rail service has gone from two railroads to one; whether competition is lost by shippers that now have only a direct connection with either UP or SP, but who benefit from having the other carrier nearby to provide the potential for transloading, build-ins, or build-outs; whether shippers suffer a significant

(continued...)

As many parties have noted, the BNSF agreement does not address competition lost by 3-to-2 shippers. We find, however, that parties have greatly overstated the harm that would be experienced by shippers in 3-to-2 markets.[98] For example, by DOJ's calculation, over half of the 3-to-2 traffic affected by this merger is intermodal, while almost a quarter of it is automotive traffic. Shippers moving this intermodal and automotive traffic, for which there is strong motor competition, have universally supported the merger. They believe that competition will be stronger after the merger, and that service will be better. In addition, DOJ's primary economic study, on which it bases its estimate of harm to 3-to-2 shippers, is deeply flawed. DOJ's study is based solely on grain traffic even though grain represents only a tiny portion of the 3-to-2 traffic at issue. Because grain has unique transportation characteristics, we find that DOJ's application of its "grain" study to other commodities is inappropriate. Moreover, we also find that the study is not reliable even for grain traffic because, as explained below, it is based in part upon a crucial, incorrect assumption that there tend to be fewer rail carriers near navigable waterways.

Any competitive harms will be heavily outweighed by the broad-based, positive effects of the merger as conditioned. Many of these benefits will be passed through to shippers in terms of lower rates and better service. The merger will achieve quantifiable cost savings of approximately $627 million per year. There are also other major public interest benefits, which, although not so readily quantifiable, are just as important. Some of the more significant benefits include substantially shorter and more efficient, single-line routes between many city pairs for major traffic flows, especially over the Central Corridor; increased capacity and capital investment to upgrade facilities, more direct routes, new terminals and yards, and improved service; directional running of the lines between Houston and Memphis/St. Louis; two new single-line routes on the west coast I-5 Corridor from Canada to Mexico; access for BNSF to New Orleans, and reduced mileage between major points that BNSF serves in single-

---

(...continued)
loss of geographic or source competition due to the loss of SP as an independent carrier; and whether any other party has offered a solution that better serves the public interest.

[98] Some of the key issues that we have examined in reaching our conclusion include whether shippers at points that go from three to two directly serving railroads suffer a substantial loss of competition as a result of losing their SP option; and whether the public interest is harmed by the fact that there would be only two major Class I railroads, rather than three, serving the western half of the country.

line service; and a solution for the problem long posed to the public interest by the service decline and capital inadequacy of SP.

With regard to SP, we agree with applicants that western rail service is a rapidly evolving market, not a static one. As detailed below, SP has been declining for over a decade; it is not able to generate sufficient capital to invest in the quality service desired by many of its shippers. UP and SP face increasing pressure from a newly merged, more efficient BNSF, which has been investing substantial capital into improving its service. We think that a revitalized UP/SP will be in a much improved position to compete aggressively with BNSF to provide better, more efficient service to shippers in the West. *See, Guilford Transportation Industries, Inc.--Control--Delaware and Hudson Railway Company*, 366 I.C.C. 396, 411 (1982) (*D&H); NS Control*, 366 I.C.C. at 233. Although the number of major carriers will be lower, sufficient competitive pressure will remain to ensure that the quality of service they provide will be improved. *D&H*, 366 I.C.C. at 400-01, 410.

The efficiency savings of the merger are very substantial, and the clear trend since 1980 has been that when railroads have reduced their costs through mergers or otherwise, those savings have largely been passed on to their shippers in terms of lower rates and improved service. Rail rates have decreased remarkably since 1980, despite the fact that *most* shippers are served by a single rail carrier, and few are served by three. Because of the several major mergers since that time, and due to the formation of Conrail as the single Class I carrier in the Northeast, large regions of the country are now served by a single major rail carrier or by two such carriers. Even with this structure, rail competition has thrived, and shippers have continued to enjoy increasingly lower rates. Since 1980, the number of Class I railroads has decreased from 26 to 10, while the average rail rate per ton has declined more than 37% on an inflation-adjusted basis from its peak in 1981 through 1993.[99]

Several parties, including NITL, SPI, KCS, Conrail, DOJ, DOT, and USDA, have expressed concerns regarding alleged problems with the BNSF trackage rights agreement as it was originally proposed in the application. These parties claim that the terms of the trackage rights agreement will not permit BNSF to compete effectively; that BNSF will lack sufficient traffic density and face other operational obstacles that will keep it from competing effectively; that trackage

---

[99] ICC, Office of Economic and Environmental Analysis, *Rail Rates Continue Multi-Year Decline*, 1995.

rights are inherently inferior to outright ownership; that BNSF is not really interested in providing service in these markets; that the agreement is not broad enough to remedy all competitive harms.

We have carefully reviewed each of these allegations, and, after analyzing the record and hearing the parties' oral arguments presented on July 1, 1996, we believe that the proposed merger, subject to certain mitigating conditions that we are imposing, will be in the public interest, and that any competitive harm will be heavily outweighed by the positive effects and benefits of the merger as conditioned. Contrary to the assertions of these parties, trackage rights have been a widely used and time-tested means of assuring against a threatened loss of competition in rail merger proceedings. Moreover, a trackage rights remedy seems particularly appropriate here to preserve competition now being offered by SP that, in many instances, has been made possible through trackage rights, not outright ownership, in the first place.[100]

Applicants have effectively addressed many of the particular problems raised by protestants in their settlement agreement with CMA, and additional concessions made in their rebuttal statement and brief. These modifications have substantially improved the original BNSF settlement agreement, and have removed many problems that might otherwise have hindered the effectiveness of these trackage rights. For example, trackage rights have been granted over both UP and SP lines between Houston and St. Louis, permitting BNSF to operate with the primarily unidirectional flow of UP/SP traffic; an arbitration procedure has been devised for CMA members to permit build-outs under the same principles we applied in the BN/SF merger; a dispatching protocol has been arranged to protect BNSF's service; BNSF has been given the right to serve all new industries on the SP segments over which it is obtaining trackage rights; half of the volume of shipments under contract at 2-to-1 points in Louisiana and Texas will be opened up to BNSF; BNSF has been given the option to pay compensation under a formula similar to the method set out in *SSW Compensation,*[101] only more favorable to it; SP reciprocal switching charges have been reduced substantially to $130 per car to ensure that shippers who reach BNSF at 2-to-1 points by reciprocal switching will have meaningful

---

[100] SP now operates over trackage rights from Fort Worth to Pueblo and Kansas City, between Topeka and St. Louis, between Kansas City and Chicago, and between Pueblo and Kansas City.

[101] *St. Louis Southwestern Ry. Co. Compensation--Trackage Rights*, 1 I.C.C.2d 776 (1984), 4 I.C.C.2d 668 (1988), 5 I.C.C.2d 525 (1989), 8 I.C.C.2d 80 (1991), 8 I.C.C.2d 213 (1991), *aff'd without opinion*, 978 F.2d 745 (D.C. Cir. 1992), *cert. denied*, 508 U.S. 951 (1993) (the *SSW Compensation* cases).

access; and applicants have consented to 5 years of oversight by the Board to ensure that these trackage rights work, and have conceded that we will retain authority to impose additional remedial conditions, including divestiture.

But, even though applicants have met many of their critics' objections in the CMA Agreement, we recognize that some areas of objection remain. As DOJ and DOT correctly point out, BNSF's trackage rights will permit it to serve only certain specified points, those at which a shipper goes from two to one directly serving carrier. The merger would reduce competition where a shipper, at what applicants call a "1-to-1" point, had a competitive option of building out or building in to or from either SP or UP to put pressure on the single carrier serving it. Similarly, where a shipper served only by UP or SP could have transloaded shipments to the other carrier, that option would not be replaced by the terms of the CMA agreement.

The potential for exercising such options does give shippers competitive leverage, though clearly not as much as if they had two carriers serving them directly. After all, a shipper would have to undergo some additional cost to take advantage of these options before the merger. A build-in or build-out could cost millions of dollars even for a relatively short segment, as testimony in both this case and in *BN/SF* demonstrates. Transloading also results in additional costs, as freight is first loaded into a truck, and then reloaded into a freight car, or the reverse. Nonetheless, we believe that maintaining these options is important to shippers who use them as leverage in their negotiations with carriers.

Rather than redefining 2-to-1 points as those within some arbitrary proximity to two rail carriers (a BEA or 4-digit SPLC),[102] and thus treating direct and indirect rail competition as equivalent, as DOJ, KCS, and others have suggested, 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

---

[102] "BEA" refers to Business Economic Area, a location grouping established by the Bureau of Economic Analysis of the U.S. Department of Commerce for statistical reporting of regional economic activity. BEAs are collections of counties that may be as large as two-thirds or more of the area of some western states.

"SPLC" refers to the Standard Point Location Code, a code used on all interline freight accounting forms to identify all U.S. points served by rail or motor carriers. It may have up to six position numbers, identifying a geographic area in the first position, the state in the second position, the county in the third and fourth positions, and the station in the city or town in the fifth and sixth positions.

to compete effectively. We will require as conditions, which we will discuss in detail below, that the "new facility" provision of the CMA agreement be extended to require applicants to permit BNSF to serve any new facility at any point on any SP *or UP* segment over which it has been granted trackage rights; that the term "new facility" include new transload facilities, and that applicants make available all points on their lines (over which BNSF receives trackage rights) to transload facilities, wherever BNSF or some third party chooses to establish them; that applicants extend the build-out and build-in provision contained in the CMA agreement to *all* shippers with physically feasible connections and remove the time limitation contained in the provision; and that applicants expand Paragraph 3 of the CMA agreement to make immediately available to BNSF at least 50% of the volume under contract at 2-to-1 points on all of the BNSF trackage rights corridors (not limited to just Texas and Louisiana).

We also will impose as a condition the 5-year oversight period to examine whether the conditions we have imposed have effectively addressed the competitive issues they were intended to remedy. We will impose a common carrier obligation on BNSF to provide service to the shippers to which it has been given access under the BNSF agreement. Applicants and BNSF will be required to submit progress reports and implementing/operating plans, as discussed in more detail later in this decision. Unless circumstances warrant otherwise, we will plan to initiate a proceeding on or about October 1, 1997, to seek comments from interested parties on the effects of the merger and implementation of the conditions.

In addition to the broad remedies, we have also crafted specific remedies addressing particular problems raised by various parties. In the South Central/Gulf Coast region, these remedies include trackage rights for the Tex Mex from Corpus Christi to Beaumont to ensure that this small carrier can continue to play its important role in international service. We also have expanded BNSF's access to SIT facilities necessary to serve plastics shippers, have removed restrictions on the service BNSF can provide to shippers in the Lake Charles area and eliminated a fee that BNSF otherwise would have had to pay to gain access to this traffic, and have confirmed the availability of build-out options for Dow and UCC, and the continued availability of two independent and efficient PRB routings for TUE. In the Central Corridor, these remedies include imposing the URC agreement which would give Utah coal producers important new rail access to midwestern and eastern markets, and retaining the

Tennessee Pass Line as an alternative to the Moffat Tunnel Line to ensure that this route does not become overly congested.

Although certain protestants have also claimed that the merger will create a rail transportation duopoly in the West, leading to tacit collusion and higher prices, we do not believe this will be the case. As DOT explains, "the competitive outcome of duopoly is indeterminate. In principle, competition can lead to a wide range of outcomes from prices that maximize the joint profits of the duopolists to a competitive equilibrium." DOT-4 at 22. Experience with rail mergers since 1980 indicates that carriers have not colluded in two-railroad markets. After carefully examining this issue, we have determined that rivalry, not tacit collusion, is the likely outcome here. Moreover, we will be carefully monitoring the situation to ensure that this is so.

Some opponents contend that, even with the remedies offered by applicants, trackage rights are simply not enough, and that divestiture is required. We disagree. Ordering divestiture of any of the major components of SP that have been sought by the various parties would be a substantial overreach and would destroy important efficiency benefits of the merger. As we explain below, only part of the traffic on these routes would be directly affected by the merger even if BNSF were not given any trackage rights. This is so because most of the shippers are now either solely served by UP or solely served by SP. Giving another carrier direct access to this traffic would unnecessarily affect a great deal of traffic not harmed by the merger.

Divestiture of the "offending assets" is promoted by DOJ and others as a neat and clean solution that does not require the setting of trackage rights compensation or oversight to ensure that shippers are effectively protected from competitive harm.[103] Although divestiture may have a surface appeal, it also entails substantial regulatory intervention in supervising the sale of rail lines,[104] and it would likely lead to serious additional problems here. Divestiture could destroy major parts of the efficiency benefits of the merger, especially a Central Corridor divestiture. Moreover, divestitures could cause this deal to become uneconomical for UP and destroy the merger. After all, the corridors that form the central focus of divestiture proposals generate a very substantial volume of traffic. Frustration of the merger would leave the SP problem unresolved,

---

[103] Unlike DOJ, we have the capacity for continuing regulatory oversight under the statute we administer.

[104] DOJ also recognizes this problem. *See* DOJ-14 at 3.

leading to the breakup of that company, or a substantial retrenching of its service. It might ultimately preclude the solution that we have before us, one that allows the network efficiencies of the SP system to be preserved, with tremendous public interest benefits. If SP were sold in pieces, shippers, labor, and SP shareholders would all be adversely affected. Substantial divestitures would almost surely destroy the BNSF agreement, which has its own substantial pro-competitive features and efficiency gains.

In sum, the merger benefits here outweigh any competitive harms of the transaction, and the public interest requires that we approve it. The conditions we are imposing will effectively mitigate the competitive harms of the merger, while preserving its benefits. We will turn now to a more detailed discussion of the various merger benefits and competitive issues that we have examined in carrying out our balancing of interests under the statute.

PUBLIC BENEFITS OF THE MERGER. Despite significant parallel aspects examined below, the merger as conditioned clearly will be pro-competitive in the sense that it will stimulate price and service competition in markets served by the merged carriers. The merger will create a more efficient and competitive UP/SP system competing head-to-head throughout the West with BNSF, whose efficiency was greatly enhanced by its recent merger. UP/SP customers will benefit from tremendous service improvements brought about by reductions in route mileage, extended single-line service, enhanced equipment supply, better service reliability, and new operating efficiencies. Similarly, BNSF shippers will receive substantial benefits from the improved service efficiency of that carrier as a result of the merger conditions that we are imposing. Shippers now served by SP, whose service is threatened by that carrier's decline, will now be assured of quality service by UP/SP or BNSF.

QUANTIFIABLE PUBLIC BENEFITS. Applicants argue that the merger will yield about $752 million in quantifiable public benefits in a normal year, including just over $580 million in operating efficiencies and cost savings,[105] $76 million in net revenues from diverted traffic, and $93 million in shipper logistics savings. We have excluded the $76 million related to net diversion gains and $47.2 million in net trackage rights proceeds from BNSF that should not be included as quantifiable public interest gains. This still leaves $627 million of quantifiable benefits per year, as follows:

---

[105] Applicants have withdrawn a benefit claim of $1.7 million in the procurement area. *See,* UP/SP-230 at 69 n.25.

STB's Restatement of Applicants' Projected Annual Efficiencies and Cost Savings (in $ millions)

OPERATING BENEFITS	
Labor Savings	261.2
Non-Labor Savings	
Car Use	12.7
Communications/Computers	14.2
Operations	116.5
General/Administrative	129.7
Subtotal (Operating Benefits)	$ 534.3
SHIPPER LOGISTICS SAVINGS	$ 93.1
TOTAL BENEFITS	$ 627.4

Thus, we find that applicants should realize public benefits from more efficient operations of $534.3 million per year. These savings would reduce the combined UP/SP operating ratio by four or five points. BNSF's costs will fall further as well, as a result of the trackage rights. UP/SP will: (a) streamline and consolidate operations at major common terminals; (b) combine terminal and station facilities at a number of common points; (c) establish new blocks and new trains to improve service and efficiency; and (d) pursue numerous coordinations and consolidations of transportation, mechanical, engineering, information, purchasing, customer service, and other operating and marketing functions and activities. In addition, traffic will be handled more efficiently, in many instances by using shorter, faster routes. The combined car fleet will be managed on a coordinated basis to reduce empty movements and improve equipment use. Economies will also be achieved in applicant carriers' administrative functions by combining SP and UP departments to permit more efficient use of existing personnel and reduce overall staff and office space.

Several parties, notably DOJ and KCS, challenge applicants' calculation of quantifiable benefits. However, we find, in particular, the testimony of DOJ's witness Christensen to lack credibility. In the recently completed BN/SF merger proceeding, only one expert witness, Christensen, mounted a detailed challenge to the cost savings estimates in the application. Christensen, then representing selected utilities, claimed that the BN/SF merger would produce few quantifiable efficiency benefits. He asserted that the economic literature

contained no evidence indicating efficiency gains through end-to-end mergers. Because that merger was largely end-to-end, he argued that it could not plausibly be expected to yield significant cost savings.[106] The ICC rejected that position,[107] and subsequent events confirm that the ICC's decision in *BN/SF* was correct and that Christensen significantly erred in his predictions. BNSF's originally projected merger-related savings were too *low,* and not, as Christensen had alleged in that proceeding, too high.[108]

The UP/SP merger is of the same order of magnitude as *BN/SF,* and with far more overlapping routes that presumably would permit applicants to take full advantage of the economies of scale, scope and density commonly found in railroading. Nevertheless, Christensen testifies that this merger will produce quantifiable public benefits as low as $73 million,[109] which we simply do not find credible.

Christensen's critique is not based on objections to applicants' detailed operating plan, which he admits that he has not examined,[110] but rather upon largely theoretical concerns. Christensen makes three broad-based claims: (1) many of the operational efficiencies projected by applicants could be achieved by voluntary cooperation short of merger and should not be considered

---

[106] This pessimistic vision was not shared by Woodward, DOJ's economic witness in that proceeding, who explained:

It is likely a merger of two railroads having combined revenues of $7 billion would create significant efficiencies * * *. In general, efficiencies could have a downward effect on the prices charged by the merging railroads. *BN/SF,* DOJ-2, VS Woodward, at 1 n.1.

[107] *BNSF,* 10 I.C.C.2d at 740-43.

[108] At the July 1, 1996, oral argument in this proceeding, BNSF's counsel confirmed that annual benefits, which BNSF had projected would be $560 million, are now believed to exceed a billion dollars a year. She explained that some of the unanticipated savings resulted from combined management having the ability to apply "best practices" from each railroad to the new operations. Jones, Oral Arg. TR at 118-19.

This is consistent with a recent trade press article published subsequent to the consummation of the BN/SF merger, which reported that:

> BNSF president and CEO Robert Krebs told analysts in New York last Tuesday that the company had identified $400 million to $500 million in annual savings on top of the $560 million in annual savings projected in their 1994 merger application. That disclosure, plus the banner earnings, helped push BNSF stock up $5.875 for the day to close at $82.75 in heavy trading. That price, a 52-week high, represents a $20 per-share gain since July 1. *Traffic World,* October 30, 1995, at 37.

[109] Christensen concedes that the quantifiable benefits may be as high as $500 million, but he (and DOJ) focus their assessments on the lower end ($73 million) of his projected range.

[110] *See,* UP/SP-230 at 61 (citing Christensen Dep., April 23, 1996, at 27).

merger-related benefits; (2) much of applicants' projected benefits will actually result, whether or not the merger takes place, from ongoing, favorable industry productivity trends brought about by Staggers Act deregulation; and (3) certain of the public benefits claimed by applicants are actually transfers from various parties to applicants and, as such, represent private, not public, benefits of the merger.[111] We will discuss each of these arguments in turn.

One of the major problems with Christensen's analysis is that he assumes that major service coordinations of the scale that will take place here can be accomplished through voluntary trackage rights and other joint agreements without the stimulus of a merger.[112] Indeed, DOJ has even gone so far as to suggest that applicants have the burden of proving the negative proposition that the merger benefits cannot be obtained through any means short of merger.[113] DOJ cites no precedent or statutory basis for this novel approach. Moreover, DOJ's approach goes against the grain of our statute, which assumes that carriers will take the initiative in proposing rail consolidations that permit railroads to create superior networks, to provide better service, and to operate more efficiently. The ICC consistently rejected claims that coordination of benefits can be achieved voluntarily on the grounds that it is up to rail management, not the agency, to determine how such efficiencies can be achieved. For example, in *SF/SP,* a merger proposal that was ultimately denied because of competitive concerns, the ICC explained:

> Applicants sought to neutralize the assertion that many of the claimed merger benefits could be achieved by SPT and ATSF by cooperative efforts short of merger. Applicants explored in detail the non-merger mechanisms suggested by DOJ in a manner which convinces us that there are

---

[111] Christensen also disputes applicants' claim that SP's service problems will be remedied by the merger. He suggests that UP's admittedly rocky experience in initially absorbing CNW demonstrates that, at least in the short term, SP's service may worsen.

Applicants have shown that they have overcome their problems integrating CNW into UP. And the record here shows that many shippers located on SP lines expect to see improvements in SP's deteriorating system quickly because of UP's plans to invest $1.3 billion, which in large part would go toward upgrading that system.

[112] This sharply contrasts with DOJ witness Majure's assumption that trackage rights are essentially worthless.

[113] *Contra* FTC 1996 Staff Report, Chapter 2, Section E, "Efficiencies Should Be Merger-Specific But Parties Need Not Prove That The Merger Is The Least Restrictive Way Of Achieving Efficiencies," at 29-31. Moreover, as we already have noted, the FTC recommends revising the merger guidelines used by FTC and DOJ in a manner that would make their antitrust enforcement more consistent with our approach to judging rail mergers.

practical, legal and competitive problems which would substantially lessen the effectiveness of such arrangements. It seems clear to us that without the unified management resulting from the merger, few if any of the operating economies projected under the Operating Plan are attainable.

SF/SP, 2 I.C.C. at 872. We continue to believe this is a correct analysis, and one that fits the facts of this case just as well. Moreover, Christensen's premise is not only unproven, it is implausible; if UP and SP have not yet been able to coordinate the core operations of their competing systems outside of the merger context, it is not realistic to suppose that they could easily do so, especially without the antitrust immunity that our approval confers.

Christensen also asserts that many of applicants' projected benefits, whatever they are, would actually be the result of ongoing, favorable industry productivity trends brought about by Staggers Act deregulation.[114] Christensen explains his basis for reducing applicants' projected *labor* savings by stating:

The ability to achieve labor savings without merger is borne out in the statistics for class 1 railroads over the 5-year period 1989-1994, when merger activity was relatively quiet.

DOJ-8 at 9. Applicants have effectively rebutted this by explaining that the UP/MKT and the SP/DRGW mergers were implemented in their entirety in 1989 and later, and that efficiency enhancing effects of earlier rail mergers (UP/MP/WP, NS, CSX, and probably the formation of Conrail) continued into the 1989-1994 period. Thus, Christensen's rail productivity study necessarily includes, rather than excludes, merger-related productivity gains.[115] More importantly, applicants' efficiency benefits are not based upon the expected yields from industry-wide trends, but on particular savings made possible under their detailed post-merger operating plan. Christensen has presented no reason for us to doubt these particular savings, which would be over and above any savings yielded by general non-merger-related productivity trends.

Applicants have included two items that we believe should be excluded from quantifiable benefits. Applicants have included $76 million in projected net revenue gains from traffic shifts in their calculation of merger-related public benefits, as well as $47.2 million in net trackage rights fees from BNSF. The

---

[114] While Christensen's testimony appears to apply this analysis only to applicants' projected $261 million in labor savings, DOJ in its Brief takes the concept a step farther in an effort to dispute *all* of applicants' benefit claims. DOJ-14 at 43-44.

[115] Christensen makes one other claim with respect to labor savings that we summarily reject. He claims that applicants' projected savings in this area should be reduced by at least 8%, the minimal amount that he asserts unionized rail employees are overpaid relative to their next best alternative. *See* DOJ-8, VS Christensen, at 11-12.

ICC has explained that many merger-related traffic gains just represent neutral revenue transfers from other carriers:

> Traffic diversions, as such, are not public benefits; only the service improvements and cost savings associated with traffic diversions can be counted as public benefits.

UP/CNW, slip op. at 67. Applicants acknowledge that the ICC did not agree that rail-to-rail traffic shifts should be viewed as public benefits. Nonetheless, they claim that the *net* revenue gains they have projected here serve as a reasonable proxy for the public benefits. Although we have eliminated the $76 million in net traffic diversions in our restatement of applicants' projections of quantifiable public benefits, we have recognized the important efficiencies leading to these traffic shifts below. Similarly, our restatement excludes applicants' projected receipt of $47.2 million in net trackage rights fees from BNSF. The largest portion of this is simply a transfer from BNSF resulting from the grant of trackage rights to preserve the competitive status quo.

Finally, we reject Christensen's assertion that applicants' projected $102.9 million in procurement savings (from combined purchasing) is a private transfer from suppliers to UP/SP because applicants have not shown that these savings will result from efficiencies achieved by suppliers, rather than by UP/SP's combined purchasing power. Applicants explain that the ICC regularly accepted as public benefits "lower materials costs resulting from purchasing efficiencies." *BN/SF,* 10 I.C.C.2d at 740. In accepting these, the ICC never required merger applicants to audit the production activities and pricing decisions of their suppliers, and this proprietary information would generally not have been available. We accept applicants' projected procurement savings and incorporate them in our restatement of quantifiable public benefits.

KCS witnesses O'Connor and Darling claim that past rail mergers have produced few efficiency gains or other cost savings. Nonetheless, they conclude that there are $434.8 million in supportable normal year recurrent savings. *See* KCS-33 (Vol. 1), VS O'Connor/Darling, at 343.

Applicants explain that O'Connor and Darling are in error in concentrating on the huge decline in UP performance in 1983, the first year after the UP/MP/WP merger, in judging that merger a failure. For all practical purposes, that merger was not implemented in 1983, but in 1984-86, after labor agreements were reached and the WP rebuilding project was completed. Applicants also have shown numerous other errors in the O'Connor/Darling statement, and have effectively rebutted claims by the KCS witnesses that applicants have improperly calculated merger benefits in those benefit categories that we have accepted. *See* UP/SP-230 at 70-73.

UNQUANTIFIED BENEFITS.

More Efficient Routes/Single-Line Service. In prior mergers, the ICC placed substantial weight on evidence that a proposal presented "opportunities for significantly improved routings." *See, e.g., NS Control,* 366 I.C.C. at 173, 175, 196-200. The ICC also consistently recognized the substantial public benefits that can be derived through creating new single-line services. *CSX Control,* 363 I.C.C. at 553.

Applicants have shown evidence of unprecedented opportunities for improved routings and new single-line routes here. A combined UP/SP system will provide shippers with shorter, more efficient routes throughout the West. Similarly, the trackage rights and line sales provided in the BNSF agreement will greatly improve BNSF's western route system. A brief summary of these improvements is set forth in Appendix D at 1 (Improved Routings).

As a result of this merger, every shipper served by UP, but not by SP, will gain single-line service to all SP points, and vice versa. More than 350,000 cars, trailers, and containers, carrying 26 million tons of freight, will gain single-line service each year. The BNSF agreement will add single-line service for another 120,000 cars a year. *See* Appendix D at 2 (Expanded Single-Line Service).

Moreover, the expanded coverage that common control promises will have numerous beneficial impacts on many markets--international, intermodal, food products, forest products, autos, chemicals, grain, coal, metal and minerals. *See* Appendix D at 3 (Expanded Market Coverage).

Applicants will reduce SP's high reciprocal switching charges of almost $500 per car. SP's charges have been criticized by many shippers as reducing their competitive options at commonly served points, and have prompted SP's interchange partners to increase *their* switching charges when dealing with SP. Applicants will reduce these charges pursuant to the CMA agreement,[116] making available to shippers many routings that were previously uneconomical.

Increased Capacity and Capital Investment. UP/SP plans to spend approximately $1.3 billion over the next 4 years to upgrade SP facilities, assemble more direct routes, build new terminals and yards, and improve service. These merger-related investments will improve rail service and

[116] In UP/SP-266, applicants acknowledge their modified agreement to provide reciprocal switching charges to BNSF at 2-to-1 points as well as non-2-to-1 points at a rate no higher than $130 per car, adjusted over time for costs. At other points, UP/SP will cap its reciprocal switching charges with all other railroads at $150 per car, subject to the same adjustments, with further reductions possible through bilateral negotiation.

strengthen competition. Many of these investments will go toward updating the inadequate SP system, investments that SP does not have the capital to make on its own.[117]

These improvements will include more than a quarter of a billion dollars in new intermodal facilities. UP/SP will build a new intermodal terminal in the "Inland Empire," the east end of the Los Angeles Basin where BNSF's state-of-the-art facility at San Bernardino gives it an advantage today. It will build a new facility at Kansas City, and others at points in Texas; expand intermodal facilities such as SP's Long Beach intermodal facility and UP's Chicago facilities; and add substantial capacity to intermodal terminals at Seattle, Portland, Salt Lake City, Denver, and St. Louis. UP/SP also will invest millions of dollars in new and improved freight yards, repair shops, and other facilities.[118]

Improvement of the Declining SP Service. A major benefit of the merger is that it would permit the financially weak SP to become a part of a large, healthy rail system with the financial wherewithal to sustain efficient operations and maintain a viable plant investment. There may be theoretical alternatives for SP to explore a merger with some company other than UP, but no such buyer has come forward with an offer to buy the whole SP system, even though the filing of this merger application was public notice that prospective offerors needed to file such an inconsistent application under the timeframes established for this proceeding. And, the retention of the SP system in one piece permits network efficiencies (efficient single-line service for numerous shippers) that are clearly in the public interest.

DOJ, KCS, and Conrail contend that SP is, and can continue to be, an effective competitor, but the facts suggest otherwise. DOJ's witness Zimmer contends that SP has begun to be profitable since its new management took over

---

[117] For instance, UP/SP will invest: $221.4 million, adding over 100 miles of double track to the Sunset Route to improve train speeds and reliability; $145.8 million to make the SP Tucumcari Line a high-speed intermodal link between the Midwest and Southern California; and $125.4 million to upgrade UP's Texas & Pacific line to connect with the Sunset Route to provide direct service between Memphis and California. The merged system will clear tunnel restrictions that block SP from competing for most doublestack traffic in the I-5 and Central Corridors. Shippers will benefit from all of these investments.

[118] One such project will be to restore SP's deteriorated Roseville Yard. UP/SP's $38.2 million commitment will allow Roseville to reduce transit times and improve blocking for traffic from Los Angeles to Seattle, and as far east as Chicago. Further south in California, UP/SP will build a new $24 million repair facility at West Colton, which will complement $40 million of other investments to ensure equipment reliability.

in 1993, and she contends that a positive income of $61 million would have resulted in the absence of special charges during 1995. Zimmer also notes that SP's operating income and net income improved substantially in 1994 over 1993. During that period, SP raised $886 million through the sale of common stock and $375 million through issuance of senior notes. Zimmer argues that SP can generate funds from operations to support additional capital investments as well as using other financing options. She assumes the availability of a $300 million credit line, and SP's continuing ability to sell real estate as a means of financing what she accepts would be SP's necessary capital expenditures of $1 billion over the next 4 years.

Applicants, the State of California,[119] and UTU, however, have submitted convincing evidence that SP's competitive position is eroding, and will continue to do so, because of its inability to generate sufficient capital to provide quality service. Other than in one unrepresentative year, 1994, SP has historically been financially weak and unprofitable, relying heavily on large real estate sales to generate necessary cash flows. SP cannot continue to generate funds from this source, however, because it has a dwindling amount of marketable real estate available for sale.[120] As applicants note, SP's unsecured credit now has "junk bond status," and it is unable to secure additional funds from its lenders because it cannot meet the earnings tests of its loan covenants. Issuance of additional stock does not seem to be an option because it would further dilute the low value of existing shares without yielding any substantial additional funds. Thus, even if the optimistic income projections of Zimmer are borne out, and we think that is unlikely,[121] SP would still lack the funds to halt its competitive slide.

Based on our examination of the record, and SP's Annual Reports, we conclude that SP is, and will continue to be, weaker than its principal competitors in the West (BNSF and UP). Although SP could remain in

---

[119] Many government and shipper parties from the State of California appear in this record in support of applicants' proposed merger. Their statements stress the benefits that will result from a financially revived SP, and strongly dispute protestants' claims of competitive harm for traffic moving into or out of the State. *See, e.g.*, Conlon, Oral Arg. Tr. at 468-478.

[120] SP notes that most of its more valuable property has previously been sold; in 1995, it took 400 separate transactions to sell $49 million worth of property. UP/SP-230, VS Yarberry, at 3.

UTU has corroborated this, explaining:

> As far as UTU is concerned, there just isn't enough real estate left * * * for the SP to continue to offset its net operating losses from rail operations by selling the real estate that it does have left. That has been * * * the modus operandi of SP for quite some time.

Miller, Oral Arg. TR at 507-08.

[121] Indeed, SP incurred a net operating loss of $24 million in 1995.

operation as an independent carrier for some time absent the merger, its inability to generate adequate cash flow from operations, and limitations on its ability to borrow or to sell stock, will preclude it from being a strong competitor to UP or BNSF. The level of service now offered by SP is below that offered by its competitors, and declining; it is essentially a single-track, low-density, high-cost railroad.

Further, if SP continues to operate as an independent carrier, its relative position will worsen. Absent a merger, SP projects that it would spend less than $100 million a year for improvements, while BNSF and UP each plan to invest billions of dollars in maintaining existing facilities and upgrading plant and equipment. With the merger, however, it is undisputed that UP will have adequate financial resources to supply the SP system the capital that it needs to provide truly competitive service over SP's routes.

COMPETITIVE HARM. The Staggers Act granted railroads freedom from an overly restrictive and burdensome regulatory regime, enabling them to compete more effectively with each other and with other transportation modes, most notably motor carriers and barge lines. This competition has provided an important spur to more efficient operations, including efficiencies gained through merger and consolidation, while ensuring that these efficiency gains have been equitably shared by railroads and their customers. The competitive process unleashed by the Staggers Act has been one of the most significant public policy successes of this century. One of our most important roles is to ensure that this process continues.

As with our determination of the merger's expected public benefits, our assessment of the potential for merger-related competitive harms takes into account the effects of the BNSF agreement. As explained below, subject to that agreement and certain conditions that we are imposing, we find that the merger as conditioned is unlikely to lead to any significant competitive harms. The BNSF agreement is intended to permit BNSF to replace the competition that will be lost when SP is absorbed into UP. Our assessment of the effectiveness of the agreement at preserving this competition begins with an examination of the manner in which UP/SP and BNSF will compete after the merger.

MERGER WILL RESULT IN RIVALRY, NOT COLLUSION. DOJ and others have argued that, because the settlement agreement here results in trackage rights for BNSF, already UP's largest rival in the West, it is inherently flawed. These parties claim that duopoly in the West will lead to market

splitting and collusion between these two major carriers.[122] When the ICC turned down an eleventh hour effort to formulate ameliorative conditions in the *SF/SP* merger it expressed similar concerns:

> We are disinclined to risk the possibility of collusion and market splitting that might result from such an artificial, settlement induced rationalization of the western rail system.

SF/SP, 3 I.C.C.2d at 935.

In refusing to reopen the record there to permit examination of the remedies that were proposed, the ICC expressed dissatisfaction that applicants in that case were dilatory in bringing forth their proposal for conditions and disingenuous in agreeing to accept conditions that they had categorized for well over a year as "deal breakers":

> We choose not to allow merger applicants an opportunity to, in effect, seek consolidation twice: first by taking a hard-line preliminary approach toward the issues of competition and acceptable conditions, then falling back on a more conciliatory approach if the initial approach is unsuccessful.

Id. at 933. Here, in contrast, applicants presented their plan for addressing competitive harms at the outset. This permitted us to examine the plan in detail in light of numerous comments. The agency also has the benefit of nine years of additional experience with decreasing rates in two-carrier rail markets under Staggers Act deregulation. We now believe that rail carriers can and do compete effectively with each other in two-carrier markets. We also think that the fact that applicants and BNSF have granted access to each other's markets is not a splitting of markets, but a pro-competitive action that promotes the public interest.

As DOT has pointed out, the outcome where just two companies offer the only significant competitive alternatives in a market may range all the way from intense rivalry to collusion, depending on the circumstances of the industry.[123]

---

[122] Not all parties calling for some form of divestiture base their requests on fear of market splitting and collusion among BNSF and applicants. For example, DOT and SPI state that BNSF would be an acceptable purchaser of the lines they request that we order applicants to divest.

[123] DOT-4 at 22.

After thoroughly examining the economic analyses submitted by various parties, we have concluded that tacit collusion is an unlikely outcome here.[124]

DOJ and others define tacit collusion as a situation where firms in a market have a mutual understanding, not directly communicated, permitting rate or service offerings to be set at non-competitive levels. DOJ correctly notes that, as the number of firms declines, it becomes easier to understand and to follow the actions of the other firms. Conversely, additional participants in a market cloud the picture, and possible reactions of different parties to a rate or service offering become harder to predict.

In prior mergers, the ICC often permitted the number of railroads offering service in a given market to decrease to two railroads. Indeed, it approved mergers resulting in only two major railroads serving large portions of the East. The two railroads, CSX and NS, have competed effectively in these markets. As has been true for the nation's rail system as a whole since the Staggers Act, competitive pressures have been sufficient to spur railroads to enhance productivity by adopting efficient operating and management systems, and their costs have gone down each year because of significant productivity gains. Competitive pressures have ensured that the preponderance of those gains have been passed along to shippers in the form of lower rates and better and more responsive service. There is no evidence that railroads have colluded, overtly or tacitly, to maintain inefficient operations, unresponsive service, or above-market rate levels.

Another example of effective competition in a two-carrier market is in the Powder River Basin, where BNSF and UP offer vigorous competition to PRB coal shippers who have seen rates continuously decline. At oral argument, DOJ stated:

> * * * the Powder River Basin precedent is too small, and too narrow, and too recent to be applied to the facts of this case. I am not actually familiar with the prices in the East * * *.

Bingaman, Oral Arg. TR at 143. In response to being asked whether DOJ could provide any evidence of collusive behavior between railroads in two-railroad markets in the past, DOJ responded:

> We have evidence of collusive behavior in many industries * * *. I don't know if there is a railroad case specifically, but it is a fundamental tenet of merger law that collusion, where there are only two parties, is much more possible.

---

[124] Our analyses of the economic witnesses' testimonies concerning this issue are set forth in Appendix E. We agree with DOT that these studies are inconclusive.

Id. at 144. However, at oral argument, DOT argued that two-railroad markets result in rivalry rather than collusion, and that the conclusions of DOJ and other protesting parties concerning 3-to-2 competitive harm were incorrect:

> * * * industry concentration has not led to increased rail rates at all. Your own precedent in the BN/Santa Fe and UP/Katy indicate your belief that two independent, unconstrained railroads can and do supply vigorous competition * * *. [W]e concluded that is indeed the case.

Smith, Oral Arg. TR at 173-74. Based on our experience with railroad mergers, and the lack of railroad-specific evidence presented by DOJ in support of its position, we find DOJ's arguments to be unconvincing.

We conclude that steps taken by applicants here to avert anticompetitive impacts (through the BNSF agreement), combined with the additional conditions we are imposing, will safeguard against tacit collusion. We believe that BNSF will aggressively compete with UP/SP where it can obtain profitable traffic under the BNSF agreement. Further, the monitoring condition we are imposing will deter collusion and enable us to take any necessary corrective action. We note that the antitrust immunity incorporated in our approval of the merger in no way extends to any collusive pricing action.

Competition at 3-to-2 Points Not Diminished. 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. Most of this traffic is either intermodal or automotive traffic that enjoys vigorous motor carrier competition.[125]

As we have previously explained, numerous mergers since 1980 have sharply reduced the number of major railroads. During that time, the ICC's policy focused usually on preserving two-railroad competition, not on preserving three-railroad competition. Overall, however, railroad costs and rates have declined a great deal, with the average inflation-adjusted rail rate per ton declining by 37.7% from its 1981 peak to year-end 1993. Even so, because

---

[125] Applicants and DOJ agree that the largest 3-to-2 traffic flow is Los Angeles-Chicago intermodal traffic. DOJ's numbers confirm that BNSF's premium service currently dominates these movements. BNSF's share of intermodal rail traffic in this corridor is over 50%. We believe applicants' plan to assign most expedited, service sensitive intermodal and automotive traffic to SP's Tucumcari Line and most slower manifest traffic to UP's Central Corridor Line will provide more effective competition to BNSF for all traffic moving between Los Angeles and the St. Louis and Chicago gateways. Shippers and numerous other affected California parties agree. Remarkably, DOJ, alone among the major parties, has concluded that competitive harm to this traffic is so significant that it can only be cured by divestiture of one of applicants' Los Angeles to Chicago routings. We strongly disagree.

pervasive reduction of the major rail carriers across the West from three to two carriers could be grounds for concern, we have carefully examined the circumstances surrounding this case. We have concluded that no corrective action beyond the conditions we are imposing here is necessary.

Our analysis of the various empirical studies in this record attempting to measure 3-to-2 rail pricing effects is set forth in Appendix E. Studies from the academic literature[126] and from original or updated work done for this proceeding were presented by various witnesses, including MacDonald and Grimm for KCS, Majure for DOJ, Kwoka for Dow, Ploth for KCS, and Peterson and Bernheim for applicants. We agree with DOT's overall assessment that these studies are inconclusive. According to DOT:

> Opponents' positions on the instant merger are drawn from theory and models of firm behavior that lack empirical support. They support their statements with reference to a body of literature on industrial organization, showing that concentration at some point leads to higher prices. However, only a very few of these studies address the railroad industry, and their credibility has been seriously challenged * * *.

DOT-4 at 22. After briefly discussing the various studies, DOT concludes that:

> [None] of the foregoing analyses, examining both sides of the duopoly issue, leads to a firm conclusion on the competitive outcome in markets in which the number of railroads goes from three to two * * *. DOT recommends that the Board refrain from remedial action to maintain three railroad service in these markets.

Id. at 24.

A number of protestants' studies do specifically address railroad pricing. They attempt to estimate any enhanced ability of railroads to raise rates above costs by taking advantage of the reduction, by one, in the number of post-merger rail carriers. The studies compare rates in markets served by three railroads with rates in markets served by two. One common problem with these studies is the use of a static context to project rate increases in rail markets after the merger. Protestants neglect to account for a key dynamic element of this merger, the dramatic cost reductions it will make possible. They generally fail to

---

[126] C. Grimm, "Horizontal Competitive Effects in Railroad Mergers," *Research in Transportation Economics*, Vol. 2, T. Keeler (ed.), JAI Press, 1985, at 27-53; J.M. MacDonald, "Competition and Rail Rates for the Shipment of Corn, Soybeans, and Wheat," *Rand Journal of Economics* 18:1 (Spring 1987); J.M. MacDonald, "Railroad Deregulation, Innovation, and Competition: Effects of the Staggers Act on Grain Transportation," *Journal of Law and Economics* 32:2 (April 1989); and C. Winston, T. Corsi, C. Grimm and C. Evans, *The Economic Effects of Surface Freight Deregulation*, Brookings, 1990.

acknowledge that any limited ability this merger creates to raise rates over costs will be offset to the extent that the merger results in significant reductions in applicants' costs. Another dynamic element of this merger is the deteriorating condition of SP, and the effect this would have on rail pricing.

Majure's study for DOJ is particularly flawed. His study estimates that the merger will result in a rate increase of 10.9% for $4.751 billion in 3-to-2 traffic flows. Majure's large pricing effects are derived entirely from studies of grain, a commodity with very different transportation characteristics from the commodities that make up most of the 3-to-2 traffic here. We do not think it is valid to apply rate projections based on grain traffic to other categories of 3-to-2 traffic that have markedly different transportation characteristics, as Majure has done. This is especially true because more than 70% of the 3-to-2 traffic is made up of commodities that are clearly much more truck-competitive than grain, and whose shippers strongly support the merger.

Moreover, as detailed in Appendix E, Majure's study is not even valid for grain because he fails to include a variable to account for the distance of the shipper from nearby waterways. Barges, where they are available, are a particularly important factor in grain transport. Further, the nearer a shipper is to a waterway, the more likely that more than one rail carrier will be available, rather than less likely, as Majure speculates.

Finally, Majure's study is suspect to the extent that he uses one geographic definition, a 6-digit SPLC, in estimating 2-to-1 and 3-to-2 rate impacts, while using much broader geographic definitions, BEAs or 4-digit SPLC's, to define the universe of traffic that supposedly would suffer the rate increases he predicts. This mix-and-match approach is inherently suspect and thus cannot be given substantial weight.

In summary, Majure's use of BEAs and SPLCs to measure traffic flows leads to an overestimate of the amount of traffic that would face the loss of one of three direct rail competitors. His use of grain rate data makes it inappropriate to apply his results to other commodities that do not share grain's unique transportation characteristics. His data limitations and measurement errors significantly increase the upward bias in his estimates of merger-related competitive harm. And he has failed to account for any offsetting effects from the dramatic merger-related reduction in applicants' costs.

Nonetheless, we have used his study to provide an upper bound to the potential competitive harm faced by 3-to-2 shippers. Even if DOJ's estimate of $1.4 billion of non-intermodal, non-automotive 3-to-2 traffic were accurate, which we do not believe it is, and its projected post-merger rate increase for that

traffic of 10.9% were valid as well, which we believe is overstated, it would produce a rate increase of $152 million for that traffic. We consider this at best an outside estimate of harm for shippers in 3-to-2 markets. Even if this assessment of harm were accurate, this amount is heavily outweighed by the substantial public benefits that will result from this merger as conditioned.

Another key factor in our analysis is the limited role now played by SP as the third carrier in these markets. As we explain elsewhere in this decision, SP's poor financial condition has limited its access to capital necessary to renovate its plant and equipment so as to match the service quality and cost of service of its competitors. Thus, SP is a constrained, not a full competitor, with limited impact on the pricing actions of other western carriers.

As a result, SP's role, particularly with regard to the very service-sensitive automotive and intermodal traffic that makes up a large part of the 3-to-2 traffic, has diminished. (According to applicants, SP now handles only 20% of 3-to-2 traffic.) Two decades ago, for example, SP was the dominant automotive carrier in the West, with direct service to and from four automobile assembly plants in California. Since then, as a result of the closure of three of these four plants and SP's decline in service, SP has fallen to a very small share (less than 10% in 1994) of the automobile business handled by the western railroads. SP has been unable to make necessary investments in new automobile facilities and auto-handling freight cars.

For all of these reasons, we believe that protestants have overstated harm in 3-to-2 markets and that corrective action in 3-to-2 markets is not required.

COMPETITION AT 2-TO-1 POINTS NOT DIMINISHED. UP and SP directly compete for the business of a small number of shippers whose plants have direct access to both railroads. They also compete for the traffic of a larger group of shippers with plants located on the line of one of the two railroads, but who can reach a nearby line of the other through a reciprocal switching arrangement. When no third carrier is present, applicants have designated plants with access to both UP and SP, either directly or through reciprocal switching, as 2-to-1 points, and have granted BNSF access to those plants via trackage rights, as a replacement carrier for SP. Applicants have also agreed to continue to offer reciprocal switching at these plants vis-à-vis BNSF at a charge not to exceed $130 per car, adjusted upward or downward each year on the basis of 50% of the RCAF, unadjusted for productivity.

To identify points to be covered by corrective trackage rights, applicants have identified 2-to-1 points as those that can be served directly, or through

reciprocal switching, by UP *and* SP but by no other Class I railroad.[127] Applicants have also identified a category of 2-to-1 *corridor* flows, where only UP and SP offer competitive alternatives: Houston-New Orleans; Houston-Memphis; Lake Charles/West Lake-New Orleans/Mexico; Texarkana-Memphis; and Shreveport-Memphis.[128] Under the BNSF agreement, BNSF would be given overhead trackage rights over those corridors, but it would only have authority to serve shippers at 2-to-1 points.

Protestants argue that applicants' approach is too restrictive because many shippers benefit from UP-SP competition in ways other than having both of those carriers physically reach their sidings. Protestants argue that other forms of competition--transloading, build-ins or build-outs, close market competition and plant switching, and location of new sites--can all be effective in bringing pressure on each carrier's rates.[129]

Protestants argue that the correct measure of competitive impact must center around flows between origin-destination pairs, and they evaluate origin-destination flows by commodity. They also use broader geographic areas than "points" in an attempt to estimate the potential for such options as build-ins and transloading that result from carriers being near each other. They argue that all shippers who have such competitive options before the merger need to be protected with direct access to another carrier.

Protestants use various geographic units to estimate situations where rail carriers are close enough together that loss of one of the two merging carriers should be considered a full 2-to-1 impact. Under this approach, the broader the geographic unit chosen, the greater the likelihood that points applicants treat as 1-to-1 will be identified by protestants as 2-to-1, 3-to-2, or even 4-to-3. This accounts for much of the discrepancy in the parties' estimates of the volume of traffic that will be affected by the merger. Applicants' analysis translates readily into conclusions as to what points trackage rights must serve. In contrast, protestants' analysis leads to differentiation at each point depending on the commodity and origin-destination flow.

---

[127] Applicants contend that they carefully checked actual accessibility. They added points on shortline railroads reachable by connections to UP *and* SP, but by no other Class I railroad. Further, they added any point that had what they considered to be a bona fide build-in, build-out, or transload option prior to the merger.

[128] The ultimate eastern origins or destinations for interterritorial traffic are not considered, only the eastern gateways for such traffic.

[129] KCS-33 (Vol. 1), VS Grimm, at 163-180.

KCS studied flows between BEAs,[130] based on a commodity breakdown at the 5-digit STCC level.[131] KCS estimates total revenues for 2-to-1 traffic, based on this broad definition and using the 1994 100% traffic data base, to be $2.04 billion. DOJ, in its study, uses various broad geographic units depending on the type of commodity to estimate the volume of affected traffic [*i.e.*, BEAs for manufactured products; and 4-digit SPLCs for "low-valued" (per weight unit) freight, for which it alleges that extensive truck hauls to a reload point would not be feasible[132]], and excludes all traffic it considers truck competitive for the entire movement from origin to destination based on distance (up to 500 miles for BEA commodities and 100 miles for 4-digit SPLC commodities). Using the 1994 Waybill Sample, DOJ estimates revenues for 2-to-1 markets at $1.5 billion. NITL's study, using 1994 Waybill Sample data at a 6-digit SPLC level,[133] estimates revenues for 2-to-1 traffic to be $2.58 billion. Applicants identify $1,002 million of traffic at 2-to-1 points.[134] Protestants imply that the BNSF trackage rights are inadequate to the extent that they do not serve all shippers that experience some competitive harm, however indirect.

In essence, the problem with protestants' 2-to-1 analysis is that they aggregate traffic that will experience various types of competitive problems that we think are readily susceptible to different types of remedies. Although divestiture of parallel lines could address harms discussed here, there are less

---

[130] The ICC has found that BEA-to-BEA rail traffic flows are often far too broad to measure accurately potential merger-related competitive harm:

> [t]he traffic flows between BEA areas in some instances, such as the Los Angeles BEA, include rail traffic not affected by changes in the levels of competition resulting from the proposed merger. For example, in the Los Angeles BEA, traffic terminated at Needles, CA, on the ATSF would not be affected because it is a point exclusive to ATSF at the present time and, in fact, is near the Arizona border.

SF/SP, 2 I.C.C.2d at 768.

[131] "STCC" refers to the Standard Transportation Commodity Code developed by the Association of American Railroads (AAR) in the early 1960s. This code, adopted for reporting commodity statistics to the ICC, was patterned after the U.S. Government's Standard Industrial Classification Code.

[132] Inexplicably, as noted earlier, Majure uses 6-digit SPLCs to perform his rate study.

[133] As we have explained, 6-digit SPLCs are the equivalent of freight stations. By using that level, NITL approximates applicants' standard of seeking points with direct access to UP and SP. Applicants, however, note that NITL did not check actual access.

[134] The number would be $795 million if applicants were to leave out 2-to-1 traffic solely served by UP or SP at one end of the movement.

intrusive ways and more focused ways of achieving that result, which are adopted here.

We agree with protestants that applicants have not gone far enough in addressing certain adverse competitive effects. Applicants, for example, address the loss of transloading options by allowing BNSF to locate transloading centers only at 2-to-1 points. Applicants maintain that truck movements to new BNSF transloading centers at 2-to-1 points or to centers on BNSF's own lines, would be sufficient to ensure that no shipper previously enjoying such options would be hampered by this limitation. But today UP or SP may locate transloading facilities anywhere on their lines to reach shippers on the other carrier. We believe that allowing BNSF or third parties to locate transloading facilities anywhere on the lines where BNSF will receive trackage rights will preserve that competition.

The same is true with respect to accommodating build-in or build-out options. If a UP shipper undertakes a build-out option, for example, to reach SP, SP need not subject the shipper to a feasibility test. It can simply negotiate a contract rate with that shipper that goes into effect if the shipper or the carrier that wants to obtain its business actually constructs a connection. Allowing BNSF to do the same is a more appropriate means of rectifying what would otherwise be adverse competitive impacts brought about by loss of build-out options.

Shippers of chemicals and plastics that are served by just one railroad have noted that they also benefit from pressure brought on by competitive rates that nearby competing shippers having access to two rail carriers can obtain. These shippers will continue to benefit from ample geographic competition of this type, as we explain elsewhere in this decision.

Location of new facilities provides competitive pressure, and this issue was partially resolved in the CMA agreement, as BNSF will be authorized to serve all new shippers that choose to locate on the SP lines over which BNSF is obtaining trackage rights. We will broaden that provision also to permit BNSF to serve new facilities that locate on UP lines over which BNSF has been given trackage rights.

With the conditions we are imposing, we find that BNSF will be an effective replacement for SP at these 2-to-1 points and affected 1-to-1 points. Although various protestants have argued that the compensation terms and other conditions of the trackage rights arrangement may not allow BNSF to replace the competition that will be lost when SP is absorbed into UP, those arguments are without merit, as discussed in detail below.

SOURCE AND OTHER INDIRECT COMPETITION NOT IMPAIRED. A number of parties (particularly DOJ, DOT, and KCS) note that UP and SP often restrain each other's rates and service levels even where the shipper has access to only one rail carrier. This indirect competition can take two forms. First, as discussed in detail above, when UP or SP lines run near the plant of an exclusively served shipper, the ability of that shipper to transload or build out to a second carrier can provide important leverage in rate and service negotiations with the carrier providing direct service to the plant, and the conditions which we are imposing reflect the importance of this arrangement.

Second, UP and SP can compete indirectly through source or geographic competition when their exclusively served shippers are transporting relatively homogeneous products. We explain below why the merger will not diminish source competition for the main products for which this issue has been raised: plastic and chemical products moving out of the Gulf area; coal moving out of the (SP-served) Uinta Basin and (UP-served) PRB and Hanna Basin; and for grain and lumber moving throughout the West.

Plastics and Other Chemicals. Protestants express concern that the merger will permit UP/SP to exercise increased market power over shippers of plastics and other chemicals. We find that, with the addition of certain conditions discussed below, these concerns have been shown to be groundless. Applicants' studies of Gulf Coast plastic and chemical traffic have shown that source competition will remain powerful, and in some respects will be magnified, following the merger. Applicants have demonstrated that a combined UP/SP will be unable to exercise any additional market power over shipments of any plastic or chemical commodity because the overwhelming percentage of shipments will continue to be available to non-UP/SP rail and non-rail transport alternatives.

The settlements that UP/SP have crafted with BNSF and CMA will enhance competition for the large number of plastic and chemical shippers whose plants are now served by UP, SP, and no other railroad. Indeed, CMA, which accounts for 90% of the nation's basic industrial chemical productive capacity, has withdrawn its opposition to the merger in response to important steps taken by applicants to meet the concerns of its members.[135]

BNSF will now be able to serve every plastic and chemical shipper currently served by UP and SP and no other railroad. For those 2-to-1 shippers,

[135] CMA-12 at 4-5.

competition will be expanded to the extent that BNSF will provide a more effective alternative than SP has been able to provide at those points. The prospects for BNSF being able to improve service options for a particular shipper are good because it can provide direct, single-line service to much of the West, and can provide efficient access to major gateways for movements to the rest of North America. Moreover, various other shippers will continue to have extensive access to carriers other than UP/SP, including BNSF, KCS, and IC.

For plants served by a single railroad, source competition can be an effective competitive restraint on rail rates when sources of supply are numerous, cost conditions of alternative sources of supply are homogeneous, transport costs from alternative sources are similar, delivered products are close substitutes, and the share of transport costs in the delivered price of the product is high. Especially for plastics, as SPI admits in its comments, each of these factors is present now. SPI-11 at 14; VS Ruple at 9; and VS Bowles at 2. We note that these factors will continue after the merger. The record shows that there are approximately 40 plants producing substantially identical plastic resins in the Gulf region alone.[136] Transportation costs for plastics are approximately 20% of delivered costs. The railroads are well aware that, if plastics shippers do not receive transportation rates comparable to those received by their nearby competitors, they will be hindered in their ability to compete in marketing their products, and the serving carrier will lose traffic.

SPI asserts that UP/SP would have access to 90% of the plastics movements, with a post-merger market share of about 63%. SPI's concern is that the merger would permit UP/SP to dominate the transportation of plastics, but we think that is unlikely to occur because many plastics shippers continue to have rail transport options with carriers other than UP or SP, and about 15% of the plastics traffic is shipped by truck and intermodal transport. After accounting for the BNSF agreement, UP/SP's exclusive originations will remain less than 40% of plastics production in the Gulf. Even at points where UP/SP is the only serving rail carrier, it will not be able to increase its rates without weighing the possibility that the shipper will lose its business to one of its many nearby competitors served by other carriers. We conclude that there will continue to be sufficient source competition to suppress UP/SP's exercise of additional market power at plants where it is the only rail carrier.

---

[136] Capacity, although primarily located in the Gulf Coast, is sufficiently dispersed throughout Texas and Louisiana, so as not to be under the control of any one railroad. Other plants are located in the Midwest, East, and Canada.

Further, applicants explain that most chemical traffic, other than plastics, moves predominately by truck and barge,[137] in addition to moving by rail. The preconditions for source competition will continue to be present for these nonplastic chemicals as well. The customers producing these products are large firms, many of which are multinational, and all of which are sophisticated in effective negotiations with carriers. Continued source competition should preclude the exercise of market power at nonplastic chemical plants served by a single carrier.

Despite these facts indicating that effective source competition will continue, merger opponents continue to allege that UP/SP will be able to exercise new-found market power and thus "control" a large portion of the Gulf Coast shipments of plastics and chemicals. Protestants argue that UP/SP will have "control" over large percentages of Gulf Coast plastic and chemical originations. They also argue that the amount of plastic and chemical traffic that will go from 2-to-1 or 3-to-2 is far larger than applicants concede.

We agree, however, with applicants' witnesses Barber, Spero, and Peterman that protestants' contentions are flawed because of the continued availability of source competition to prevent the abuse of market power. Moreover, applicants show that protestants have overstated the traffic that will be exclusively served by UP/SP. They show that half of the shipments of any specific plastic or chemical commodity moved in volume would be available to non-UP/SP rail or other non-rail transport alternatives.[138] Protestants originally asserted that UP/SP would control 63% of Gulf Coast originations for plastic resins, but the settlement agreement with CMA will reduce UP/SP exclusive service to less than 40% of production capacity in the Gulf. In addition, any new plants producing these products will be able to receive service from both UP/SP and BNSF, depending on where they locate.

Coal. A number of utilities and some shipper organizations have submitted comments addressing coal issues. These parties primarily argue that the merger will diminish existing source competition among different coal origins served by UP and SP. Most notably, opponents allege that UP/SP will not have the incentive to promote SP's Colorado/Utah coal business, and will suppress that business in order to favor UP's PRB coal origins. This allegation is also the focus of MRL's responsive application.

---

[137] UP/SP-23 (Vol. 2), VS Barber, at 487.

[138] The only exception is adipic acid.

But, as explained below, applicants demonstrate that there is little meaningful source competition between UP and SP for coal because each originates coal that typically serves different markets. UP's coal competition is BNSF, not SP. UP's coal business is based overwhelmingly on movements out of the PRB in Wyoming, whereas SP originates coal only out of the Uinta Basin in Colorado and Utah. Those coals are fundamentally distinct in terms of price and physical characteristics. PRB coal is lower-cost, lower-BTU coal that invariably offers a lower delivered cost than Colorado/Utah coal, with the exception of minemouth coal-burning operations or for utilities with significantly shorter rail hauls from the Uinta Basin than the PRB. This means that plants that can burn PRB coal will typically not burn Colorado/Utah coal except if needed for blending purposes or other technical requirements not related to the relative prices of the two coals. On the other hand, those plants (especially in the Midwest and East) that cannot burn lower-BTU PRB coal will instead look to Colorado/Utah coal and other higher-BTU coals in the East and West, and *not* PRB coal, as their competing alternative sources.

Thus, UP competes intensively, head-to-head, against BNSF for originations of PRB coal, and not against SP movements of higher-priced Colorado/Utah coal. In contrast, SP's competition for Colorado/Utah coal movements is with other high-BTU coals, especially from the Appalachian and midwestern coal regions that supply high-BTU coal to eastern and midwestern utilities.

In addition to its heavy volume of PRB originations, UP also moves a small amount of coal from the Hanna Basin and other coal regions in Southern Wyoming. The demand for Hanna Basin and other Southern Wyoming coal has declined because, while it is lower in BTU content than the high-BTU coals, it is significantly higher in price than the low-BTU coal of the PRB. Most of the coal opponents do not even mention Hanna Basin coal as a significant competitive factor. Applicants have shown that Hanna Basin coal has deficiencies in both BTU content and price, in a way that makes it largely non-competitive for new coal business.

Once the proper marketplace dynamics are taken into account, it becomes clear that the coal opponents have predicated their opposition to this merger on a fundamentally mistaken premise. Virtually every coal opponent claims that there is extensive, head-to-head competition between UP and SP that will be "extinguished" or "lost" or "destroyed" as a result of the merger. *See, e.g.,* WSC-11 at 1-3, 22; WCTL-11 at 21; WPL-5 at 6. But, drawing on aggregate industry trends as well as plant-by-plant detail, applicants' witnesses Sharp and

Sansom show that there is little meaningful competition today between PRB and Colorado/Utah coals.

As a result, we find that there is no substance to the coal opponents' arguments based on a supposed "western coal market." *See, e.g.*, WCTL-11 at 11. Various experts engage in market share or concentration analyses of this "market."[139] But, all of this falls apart once it is recognized that there is no single "western coal market." SP's Colorado and Utah coals are competing principally against eastern and midwestern coals, for the business of utilities that need to buy high-BTU coal for at least a portion of their coal burn. Opponents err by defining a "market" for SP's Uinta Basin coal originations that incorrectly includes UP's PRB coal originations and incorrectly excludes originations from high-BTU eastern and midwestern coal regions. This misses the real competition for SP's Colorado/Utah coal business.[140]

Many of the coal opponents assert that UP will suppress rather than build SP's Colorado/Utah business, or that UP will lack "incentive" to build upon SP's coal business. For example, MRL asserts:

> The potential for neglect of Western Bituminous coal transportation initiatives following the UP/SP merger is high * * *. UP/SP would be able to effectively choke off Western Bituminous coal growth in favor of its preferred PRB mines.

MRL-10 at 30 and 36.

We reject the notion that UP is likely deliberately to undermine and weaken the Colorado/Utah coal business, rather than developing it. We find applicants' claim far more credible: that UP would not ignore a core element of SP's rail franchise, forgoing the benefits that will flow to the merged system from greater efficiencies and operational capabilities. Applicants explain that a central

---

[139] *See, e.g.*, WPL-5, VS Crowley, at 7-9; WCTL-11, VS Weishaar, at 14-23. WCTL asserts that three railroads now originate 96.4% of all rail movements in the western coal market: BNSF (57.7%); UP (30.3%); and SP (8.4%). Others talk about "collusive behavior" or a "duopoly" in this supposed "market." *See, e.g.*, WCTL-11, VS Borts, at 3-16; WPL-5, VS Weishaar, at 15.

[140] Certain utilities whose coal fired generating plants are served exclusively at destination by UP or SP have requested that we grant trackage rights for a second carrier to serve the plant to make up for any lost source competition between SP-served Uinta Basin mines and UP-served PRB mines. For example, this argument forms the basis for WEPCO's requested relief at its Oak Creek Power Plant. These parties have not met the ICC's standard for relief under these circumstances, which we affirm and apply here. The record must clearly show, first, that prior to the merger the benefits of origin competition flowed through to the utility and were not captured by the destination monopoly carrier, and, second, that the competitive flow through will be significantly curtailed by the merger. *See, BN/SF*, 10 I.C.C.2d at 747.

benefit of this merger is market expansion--building on the strengths of the separate railroads by delivering rail services more efficiently than either UP or SP can accomplish separately.

UP's PRB business and SP's Colorado/Utah business are complementary. Both businesses can grow at the same time. The coal opponents are simply wrong in claiming that UP would "compete against itself," WSC-11 at 42, if it sought to build the Colorado/Utah business.

Applicants' witness Nock explains why the Colorado/Utah business is a major new business opportunity for UP. For the first time, UP will have access to extensive originations of high-BTU coal--originations that present *new* market opportunities for UP in competing against eastern and midwestern high-BTU coals, and in competing for export business. UP states its firm intentions to build the Colorado/Utah coal business aggressively. RVS Nock at 9. Precisely because the merged system will be more efficient and cost-effective, UP/SP plans to expand the market reach for SP's Colorado/Utah business. Single-line access to more destinations, upgrading of key routes, the availability of shorter routes, and operating efficiencies will all sharpen the competitiveness of Colorado/Utah coal. This directly contradicts the suggestion of various coal opponents that UP will downplay SP's Colorado/Utah business.

UP has competed aggressively to build its coal business, not just its PRB coal business, but also its Hanna Basin and other Southern Wyoming coal business. RVS Nock at 5-8. This has included "backhauls" and "aggressive pricing." RVS Sansom at 67-69; RVS Sharp at 56-65. In the aggregate, UP's coal rates have been lower than SP's. RVS Sharp at 58-60; RVS Nock at 18.[141]

A number of opponents point to the declining presence of Hanna Basin coal as supposed evidence that UP will not pay adequate attention to SP's Colorado/Utah business. But, as noted, Hanna Basin coal has confronted fundamental problems in the marketplace, such as significantly higher cost than PRB coal, but lower quality than Colorado/Utah coal. Applicants' witness Sansom explains why these marketplace dynamics--and not any inattention by UP--have caused the relative demise of Hanna Basin coal. UP/SP-230, RVS Sansom, at 12-17. Nock notes that UP has sought for years to build the Hanna Basin business through aggressive rates and other marketing efforts that have not borne fruit. UP/SP-230, RVS Nock, at 7-8.

In contrast, Nock's statement addresses the reasons that the merged system will be able to expand SP's Colorado/Utah coal business significantly. Unlike

[141] We agree with applicants that the rate comparisons presented by WCTL (WCTL-11, VS Crowley, at 16-19) are not reliable. RVS Sansom at 78-79; 89-91.

Hanna Basin coal, which has not responded to UP's best efforts, Colorado/Utah coal is well-positioned to intensify competition against other high-BTU coals, particularly eastern and midwestern coals where Hanna Basin coal has not proven to be competitive.

We also find that competition among high-BTU coals will be stimulated by applicants' settlements with the URC and BNSF. Utah producers will gain important new rail access to midwestern and eastern markets, which will add a further stimulus to competition between UP and BNSF. RVS Nock at 18-20.

While we have explained why we find little credibility in opponents' claims that UP will deliberately choose to neglect or otherwise degrade SP's Colorado/Utah coal business, we note that opponents' concerns will be monitored through the oversight process.

MRL has asserted that, even if there is limited Uinta Basin versus PRB competition for coal movements to utilities' existing power generating plants, the merger presents a threat to *ex ante* source competition for coal. This refers to competition that derives from a utility's ability to choose from among various alternatives while selecting a site for a new plant or rebuilding an existing one.[142] Our assessment is that this argument also lacks merit. As MRL acknowledges, before a utility plant has been sited and designed, competition takes place between coal sources, transportation modes, boiler designs, and individual carriers. Utilities at this stage--before they have sited a plant, chosen a boiler design and coal source, or negotiated with coal mines and transportation firms--will not be competitively harmed because they will retain adequate transportation and coal sourcing options. After the merger, shippers will generally be able to site or configure new plant investments in such a way as to take advantage of several transportation options, including several major railroads, barge transport, or some combination of these.

Grain and Lumber. Grain and lumber are among the most important commodities carried by western railroads. Although submissions by states, shipper associations, and community groups[143] allege competitive problems associated with grain and lumber, they afford no comprehensive market analysis and the evidence presented on their behalf is quite limited. Grain and lumber

---

[142] *See* MRL-26 at 18.

[143] Among the shipper associations concerned with grain are Mountain-Plains Communities & Shippers Coalition, Montana Wheat and Barley Committee, Montana Farmers Union, and Colorado Wheat Administrative Committee. The State of Montana underscored grain issues, while Or/DOT underscored lumber.

are rail-oriented commodities, especially beyond certain distances, and both are marked by very strong geographic competition.

Shippers of both commodities raise concerns, recapitulated by USDA, about the vulnerability of small, rural shippers and shortline railroads to merger-related rate restructuring and car supply actions of the major railroads. As we will explain, these and other concerns raised by protestants are misplaced here. To begin with, SP now plays only a minor role in grain transportation.[144] Over recent decades the number of primary grain-hauling railroads in the West declined both because of mergers and bankruptcy. Except for areas served by the CP Rail System/Soo Line Railroad Company and KCS, the competitive battleground for western grain has come to be occupied almost entirely by BNSF and UP.

Montana grain interests and Oregon lumber interests, among others, essentially have complained that they are unable to take advantage of the PRA between UP and BNSF for Pacific Northwest traffic routed over the Portland gateway. This agreement opens California for the first time to single-line competition between UP and BNSF from origins to the north and to the west of Portland--a remarkably pro-competitive development. As a result of this agreement, shippers in this corridor will now experience more intense geographic competition than before.

Nevertheless, Montana interests claim they are harmed because the BNSF PRA does not extend to the eastern part of Montana. *See* MWBC-4 at 13. We will not impose a condition just because one group of shippers obtains pro-competitive merger benefits that other shippers do not enjoy.[145] In any event, to the extent that some shippers benefit by receiving improved competitive options, the more intensive geographic competition that results should keep rates for other shippers in check.

Colorado wheat growers' concerns center around abandonment of part of the Dotsero to Towner line. They argue the abandonment is an attempt by applicants to ensure that no one else uses the assets in question. They claim that the current dearth of rail traffic on the line results from poor car service and disadvantageous rates, and argue that farmers expend greater resources driving

---

[144] According to the AAR's 1995 Annual Summaries of Weekly Railroad Traffic, SP handled only approximately 4% of all western grain carloads in 1995.

[145] *See, BN/SF,* 10 I.C.C.2d at 782: "We realize that the SP settlement agreement, by providing increased rail options for [the shipper's] competitors but not for [the shipper], may work to [the shipper's] disadvantage. But that is not the kind of harm that we should rectify under our conditioning power."

trucks, especially during critical harvest times, when they are delayed for long periods of time awaiting unloading. But applicants correctly explain that the use of semi-trailers to haul grain long distances, which did not begin in earnest until the late 1980s, now provides effective truck competition directly from farm to market or to terminal points served by several railroads via unit trains. And, if the shippers desire to keep this line open, they can purchase it under 49 U.S.C. 10905 (now 49 U.S.C. 10904).[146]

Arguments by other Kansas growers, and KCS, center on the Wichita to Fort Worth corridor, over which SP, as a result of a voluntary settlement agreement with BNSF in the BN/SF proceeding, gained rights to provide service (which we note are rights that the ICC did not impose as a condition of approval of the *BN/SF* merger). The current merger would reduce the number of carriers serving that corridor to two, UP/SP and BNSF. Although USDA joins in the request to restore a third carrier to replace SP, it acknowledges SP's minor role in this market so far.[147] SP uses a shortline operator, SKOL, to exercise the trackage rights, and it is not expected to improve on the service BN provided over this corridor prior to its merger, using a fragile branch line from eastern Kansas. UP/SP-23, VS Peterson, at 219-220. In sum, SP's presence has been minimal here, and the presence of two strong competitors here makes it unnecessary for us to impose a third.[148]

The most direct competitive effect of the merger on lumber concerns the aggressive transloading program UP has conducted reaching into SP's southern Oregon area to draw freight to Portland from shippers located on lines served exclusively by SP.[149] Comments of Or/DOT, March 29, 1995, at 13. Because BN also conducts transloading operations directed at SP below Portland, this situation can be regarded as 3-to-2, although BN was less active in this regard. Oregon lumber interests seek to expand the BNSF PRA to open Eugene for

---

[146] Arguments raised by Kansas wheat growers on the Pueblo-Herington line are similarly without merit.

[147] Comments of USDA, March 29, 1996, at 5.

[148] In any event, as applicants indicate, the relevant wheat market is broader, including such options as barge transportation from Kansas City to the Gulf. Applicants also expect added competition from upgrading of the OKT line and use of combined UP and SP lines in Texas to move heavier-loading cars of wheat for export.

[149] It is not surprising that, with SP's transit times on lumber from Pacific Northwest to Chicago running an average of 11.8 days compared with UP's average of 7.5 days, SP's traffic was vulnerable to competitive inroads through transloading. UP/SP-22, VS Gray, at 216.

lumber traffic flowing east and to open SP-restricted short lines to interchange with BNSF. *Id.* at 4 (Boise Cascade letter).

The new competitive options that these shippers seek have nothing to do with competitive harm caused by the merger, and competition in this market will remain strong after the merger. Lumber shippers in Oregon are subject to both source competition and destination competition. When Oregon lumber moves to eastern markets it faces competition from Canadian, other Pacific Northwest, and Southeast origins. UP/SP-23, VS Peterson, at 101-102. When Oregon lumber moves south to California, competition from origins to the north has been limited because access to California required interline arrangement with SP. The BNSF PRA opens that access, thereby intensifying source competition. From the standpoint of destination competition, an Oregon shipper has the choice of directing lumber either to eastern markets or to California depending on product market conditions and transportation options. These forms of geographic competition were highly effective pre-merger and, with the BNSF PRA, will improve post-merger.

TRACKAGE RIGHTS ISSUES AND ALTERNATIVES. Trackage Rights Are Operationally Feasible. Several parties, most notably Conrail and KCS, have argued that BNSF will face crippling operational obstacles in providing service over these trackage rights. They argue that BNSF's service will be subject to dispatching discrimination by applicants, that it will be hampered by going against the flow of the directional running of certain lines, that BNSF will lack sufficient SIT and other facilities to provide quality service, and that BNSF will lack the traffic density or sufficient incentive to operate these lines competitively. We believe that the CMA settlement agreement and other conditions that we have devised have effectively addressed the objections raised by those parties. The dispatching protocol, additional trackage rights permitting BNSF to participate in directional running, the availability of additional SIT facilities, and BNSF's ability to access additional traffic now under contract to UP or SP and to obtain transload and build-out traffic combine to ensure that these trackage rights will be a successful remedy.

We agree that the landlord's power to control dispatching is an important one, and we might have been reluctant to rely on trackage rights to solve a competitive problem over such a large area without assurances that dispatching would be conducted without discrimination against the tenant carrier. Applicants and BNSF, however, have agreed upon a detailed written trackage rights protocol that should ensure equal treatment of all trains without regard to ownership. Applicants note that the protocol ensures that each railroad can

monitor in real time the handling of its trains by the other; stations tenant supervisory employees at the landlord's dispatching center; and, if a dispute arises, provides for dispute resolution procedures, prompt arbitration and sanctions. This protocol, together with our continuing oversight, should ensure that dispatching discrimination does not occur.

Concerns raised by KCS, Conrail and others that BNSF service will be going "against the flow" and will be using an inferior route from Houston to St. Louis are now moot due to applicants' agreement to give BNSF additional trackage rights to permit it to take advantage of the same directional running that applicants plan to use on parallel UP and SP lines between these points. Applicants have partially addressed concerns about the sufficiency of BNSF's SIT facilities by making available a large facility near Baytown, TX, and by agreeing to make other facilities available as necessary. We will impose an additional condition, discussed in detail below, requiring applicants to give BNSF access to all facilities formerly used by SP. BNSF also will have its own SIT facilities at Lafayette Yard in Louisiana, and at Cleveland and Silsbee, TX. Further, we note that BNSF has an outstanding rail network in the West, which fits very well with the additional service it will provide under these trackage rights. BNSF should be able to provide the necessary infrastructure to provide quality service--terminals, repair facilities, and information systems--at a reasonable cost.

Several parties have argued that BNSF will not be able to achieve sufficient traffic density to make these operations efficient, in part, because BNSF is only obtaining authority to serve 2-to-1 points, which, as we have explained, provide only a fraction of the total traffic on these lines. Despite this limitation, however, applicants have demonstrated that BNSF will be in a position to compete for a substantial amount of traffic, and BNSF has corroborated this. Overall, the BNSF agreement will permit BNSF to compete for $1.9 billion worth of traffic, much of which is unrelated to the particular competitive problems at issue. Of this total, BNSF will be able to compete for $795 million of traffic at points applicants identify as 2-to-1.

Given all of the protections set forth in the BNSF agreement (particularly the terms of the CMA agreement) and the additional conditions we are imposing

imposing, we believe that BNSF will be able to compete efficiently for this traffic.[150] As discussed elsewhere, some of these additional conditions expand the terms of the CMA agreement. For example, the CMA agreement requires applicants to open at least 50% of existing contract volume at 2-to-1 points in Texas and Louisiana to BNSF, and we will require that UP/SP similarly open at least 50% of existing contract volume at all other 2-to-1 points served by BNSF's trackage rights. Likewise, we are expanding the new facilities and transloading provisions. Even without our new conditions, applicants estimate that BNSF will be able to compete for nearly three-fourths of the 2-to-1 traffic now, and nine-tenths of it within a year of consummation. UP/SP-231, RVS Peterson, at 191-94.

As applicants note, BNSF has no sunk cost in these lines, and will share in the cost only to the extent of its usage. In this regard, the structure of the trackage rights fees is advantageous to a carrier attempting to gain a foothold in a new market. Also, where BNSF is replacing service formerly provided by UP or SP via reciprocal switching, it will only have to pay $130 per switch, or, if it prefers, it can provide the switching service itself. We conclude that all of these factors taken together should result in BNSF having sufficient traffic to make these operations run efficiently.

Many protestants have claimed that BNSF is generally unwilling or otherwise uninterested in providing all the service contemplated in the trackage rights arrangement. BNSF's counsel addressed this issue at oral argument, saying that "we also want to assure you that BN/Santa Fe is willing, able, and anxious to compete for this traffic to which it will gain access under these rights." Jones, Oral Arg. TR at 99. BNSF's counsel also explained that:

> [W]e put in substantial evidence showing that we think the densities are sufficient to permit the building of trains that will meet the customers' needs * * *. The operating problems are actually quite manageable, and we are confident that we can compete for this traffic and that we can do so with very strong, vigorous competition. *Id.* at 106.

We agree with BNSF that it should have sufficient traffic for efficient operations and that it should have every incentive to take advantage of this new opportunity.

---

[150] Conrail's attempt to use the ALK diversion model to prove that BNSF will not have adequate traffic density is inherently flawed. Conrail applied an arbitrary penalty to traf fic moving under trackage rights, which naturally resulted in less traffic being shown as divertible to BNSF. That study can be given no weight here.

Nevertheless, as parties such as DOJ, DOT, and RCT[151] have pointed out, because so much depends upon BNSF's performance, we are imposing special conditions directed to this issue. As an initial matter, we expect BNSF to compete vigorously for the traffic opened up to it in this proceeding. Indeed, we will impose upon BNSF a common carrier obligation with respect to this traffic, including traffic that is handled under haulage rights rather than trackage rights.

Various parties have expressed concerns that BNSF may not immediately commence the trackage rights operations at issue. There are some indications that a start-up of all of these trackage rights operations on the date of consummation may not be physically possible. Nonetheless, we expect that as soon as reasonably practicable BNSF will begin trackage rights operations over the key corridors between Houston and New Orleans, between Houston and Memphis, and in the Central Corridor. A failure to conduct trackage rights operations in these corridors could result in termination of BNSF's trackage rights, and substitution of another carrier, or in divestiture.[152] BNSF will be required to submit a report on its progress in meeting these requirements and an operating plan on or before October 1, 1996, and further progress reports on a quarterly basis thereafter.

DOJ has predicted that our course of imposing trackage rights with monitoring rather than requiring divestiture will involve the Board deeply in further regulation of this matter. We are confident, however, that this will not be the case, and we are imposing these monitoring conditions to ensure that the conditions we are imposing to address competitive harm do so effectively. Moreover, as discussed elsewhere in our decision, divestiture certainly would involve the Board and the parties in further extensive regulatory proceedings.

We have examined the various major corridors over which BNSF will be providing service as a replacement for SP. As noted below, the operations that BNSF will undertake appear reasonable to meet its common carrier obligations. It also appears that BNSF should be able to attract sufficient traffic to provide efficient operations.

---

[151] RCT's representative noted at oral argument that "[i]f BNSF fails to seriously and immediately compete on any of these trackage routes in Texas, damaging loss of competition will result." Williamson, Oral Arg. TR at 464.

[152] As applicants noted at oral argument, the Board "will have unrestricted power to impose additional conditions if appropriate" and "[t]hat would include divestiture * * *." Roach, Oral Arg. TR at 59-60.

Houston to New Orleans. In the Houston-New Orleans corridor, BNSF plans to operate by exercising its option to acquire from applicants the line between Iowa Junction and Avondale, LA,[153] and by using trackage rights between Iowa Junction and Houston and within the New Orleans Terminal. BNSF intends to provide new service for overhead expedited traffic, as well as for manifest traffic originating and terminating on the acquired segments. BNSF proposes to schedule and operate eight regular trains (four in each direction). One intermodal train pair will operate between California and New Orleans, accessing BNSF's newly acquired route near Beaumont. BNSF also will extend to New Orleans its existing train service that now terminates at Houston.

One daily manifest train pair will be scheduled between Temple, TX, and New Orleans handling through California traffic in both directions and bypassing the Houston terminal by using BNSF's Conroe Subdivision. This train also will connect with other trains handling Intermountain and Pacific Northwest traffic via the Fort Worth, TX, gateway.

BNSF's new route between New Orleans and West Coast locations, of which the New Orleans to Houston segment will be a vital link, will provide service that is competitive with the routes of UP/SP. In addition, these through trains will provide a significant benefit by enabling traffic originating or terminating at numerous points in Texas to receive this competitive service alternative.

A second manifest train will operate between Houston and New Orleans, allowing interchange of South Texas/Mexican traffic at Houston. In addition, BNSF will handle traffic to and from Lafayette, LA, and other intermediate points. Extra manifest and unit trains will be operated as needed, including trains that will be assembled at BNSF's yards at Temple and Teague, TX. RCT and other parties, relying on analysis by Crowley, allege that BNSF will be unable to attract sufficient traffic for efficient operations in the Houston/Gulf Coast area. Those computations ignore BNSF's current traffic base in the region. Where BNSF has had access to plastic and chemical shippers in the Houston region, it has been able to develop a 50% share of this business.

---

[153] In UP/SP-266, applicants indicate that BNSF has concerns about this line it will purchase, and that applicants and BNSF will inspect the line prior to the closing of the sale and, if necessary, place $10.5 million of the purchase price in escrow pending arbitration regarding the condition of the line. The funds will be used to improve the line, if necessary, to bring it into compliance. UP/SP-266 at 7.

BN/SF-54, VS Rose, at 4. But BNSF has been limited in its ability to attract a larger share of traffic in the area due to its absence of direct and efficient routes to key interchange points with the eastern railroads. With the trackage rights and purchase agreements included as part of this merger, BNSF now possesses the necessary direct routes to the eastern connections to allow it to be competitive for an even larger share of this market. Overall, the operations contemplated by BNSF should be sufficient to meet the needs of the shippers it will be serving in this corridor.

Houston to Memphis/St. Louis. BNSF will operate trackage rights over the Houston to Memphis/St. Louis route. The CMA agreement permitted two major improvements in BNSF's operations by allowing for BNSF trackage rights over applicants' lines between Houston and East St. Louis, and by permitting BNSF trains to operate along the same directional lines as applicants' trains.[154] Thus, BNSF will be able to route its northbound trains over the UP lines, and its southbound trains over the SP lines.[155]

BNSF plans to run four trains daily (two in each direction) between Houston and Memphis/St. Louis. One pair would be scheduled between St. Louis and Houston for carload traffic. A second train pair would operate between Memphis and Houston for that traffic. These trains would connect with existing BNSF service at intermediate points such as Cleveland, TX, and Tenaha, TX, and to new service at Pine Bluff, AR.

Crowley (for NITL and other protestants) calculates that BNSF will have a market share of only 17.3% of the traffic at the 2-to-1 points that it will serve in this corridor, which we believe grossly understates the traffic that BNSF will attract. Crowley's calculation is based upon the unsupported and erroneous assumption that all traffic that originates and terminates on the new UP/SP merged system is simply "unavailable" to BNSF. Consequently, Crowley eliminates from consideration over two-thirds of the traffic at these 2-to-1

---

[154] Originally, the BNSF settlement agreement provided that BNSF would operate all of its trains on the SP line between Fair Oaks, AR, and Houston. This arrangement would have caused northbound BNSF trains to meet applicants' southbound flow of 23 daily trains, which would have caused substantial delays to BNSF traffic. Extending BNSF's trackage rights from Memphis to East St. Louis has eased concerns of certain protestants over ensuring BNSF an efficient connection with Conrail at St. Louis.

[155] By obtaining these trackage rights between Houston and Memphis, BNSF will shorten that route by 462 miles, and its route between Houston and St. Louis by 125 miles. BN/SF-1, VS Owen, at 19.

points. There is no reason for us to think that BNSF is going to be able only to compete for less than a third of the available traffic, when it has a route structure in the West comparable to UP/SP's, and when it has improved and comparable routings for connections to eastern railroads. Where BNSF has had access to markets in the Gulf region, it has been able to carve out a significant share of the available traffic, and we think that it will continue to do so under the broad trackage rights granted here.

Evidence of the importance placed by shippers on the quality of service in selecting a railroad is offered by IPC. IPC-10, VS McHugh, at 11-14. IPC states that reliability of service is equal to, if not more important than, the rate. Elements of service such as percentage of freight cars rejected for loading, provision of adequate freight cars, and variances from promised delivery dates are used by shippers to evaluate the quality of a railroad's service. The trackage rights and routes opened to BNSF will permit that carrier to provide quality service competition in these markets.

IPC has raised concerns that trains carrying its products would have to travel over an extremely circuitous route due to the directional running of the Houston-Memphis lines. This is incorrect. BNSF will have access to IPC at Camden and Pine Bluff through haulage agreements with applicants, permitting efficient movement of northbound BNSF traffic from these points to North Little Rock for placement in BNSF trains for movements to eastern connections as well as to other points on the BNSF system.[156]

Houston to Brownsville. BNSF will operate its Houston to Brownsville trackage rights to maintain competitive service to important stations such as Corpus Christi, Harlingen, and Brownsville, including interchange with Mexican carriers at Brownsville and interchange at Robstown with Tex Mex, for Mexican traffic via the Laredo gateway.

BNSF proposes to operate one through train daily between Houston and Robstown with a run-through block of Mexican traffic via Laredo, and a block of traffic to and from Corpus Christi. To effect efficient interchange with Tex Mex, a new connection will be required at Robstown. For traffic between

---

[156] *See*, generally, UP/SP-266.

As applicants explained at oral argument, this traffic would move promptly to North Little Rock in local trains. Roach, Oral Arg. TR at 74. The record shows that the routes between Camden and Pine Bluff and between Pine Bluff and North Little Rock are both in good condition, both have centralized traffic control, and both have ample sidings that will allow for efficient and timely movements for this shipper even in the face of train meets from the predominantly southbound traffic flow.

Houston and Brownsville, BNSF will initially move traffic via haulage rights on UP/SP trains as provided for in the BNSF agreement.

KCS and Tex Mex have alleged that BNSF is uninterested in, or will be incapable of, providing competitive interline service for movements into Mexico over the Laredo gateway. Laredo is the principal rail gateway between the United States and Mexico. In 1994, 55% of the total U.S.-Mexican rail tonnage moved through Laredo.[157] This is due to its superior infrastructure, especially customs inspection facilities, and its location on the shortest route between many U.S. and Mexican origins and destinations.

Significant volumes of grain and other agricultural products, minerals, woodpulp, paper products, automobiles and auto parts, and other metals all move through the Laredo gateway. Much of this is bulk traffic moving long distances, and thus dependent on rail for competitive transport options.

Laredo is served directly by UP and by Tex Mex, a small railroad operator originally chartered in 1875. Tex Mex's 157-mile line runs from Laredo to Corpus Christi, where it connects with SP.[158] Tex Mex and SP together now provide the only competition to UP for traffic moving through Laredo. While UP has recently been carrying more than 75% of the Laredo traffic, the record shows that Tex Mex's presence has been effective in constraining UP's rates and service through this important international gateway.

One element of the BNSF agreement is to preserve the competition to UP now offered by the Tex Mex/SP connection at Corpus Christi. BNSF's trackage and haulage rights over the UP line running from Houston to Brownsville will permit BNSF to serve all 2-to-1 points along that line, including a connection with Tex Mex near Corpus Christi (at Robstown).

While we have some reservations about BNSF's willingness and ability to attract sufficient traffic over the Laredo gateway, we have remedied this problem by giving Tex Mex trackage rights to permit it to gain additional traffic, as discussed below.

Houston to San Antonio/Eagle Pass. The BNSF agreement provides BNSF with trackage rights over UP's line between Waco and Smithville, TX (with a

---

[157] Tex Mex states that the seven other gateways are at Calexico, Naco, Nogales, El Paso, Presidio, Eagle Pass, and Brownsville. Brownsville, Eagle Pass, and El Paso together handled over 40% of 1994 U.S.-Mexican rail tonnage.

[158] According to Tex Mex, almost three-quarters of its traffic in 1994 was bridge traffic (26,240 carloads) between points in the U.S. and Mexico handled through its connection with SP, and the remainder was derived from service provided to more than 30 shippers located on its line.

connection to the GTRR at Kerr, TX), connecting at Smithville with trackage rights over UP's line between Sealy and San Antonio. This upgrades BNSF's access to Eagle Pass, which has been via haulage rights on the SP route from San Antonio, obtained in a settlement in the *BN/SF* merger.

BNSF proposes to operate four through trains daily (two in each direction) in this corridor. One expedited train pair would be scheduled between Kansas City, MO, and Eagle Pass using trackage rights south of Temple, TX, handling traffic to and from San Antonio. A second train pair would be scheduled to operate between Houston and San Antonio carrying Eagle Pass traffic to connect with the Kansas City-Eagle Pass train at Smithville (or at an alternate location between Smithville and San Antonio). Unit trains, including GTRR aggregate trains and Lower Colorado River Authority (LCRA) coal trains would operate also over these lines as traffic develops.

Overall, this operating proposal appears reasonable, although some concerns have been raised about whether there will be sufficient traffic density to allow efficient service. This depends largely on whether shippers will be willing to use a Mexican gateway other than Laredo or Brownsville to move significant volumes of Mexican import/export traffic.

Central Corridor. Several parties have expressed concerns about the competitive effectiveness of BNSF service under the BNSF agreement over the Central Corridor. They argue that BNSF will lack the incentive to provide effective competition, and will not have sufficient traffic density to provide efficient service over this line. Specifically, these parties argue that, because BNSF already has its own transcontinental routes (the Northern and Southern Corridors) BNSF will lack the incentive to provide vigorous competition with UP/SP in the Central Corridor. They also contend that BNSF's route will be an inferior one. None of these arguments has merit. As we will explain, the BNSF agreement makes possible a very efficient and much improved route for BNSF, and with the additional conditions that we are imposing, BNSF should have more than enough traffic to provide efficient service.

Although BNSF does have other transcontinental routes, this new route will provide it important new efficiency advantages. BNSF's new route, the well-maintained Amtrak route from Chicago to Oakland, will be substantially better than the SP route it replaces. It includes: (1) BNSF's high-speed mainline from Chicago to Denver; (2) the SP (DRGW) Moffat Tunnel route through the Rockies, which is much faster than SP's Tennessee Pass route; and (3) the most direct route from Salt Lake City to Oakland. BNSF will easily improve on SP's current transit times, while providing essential competitive service to

intermediate points such as URC coal interchanges, Provo, Salt Lake City, and Reno.

Despite these efficiencies, Crowley argues that BNSF will move only 29,699 loaded cars a year, enough to justify only 1.08 loaded trains per day. We believe, however, that BNSF's estimate of 90,619 loaded cars a year and two to five through trains per day is more accurate. As BNSF explains, its traffic will be made up of several different components, including traffic at 2-to-1 points, existing BNSF traffic that will be shifted to improved routings made possible by the trackage rights segments, and new overhead business made possible by these routes as well. Applicants point out that Crowley's diversion estimates exclude substantial amounts of 2-to-1 traffic that will in fact be available to BNSF, while ignoring new traffic opportunities made possible by these new routes or BNSF's recent merger.

A basic deficiency in Crowley's study is that he treated much of applicants' existing traffic as captive and not available to BNSF, even though it moves to competitive points. Applicants explain that Crowley fails to adjust for the fact that the Waybill Sample reflects certain traffic to be originated or terminated by UP or SP when it was actually rebilled over a gateway or moving to a transit point. Applicants note that BNSF will be able to compete for all of this traffic.[159]

Applicants correctly note that Crowley failed to consider BNSF's opportunities to capture traffic that moves to or from points that both BNSF and UP or SP serve today. Protestants also left out large volumes of Chicago-Bay Area conventional intermodal traffic that BNSF will handle over its Denver-Oakland rights (BNSF already runs two trains per day of this traffic from Chicago to Denver, and will extend those trains to Oakland).

Protestants also understate the effects of BNSF's rerouting and new marketing opportunities. Crowley predicts only 2,864 loaded cars per year, but

[159] Some of the biggest movements originating and terminating at 2-to-1 points in the Central Corridor involve traffic where eastern and western carriers separately bill their customers. Because the Waybill Sample divides these movements, Crowley mistakenly reflects these highly competitive movements to and from the Northeast as originated or terminated by UP and SP at gateways such as Chicago, and not divertible to BNSF.

applicants' estimate of 6,676 seems more plausible.[160] BNSF also will be able to compete for $994 million of new traffic.[161]

In sum, BNSF will gain a very efficient and much improved route in the Central Corridor and, along with conditions we are imposing, should have the incentive to compete vigorously with UP/SP. Moreover, BNSF's operations should have sufficient density to permit effective competition in the Central Corridor. Protestants have vastly understated the traffic for which BNSF will be able to compete, and have overlooked BNSF's ability to integrate the new routes into its existing system. A realistic view of the markets at issue makes it apparent that BNSF will be able to bid for more than enough traffic to justify aggressive operations in the new corridors to which the BNSF agreement would give it access. Finally, the 5-year annual oversight by the Board will provide an orderly mechanism for shippers to raise any concerns.

TRACKAGE RIGHTS COMPENSATION IS REASONABLE. Numerous protestants have argued that the trackage rights compensation to be paid by BNSF to UP/SP is too high to allow BNSF effectively to replace the competition that will be lost at 2-to-1 points after SP is absorbed into UP. After thoroughly examining these rates, we find that applicants' fees of 3.0 to 3.1 mills[162] per gross ton-mile are well within a reasonable level.[163] DOJ's argument that the

---

[160] BNSF will be able to improve routings for substantial traffic flows to and from Omaha, Denver, and the Twin Cities, and for Western Nebraska grain, and South Dakota bentonite. BNSF will save substantial mileage on movements of forest products from Northern California and Southern Oregon to the Midwest, on movements of beer from its exclusively served Coors facility in Golden, CO, to California distributors, and for movements of wine from Modesto to the Twin Cities. BNSF will save approximately 350 miles for numerous Northern California movements to and from Colorado and nearby states now moving via BNSF's Southern Corridor mainline.

[161] This includes Nebraska grain moving to feedlots in California; South Dakota and Wyoming bentonite moving to the West Coast; Southern California-New Orleans intermodal traffic and intermodal traffic moving between points like Omaha or the Twin Cities and Northern California. For example, UP grain marketing personnel projected that BNSF would be able to ship 1,500 cars per year of Nebraska grain to Central California receivers. BNSF has numerous grain unit-train loading sites in Nebraska, often near UP's lines. Given that all grain is trucked to rail loading points, and at destination is trucked from unloading points to poultry feedlots, UP projected that BNSF will be able to develop a presence in this market, even though the 1994 Waybill Sample shows similar grain movements as moving between exclusively-served UP/SP points at both ends.

[162] A fee of 3.48 mills will apply to one high-maintenance cost segment between Keddie/Stockton and Richmond, CA, for intermodal and carload traffic.

[163] Under new 49 U.S.C. 11324(c), the Board is required to approve the operating terms and level of compensation for trackage rights imposed in the merger context. Although that post-

(continued...)

compensation should be restructured so that part of it is paid by BNSF as a capital contribution, rather than a return on value, is also without merit.

The Level of the Payments. We will not disapprove trackage rights agreements negotiated in the merger settlement context unless their terms are shown to be unreasonable. Where compensation terms are seriously challenged, as here, we will examine them in light of the principles in *SSW Compensation.* Trackage rights fees set under that method have included three components: (1) the variable costs to the landlord resulting from the tenant's use of the track; (2) a portion of the maintenance and operating costs on the relevant rail properties based on usage; and (3) a return element on the value of the rail properties based on usage. We have thoroughly examined the trackage rights compensation levels challenged here, and we conclude that, because the agreed levels are lower than we would set under *SSW Compensation,* they are reasonable.

As a threshold matter, Crowley[164] argues that a trackage rights tenant should not have to pay any return element on the rail property used, but should be charged no more than the landlord's "below the wheel" variable costs. He calculates this level to be 1.48 mills per gross ton-mile. We will adhere to the ICC's consistent position in *SSW Compensation,* which has been affirmed by the D.C. Circuit Court of Appeals, that trackage rights fees will allow landlord and tenant to compete on an equal basis only where the tenant is allocated an appropriate share, based on usage, of the total costs. *See, e.g., BN/SF,* 10 I.C.C.2d at 772.

Recognizing that our well-established standards require inclusion of a return element based on market value, Crowley also develops a fee of 1.8 mills per gross ton-mile based on the fair market value of SP's roadway assets. Although Crowley's method is similar to our capitalized earnings method, there are several significant errors in his approach that make his calculation totally unreliable.[165] Because there is no recent purchase price to establish UP's market value, he has used the purchase price of SP alone to calculate a value for both UP's and SP's

---

(...continued)
application statutory amendment is not technically applicable here, it would not change the outcome because the operating terms and fees here are clearly reasonable.

[164] Although for convenience we will refer to Crowley's testimony on behalf of WCTL, our discussion responds to comments he has submitted on behalf of numerous parties.

[165] Crowley's computation of the operating and maintenance cost portion of the formula is also wrong because Crowley includes only the tenant's share of the *variable* portion of operating and maintenance costs rather than its share of those full costs.

lines. But this significantly understates the value of the investment base because a substantial portion of the trackage rights at issue run over UP's lines,[166] which tend to be in much better-maintained condition, and of higher value, than SP's lines. Next, Crowley computes the present value of the track investment base as depreciated to zero over 32 years. This too understates the real costs because UP/SP will be required constantly to replace capital as its lines deteriorate. Finally, Crowley uses the wrong interest rate, an after-tax cost of capital, despite the fact that the ICC consistently found that the pre-tax cost of capital should be used to reflect the cost of income taxes. These errors result in a substantial understatement of the investment base, and thus of the return element.

Applicants demonstrate that, if Crowley's errors (other than his use of just SP property) were corrected, the capitalized earnings method would yield a rate of 3.84 mills per gross ton-mile. This includes a return element of 2.40 mills per gross ton-mile, which would be the correct number if all the properties were the less expensive SP properties, rather than a mix of SP and UP properties. Applicants correctly use URCS to develop UP/SP's system average operating and maintenance costs, which they calculate to be 1.44 mills per gross ton-mile.[167] This would yield total compensation of 3.84 mills (2.40 mills + 1.44 mills) per gross ton-mile, which is substantially higher than the 1.8 mills Crowley developed, and, more importantly, much higher than the 3.0 to 3.1 mills per gross ton-mile that BNSF has agreed to pay.[168]

In addition, UP/SP has agreed to allow BNSF an option to elect to use a formula under which BNSF would pay a share, based on usage, of UP/SP's actual total maintenance and operating expenses, taxes, and an interest rental based on depreciated book value of the segment used times the current pre-tax

---

[166] Under the original BNSF agreement, BNSF would operate over approximately 1,727 miles of trackage rights over UP lines, and 2,241 miles over SP lines.

[167] URCS costs will understate the actual maintenance expenses UP/SP will incur on the SP lines. Because URCS is derived from historical costs for 1990 through 1994, it reflects the relatively lower maintenance activity by SP.

[168] WCTL and WSC attempt to show that the fees agreed to by BNSF are excessive when compared to those in other agreements between UP and SP. We agree with applicants that none of these agreements is comparable. *See* UP/SP 231, RVS Rebensdorf, at 14-30. For example, one of the compared agreements required a capital contribution by the tenant, which this one does not. Others pertained to switching and terminal operations and industrial spurs, operations generally unlike those at issue here.

Applicants' witness Kauders also demonstrates that total compensation per gross ton-mile would be 8.32 mills under the annuity method and 9.05 mills under the replacement cost new less depreciation method, the two alternatives to capitalized earnings under the SSW Compensation standard that are used when fair market value is not available.

cost of capital.[169] That alternative approach, which is similar to *SSW Compensation,* though more generous to the tenant, may result in even lower fees to BNSF. The availability of this option provides additional assurance that the fees are not unreasonably high, and that they will permit BNSF to compete effectively.[170]

Structure of the Payments. DOJ again argues, as it did in *BN/SF,* that, because the fees are 100% variable, BNSF will be constrained in its ability to compete with UP/SP.[171] DOJ claims that competition will force rates down to variable cost levels, and that, because UP/SP's variable costs will always be much lower than BNSF's, it will always be able to offer lower rates and obtain all of the traffic. DOJ's argument reflects a basic misunderstanding of the relative importance of trackage rights fees in BNSF's overall cost of service, and of rail pricing in general.

As the ICC explained in rejecting DOJ's approach in *BN/SF,* 10 I.C.C.2d at 771-72:

> Placing the tenant in the same economic position as the landlord suggests that it might be appropriate to break up the rental charge into similar constant and variable components, or to ask the tenant to make a lump sum contribution to capital. But potential tenants may have difficulty in making such capital contributions, and a 100% variable rental charge reduces risks for the tenant railroad, which may not have experience participating in that market * * *.

As is true of any investment, no prospective trackage rights tenant would agree to make a capital contribution unless it believed it could recover that cost

---

[169] Applicants have also improved the method by which the charges are updated each year. Originally, the index was to be 70% of the RCAF, unadjusted for productivity. Certain protestants wanted to use the RCAF, adjusted for productivity. UP/SP has agreed to use actual maintenance related expenses, rather than using an index at all. This reflects costs more accurately.

[170] KCS argues that BNSF will have to pay reciprocal switching charges at certain origin or destination points for SP-served shippers. But the number of situations where switching is required will not increase, and may decrease. Moreover, SP's level of reciprocal switching charges will fall significantly. Amendments to the operating agreements now allow BNSF to select: (1) switching by UP at a maximum switching charge of $130 (reduced from approximately $495) at both 2-to-1 points and non-2-to-1 points; or (2) direct service by BNSF, or a third party with UP/SP's concurrence.

KCS also argues that BNSF's costs should be increased by 77% for "additional charges" it assumes will be assessed by UP/SP, but applicants have shown that there will be no additional charges to BNSF other than those specified in the BNSF agreement. We note that these charges pertain to the first of the three components of trackage rights fees discussed in *SSW Compensation.*

[171] DOT and MRL also raise this argument, although to a lesser extent.

through the rates it charges to shippers on that line. No railroad would invest in rail properties, through trackage rights or through purchase of divested rail lines, if it anticipated revenue that only covered its variable costs.[172] Only by pricing above their variable (or marginal) costs can railroads recover all their costs and achieve adequate revenues.[173]

The only markets in which railroads tend to price their services down to their total variable costs are those where motor carriage is extremely competitive. Those markets are not of concern in the rail merger context because rail competition is relatively unimportant in such markets in comparison to the overall competitive picture. And because railroads need to return their joint and common costs to replace their road bed and track structure as these items deteriorate, they cannot long continue to provide service in such markets. The issue of how the fees are structured is ultimately a red herring because railroads generally must price significantly above their variable costs in order to return their joint and common costs and continue to compete.

Even if we were to assume that variable cost is the only relevant cost for rail ratemaking purposes, protestants still have not shown that BNSF would be at a disadvantage here. Protestants compare BNSF's trackage rights fee with the lower "below the wheel" variable costs that UP/SP will experience, and they argue this proves BNSF will have a substantial variable cost disadvantage. This comparison is extremely misleading because the costs protestants focus on are just a small portion of the total variable costs that BNSF will experience for any particular movement. Overall, BNSF's variable costs are likely to be lower than were SP's, and certainly low enough to allow it to compete effectively with UP/SP.[174]

---

[172] Railroading exhibits economies of scale, scope, and density that lead to declining average cost levels, so that costs attributable to any movement are below average costs.

[173] *See, generally, Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 526-528 (1985), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3rd Cir. 1987).

[174] The "below the wheel" variable costs included in the trackage rights fees relate only to the expense of ownership and maintenance of running track and structures. These costs account, on average, for only about 17% of the total variable costs of western railroads. Thus, at most, a small component of BNSF's total variable costs will be higher than SP's for the trackage rights portion of a given movement. But BNSF is a very efficient carrier, and its remaining variable costs of operating its trains over the trackage rights segment should be lower than SP's comparable costs.

Moreover, BNSF will be operating over its own lines for a substantial portion of any given movement from origin to destination, and for that portion of the movement, trackage rights fees are irrelevant. For those portions of the movements, BNSF's variable costs will also tend to be

(continued...)

CONDITIONS IMPOSED.

Criteria for Imposing Conditions. The various conditions requested by parties involve the exercise of our conditioning power under section 11344(c) as part of any approval of the application.[175] Section 11344(c) gives us broad authority to impose conditions governing railroad consolidations. Because conditions generally tend to reduce the benefits of a consolidation, they will be imposed only where certain criteria are met. *UP/MKT,* 4 I.C.C.2d at 437.

We will adhere to the criteria for imposing conditions set out in *UP/MP/WP,* 366 I.C.C. at 562-65. Conditions will not be imposed unless the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate. A condition must also be operationally feasible, and produce net public benefits. We are also disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects. *See, e.g., SF/SP,* 2 I.C.C.2d at 827, 3 I.C.C.2d at 928; and *UP/MKT,* 4 I.C.C.2d at 437.

A condition must address an effect of the transaction. We will not impose conditions "to ameliorate longstanding problems which were not created by the merger," nor will we impose conditions that "are in no way related either directly or indirectly to the involved merger." *Burlington Northern, Inc.--Control & Merger--St. L.*, 360 I.C.C. 788, 952 (footnote omitted) (*BN/Frisco); see also, UP/CNW,* slip op. at 97.

(...continued)

lower than were SP's. We conclude that, even if we viewed this issue from the perspective of variable costs alone, BNSF would likely be in a better position to compete than was SP. *See* UP/SP-260 at 26-27.

DOJ asserts that applicants' focus on a comparison of BNSF's and SP's total operating costs is misplaced, claiming:

> In effect, Applicants argue that the Board may impose a tax --in the form of higher trackage rights fees than necessary to reimburse the landlord for the trackage costs--on any replacement railroad whose current operating costs are lower than SP's current operating costs.

DOJ-14 at 31. "Imposing a tax" is an odd phrase to use to describe a compensation arrangement that has been mutually agreed to by applicants and BNSF, and which we have found to be lower than the compensation we would have set if the parties had not come to an agreement. This beneficial arrangement can hardly be called a tax on BNSF's efficiency.

[175] The responsive applications filed by CMTA, MRL, Entergy, Tex Mex, WEPCO, and MCC's rail affiliates are not independent applications.

While showing that a condition addresses adverse effects of the transaction is necessary to gain our approval for imposition of a condition, it is by no means sufficient. The condition must also be narrowly tailored to remedy those effects. We will not ordinarily impose a condition that would put its proponent in a better position than it occupied before the consolidation. *See, UP/CNW,* slip. op. at 97; *Milwaukee--Reorganization--Acquisition by GTC,* 2 I.C.C.2d 427, 455 (1985) (*Soo/Milwaukee II*).[176]

BNSF agreement. For many shippers throughout the West, the various rights provided for in the BNSF agreement will ameliorate the competitive harms that would be generated by an unconditioned merger. We therefore impose as a condition the terms of the BNSF agreement, by which we mean the agreement dated 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.[177]

CMA agreement. Although applicants have not asked that approval of the merger be made subject to the CMA agreement, because we find that the CMA agreement is largely tied to the BNSF agreement and its provisions are necessary to ameliorate competitive harm, we impose as a condition the terms of the CMA agreement. Many of the pro-competitive provisions of the CMA agreement require amendments to the BNSF agreement, and are reflected in the second supplemental agreement dated June 27th; other such provisions do not require amendments to the BNSF agreement.

Broad-based Conditions. As we have previously discussed, we are imposing 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.

New facilities and transloading facilities. The BNSF agreement, as amended by the CMA agreement, grants BNSF the right to serve any new facilities

---

[176] If, for example, the harm to be remedied consists of the loss of a rail option, any conditions should be confined to restoring that option rather than creating new ones. *See, Soo/Milwaukee II,* 2 I.C.C.2d at 455; *UP/MP/WP,* 366 I.C.C. at 564. Moreover, conditions are not warranted to offset competitors' revenue losses. *BN/Frisco,* 360 I.C.C. at 951.

[177] As we already have discussed, in imposing the BNSF agreement as a condition to this merger, we will require applicants to honor *all* of the amendments, clarifications, modifications, and extensions thereof described in: (1) the April 18th CMA agreement (UP/SP-219); (2) the April 29th rebuttal filings (UP/SP-230 at 12-21; UP/SP-231, Part C, Tab 18 at 5-11; *see also,* UP/SP-260 at 8-9, summarizing the clarifications and amendments described in the April 29th rebuttal filings); (3) the June 3rd brief (UP/SP-260 at 23 n.9); and (4) the June 28th filing that accompanied the second supplemental agreement (UP/SP-266 at 3).

located post-merger on any SP-owned line over which BNSF receives trackage rights in the BNSF agreement. The BNSF agreement further provides, however, that the term "new facilities" does not include expansions of or additions to existing facilities or load-outs or transload facilities. We require as a condition that this provision be modified in two respects: first, by requiring 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; second, by requiring that the term "new facilities" shall include transload facilities, including those owned or operated by BNSF.

Build-in/build-out options. The CMA agreement provides a post-merger procedure by which a CMA member can raise a claim that the merger deprived it of a build-in/build-out option. We require as a condition that this procedure be modified in two ways: first, by making this procedure applicable to all shippers; second, by removing the time limit to which this procedure is subject. These modifications will allow BNSF to replicate the competitive options now provided by the independent operations of UP and SP. We further clarify that a shipper invoking this procedure need not demonstrate economic feasibility; the only test of feasibility is whether the line is actually constructed. Any technical disputes with respect to the implementation of this build-in/build-out remedy may be resolved either by arbitration or by the Board.

Opening contracts at 2-to-1 points. The CMA agreement provides that, immediately upon consummation of the merger, applicants must modify any contracts with shippers at 2-to-1 points in Texas and Louisiana to allow BNSF access to at least 50% of the volume. We require as a condition that this provision be modified by extending it to shippers at all 2-to-1 points incorporated within the BNSF agreement, not just 2-to-1 points in Texas and Louisiana. The extension of this provision to all 2-to-1 points will help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations.

Oversight. We impose as a condition to approval of this merger oversight for 5 years to examine whether the conditions we have imposed have effectively addressed the competitive issues they were intended to remedy. We retain jurisdiction to impose additional remedial conditions if, and to the extent, we determine that the conditions already imposed have *not* effectively addressed the competitive harms caused by the merger.

We require as a condition that applicants submit on or before October 1, 1996, a progress report and implementing plan regarding their compliance with the conditions to this merger, and further progress reports on a quarterly basis.

As we have discussed earlier, we expect that BNSF will compete vigorously for the traffic opened up to it by the BNSF agreement and have imposed upon BNSF a common carrier obligation with respect to this traffic.[178] We further require that BNSF submit a progress report and an operating plan on or before October 1st of this year, and further progress reports on a quarterly basis thereafter.

We plan to initiate a proceeding at the end of the first year, on or about October 1, 1997, seeking comments from interested parties on the effects of the merger and implementation of the conditions. The competition provided by BNSF will be one of the key matters to be considered in the oversight proceeding. If circumstances warrant, a proceeding may be held prior to October 1, 1997. Subsequent proceedings will be scheduled as needed.

South Central Lines/SP East.

NAFTA/Grain: Tex Mex. We are particularly sensitive to our responsibility to ensure that this merger will foster the goal of North American economic integration embodied in NAFTA. After all, our regulatory powers are derived from the "Commerce Clause" of our nation's constitution,[179] which, in a very real sense, has resulted in the creation of a "free trade zone" within these United States, leading to our emergence in this century as an economic superpower.

NAFTA now has the potential to contribute to the economic growth and prosperity of the United States, Mexico, and Canada. Mexico, in particular, holds great promise as a market for our agricultural and other products. As USDA explained, "[u]nder NAFTA, Mexico is expected to be an important growth market, especially for grains and oil seeds produced in the midwest and plains states. Affordable rail rates and access to service are critical."[180]

---

[178] Again, we emphasize that BNSF, as soon as reasonably practicable, must begin trackage rights operations over the key corridors between Houston and New Orleans, between Houston and Memphis, and in the Central Corridor. A failure to conduct trackage rights operations in these corridors could result in termination of BNSF's trackage rights, and substitution of another carrier, or in divestiture.

[179] Article I, Section 8, states in part:
The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States * * *.

[180] Dunn, Oral Arg. TR at 240.

The BNSF agreement should preserve shippers' competitive alternatives at the Brownsville border crossing, and should enhance them at Eagle Pass by upgrading BNSF's access from haulage to trackage rights. But Tex Mex and its supporters have raised legitimate concerns that, absent a grant of Tex Mex's responsive application, the merger could result in a reduction in competition at Laredo, the most important U.S.-Mexican rail gateway.

Specifically, Tex Mex has proposed that we grant it trackage rights that would permit it to connect with KCS at Beaumont via Houston. Tex Mex notes that, except for a small segment of UP track running from Robstown to Placedo, the routing proposed by Tex Mex would not overlap with BNSF's trackage and haulage rights from Houston to Brownsville, and thus it would not unduly interfere with BNSF's new operations. Tex Mex envisions its proposed trackage rights as an addition to those competitive safeguards contained in the BNSF agreement, and not as a replacement.

Tex Mex has offered a number of arguments in favor of its proposal. First, it suggests that all the U.S.-Mexican gateways should be viewed as a single market now served by UP, SP, and BNSF, and that the reduction from three railroads to two brought about by the merger is an unacceptable loss of competition that cannot be remedied through any condition relying on BNSF, which is one of the three.

We must reject this argument. In *SF/SP,* the ICC determined that there was no all-Mexican-gateway market, and that Laredo clearly occupied a position of separate and surpassing economic significance. *SF/SP,* 2 I.C.C.2d at 797. We reaffirm that finding here, but also acknowledge that, as BNSF has explained, this does not mean that the Mexican gateways are completely independent. BN/SF-59 at 31 n.12.

Further, Tex Mex acknowledges that, in 1994, BNSF handled only 3% of all U.S.-Mexican rail traffic at the border.[181] TM-39 at 36. Even if there were a single market for U.S.-Mexican movements by rail, BNSF's extremely limited

[181] This market share will likely rise. The BNSF agreement will extend BNSF's presence for handling Mexican traffic. Its haulage rights to Eagle Pass will be converted into trackage rights, and, as noted previously, it will have new trackage and haulage rights over the UP line into Brownsville.

presence prior to this merger would hardly make this a 3-to-2 situation, much less one that calls for remedial conditions.[182]

Tex Mex has raised other arguments that we find more persuasive. It is concerned that the merger will diminish its traffic base to the point where it is unable effectively to preserve a second competitive routing at Laredo, and that the merger might endanger the essential service it provides to the more than 30 shippers located on its line.

The 8.8% of current Tex Mex traffic originated at points served exclusively by SP is likely to shift to the new and efficient UP/SP single-line route into Laredo created by this merger. Another 31% of Tex Mex traffic now originates at or moves through 2-to-1 points on SP. BNSF will have access to this traffic via the BNSF agreement. Applicants' traffic study shows all this traffic moving via a BNSF/Tex Mex routing into Laredo. As we have explained elsewhere, the BNSF agreement will permit BNSF effectively to replace the competition that will be lost when SP is absorbed into UP, and thus protect shippers at 2-to-1 points from facing higher prices or deteriorated service. This does not mean that BNSF will be able to retain all the traffic now carried by SP when BNSF's competition is the newly merged and more efficient UP/SP, which may choose to offer shippers lower rates or better service than offered by either UP or SP today.

Further, for this 2-to-1 traffic, and for the 34.2% of 1994 Tex Mex traffic carried via a Tex Mex/SP/BN or SF interline movement,[183] the BNSF agreement has created a new potential single-line movement for BNSF into Mexico via Eagle Pass. As RCT explains:

> [W]ere it not for the fact that Laredo currently enjoys a competitive advantage over the other gateways to Mexico because there is a larger infrastructure of customs brokers located at Laredo than at the other gateways, there would be little or no incentive for BN/SF to route traffic via Tex

---

[182] Our finding that this is not a 3-to-2 situation is corroborated by the testimony of Tex Mex's own witness, Grimm, who argues that this would remain a 2-to-1 situation even after implementation of the BNSF agreement:

> In the market for rail transportation between the United States and Mexico, therefore, the effects of the merger will be much closer to a 2-to-1 reduction than a 3-to-2 reduction. Although BNSF will be a theoretical competitor, it will be a very minor and ineffective one.

TM-23 at 122.

[183] Tex Mex notes that nearly all of the 1994 traffic it received in interline movements with BN or SF has disappeared because of a $300 per car surcharge imposed by BN and SF (and continued by BNSF) on all grain cars originating on BNSF destined for Laredo. TM-39 at 9. BNSF has explained that this was due to service problems and poor turnaround times for these cars by SP, which would be eliminated with the rights it receives under the BNSF agreement.

Mex. Certainly, there is no reason to assume that BN/SF would deliberately route unit trains of grain in joint-line service with Tex Mex via Laredo when it will have a comparatively direct shot in single-line service at Eagle Pass. Given the admitted concentration of BN/SF's traffic from the grain belt and the Pacific Northwest and the industrial Midwest, it is only logical to assume that BN/SF would favor the less circuitous, single-line routing via Eagle Pass.
RCT-7 at 22-23.

We are persuaded that a partial grant of Tex Mex's responsive application is required to ensure the continuation of an effective competitive alternative to UP's routing into the border crossing at Laredo. Further, as noted by Volkswagen of America:

[E]conomical access to international trade routes should not be jeopardized when the future prosperity of both countries depends so strongly on international trade.
TM-39 at 15.

Tex Mex has offered an effective rebuttal to applicants' and BNSF's claims that the BNSF agreement is sufficient to preserve competition at Laredo:

If Applicants are right that BNSF will be better for Tex Mex than SP and that the route Tex Mex seeks will be inferior to BNSF's route, then granting Tex Mex's application would have little adverse impact on Applicants or BNSF, because little traffic would move over Tex Mex's trackage rights.
TM-39 at 5.

Finally, we note that applicants and BNSF have raised legitimate concerns over Tex Mex's request that it have unrestricted access to interline with other carriers along its trackage rights route. Tex Mex has conceded this point, explaining:

An incidental competitive benefit of granting the rights Tex Mex seeks is that Tex Mex could carry some shipments between Beaumont and Houston that had no prior or subsequent rail movement south of Houston. This, however, would be a relatively minor benefit, and it was certainly not a central purpose of the application * * *. [The Board] could limit the rights granted to exclude Tex Mex from carrying shipments between Houston and Beaumont that have no prior or subsequent movement by rail south of Houston.

TM-34 at 7. Although we have accepted Tex Mex's arguments that it may need to replace traffic it will lose via the merger in order to preserve competition at Laredo, the trackage rights we are granting here may only be used in conjunction with traffic that moves on the Tex Mex.

We are therefore granting Tex Mex the trackage rights sought in its Sub-No. 13 responsive application and in its Sub-No. 14 terminal trackage rights application, restricted in both instances to the transportation of freight having a

prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. These trackage rights will be effective on the effective date of this decision.[184]

With respect to the precise details of the Sub-No. 13 trackage rights, we will allow Tex Mex and UP/SP an opportunity to reach an agreement, and we will require these parties to submit, within 10 days of the date of service of this decision (August 12, 1996), either agreed-upon terms respecting implementation of the Sub-No. 13 trackage rights or separate proposals respecting such implementation. We realize that 10 days is a short time frame, but it will enable us, if necessary, to choose the better of the offered alternatives, or some variation thereof, prior to the effective date of this decision (September 11, 1996). We wish, however, to emphasize that, even if certain details respecting the Sub-No. 13 trackage rights cannot be resolved prior to the effective date of this decision, these trackage rights will nevertheless become effective on that date. If the terms of compensation have not been resolved prior to the effective date, compensation will accrue from the actual date of the start of trackage rights operations, and will be payable after terms have been established. We note that, if we are required to prescribe the Sub-No. 13 compensation terms, we will look to the terms and conditions in the BNSF agreement as well as to the principles announced in the *SSW Compensation* cases.

With respect to the precise details of the Sub-No. 14 trackage rights, we will allow Tex Mex and HB&T an opportunity to reach an agreement, and we will require these parties to submit, within 10 days of the date of service of this decision (August 12, 1996), either agreed-upon terms respecting implementation of the Sub-No. 14 trackage rights or separate proposals respecting such implementation. The 10-day time frame, as previously noted, will enable us, if necessary, to choose the better of the offered alternatives, or some variation thereof, prior to the effective date of this decision (September 11, 1996). We wish, however, to emphasize that, even if certain details respecting the Sub-No. 14 trackage rights cannot be resolved prior to the effective date of this decision, these trackage rights will nevertheless become effective on that date. If the terms of compensation have not been resolved prior to the effective date, compensation will accrue from the actual date of the start of trackage rights operations, and will be payable after terms have been established. We note that,

[184] The Sub-No. 14 application is unopposed, and an extended discussion with respect thereto is therefore unnecessary. We find that the use by Tex Mex of the HB&T terminal facilities at issue in the Sub-No. 14 docket is practicable and in the public interest, and will not substantially impair HB&T's ability to handle its own traffic. *See* 49 U.S.C. 11103(a).

if we are required to prescribe compensation terms, we will apply the principles for compensation in condemnation proceedings. 49 U.S.C. 11103(a) (third sentence); *UP/MP/WP*, 366 I.C.C. at 576 n.114.[185]

Plastics/Chemicals: SIT/Lake Charles/Dow/UCC. Plastic and chemical shippers located in the Gulf Coast area have raised a number of legitimate concerns over merger-related competitive harm that would not be effectively remedied by the BNSF agreement. Accordingly, we are imposing additional conditions to address these concerns. For example, we are imposing a condition that will broaden BNSF's access to SIT facilities in the area. For shippers located near Lake Charles, LA, we have crafted conditions that will permit KCS to offer an interline routing into St. Louis independent of applicants, and that will eliminate the restrictive destination conditions and "phantom" haulage charges that together would have unduly inhibited BNSF's ability to offer direct, competitive service to those shippers. Finally, we have ensured the continued availability of competitive build-out options for Dow at Freeport, TX, and UCC at Seadrift, TX, which are discussed in detail below under conditions requested by individual parties. Preserving the Dow build-out opportunity also will benefit numerous plastic and chemical shippers located along the Gulf Coast between Freeport and Texas City, TX, such as Quantum's plant at Chocolate Bayou.

Storage-in-Transit (SIT) Facilities. There is widespread agreement among the parties that SIT capacity is a critical element in service to the plastics industry. The use of railcars for storage allows plants to run at capacity and product to be readily available for prompt movement to various markets as market price and demand change.[186] It has also proven to be a cost-effective alternative to investing in multiple silos as a means of storing up to 50 products while avoiding any possible problems with contamination. SPI's witness Ruple notes that "(w)hile the percentage of resins utilizing storage varies, in general between 30% and 50% require storage." *Id.*

Prior to the merger, SP undertook a comprehensive analysis of storage requirements for plastics shippers in the Gulf Coast. According to SP:

> Plastic storage in the Gulf Coast impacts operations more than any other normal operating condition, with the only possible exceptions being locomotive/crew availability and scheduled track maintenance.

---

[185] Our pledge to apply condemnation principles in setting compensation fulfills the alternative requirement in the fourth sentence of 49 U.S.C. 11103(a) that compensation be "adequately secured" before commencement of terminal trackage rights operations.

[186] *See, e.g.*, SPI-11, VS Bowles, at 3-4; and SPI-11, VS Ruple, at 15-17.

See, SPI-11, Exhibit 14. Two-thirds of the plastics hopper cars require storage, and the mean storage duration at the time of the analysis was 45 days. *Id.*

UP and SP currently enjoy 84% of the plastics hopper car storage capacity in the Gulf Coast.[187] To meet customer needs, SP committed to a new 3,000-car storage yard at Dayton, TX, strategically located near plastics resins production facilities.[188] The CMA settlement has made provision for BNSF access to Dayton Yard to supply some of the needed additional storage capacity. That agreement indicates that BNSF will have equal access to that facility. It also states that applicants will work with BNSF to locate additional facilities on the trackage rights lines as necessary.

These provisions are somewhat ambiguous, and various parties have criticized them as inadequate. We think that these provisions should be clarified and strengthened. We are therefore imposing the additional condition that the BNSF agreement be modified to require that BNSF shall have access to all SP Gulf Coast SIT facilities on economic terms no less favorable than the terms of UP/SP's access, for storage in transit of traffic handled by BNSF under the terms of the BNSF agreement.

Lake Charles, LA. A number of plastic and chemical shippers, including Montell, Olin, and PPG, operate plants located at three rail stations (Lake Charles, West Lake, and West Lake Charles) in the Lake Charles area of Louisiana. These plants have access to SP and KCS, and some have access to UP as well via haulage or reciprocal switching. But KCS must interline with UP or SP to provide efficient routings to the New Orleans, Houston, and St. Louis gateways. Thus, while these shippers now benefit from direct rail competition, an unconditioned merger would place all their efficient rail routings under applicants' control.

Paragraph 8 of the CMA Agreement amended the original BNSF settlement agreement to give BNSF the right to handle traffic of Lake Charles and West Lake shippers open to all of UP, SP, and KCS for traffic moving (a) from, to, and via New Orleans and (b) to or from points in Mexico via the Texas border

---

[187] SPI witness Ruple identifies the following Gulf Coast SIT sites of UP, SP, and BNSF, respectively: UP, in Spring, TX (1520 spots), in Addis, TX (550 spots), and in Avondale, LA (350 spots); SP, in Dayton, TX (3000 spots), in East Baytown, TX (1200 spots), and in Beaumont, TX (250 spots); and BNSF, in Casey, TX (720 spots), and in Teague, TX (550 spots). In addition, he identifies the following non-Gulf SIT facilities: UP, in McGehee, AR (380 spots), and in Dupo, IL (350 spots); SP, in Pine Bluff, AR (250 spots), and in East St. Louis, IL (100 spots). *See* SPI-11, VS Ruple and Exhibits 7-9.

[188] *See,* SPI-11, VS Ruple, at 15, and Exhibits 8, 14, and 18.

crossings at Eagle Pass, Laredo, or Brownsville. On brief, applicants extended this relief to incorporate West Lake Charles traffic open to SP and KCS.[189]

We believe this to be an inadequate solution for these shippers. Any KCS routing to and from St. Louis or Chicago must still include a connection with applicants at Shreveport or Texarkana, giving applicants control of a "bottleneck" for these movements. Moreover, the key role of SIT facilities for plastics shippers further complicates this situation:

> As much as 70% of a plant's output may be assigned initially to storage * * *. Generally, it is only after the car has been in storage that its contents are sold and a delivery destination determined.

MONT-9 at 12. Because BNSF would only be able to handle shipments routed to certain destinations, and because the destinations are not known when the product moves to the storage point, a shipper could be forced to order a rail car returned from a storage point to its facility so that it could be transported by a different carrier.

To preserve existing competitive alternatives for shippers in the Lake Charles area, we will require applicants to modify the BNSF agreement in two ways. First, BNSF must be able to use its Houston-to-Memphis trackage rights to interline with KCS at Shreveport and Texarkana. This will have the principal effect of substituting a KCS-BNSF joint-line routing via Texarkana and Shreveport for the existing KCS-UP joint-line movement via Texarkana. Second, applicants must remove the (New Orleans and Mexico) geographic restrictions on direct BNSF service to Lake Charles, West Lake, and West Lake Charles shippers and permit BNSF to serve all destinations from these points. This will permit BNSF to offer SIT facilities for a full range of destinations, without which shippers might be hesitant to use BNSF services for any shipments requiring SIT.

Furthermore, we have one additional concern with the arrangements under which BNSF service will preserve competition for Lake Charles area shippers. Section 5b of the original BNSF settlement agreement, as amended by Section 4b of the second supplemental agreement dated June 27, 1996, reads in part as follows:

> In addition to all other charges to be paid by BNSF to UP/SP herein, at West Lake and West Lake Charles, BNSF shall also be required to pay a fee to UP/SP equal to the fee that UP pays KCS as of the date of this Agreement to access the traffic at West Lake, adjusted upwards or downwards in accordance with Section 12 of this Agreement.

---

[189] *See,* UP/SP-260 at 23, n.9.

Protestants have referred to this as a "phantom haulage fee." It appears to us that applicants are intending to charge BNSF a fee to access traffic at West Lake Charles, even though this location is not presently open to UP under haulage or switching and is served only by KCS and SP via jointly owned track. Further, the fee that UP currently pays to KCS at West Lake is compensation for reciprocal switching or haulage service performed by KCS. Elsewhere in the BNSF agreement, the parties have made arrangements for reciprocal switching and haulage charges. If applicants perform any switching or haulage in the Lake Charles region, then these are appropriate charges that should be assessed BNSF. It appears, however, that BNSF will have direct access to West Lake shippers when it begins to operate under its trackage rights arrangement, so that UP/SP may not be performing any switching or haulage service for BNSF in this area. Under these circumstances, we find it is unreasonable for applicants to impose any charge to BNSF at West Lake over and above the compensation for trackage rights unless they are performing an additional service. It is even more unreasonable for applicants to expand the scope of this fee to include West Lake Charles, which represents 93% of the Lake Charles area's rail traffic,[190] and where no switching or haulage is now performed and no fee is assessed. We will require applicants to modify the BNSF agreement to remove this fee.

Coal: Entergy/CPSB/TUE. We are imposing specific conditions crafted to preserve existing competitive alternatives for three coal shippers located along applicants' South Central lines. The details of each are discussed elsewhere under conditions requested by individual parties.

First, we have ensured the continued availability of a competitive build-out option for Entergy's White Bluff plant near Redfield, AR, which is now served exclusively by UP. BNSF will be permitted to substitute for SP if a connection is ever built linking the plant to a nearby SP line at Pine Bluff. (BNSF will be operating over this SP line via the trackage rights it will receive under the BNSF agreement.) Entergy will thus continue to have the option of building out to an independent carrier and will continue to be able to use this option in its negotiations with applicants.

Second, we are imposing a condition to maintain the pre-merger competitive status quo at CPSB's two plants at Elmendorf, TX. While these plants receive rail service at destination via a line owned by SP, UP is permitted

[190] *See,* SPI-21 at 35.

to deliver coal to CPSB under trackage rights that have been granted by SP to CPSB. BNSF will be permitted to substitute for UP by using the CPSB trackage rights to deliver shipments to the plants.

Finally, we are imposing a condition to maintain the availability of two independent and efficient PRB routings to TUE's Martin Lake plant near Henderson, TX. This plant is now exclusively served by BNSF, and its most efficient PRB route is an interline movement involving both KCS and a short SP line segment. (Interline movements do not significantly detract from the efficiencies of run-through coal unit trains.) TUE has plans, however, to build a 6-mile spur to connect to UP and gain a second independent routing into the plant. We will require that the BNSF agreement be amended to permit BNSF and KCS to provide an efficient PRB joint-line movement into Martin Lake as an independent competitive alternative to the UP/SP single-line routing it will gain access to once the spur is completed.

Central Corridor.

Coal: URC agreement/Tennessee Pass. As we explain below, we are imposing two conditions to ensure that this merger does not result in competitive harm to Central Corridor coal shippers. First, we are imposing the URC agreement to preserve the existing level of rail competition for those few western coal shippers dependent on originations of Utah/Colorado coal. Second, we are granting discontinuance authority rather than full abandonment authority for applicants' Tennessee Pass Line to ensure that the merger does not result in service degradation for Central Corridor coal (and other) movements.[191]

URC agreement. Under the URC agreement, URC will receive access to additional coal sources in Utah and overhead trackage rights between Utah Railway Junction, UT, and Grand Junction, CO. BNSF, via the trackage rights it will receive under the BNSF agreement, will be able to move URC-originated coal to destination points west of Provo, UT, and east of Grand Junction. URC has explained that its agreement with applicants "will provide the market discipline to assure competitive rates for coal customers in the western region by means of its cost efficient operations and access to Utah coal acting either in

[191] We have viewed the concerns raised over potential degradation of Central Corridor service as concerns over potential competitive harm. As noted above, merger-related competitive harm results when the merging parties gain sufficient market power profitably to raise rates and/or reduce service.

conjunction with the BNSF or with UPSP."[192] As discussed elsewhere in this decision, the URC agreement is an especially important competitive safeguard for those few western coal shippers, such as the SPP/IDPC jointly owned North Valmy Station plant, that are dependent on originations of Utah/Colorado coal. We therefore impose as a condition the terms of the URC agreement.

Tennessee Pass Line. Applicants seek to abandon a portion of the Tennessee Pass Line between Malta and Cañon City, CO,[193] and to route traffic over more efficient routes post-merger. Several parties have raised concerns that the Moffat Tunnel Line between Dotsero and Denver, CO, will lack the capacity to handle overhead traffic rerouted from the Tennessee Pass Line.

Parties have requested that we consider alternative conditions designed to ensure that shippers do not suffer a degradation of the level of service now provided by SP as a result of the merger. One such condition would require UP/SP to maintain service on SP's (DRGW's) Tennessee Pass Line between Dotsero and Pueblo, Colorado. An alternative condition would permit UP/SP to discontinue service on, but not physically abandon, the Tennessee Pass Line. If the Moffat Tunnel Line cannot handle the increased traffic, we could then take steps necessary to enable UP/SP to restore the prior level of service over the Tennessee Pass Line. In addition, opponents argue that the Tennessee Pass Line is an important alternate route in the event of a derailment or congestion on the Moffat Tunnel Line.

Applicants assert that, in the 1970s, DRGW operated as many as 25 to 30 trains per day through the Moffat Tunnel, which indicates that this line should be able to handle the projected increase in traffic volume, and that additional capacity improvements on this line could be made if they prove necessary. Nevertheless, opponents point out that the traffic mix has changed considerably since the 1970s. DRGW's operations consisted mostly of short mixed-freight trains, whereas today SP operates longer trains, including heavy unit trains transporting coal. Opponents are concerned that, if SP has difficulty meeting contracted delivery schedules now, shifting more traffic to the Moffat Tunnel Line will cause additional capacity and service problems. Such a degradation

---

[192] UTAH-6 at 19.

[193] Specifically, applicants seek by petitions for exemption in Docket Nos. AB-8 (Sub-No. 36X) and AB-12 (Sub-No. 189X) for SPT to abandon, and DRGW to discontinue operations over, SP's Sage-Malta-Leadville line; and by applications in Docket Nos. AB-8 (Sub-No. 39) and AB-12 (Sub-No. 188) for SPT to abandon, and DRGW to discontinue operations over, SP's Malta-Cañon City line.

in service could increase cycle times for unit trains of shipper-owned cars, and thus require shippers to purchase more cars to receive the same level of service.

Applicants assert that the Tennessee Pass Line is the least efficient link for an overhead route across the Central Corridor, and that the merger will open new, more efficient routes for the present traffic flows. Given the UP/SP and BNSF options that will become available after the merger, applicants claim that routing via Pueblo and the Tennessee Pass Line is an inferior choice.[194]

We acknowledge that applicants have taken the railroad capacity concern seriously and recognize that the inefficient Tennessee Pass Line might need to be retained just in case the Moffat Tunnel Line is overwhelmed. Applicants provided assurances that no action will be taken precipitously to abandon the line, and that overhead traffic flows will leave that line only as their new routes become fully prepared to take them efficiently.[195] Notwithstanding these reassurances, we will grant discontinuance authority rather than full abandonment authority because of the crucial nature of this through route. This will preserve the line intact until applicants demonstrate that overhead traffic over the Tennessee Pass Line has been successfully rerouted.

Related procedural aspects. Consistent with the Board's policy to promote private-sector solutions to disputes, we encourage parties to this proceeding to make their best efforts to resolve among themselves any disputes that may arise concerning the meaning or applicability of any of the terms or conditions imposed or approved before resorting to the Board for resolution. Use of arbitration to resolve disputes can result in resource and time savings for all concerned. If parties choose to use arbitration in the first instance, the Board will entertain appeals from arbitral decisions using the standards in *Lace*

---

[194] Applicants note that double-stack traffic is transcontinental traffic that can easily be rerouted to shorter routes through Wyoming or New Mexico and by-pass Colorado completely. Applicants state that the Tennessee Pass Line would be the shorter post-merger route only for coal moving to West Texas, New Mexico, and Arizona. The volume of this coal, applicants assert, currently amounts to about one train per week. UP/SP-232 (Vol. 3), VS Ongerth, at 47-48.

[195] According to applicants, existing service to overhead shippers will be protected until superior options are in place, and the track itself will be left in place for a set period of time in accordance with assurances made to the Governor of Colorado. These include a commitment to maintain service on the line for at least 6 months following consummation of the merger, and to leave track in place until upgrades are completed on the new routes and at Roseville Yard in California, which could take several years. UP/SP-232 (Vol. 3), VS Ongerth, at 49.

Curtain[196] set forth for review of arbitral decisions under our labor conditions, unless the parties agree otherwise.

NO DIVESTITURE NEEDED. A number of parties have called on us to impose certain broad-based remedies to supplement or replace the BNSF agreement. Most notably, a number of parties request that we impose some version of MRL's plan for divestiture of certain Central Corridor lines and/or some version of KCS' and Conrail's plans for divestiture of certain lines running from St. Louis to the Gulf Coast region.

As we have explained above, the merger, subject to the conditions we are imposing, including an oversight condition, will be consistent with the public interest. These conditions are narrowly tailored to ensure that they effectively remedy all significant merger-related competitive harms without unduly limiting the merger's substantial public benefits. Therefore, no other broad-based remedy is required for our approval. Further, as we explain below, while divestiture of certain of applicants' lines may have a surface appeal, it also entails its own very substantial problems in this proceeding.

South Central Lines/SP East. Various parties, including Conrail, KCS, NITL, RCT, the Arkansas Attorney General, DOT, and DOJ argue for a condition requiring divestiture of extensive UP or SP lines in the South Central region. Conrail and KCS put forth requests involving forced divestiture of specific SP line segments. While these proposals all differ somewhat in their particulars, they are all quite similar. The Conrail proposal envisions a larger divestiture of SP's assets than the KCS plan, but both these and the others would entail removing the core of what would be the UP/SP South Central network.

Divestiture in the rail industry, with its network economies, is a requirement, to be imposed only under extreme conditions, when no other less intrusive remedy would suffice. Here, divestiture would be greatly inferior to the remedy we have chosen. Divestiture would be an over-reaching solution, especially in light of the agreements that applicants have reached with various parties and the additional conditions we are imposing. Because the competitive justifications that would be the basis for compelling divestiture have been mooted, we will deny the requested conditions calling for divestiture of South Central lines.

As we already have discussed, BNSF, through the agreements applicants have arranged and the additional conditions we are imposing, will be more than

---

[196] *Chicago & N.W. Transp. Co.--Abandonment*, 3 I.C.C.2d 729 (1987) (*Lace Curtain*), *aff'd, International Bhd. of Elec. Workers v.* ICC, 862 F.2d 330 (D.C. Cir. 1988).

sufficient as a replacement competitor in these corridors. All the parties' competitive concerns have been effectively addressed. In these circumstances, we need not resort to the significantly more intrusive divestiture remedy. As for potential purchasers, both Conrail and KCS suffer from deficiencies. Despite their attacks on the adequacy of BNSF's service plans, neither Conrail nor KCS utilized existing Board procedures to submit responsive applications in support of their sweeping proposals. They have provided no traffic studies, no operating plans, and no pro forma financial statements to reveal the full effects of their proposals.[197] As previously noted, we will not impose conditions that will restructure the competitive balance among railroads with unpredictable effects, which is what divestiture to KCS or Conrail would result in here.

Divestiture would introduce a distinctly weaker competitor than BNSF at 2-to-1 points and a distinctly weaker competitor than UP/SP at exclusively served (1-to-1) points. Neither KCS nor Conrail (nor any other purchaser other than BNSF, for that matter) could offer the array of service and single-line coverage that both the merged system and BNSF will offer to their shippers. A KCS purchase would raise the most new competitive concerns, as the KCS system itself is mostly within these corridors. As such, there would be many of the same problems with parallelism as with the UP/SP merger, but without the competitive solutions we now have before us. There is evidence that Conrail is a much higher cost railroad than BNSF, and thus there are serious questions as to its ability to be a competitive force in these corridors. UP/SP-231, RVS Whitehurst, at 21.

At points that will continue to be served by multiple railroads after the merger, such as Dallas (which will be served by BNSF, UP/SP, KCS, South Orient Railroad Company as well as other shortlines) and Houston (which will be served by BNSF, UP/SP, KCS for grain, and Tex Mex for Mexican traffic over the trackage rights we are granting here, and neutral terminal roads),

---

[197] NITL's divestiture proposal (NITL-9 at 5-6, 56-57) is equally unsupported. It offers no justification to support its request for additional requirements that (a) SP's Houston-Flatonia-Placedo line be sold, yielding a Houston-Corpus Christi-Brownsville route distinctly inferior to the one BNSF would have under the BNSF agreement, and (b) SP's Flatonia-Eagle Pass line be sold subject to BNSF's present haulage rights, thus yielding weaker competition at Eagle Pass than would the BNSF agreement.

The proposal of the Arkansas Attorney General to turn SP lines into public highways is vague, unprecedented, and unpredictable, and thus we cannot judge its impacts. RCT suggests a specific overreaching addition to the Conrail and KCS proposals that would require the insertion of a second railroad at CP&L's Coleto Creek plant. RCT-4 at 17.

divestiture would add an additional railroad, reducing volume efficiencies, despite the fact that the merger as conditioned will not result in competitive harm. And divestiture will be a significant overreach because it would transfer large volumes of business at exclusively served points to the acquirer, without any competitive justification.[198]

These divestiture proposals would also take the railroad system backwards by destroying, rather than creating, single-line service.[199] Many shippers who would have received new single-line service, or who would see existing single-line service eliminated, would no longer share in the merger's benefits. It is true that the loss of new UP/SP single-line routings could be reduced somewhat by a grant back of trackage rights from the carrier chosen for divestiture to UP/SP, as variously suggested by NITL and MRL. But many shippers on the divested segments would lose single-line service because the overhead trackage rights would not permit local service. Nonetheless, single-line service over BNSF in the South Central Corridor, to and from the Pacific Northwest, to and from the Upper Midwest, and to and from the PRB for major coal utilities, would all be adversely affected.

Further, the quality of UP/SP service in the Chicago-St. Louis-Memphis-Texas corridor would be adversely affected by these proposals. Applicants note that a study performed for Conrail graphically demonstrates the improved transit times that will result from directional running. UP/SP-232, RVS Salzman, at 23. Even more seriously, loss of SP's Pine Bluff Yard would destroy the UP/SP blocking plan, overload UP's North Little Rock Yard, and require extra switching throughout the South Central UP/SP region. *Id.* at 17-20. UP/SP would lose the ability to make many blocks at Arkansas yards, requiring additional switching at other congested yards. *Id.* Conrail points out in detail

---

[198] For example, applicants' witness Peterson shows that the Conrail proposal would compel the merged system to convey lines to Conrail that accounted for 265,000 carloads of exclusively served SP traffic in 1994, compared to only 90,000 carloads of 2-to-1 traffic. UP/SP-231, RVS Peterson, at 195.

Peterson details how the Conrail and KCS divestiture proposals would cause very large and unnecessary traffic losses to UP/SP (*i.e.*, $924 million in annual gross revenues in the case of the Conrail proposal and $874 million in annual gross revenues in the case of the KCS proposal). Such losses would adversely affect the economics of the merger. *Id.* at 196-201.

[199] Peterson also shows that the Conrail and KCS divestiture proposals would eliminate single-line service for 357,000 units of traffic per year--even more than the volume of traffic that will gain new single-line service as a result of the merger. Offsetting this in the case of Conrail (but not KCS) would be the creation of new single-line service for a smaller volume of traffic that moves to Conrail points. *Id.* at 201-08.

how each additional switch increases transit time, increases damages, and increases safety risks. CR-22, VS Carey/Ratcliffe/Shepard, at 13-15. We note that these problems are inherent in Conrail's own proposal.

UP/SP would lose the ability to build run-through trains for NS via St. Louis. It would be unable to block for Conrail's Buckeye Yard. Blocking for many smaller yards in Texas and Louisiana would be eliminated. UP/SP-232, RVS Salzman, at 17-19. Almost every new block proposed in the UP/SP Operating Plan for the South Central corridor would have to be eliminated, and those that remain would displace existing blocks. *Id.*

In exchange, shippers would gain no discernable service benefits. Conrail witnesses acknowledge that the service plan to which Conrail is committed calls for *no* changes in SP's existing train schedules. UP/SP-232, RVS King, at 26-27. KCS has not disclosed its plans, but we assess that KCS could not offer significantly improved train schedules because its route network is too constrained.

Applicants' witness King asserts that the UP-Conrail "Salem Gateway" service, which provides the best service between the Northeast and the South Central region, would be degraded if Conrail were to acquire the SP lines it seeks. If Conrail is the acquirer, applicants assert it will have no incentive to help its competitor, UP/SP, maintain that gateway, or vice versa. As a result, service would decline and cars would likely be rerouted via urban St. Louis, absorbing additional delay. UP/SP-232, RVS King, at 29-30. UP/SP also asserts that there is a significant risk that current SP-NS and SP-CSX services would also be undermined because Conrail would have sharply reduced incentives to work with its competitors in the East, and vice versa. *Id.* at 30-31.

The economic benefits of the merger would also be undermined by these divestiture proposals. Applicants have shown that claims by some parties, especially Conrail, that the UP/SP savings are all in the West are erroneous. UP/SP-232, RVS Salzman, at 14 & Ex. DWS-1. Although many of the benefits from the merger accrue in other areas, divestiture would mean that the new system would still lose well over $100 million per year of labor, operating, and other benefits of the merger.

UP/SP would also be forced to spend huge sums for increased capacity without the use of its parallel lines for directional running. Applicants have explained that the increased burden caused by focusing more traffic on the UP lines in Arkansas and Texas would require UP to invest over $220 million to create new capacity on UP segments, and to implement capacity-enhancement

plans that the merger would have avoided. UP/SP-232, RVS King, at 31. KCS, Conrail, and RCT all recognize that UP/SP probably would have to incur the tremendous expense of double-tracking the UP Houston-Memphis route, and a number of UP lines in Texas would also be affected. KCS-33 (Vol. 2), VS Rees, at 228; CR-22, VS Carey/Ratcliffe/Sheppard, at 78-79; RCT-4 at 15, 40-41. Increased switching burdens on already-taxed UP yards would likely require UP/SP to construct a new switching yard at a cost of up to $100 million, although no location would be as well suited as the existing Pine Bluff and Little Rock facilities. UP/SP-232, RVS King, at 32.

Applicants explain that the expenditures would be vastly greater, with even greater loss of service quality and efficiency, if Conrail were to acquire SP's El Paso line. *Id.* at 33-34. The net effect of this further Conrail overreach would be to divert transcontinental traffic between California and New Orleans/Houston/San Antonio/Laredo from an SP line that has excess capacity to UP lines that have no extra capacity. Again, UP/SP would be forced to spend $160 million, if not more, and service quality would still decline as most traffic flows would be concentrated on a single, overburdened line and forced through the congested Ft. Worth terminal. *Id.* Applicants assert that these unnecessary capital outlays would make it impossible for it to make other vital investments, such as developing new intermodal terminals and services. *See* Comments of Riss Intermodal, March 29, 1996.

A forced South Central divestiture is incompatible with the trackage rights and line sales provided for in the BNSF agreement, and could cause the entire agreement to collapse. Nothing remotely comparable in its benefits would be available. Even if some other competitive agreement or agreements could be pieced together, shippers would lose the intense, comprehensive competition offered by the BNSF agreement, and all the added competition that agreement brings. For example, instead of gaining access to two railroads in place of one and single-line service to points all across both the UP/SP and BNSF networks, shippers on SP's Southern Louisiana line would be exclusively served by the forced acquirer and would lack single-line service to any UP/SP or BNSF point.

We also believe that a divestiture requirement along the lines advocated by Conrail and KCS might dissolve the merger, leaving SP to retrench its services or possibly to dismember itself.[200] We do not believe that dismemberment of SP

---

[200] This would be the result both because of the reduction in merger benefits, which KCS and Conrail could not replicate, and because, as can be seen from Conrail's bidding and from KCS'

(continued...)

through forced divestiture is in the best interest of shippers and the public. Essential services would irretrievably be lost, the quality of services that are preserved would be greatly degraded, and the significant benefits of the UP/SP merger and the BNSF agreement would likely be lost.

Central Corridor. Several parties, including DOJ and MRL, argue that competition in the Central Corridor can be preserved only through divestiture. DOT states that circumstances unique to the Central Corridor militate against divestiture of that line, but it urges conditions to strengthen significantly the trackage rights proposed in the Central Corridor. MRL, acting on behalf of its owner, Dennis Washington, seeks the divestiture of all DRGW lines; extensive UP and SP lines in Nevada, California, and Oregon; UP's line to Silver Bow, MT, with trackage rights to connect it to the Central Corridor; trackage rights on UP in Kansas to reach a variety of grain gathering points; and unilateral authority to set rates to and from all SP points in California and Oregon, with revenues pro-rated by mileage.

We have rejected already the arguments that form the basis for this extraordinary relief. We believe BNSF will be an effective competitor as a tenant over UP/SP lines,[201] as discussed more fully above. We also have rejected the argument that, given the high-quality, low-cost routes that BNSF operates between the Midwest and the West Coast, BNSF will have no incentive to operate via its trackage rights in the Central Corridor.

Even if we were to find that there was some predicate for divestiture, we would have serious reservations concerning the ability of MRL's newly formed affiliate to provide adequate, competitive service. As noted by DOT, MRL itself does not appear to possess an adequate network, particularly in California, to gather traffic that would flow over the corridor.[202] MRL may also be

---

(...continued)
claim that UP overpaid for SP, the price that would be offered is likely to be inadequate. UP/SP-231, RVS Rebensdorf, at 30-32.

[201] As counsel for CPUC explained at the oral argument:

[T]he proposed divestiture of one of the two lines in the Central Corridor is not a good idea for California * * *. We concluded that the BN/Santa Fe, through its trackage rights, will provide the kind of Central Corridor service and competition that will be best for California. Conlon, Oral Arg. Tr. at 470.

[202] As DOT's counsel explained at the oral argument:

[O]ther than the applicants, only the BN/Santa Fe has the gathering lines that can supply the volume of overhead traffic necessary to maintain competition throughout the Central Corridor

(continued...)

disadvantaged in competing against two carriers in the West that could offer single-line service to the major midwestern gateways. A probable result would be the rerouting of the overhead traffic on the Central Corridor to the other single-line carriers, jeopardizing the viability of competitive service on that corridor.

MRL's divestiture proposal would eliminate significant amounts of existing single-line service, as well as the new single-line service and improved routings created by the merger. MRL proposes to purchase approximately 350 miles of UP's lines north of Pocatello, ID, including the mainline to Silver Bow, a number of connecting branch lines, and an important connection to UP's spin-off, Eastern Idaho Railroad, at Idaho Falls, ID, which will affect over 40,000 annual carloads of UP traffic and $90 million in annual UP revenues. While a grant back of overhead trackage rights to UP/SP and BNSF, as MRL proposes, could ameliorate these losses somewhat, they would still be substantial.[203] As a result of MRL's proposal, numerous shippers located on this trackage in Idaho would no longer have access to UP's single-line routes to important UP points such as Chicago, St. Louis, Memphis and Dallas. These shippers would be left either with a very inefficient route over the new MRL affiliate via Salt Lake City to Kansas City, or with having to move their traffic north to the Montana Western Railway, which would hand it off to MRL, and then to BNSF.

Large volumes of agricultural commodities, such as potatoes and grain, would be adversely affected by a divestiture to MRL. This business is intensely truck competitive and diversion to the highways will occur as transit times deteriorate under the MRL proposal. Potatoes originate on this UP Northern Idaho network, destined to the population centers of the South and East; grain, primarily wheat, barley, and malt, moves mainly east and to the Portland area for export. Grain and lumber is trucked from origins on BNSF and MRL to Silver Bow for handling by UP to a variety of markets. MRL's purchase of this line could make rail service uncompetitive in these markets.

Under the BNSF agreement, intermodal and automotive customers at Salt Lake City and Reno will gain new single-line access from the numerous and substantial intermodal terminals throughout the BNSF system, especially in the East (Chicago, Twin Cities, Memphis, Kansas City, Denver, St. Louis, Omaha

---

(...continued)
between the West Coast and the Midwestern gateways.
Smith, Oral Arg. Tr. at 156.

[203] It is not clear whether three railroads could operate efficiently over this segment.

and Dallas) and the West (Richmond, Stockton, Modesto and Fresno). MRL would only reach Kansas City and Denver on the east and Stockton on the west. Moreover, even at these few locations, intermodal shippers would not have access to BNSF's facilities. MRL's new affiliate would only possess facilities initially at Denver that it would acquire as part of the divestiture. Most of the existing intermodal and automotive volumes to or from Salt Lake City and Reno would lose the benefit of a second competitive single-line route.

As part of the BNSF agreement, UP/SP will obtain new, shorter routes by gaining trackage rights over BNSF from Bend to Chemult, OR, and between Barstow and Mojave, CA. The MRL proposal could undermine the BNSF agreement, and with it the significant mileage savings associated with these trackage rights.

As already discussed, both UP and SP now operate over more circuitous routes than the efficient single-line routes the merger will create. The merger will reduce UP's mileage between Oakland and Chicago by 189 miles and SP's by 388 miles. From Oakland to Kansas City and St. Louis, the reductions will be 189 miles for UP and 143 miles for SP. Between Los Angeles and Memphis, the savings will be 283 miles over SP's present route and 580 miles over UP's non-competitive Central Corridor route. These mileage reductions will make the merged system more competitive with BNSF, the service leader for Bay Area-Midwest traffic.[204]

Divestiture would jeopardize the ability of the merged company to ensure long-term, high-quality rail service to shippers who are dependent presently on SP throughout the West.[205] SP's transcontinental service time will be reduced

---

[204] Upon merger, UP/SP will gain route and terminal flexibility in several major corridors including Los Angeles-Chicago, Bay Area-Utah, and San Antonio-Houston-Dallas-Memphis-St. Louis-Chicago. Between Los Angeles and Chicago, expedited intermodal and auto traffic will be concentrated on the Tucumcari line and slower manifest traffic on UP's Central Corridor line, adding to the total capacity of both. Between the Bay Area and Utah, expedited traffic will move via SP's Donner Pass line, and slower bulk traffic will move via UP's Feather River line. The merger will also alleviate congestion in Utah by eliminating the conflicting and inefficient movements of UP and SP traffic between Salt Lake City and Ogden which add unnecessary miles and hours to every UP and SP train that crosses the Central Corridor. Most UP/SP Northern California trains will be operated straight through at Ogden, and BNSF trains will be operated straight through at Salt Lake City.

[205] SP has hundreds of carload lumber and food products shippers local to its lines in California and Oregon who have endured 2- or 3-week delivery times to the Midwest, cars lost and

(continued...)

from weeks to days; service in coal, automobile, and other markets will similarly improve; reliability will be vastly increased; and cars will be available. This improvement in competition will mean that, for the first time in many years, rail transportation will be a real competitor for these shippers' business.

Divestiture would also impede applicants from using the combined facilities of UP and SP in this corridor, and thus limit the merged company's ability to resolve problems of route congestion (particularly between Ogden and Salt Lake City, and between Pueblo and Herington), circuity and altitude, which have contributed to the irregularities that make SP's services less competitive.[206] The new plan will avoid or cure tunnel clearance problems on SP's routes through the Rockies (Moffat Tunnel) and the Sierras. Yard expansion or pre-blocking of larger volumes of combined traffic to bypass yards will alleviate delays for traffic that moves through the Roseville yard and other rehandling yards in California, as well as at Kansas City. The resulting service improvements will provide consistent transit times--better by many days than what SP offers now--that can more effectively compete with the offerings of BNSF for food products, forest products and coal moving in this corridor.

In sum, we believe that the service that will be provided by BNSF over trackage rights is an appropriate replacement for the service formerly provided by SP. Divestiture to another carrier would not replace the competitive single-line and routing options that shippers will lose when SP merges with UP. No railroad other than BNSF so nearly duplicates the SP and UP networks. Likewise, no other railroad has the financial strength, operational capabilities, and marketing expertise to serve the long routes in the Western United States. The BNSF agreement grants BNSF trackage rights between Denver and Oakland, with access to all 2-to-1 shippers in Utah, Nevada, and Northern California (there are no 2-to-1 points in Colorado).

(...continued)
untraceable in terminals, inaccurate bills, and unavailable equipment. Some have limited or eliminated their carload rail shipments and are paying more to move their goods by truck or BNSF intermodal or transload service--and would return their traffic to rail if SP could provide adequate service.

[206] SP has two transcontinental routes, the Central Corridor and the Southern Corridor, both of which are largely single-track, difficult to operate, and costly to maintain. The distribution of its traffic is such that it cannot eliminate either of those routes without losing more than it would gain. Clearance problems and mountainous operating conditions across the Central Corridor route cause SP to move even more traffic over its Tucumcari route, notwithstanding congestion. SP's yards are clogged and need capital investments that SP has not been able to fit within its constrained capital budgets.

We find that divestiture in the Central Corridor lacks competitive justification, and that MRL's proposed divestiture is overbroad and overreaching. Divestiture of the Central Corridor would eliminate single-line service, degrade service quality, increase transit times, restrain efficiencies, and undermine the merged system's ability to fund new capital projects as proposed by applicants. The MRL proposal would force a sale of lines accounting for approximately 350,000 carloads of exclusively served traffic in 1994, compared to only 75,000 carloads of SP's 2-to-1 traffic. Applicants predict that MRL's divestiture proposal would result in $631.3 million in annual revenue losses to UP/SP, involving five areas: carload diversions, losses resulting from MRL's proposed PRA, intermodal traffic, automotive traffic, and losses of new UP/SP marketing opportunities for carload traffic. UP/SP-231, RVS Peterson, at 210-213.

A Central Corridor divestiture is not in the best interest of shippers or the public. We believe that BNSF will be an effective competitor as a tenant over UP/SP lines. We believe that the broad-based conditions that we are imposing will sufficiently augment the BNSF trackage rights agreement to preserve competition over the Central Corridor.[207]

EMBRACED CASES AND RELATED MATTERS. We are exempting, in the Sub-No. 1 docket, the trackage rights provided for in the BNSF agreement and included in the Sub-No. 1 notice filed November 30, 1995, but we are requiring the filing of additional notices covering both the BNSF trackage rights provided for in the CMA agreement and the URC trackage rights provided for in the URC agreement. We are exempting, in the Sub-No. 2 docket, the line sales provided for in the BNSF agreement. We are exempting, in the Sub-No. 3, 4, 5, 6, and 7 dockets, the terminal railroad control transactions proposed therein. We are exempting, in the Sub-No. 8 docket, common control of UP and the two motor carriers controlled by SP, and common control of SP and the one motor carrier controlled by UP. Finally, we are granting, in the Sub-No. 9 docket, the terminal trackage rights application filed therein.

TRACKAGE RIGHTS. We are exempting, in the Sub-No. 1 docket, the trackage rights provided for in the BNSF agreement and included in the Sub-No. 1 notice filed November 30, 1995. These trackage rights are essential to the competitive service that BNSF will provide under the BNSF agreement, and we

---

[207] As noted, DOT advocates augmented trackage rights as the preferred remedy in the Central Corridor. DOT-4 at 39. DOT's recommendations have been addressed elsewhere.

believe that the trackage rights class exemption codified at 49 CFR 1180.2(d)(7) (1995) can be invoked with respect to trackage rights provided for in a settlement agreement.[208]

We are directing applicants and BNSF to file, no later than 7 calendar days prior to the effective date of this decision, an additional class exemption notice covering the trackage rights added to the BNSF agreement in accordance with the amendments required by the CMA agreement. These trackage rights are also vital to the competitive service that BNSF will provide under the BNSF agreement, but were not included in the Sub-No.1 notice filed November 30th.[209]

We are directing applicants and URC to file, no later than 7 calendar days prior to the effective date of this decision, a class exemption notice covering the trackage rights provided for in the URC agreement. As explained elsewhere in this decision we are imposing the URC agreement as a condition to approval of the merger; and the URC trackage rights are vital to the competitive service that URC will provide under the URC agreement. Trackage rights imposed as a condition in favor of a named railroad do not ordinarily require any approval beyond the approval implicit in the imposition of the condition itself, *BN/SF,* 10 I.C.C.2d at 767 (carryover paragraph), and therefore do not ordinarily require a filing seeking approval; but, to provide for consistent treatment for all trackage rights imposed as conditions in this proceeding, we are directing applicants and URC to invoke the trackage rights class exemption.[210]

LINE SALES. We are exempting, in the Sub-No. 2 docket, the three line sales provided for in the BNSF agreement. These line sales would ordinarily require approval under 49 U.S.C. 11344; but, under 49 U.S.C. 10505, we must exempt these sales from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. We are of the

---

[208] We will not publish the Sub-No. 1 notice in the *Federal Register*. Sufficient notice of the Sub-No. 1 trackage rights was provided in the notice of acceptance of the primary application published at 60 Fed. Reg. 66,988 (1995).

[209] The notice with respect to the additional BNSF trackage rights will be published in the *Federal Register* in due course. Notice of the additional BNSF trackage rights was not provided in the notice of acceptance of the primary application published at 60 Fed. Reg. 66,988 (1995).

[210] The notice with respect to the URC trackage rights will be published in the *Federal Register* in due course. Notice of the URC trackage rights was not provided in the notice of acceptance of the primary application published at 60 Fed. Reg. 66,988 (1995).

opinion that regulation is not necessary to carry out the rail transportation policy; the Sub-No. 2 exemption will allow competition and the demand for services to establish reasonable rates for rail transportation, 49 U.S.C. 10101a(1), will minimize the need for regulatory control, 49 U.S.C. 10101a(2), will ensure the continuation of a sound rail transportation system with effective competition among rail carriers, 49 U.S.C. 10101a(4), and will ensure effective competition between rail carriers, 49 U.S.C. 10101a(5); and other aspects of the rail transportation policy will not be adversely affected. We are also of the opinion that regulation is not necessary to protect shippers from the abuse of market power. The very purpose of most of the arrangements provided for in the BNSF agreement, including the Sub-No. 2 line sales, is the preservation of competitive options that would otherwise be lost with the merger.[211]

TERMINAL RAILROAD CONTROL TRANSACTIONS. We are exempting, in the Sub-No. 3, 4, 5, 6, and 7 dockets, control by UP/SP of five terminal and/or switching railroads (A&S, CCT, OURD, PTRR, and PTRC, respectively) in which UP and SP presently have non-controlling interests. Control of these railroads by UP/SP would ordinarily require approval under 49 U.S.C. 11344; but, under 49 U.S.C. 10505, we must exempt these control transactions from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. We are of the opinion that regulation is not necessary to carry out the rail transportation policy. The sought exemptions will allow competition to establish reasonable rates, promote an efficient rail transportation system, foster sound economic conditions in transportation, and encourage honest and efficient railroad management, 49 U.S.C. 10101a(1), (3), (5), and (10); and other aspects of the rail transportation policy will not be adversely affected. We are also of the opinion that the A&S, CCT, OURD, PTRR, and PTRC control transactions are of limited scope, because four of these railroads conduct local operations only and because the fifth is currently inactive. We are of the further opinion that regulation is not necessary to protect shippers from abuse of market power, because these control transactions are related to, and will facilitate, common

[211] We will not publish notice of the Sub-No. 2 exemption in the *Federal Register*. Sufficient notice of the Sub-No. 2 line sales was provided in the notice of acceptance of the primary application published at 60 Fed. Reg. 66,988 (1995).

control of UP and SP, which we have found to be consistent with the public interest.[212]

MOTOR CARRIER CONTROL TRANSACTIONS. We are exempting, in the Sub-No. 8 docket, (i) common control of UP and the two motor carriers controlled by SP (PMT and SPMT), and (ii) common control of SP and the one motor carrier controlled by UP (Overnite).

Overnite, which provides both less-than-truckload and truckload service on a nationwide basis, is operated independently of UP, and applicants have indicated that they have no plans to eliminate that independence or otherwise incorporate Overnite into UP/SP's operations. PMT, which provides nationwide general commodity trucking service and which specializes in truckload freight movement, both over-the-highway and via TOFC, is operated independently of SP, and applicants have indicated that they have no plans to eliminate that independence or otherwise incorporate PMT into UP/SP's operations. SPMT, which formerly transported motor vehicles and also formerly specialized in the ramping and deramping of TOFC and COFC for SPT, has not conducted operations for more than 2 years, and applicants have indicated that they have no plans to resume SPMT's operations.

The Sub-No. 8 motor carrier control transactions would ordinarily require approval under 49 U.S.C. 11344; but, under 49 U.S.C. 10505, we must exempt these transactions from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. We are of the opinion that regulation is not necessary to carry out the rail transportation policy. The sought exemption will further the goals of ensuring an efficient, economical, and competitive rail transportation system, thereby meeting the needs of shippers, 49 U.S.C. 10101a(4) and (5); and other aspects of the rail transportation policy will not be adversely affected. We are also of the opinion that the Sub-No. 8 control transactions are of limited scope, because they involve merely changes in formal ownership and control, rather than substantive changes that might affect the operations and service provided by the motor carriers. We are of the further opinion that regulation is not necessary to protect

---

[212] We will not publish notice of the Sub-No. 3, 4, 5, 6, and 7 exemptions in the *Federal Register*. Sufficient notice of the A&S, CCT, OURD, PTRR, and PTRC control transactions was provided in the notice of acceptance of the primary application published at 60 Fed. Reg. 66,988 (1995).

shippers from the abuse of market power, because the operations of Overnite and PMT will not change as a consequence of the common control for which the Sub-No. 8 exemption is sought, and because SPMT has no operations. Shippers have pre-merger, and will continue to have post-merger, numerous motor carriage services available to them at all locations served by Overnite and PMT.

IBT contends that the exemption sought in the Sub-No. 8 docket is barred by the interplay of 49 U.S.C. 11344(c) (fourth sentence) and 49 U.S.C. 10505(g)(1). The fourth sentence of 49 U.S.C. 11344(c) provides that a railroad can be authorized to acquire control of a motor carrier only if the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition; 49 U.S.C. 10505(g)(1) provides that a 49 U.S.C. 10505 exemption cannot authorize intermodal ownership that is otherwise prohibited under 49 U.S.C., Subtitle IV (wherein 49 U.S.C. 11344 is located); and IBT therefore contends that we cannot grant the Sub-No. 8 exemption because applicants, having indicated that they intend to keep Overnite and PMT independent and SPMT inactive, have made clear that they will not use these motor carriers in furtherance of UP/SP's rail operations. The fourth sentence of 49 U.S.C. 11344(c), however, is not applicable to a transaction that involves only a change of form, not of substance, in the transportation service. *DRGW/SP,* 4 I.C.C.2d at 949-51; *UP/MKT,* 4 I.C.C.2d at 485. Here, the common control (i) of UP and PMT and SPMT, and (ii) of SP and Overnite, is merely an incidental change in ownership resulting from the primary merger transaction. Each of the motor carriers is today commonly controlled with a rail company, so the Sub-No. 8 transactions will not create intermodal ownership where there was none. And, because motor carrier operations will not change as a result of the common control, the Sub-No. 8 transactions will merely serve to bring the motor carriers under a broader corporate umbrella.[213]

TERMINAL TRACKAGE RIGHTS. We are granting, in the Sub-No. 9 docket, the application filed by applicants and BNSF for an order permitting BNSF to use two small segments of KCS track in Shreveport and one small segment of KCS track in Beaumont. These rights are important to BNSF's ability to conduct operations over the segments between Houston and Memphis

[213] We will not publish notice of the Sub-No. 8 exemption in the *Federal Register*. Sufficient notice of the Sub-No. 8 transactions was provided in the notice of acceptance of the primary application published at 60 Fed. Reg. 66,988 (1995).

and between Houston and New Orleans because KCS solely owns certain rail lines through Shreveport and Beaumont, which form essential parts of those routes. KCS has longstanding trackage rights agreements over the relevant segments with SP at Shreveport, and with SP and UP at Beaumont, but KCS is unwilling to grant trackage rights to BNSF. Under applicants' and BNSF's proposal, BNSF would be able to avail itself of similar trackage rights arrangements.

Under 49 U.S.C. 11103, we may require terminal facilities owned by one railroad to be used by another if the use is practicable and in the public interest, and will not substantially impair the ability of the owning carrier to handle its own traffic. We find that the three KCS segments at issue are terminal facilities, that use of such segments by BNSF is practicable and in the public interest, and that use of such segments by BNSF will not substantially impair KCS' ability to handle its own traffic.

Terminal Facilities. The three KCS segments are "terminal facilities" under 49 U.S.C. 11103 because each lies in the middle of a city, and each is used for switching and interchange movements as well as for line-haul movements through the terminal. The precise use to be made of these segments by BNSF is not crucial; 49 U.S.C. 11103 "is not necessarily limited to benefitting the rail service in the relevant terminal area." *Southern Pacific Transp. Co. v. ICC,* 736 F.2d 708, 723 (D.C. Cir. 1984) (*SPT v. ICC*) (citing with approval ICC decisions ordering "bridge the gap" terminal trackage rights under 49 U.S.C. 11103).

Owner Not Substantially Impaired. Use by BNSF of the three KCS segments will not substantially impair KCS' ability to handle its own traffic. For the most part, BNSF trains will be using track capacity freed up by UP/SP, so that KCS' track will not be subjected to greater use by other railroads than it was previously. We believe that the traffic handled by BNSF will replace traffic now handled by SP, although various parties, including KCS, have argued that BNSF will not be able to achieve even those traffic levels.

Use Is Practicable. Use by BNSF of the three KCS segments is practicable. We realize that the terminal trackage rights we are approving may make operations at Shreveport slightly more complicated than they are now because three carriers will be operating over them rather than two, but this will simply "require coordination of operations between the parties." *UP/MP/WP,* 366 I.C.C. at 576. Moreover, applicants' directional running plan, which will be available to BNSF for its new Houston-Memphis movement, could result in less interference with KCS' traffic at Shreveport. At Beaumont, BNSF service is

merely replacing that now provided over trackage rights by SP, and thus it will clearly be practicable.

A Grant is in the Public Interest. To ameliorate certain anticompetitive consequences of the 1982 UP/MP/WP merger, the ICC imposed a condition granting DRGW trackage rights over a line between Pueblo and Kansas City, part of which was owned by a non-applicant, SF. *UP/MP/WP,* 366 I.C.C. at 572. The ICC used its 49 U.S.C. 11103 power to grant terminal trackage rights. Applying this provision, the ICC determined that granting access to this line to make the agency's overall merger conditions effective would be in the public interest. *UP/MP/WP,* 366 I.C.C. at 574-76. The Court of Appeals affirmed. *SPT v. ICC,* 736 F.2d at 722-24. We think that the terminal trackage rights sought here fall squarely within that precedent.

Use by BNSF of the three KCS segments is in the public interest because it is essential to the merger conditions permitting BNSF to provide a competitive alternative in the Houston-Memphis and Houston-New Orleans corridors. *See UP/MP/WP,* 366 I.C.C. at 576. *See also, SPT v. ICC,* 736 F.2d at 723 (approving determination that terminal trackage rights were in public interest because they allowed ICC to create Central Corridor competitive alternative to the merged carrier).

Nevertheless, KCS contends that the terminal trackage rights here cannot be considered to be in the public interest as construed in *Midtec Paper Corporation v. CNW et al.,* 3 I.C.C.2d 171 (1986) (*Midtec*). In *Midtec,* the ICC said that it would not grant terminal trackage rights under section 11103 unless they were necessary to remedy or prevent an anticompetitive act by the owning carrier. KCS is arguing that in *Midtec* the ICC replaced the flexible public interest standard of *UP/MP/WP* with a much narrower standard.

Whether the ICC ever applied its relatively exacting *Midtec* precedent in the context of a merger is a matter of some debate.[214] In any event, we believe that it is inappropriate to do so here, and, to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the broad

---

[214] *See, e.g., Denver and Rio Grande Western RR Co. and Missouri-Kansas-Texas RR Co. v. St. Louis SW Ry. Co.,* Finance Docket No. 30759 (ICC served January 9, 1987) (not applying *Midtec*); *Rio Grande Industries, Inc., et al.--Pur. & Track.--CMW Ry. Co.,* 5 I.C.C.2d 952 (1989) (SP/CMW) (not applying *Midtec*); *Rio Grande Industries, et al.--Purchase and Related Trackage Rights--Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL,* Finance Docket No. 31505 (ICC served November 15, 1989) (*SP/Soo* Decision No. 6) (indicating that the *Midtec* standard would apply if applicant were to be given terminal trackage rights).

"public interest" standard that is in section 11103(a) itself. Congress gave us broad authority in both the public interest standard in section 11103 and in the public interest standard of section 11343. Thus, we believe that it is appropriate for us to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking our ability to craft merger conditions that are clearly in the public interest as the ICC did in the past.

Conditions and Compensation. Section 11103(a) provides that the carriers are responsible for establishing the conditions and compensation applicable to terminal trackage rights awarded under 49 U.S.C. 11103, and we will therefore allow BNSF and KCS an opportunity to reach an agreement respecting such matters. Because the terminal trackage rights are crucial to the competitive role that BNSF will play in the Houston-Memphis and Houston-New Orleans corridors, we will make them effective on the effective date of this decision (September 11, 1996). To resolve as many details as possible prior to that date, we will require BNSF and KCS to submit, within 10 days of the date of service of this decision (August 12, 1996), *either* agreed-upon terms respecting implementation *or* separate proposals respecting such implementation. We realize that 10 days is a short time frame, but it will enable us promptly to set the terms. Even if certain compensations details have not yet been resolved, the Sub-No. 9 terminal trackage rights will become effective on the effective date of this decision.[215]

49 U.S.C. 11341(a). The underlying contractual agreements pursuant to which SP has trackage rights over the two Shreveport segments, and pursuant to which MPRR (UP) and SP have trackage rights over the one Beaumont segment, arguably preclude conveyance of such rights to other carriers without KCS' consent. The 49 U.S.C. 11341(a) immunity provision provides that a carrier, corporation, or person participating in a transaction approved under 49 U.S.C. 11344 is "exempt from the antitrust laws *and from all other law*, including state and municipal law, as necessary to let that person carry out the transaction * * *" (emphasis added). In *Norfolk & Western R. Co. v. Train Dispatchers,* 499 U.S. 117 (1991) (*Dispatchers*), the Supreme Court held that the immunity provision extends not only to laws but also to contracts.

---

[215] Compensation will accrue from the actual date of the start of trackage rights operations, and will be payable after the terms have been established. We realize that 49 U.S.C. 11103(a) provides that the compensation for terminal trackage rights "shall be paid or adequately secured" before a carrier may begin to use trackage rights awarded under 49 U.S.C. 11103. We therefore pledge that, if BNSF and KCS cannot reach agreement respecting compensation terms, we will set appropriate terms under condemnation principles. *See, UP/MP/WP*, 366 I.C.C. at 576 n.114; *SPT v. ICC*, 736 F.2d at 723.

Applicants have requested that we hold that, under the circumstances of this case, the immunity provision permits BNSF to use the three line segments at issue. UP/SP-26 at 123; UP/SP-232, Tab F at 12. KCS' affiliate, Tex Mex, has acknowledged that we would have the authority to override an identical anti-substitution provision in its own terminal trackage rights application over HB&T in this proceeding.[216] We think that an override of the restrictions in KCS' trackage rights agreements would be necessary to carry out the merger here if section 11103 were unavailable.[217] (Similarly, an override for Tex Mex to permit it to operate over HB&T's trackage in the Houston terminal would be necessary to carry out the merger as well.) Because we are granting the section 11103 application, however, no override of these contractual provisions is necessary.

LABOR IMPACTS. Our public interest analysis includes consideration of the interests of carrier employees affected by the proposed transaction. 49 U.S.C. 11344(b)(1)(D); *Dispatchers,* 499 U.S. at 120.

UNION SUPPORT. The merger is supported by seven unions representing approximately 55% of the union-represented employees on the combined UP and SP systems: the United Transportation Union; the Brotherhood of Locomotive Engineers; the International Association of Machinists and Aerospace Workers; the International Brotherhood of Electrical Workers; the International Brotherhood of Boilermakers and Blacksmiths; the Sheet and Metal Workers International Association; and the International Brotherhood of Firemen and Oilers. The UP/SP merger is the first major merger since the Staggers Act that has received widespread union support, and applicants are correct in their assessment that such extensive "labor support in a major rail merger case is unheard of in recent years, and stands as a testament to the compelling benefits of this merger." UP/SP-232, Tab D at 1.

---

[216] KCS also acknowledges (KCS-60 at 43) that we have the authority under section 11341(a) to override contractual provisions prohibiting substitution of carriers in a trackage rights agreement if the criteria of section 11103 are met.

[217] We realize that there are ICC precedents indicating that the immunity provision cannot override a consent requirement in a joint facility contract. *See, SP/CMW,* 5 I.C.C.2d at 979 (ICC held that it could not compel the assignment of trackage rights); and *SP/Soo Decision No. 6,* slip op. at 8 (ICC indicated that there were "substantial questions" as to its power to override a trackage rights contract). These precedents, however, did not survive the Supreme Court's 1991 *Dispatchers* decision, which made clear that the immunity provision may override contractual obligations.

Applicants indicate that UP did not execute written agreements with the seven unions; rather, UP exchanged with each of these unions, in writing, certain commitments that form the basis of a partnership within which the parties commit to cooperate in implementing the merger. UP, applicants indicate, has gone beyond *New York Dock* conditions by committing to processes, more advantageous to the employees, by which the *New York Dock* conditions will be administered; these processes, applicants claim, give assurances to unions and employees alike that application of the protective benefits will not be fraught with delays and adversarial proceedings, and that the protective benefits will be administered fairly and expeditiously. The unions, applicants add, have committed to reach, voluntarily, agreements implementing the operating plan accompanying the primary application.

UTU, the largest union in the rail industry, indicates, in its comments dated March 29, 1996, that it supports the merger for two reasons: first, because UP has agreed to a number of conditions that will help mitigate the impact of job loss on UTU's members; and second, because UTU believes that the merger, by allowing UP and SP to form a strong competitor to BNSF, is in the best interest of rail labor in the future. UTU adds that UP's commitments include the following: (1a) that automatic certification as adversely affected by the merger will be accorded (i) to the 1,409 train service employees, the 85 UTU-represented yardmasters, and the 17 UTU-represented hostlers projected to be adversely affected in applicants' Labor Impact Study, (ii) to all other train service employees and UTU-represented yardmasters and hostlers identified in any merger notice served after Board approval, and (iii) to any engineers adversely affected by the merger who are working on properties where engineers are represented by UTU; (1b) that UP will supply UTU with the names and test period averages of such employees as soon as possible upon implementation of the merger; (2) that, in any merger notice served after Board approval, applicants will seek only those changes in existing CBAs that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement change(s); (3) that, in the event that UTU contends that UP's application of *New York Dock* is inconsistent with the above-mentioned conditions, UTU and UP personnel will meet within 5 days of notice from the UTU International President or his designated representative and agree to expedited arbitration with a written agreement within 10 days after the initial meeting if the matter is not resolved, which will contain, among other things, the full description for neutral selection, timing of hearing, and time for issuance of

the award(s); and (4) that, in the event UP uses a lease arrangement to complete the merger of the various SP properties into MPRR or UPRR, the *New York Dock* conditions will nevertheless be applicable.[218]

PROTECTIVE CONDITIONS: *New York Dock.* Applicants, as previously noted, project that the total labor impact of the merger will be 4,909 jobs abolished, 2,132 jobs transferred, and 1,522 jobs created. ARU and TCU, which regard these projections as a minimum, estimate that the number of UP/SP employees furloughed or transferred will be far greater than applicants have projected; and TCU warns that these job impacts will fall most heavily on certain crafts and in certain geographic locations. We believe that applicants have submitted reasonable estimates of job dislocations from common control, although actual job dislocations could end up being greater than projected by applicants. Neither the dislocations themselves, however, nor their concentration by craft or location, pose a barrier to our approval of the UP/SP merger transaction. Mergers of necessity involve employee dislocations, and the labor protective conditions that we impose are to mitigate these dislocations.

The basic framework for mitigating the labor impacts of rail mergers is embodied in the *New York Dock* conditions, which have been held to satisfy the statutory requirements of 49 U.S.C. 11347, *New York Dock Ry. v. United States,* 609 F.2d 83 (2d Cir. 1979). *See, New York Dock,* 360 I.C.C. at 84-90. The *New York Dock* conditions provide both substantive benefits for affected employees (dismissal allowances, displacement allowances, and the like) and procedures (negotiation, if possible; arbitration, if necessary) for resolving disputes regarding implementation of particular transactions. We may tailor employee protective conditions to the special circumstances of a particular case; but we will adhere to the practice which the ICC adopted in *Railroad Consolidation Procedures,* 363 I.C.C. at 793, and to which it consistently adhered, *see, e.g., BN/SF,* 10 I.C.C.2d at 757-759; *UP/CNW,* slip op. at 94-96, that employees are to be provided the protections mandated by 49 U.S.C. 11347 unless it can be shown that, because of unusual circumstances, more stringent protection is necessary.

We find that the statutory protections provided in *New York Dock* are appropriate to protect employees affected by the merger, the lines sales, and the

[218] UTU, in its comments dated March 29, 1996, asked that we approve the merger and note the commitments that UP had made. Furthermore, while we are not imposing these commitments as an actual condition, we expect UP to abide by its commitments here.

terminal railroad control transactions, and we further find that, subject to such protections, approval of the merger (in the lead docket), the lines sales (in the Sub-No. 2 docket), and the terminal railroad control transactions (in the Sub-No. 3, 4, 5, 6, and 7 dockets) will be consistent with the public interest insofar as carrier employees are concerned. No unusual circumstances have been shown in this case to justify additional protection.[219]

PROTECTIVE CONDITIONS: *Norfolk and Western.* In accordance with the "usual practice" followed by the ICC, *BN/SF,* 10 I.C.C.2d at 759, we will impose the *Norfolk and Western* conditions in the Sub-No. 1 docket with respect to the trackage rights provided for in the BNSF agreement.[220]

We will deny the requests made by ARU and Mr. Fitzgerald that we impose the *New York Dock* conditions, and not the *Norfolk and Western* conditions, on the trackage rights provided for in the BNSF agreement. The *Norfolk and Western* conditions, which have traditionally provided the basic framework for mitigating the labor impacts of trackage rights transactions, have been held to satisfy the statutory requirements of 49 U.S.C. 11347 in that context. *RLEA v. ICC,* 675 F.2d 1248 (D.C. Cir. 1982). The benefits provided by the *Norfolk and Western* conditions are identical to the benefits provided by the *New York Dock* conditions; the two sets of conditions differ only in matters of procedure. The *Norfolk and Western* conditions, on the one hand, allow implementation immediately upon completion of a defined negotiation period, even if management and labor have not yet achieved an agreement or gone to arbitration; the *New York Dock* conditions, on the other hand, require agreement or arbitration prior to implementation; and, for this reason, application of the *New York Dock* conditions to the BNSF trackage rights would have a severe short-term impact on BNSF's ability to provide competitive service under the trackage rights provided for in the BNSF agreement.

PROTECTIVE CONDITIONS: *Oregon Short Line.* We will impose the *Oregon Short Line* conditions on each of the authorized abandonments and discontinuances. The *Oregon Short Line* conditions are similar to the *New York Dock* conditions, but are applied in the abandonment/discontinuance context. The imposition of the *Oregon Short Line* conditions here is a matter of

---

[219] The *New York Dock* protections will be available to adversely affected employees whenever they are adversely affected, and whether or not it was anticipated that their positions would be affected.

[220] We will also impose the *Norfolk and Western* conditions in the Sub-No. 13 docket with respect to the Tex Mex trackage rights approved therein.

consistency but has little practical significance, because all affected employees will also be covered by the *New York Dock* conditions imposed on the merger. *See, UP/MKT,* 4 I.C.C.2d at 513.

THE IMMUNITY PROVISION. An arbitrator acting under Article I, Section 4 of the *New York Dock* conditions imposed in the lead docket, the Sub-No. 2 docket, and the Sub-No. 3, 4, 5, 6, and 7 dockets will have the authority to override CBAs and RLA rights, as necessary to effect, respectively, the merger in the lead docket, the line sales in the Sub-No. 2 docket, and the terminal railroad control transactions in the Sub-No. 3, 4, 5, 6, and 7 dockets. This authority derives ultimately from 49 U.S.C. 11341(a), the "immunity" provision.

An arbitrator acting under Article I, Section 4 of the *Norfolk and Western* conditions imposed in the Sub-No. 1 docket will likewise have the authority to override CBAs and RLA rights, as necessary to effect the Sub-No. 1 trackage rights. This authority, like its *New York Dock* counterpart, also derives ultimately from 49 U.S.C. 11341(a).

The immunizing power of section 11341(a) is not limited to the financial and corporate aspects of an approved transaction but reaches, in addition to the financial and corporate aspects, all changes that logically flow from the transaction. Parties seeking approval of a transaction, whether by application or by exemption, have never been required to identify all anticipated changes that might affect CBAs or RLA rights. Such a requirement could negate many benefits from changes whose necessity only becomes apparent after consummation. Moreover, there is no legal requirement for identification because 49 U.S.C. 11341(a) is "self-executing," that is, its immunizing power is effective when necessary to permit the carrying out of a project. *American Train Dispatchers Ass'n v. ICC,* 26 F.3d 1157 (D.C. Cir. 1994); *UP/CNW,* slip op. at 101; *BN/SF,* 10 I.C.C.2d at 760-61. Thus, it would be inappropriate and inconsistent with the statutory scheme to limit the use of the 49 U.S.C. 11341(a) immunity provision by declaring that it is available only in circumstances identified prior to approval.[221]

[221] Although the literal terms of the 49 U.S.C. 11341(a) immunity provision indicate that it is applicable to any transaction approved or exempted "under this subchapter" (*i.e.*, under Subchapter III of Chapter 113 of Subtitle IV of Title 49, United States Code), we believe that the immunity provision also applies in the 49 U.S.C. 10505 exemption context. *See, e.g., UP/CNW,* slip op. at 63-64, citing *Delaware and Hudson Railway Co. -- Lease and Trackage Rights --* (continued...)

CERTAIN REQUESTS DENIED. We will not impose several additional labor-related conditions that have been requested by parties to this proceeding.

Cherry-Picking. We will deny ARU's request that we order that any CBA "rationalization" be accomplished by allowing UP/SP's unions to "cherry-pick" from existing UP or SP agreements. This is a matter committed to the implementing agreement procedures established by the *New York Dock* conditions. *See, New York Dock*, 360 I.C.C. at 85 (Article I, Section 4).

Reimbursements. We will deny ARU's request that we require UP/SP to repay SP employees their forgone lump sum payments and their deferred wage increases. SP has already "paid" its employees for their wage concessions by giving up productivity concessions achieved by the nation's other railroads. UP/SP-230 at 316-17; UP/SP-232, Tab D at 8-9.

Hiring Preference. We will deny ARU's request that we modify the hiring preference provision in the BNSF agreement. This is a matter committed to the Article I, Section 4 implementing agreement procedures both with respect to UP/SP (*see, New York Dock*, 360 I.C.C. at 85) and also with respect to BNSF (*see, Norfolk and Western,* 354 I.C.C. at 610-11).

Contracting Out. We will deny ARU's request that we require UP/SP and BNSF to use bargaining unit maintenance of way employees and signalmen for all merger-related track, right-of-way, and signal construction and rehabilitation work, including items mentioned in the application, the operating plan, and the BNSF agreement. This is a matter committed to the Article I, Section 4 implementing agreement procedures both with respect to UP/SP (*see, New York Dock,* 360 I.C.C. at 85) and also with respect to BNSF (*see, Norfolk and Western,* 354 I.C.C. at 610-11). We would also observe that "contracting out" is a matter that may be covered by provisions of existing CBAs. *See,* UP/SP-230 at 315.

Annual Reports. We will deny ARU's request that we require UP/SP to submit annual reports demonstrating how the forecast benefits in the area of cost-savings have been used. Isolating merger benefits from other changes as they are experienced would be inordinately costly, and there is no reason to saddle UP/SP with reporting obligations that have been imposed on no prior merger.

(...continued)
Springfield Terminal Ry. Company, Finance Docket No. 30965 (Sub-Nos. 1 and 2) (ICC served April 21, 1993) (at 2 n.4).

Diversion Reports. We will deny IBT's request that we require UP/SP to file semi-annual reports indicating the volume of traffic diverted from truck carriage and the rate of return for such cargo. The merger-related diversion of traffic from motor to rail is properly regarded as a benefit that weighs in favor of approval of the merger, not a harm that must be mitigated or monitored. And IBT's suggestion that motor-to-rail diversions may reflect predatory rail pricing makes no sense at all. Indeed, as the recently enacted ICC Termination Act of 1995 (Pub. L. No. 104-88) demonstrates, Congress was obviously not persuaded by arguments of this type because it went so far as to eliminate regulatory jurisdiction over the issue of whether rail rates are too low.

Union Pacific Motor Freight Corporation. We will deny IBT's request that we impose *New York Dock* protection in favor of UPMF employees. Mandatory labor protection for UPMF employees is not warranted. *See, Gary W. McPherson v. Union Pacific Motor Freight Company, et al.*, Finance Docket No. 30000 (Sub-No. 45) (ICC served April 20, 1989) ("Only individuals directly employed by a rail carrier are entitled to protection under section 11347. This excludes the complainants, who were employed by non-rail subsidiaries of the rail carrier.") (slip op. at 3; footnote omitted), *aff'd, Rives v. ICC,* 934 F.2d 1171 (10th Cir. 1991). Discretionary labor protection is not warranted either; IBT has not demonstrated that UPMF employees possess skills that are not generally marketable outside the railroad industry, and that they would therefore have difficulty finding comparable employment elsewhere.

Takings Claims. TTD's contention that a CBA override effected under the auspices of the immunity provision amounts to a "seizure" of private contract rights appears to be a variation on the familiar argument that any such CBA override amounts to a "taking" of private property in violation of the Fifth Amendment. A definitive answer to this argument cannot be provided in this proceeding or by this Board. *See, RLEA v. United States,* 987 F.2d 806, 815-16 (D.C. Cir. 1993) (takings claims can be adjudicated only in the Federal Claims Court or, in certain limited circumstances, in a Federal District Court). We would note, however, that this statutory scheme is longstanding, and predates the relevant contracts. We think that a finding of a taking under the circumstances would be extremely unlikely.

Consolidated Proceedings. We will deny the request made by Mr. Fitzgerald that we consider the UP/SP merger on a consolidated basis with a reopened BN/SF proceeding. The evidence of record does not warrant the reopening of the BN/SF proceeding.

GWWR Agreement. We will deny the requests made by Mr. Downey. The arrangements provided for in the GWWR agreement are non-jurisdictional, which necessarily means that there is no basis for imposing labor protection with respect to GWWR employees; and the *New York Dock* conditions will adequately protect SPCSL employees from any merger-related adverse impacts.[222]

Alton & Southern. We think it appropriate to note, with respect to the concerns raised by Mr. Ponsler, that A&S employees adversely affected by the Sub-No. 3 control transaction will be adequately protected by the *New York Dock* conditions imposed in the Sub-No. 3 docket.

Division 892 Diversions. We think it appropriate to note, with respect to the concerns raised by Mr. Potoshnik, that UP employees adversely affected by the UP/SP merger will be adequately protected by the *New York Dock* conditions imposed in the lead docket.

FINANCIAL MATTERS. The evidence demonstrates that the entity resulting from the UPC/SPR merger will be financially sound, that UP's assumption of the payment of SP's fixed charges and the increase in total fixed charges will be consistent with the public interest, and that the terms of the UPC/SPR merger transaction are just and reasonable.

FINANCIAL CONDITION. We believe that, despite acquisition expenditures of approximately $1.576 billion,[223] the financial condition of the merged entity will be favorable, because substantial earnings gains will result from increased revenues and cost savings attributable to implementation of the post-merger UP/SP operating plan.

Applicants submitted pro forma financial statements showing consolidated data of the merged UPC/SPR, based on 1994 data (for a base year) and for each of the first 5 years after consummation of the merger. These statements reflect the anticipated benefits of the merger and resulting changes in various revenue

---

[222] When we say that the arrangements provided for in the GWWR agreement are "non-jurisdictional," we mean that such arrangements do not require our approval. Labor protection benefits are intended to protect only employees of the carriers participating in the 49 U.S.C. 11343 transaction, and are not intended to protect employees of carriers not participating in that transaction. *See, e.g., UP/CNW*, slip op. at 96.

[223] UPC acquired, on September 15, 1995, an approximately 25% interest in SPR at a cost of approximately $976 million, and will, if the merger is consummated, acquire an additional approximately 15% interest in SPR at a cost of an additional approximately $600 million. It should be noted that, if the merger is consummated, UPC will also acquire the remaining approximately 60% interest in SPR, but that such acquisition will entail an exchange of stock, not a cash expenditure.

and expense accounts. Applicants also submitted financial statements for a "normal" year (a year after the fifth post-merger year) depicting the total benefits of the merger and any normalized additional debt and interest expenses that will be incurred.[224]

Applicants expect the merger to produce in a normal year, giving effect to full implementation of their operating plan, $76 million in net revenue gains from diverted traffic and $583.1 million in operating efficiencies and cost savings. Net revenue gains are expected to total $22.8 million in the first year, growing to $60.8 million in the third year, and reaching $76 million in the fifth year. Almost all of the anticipated normalized annual operating benefits of $583.1 million are expected to be realized by the end of the third year, with benefits of $235 million in the first year (40% of the normalized amount), $449.1 million during the second year (77% of the normalized amount), and $546.2 million by the third year (94% of the normalized amount). The $583.1 million annual savings are anticipated to be reached by year five. Thus, over the first 5 years, operating benefits of well over $2 billion are anticipated.

Table 1 in Appendix F shows various financial data for a post-merger UPC/SPR. These data include balance sheet and income statement figures from applicants' pro forma financial statements and selected financial ratios developed from these statements for the base year (1994 data), each of the first 5 years after the merger, and a normal year. We have reached the following conclusions based on an analysis of these data.

The consolidated pro forma income before fixed charges exceeds fixed charges (interest payments for long-term debt) by margins that gradually rise from a low of 2.6 times during the first year after the merger to 3.1 times during the fifth year. The fixed charge coverage for the base year is 3.0 times and for the normal year is projected to be 3.2 times.

The pro forma cash throw-off-to-debt ratios, which measure the ability to generate sufficient cash flows from operations to repay long-term debt maturing during the year, are favorable. During the base year, cash flow from operations exceeds maturing long-term debt by 3.2 times. The pro forma ratios show a

[224] Applicants' financial statements reflect, among other things, merger-related private benefits, including net revenues from diverted traffic and net receipts from trackage rights, which, as noted elsewhere in this decision, are properly counted as transfers but not recognized as public benefits.

steady improvement from 3.1 times during the first year to 3.8 times by the fifth year (as well as for the normal year).

The operating ratio (the ratio of operating expenses to operating revenues) for the consolidated company is projected to improve (*i.e.*, favorably decline) each year, moving from 82.9% during the base year to 78.9% for the fifth year and normal year. This signifies a steady improvement in operating efficiency as a result of the merger.

Consolidated net income is projected to increase significantly, from $704 million during the first year to over $967 million for the normal year. As a result of this anticipated improvement in net income, UPC/SPR's return on equity is projected to improve from 9.5% for the first year to 11.8% for years 3, 4, and 5, as well as for the normal year. Also, because of these gains in net income, along with repayment of long-term debt, the ratio of long-term debt to debt plus shareholders' equity is projected to improve from over 51% in the first year to less than 46% by the normal year.

The pro forma data indicate that a combined UPC/SPR will possess considerable financial strength and earning power. Furthermore, the merged system's income projections may be understated because they do not take into account revenue and income growth beyond what is directly anticipated from the merger, such as normal business growth, increased traffic from an improved economy, and cost savings resulting from improved technology. We conclude that a merged UPC/SPR will be financially sound. Taking into account projected revenue gains and cost savings resulting from the merger, UPC/SPR should generate sufficient cash flow to service its debt and make necessary capital outlays to maintain its plant investment.

FIXED CHARGES. We are required to consider the total fixed charges resulting from the merger, 49 U.S.C. 11344(b)(1)(C), as well as any assumption of payment of fixed charges and any increase of total fixed charges, 49 U.S.C. 11344(c). There will be a manageable merger-related increase in fixed charges due to the issuance of additional debt and the assumption of obligations. The evidence demonstrates, however, that this increase will not have a significant impact on the financial condition of the merged entity. The financial soundness of the merged entity supports a finding that UP's assumption of SP's fixed charges and the increase in total fixed charges will be consistent with the public interest.

FAIRNESS DETERMINATION. Section 11344(c) directs us to approve any transaction referred to in 49 U.S.C. 11343 when we find that the transaction is consistent with the public interest, provided that the terms and conditions

thereof are just and reasonable. The "just and reasonable" standard requires, among other things, that we determine, in an appropriate case, that the transaction is just and reasonable with respect to minority stockholders. *See Schwabacher,* 334 U.S. at 198-99; and *UP/MKT,* 4 I.C.C.2d at 515-16.

UPC already owns approximately 25% of the SPR common stock; these shares, which have been held in a voting trust pending the outcome of this proceeding, were acquired on September 15, 1995, for a cash price of $25.00 per share. The UPC/SPR Merger Agreement provides that, upon the satisfaction of certain conditions, including regulatory approval, a wholly owned UPC subsidiary will acquire the approximately 75% of SPR common stock not held in the voting trust (the stock not held in the voting trust is hereinafter referred to as the outstanding stock). The Merger Agreement further provides that approximately one-fifth of the outstanding stock will be acquired for cash (at a cash price of $25.00 per share) and that approximately four-fifths of the outstanding stock will be acquired in exchange for UPC common stock (at a ratio of 0.4065 shares of UPC common stock per share).

The cash price and the exchange ratio were derived by arm's-length negotiations between UPC and SPR and have been approved by the respective boards of directors and by substantial majorities of the stockholders of the two corporations. No stockholder of either company has challenged the fairness of either the cash price or the exchange ratio. All parties directly affected, having been afforded an opportunity to evaluate the Merger Agreement in light of their respective interests, are apparently satisfied with its terms, which is a strong indication that the terms are just and reasonable to the stockholders of UPC and also to the stockholders of SPR. We also find persuasive the evidence submitted by applicants' financial advisors (CS First Boston Corporation for UPC; Morgan Stanley & Co. Incorporated for SPR), who have expertise in the valuation of businesses and their securities in connection with mergers and acquisitions. *See* UP/SP-22 at 487-517. The evidence amply supports a finding that the terms of the Merger Agreement, including without limitation both the cash price ($25.00 per share) and the exchange ratio (0.4065 shares of UPC common stock per share), are just and reasonable both to the stockholders of UPC and to the stockholders of SPR.[225]

---

[225] KCS claims that the terms of the transaction are not fair to the minority stockholders of SPR because SP's value would increase if it were broken up and sold in pieces. KCS-60 at 47-48.

(continued...)

CONDITIONS REQUESTED. We impose conditions only when we find both that a rail merger will harm the public interest and that a proposed condition will lessen or eliminate such harm, is operationally feasible, and will produce public benefits. The fact that a requested condition pertains to or involves one of the applicants is not enough to classify it as relevant to the proposed common control transaction. There must be a nexus between the merger and the alleged harm for which the proposed condition would act as a remedy. The fact that a condition would benefit the party seeking it does not justify its imposition.

We will discuss in this part of the decision all the conditions that have been requested in this proceeding, except the following which are discussed elsewhere: the conditions sought by Tex Mex; the conditions sought by labor interests; the conditions sought with respect to the proposed abandonments;[226] and the environmental conditions sought by various parties.

BROAD CONDITIONS REQUESTED. We will discuss first the various broad conditions that have been requested by multiple parties.

South Central/SP East Divestiture Conditions. Several parties have asked that we condition the merger by requiring the divestiture of parallel lines in the South Central/SP East region. The many South Central/SP East divestiture conditions almost uniformly envision the divestiture of parallel lines in the Houston-Eagle Pass, Houston-Brownsville, Houston-New Orleans, and Houston-Memphis corridors, but differ widely with respect to various details. We are denying all South Central/SP East divestiture conditions because, as explained in greater detail above, we believe that the conditions we have imposed (primarily the BNSF and CMA agreements, and the various conditions

(...continued)

We are doubtful that KCS has standing to assert a *Schwabacher* interest. In any event, the fact that KCS' *Schwabacher* claim has not been made by any bona fide SPR stockholder is a good indication that the argument is wrong. There is no reason to believe that the sum of the values of the parts exceeds the value of the whole. Indeed, there is good reason to believe that the solution proposed by the parties is likely to be the one that will produce the greatest value to SPR's stockholders.

[226] We are discussing in this part of the decision, however, one abandonment matter: with respect to the Barr-Girard abandonment in Docket No. AB-33 (Sub-No. 96), SPBC's procedural argument respecting lack of evidence of I&M trackage rights.

designed to strengthen the BNSF trackage rights) will adequately preserve existing rail competition in the South Central/SP East region.[227]

Central Corridor Divestiture Conditions. Several parties have asked that we condition the merger by requiring the divestiture of parallel lines in the Central Corridor. The many Central Corridor divestiture conditions differ in various respects, but generally envision (1) the divestiture of UP and/or SP lines between the San Francisco Bay area in the West and the Salt Lake City area in the East, and/or (2)(a) the divestiture of SP lines between the Salt Lake City area in the West and Denver and Pueblo in the East, and (b) if the divested lines are acquired by a carrier other than BNSF, the divestiture of SP lines and/or trackage rights between Pueblo and Kansas City. Some parties seeking a Central Corridor divestiture seek, in the alternative, a grant of unrestricted Central Corridor trackage rights in favor of an independent railroad such as WC or MRL. We are denying all Central Corridor divestiture conditions because, as explained in greater detail above, we believe that the conditions we have imposed (primarily the BNSF and CMA agreements, and the various conditions designed to strengthen the BNSF trackage rights) will adequately preserve rail competition in the Central Corridor.[228]

Central Kansas-To-Texas Conditions. Several parties have asked that we condition the merger by inserting a third carrier into the Lower Plains States. The conditions sought by these parties differ in various details, but generally envision that a third carrier (such as KCS) would be given access to the Central Kansas-to-Texas rights that SP obtained in a settlement agreement in connection with the BN/SF merger. We did not impose those rights as a condition to the merger. We will deny the various Central Kansas-to-Texas conditions because we believe that the conditions we have imposed will adequately preserve, and that the merger itself should enhance, rail competition in the Lower Plains States in general and for wheat traffic moving from Central Kansas to Texas in particular. BNSF and UP are currently the main competitors for this wheat flow, while SP plays a small role. A post-merger UP/SP will be

[227] South Central/SP East divestiture conditions have been sought by Conrail, KCS, NITL, SPI, CCRT, HCC, Dow, PPG, Monsanto, SCC, IPC, Weyerhaeuser, RCT, Texas State Rep. Junell, Texas State Rep. Cook, Texas State Rep. Saunders, Arkansas Attorney General Bryant, Ia/DOT, DOJ, and DOT.

[228] Central Corridor divestiture conditions have been sought by KCS, MRL, NITL, WCTL, WSC, MPCSC, JSC, CCRT, MFU, CWAC, HCC, KCOSA, WP&L, WPS, AEPCO, PSCo, ILP, Monsanto, IPC, Weyerhaeuser, IBC/IWC, and DOJ.

a stronger competitor vis-à-vis BNSF because the merger will allow UP/SP to upgrade lines and to use combined UP and SP lines in Texas to move heavier-loading cars of wheat to the export market.[229]

Strengthen BNSF Trackage Rights Conditions. Several parties have asked, generally in the alternative, that we condition the merger by strengthening the trackage rights provided for in the BNSF agreement. We have strengthened the BNSF trackage rights in several important ways, and we believe that the conditions we have imposed will adequately preserve rail competition throughout the West. We are therefore denying any conditions that would strengthen the BNSF and URC trackage rights to any greater degree.[230]

Uinta Basin vs. PRB/Hanna Basin Conditions. Several parties, fearful that the merger will eliminate source competition between coal originated by UP (in the PRB and the Hanna Basin) and coal originated by SP (in the Uinta Basin), have asked that we impose conditions protecting this source competition. We are denying all such conditions because, as explained in greater detail above, we believe that: (1) the asserted source competition does not exist to any appreciable degree; (2) a merged UP/SP will take advantage of all reasonable opportunities to market the transportation of Uinta Basin coal; and (3) the conditions we have imposed (primarily the URC and BNSF agreements, and the various conditions designed to strengthen the BNSF trackage rights) should intensify competitive options for Uinta Basin coal shippers.[231]

Trackage Rights Compensation Conditions. Several parties, fearful that the trackage rights compensation arrangements provided for in the BNSF and URC agreements will restrict BNSF and URC in their efforts to provide competitive operations, have asked that we require either that the trackage rights fee be reduced or that the compensation arrangements be restructured. We are denying all trackage rights compensation conditions because, as explained in greater detail above, we believe that the compensation arrangements provided for in the

[229] Central Kansas-to-Texas conditions have been sought by KCS, JSC, CCRT, HCC, EBT, KCOSA, and Ka/DOT.

[230] Conditions designed to strengthen the BNSF trackage rights further have been sought, generally in the alternative, by SPI, WCTL, WSC, Cargill, CRA, and DOT.

[231] Uinta Basin vs. PRB/Hanna Basin conditions have been sought by WCTL, WSC, WP&L, WPS, AEPCO, WEPCO, PSCo, ILP, PSCN, AGNC, and MRL.

BNSF and URC agreements are reasonable and will permit BNSF to compete effectively.[232]

UP/SP Integration Prohibition Conditions. Several parties have asked that we condition the merger with a prohibition against the integration of UP and SP Central Corridor rail operations until UP can certify that it has been in full compliance, for a period of 12 months, with its service commitments under its coal transportation contracts. We will deny these conditions because they would require, in essence, that we monitor UP's compliance with its contractual service commitments. We do not believe that it would be appropriate for us to do so. Under the statute, the exclusive remedy for an alleged breach of a coal transportation contract is an action in an appropriate state court or United States district court, unless the parties have agreed otherwise. Old 49 U.S.C. 10713(i)(2); new 49 U.S.C. 10709(c)(2). We do not think that hampering the merged carriers' ability to realize merger gains through consolidation of operations is a logical or correct way to enforce contract commitments.[233]

CONDITIONS REQUESTED BY INDIVIDUAL PARTIES. We will now discuss any additional conditions and arguments of various individual parties not discussed elsewhere.[234]

Railroad Parties.

Consolidated Rail Corporation. We will deny Conrail's request that the Finance Docket No. 32760 (Sub-No. 1) class exemption be revoked because we believe, as did the ICC, that the trackage rights class exemption can be invoked in connection with trackage rights provided for in merger-related settlement agreements. *See, BN/SF,* 10 I.C.C.2d at 768 n.116. We will similarly deny Conrail's related request that the Finance Docket No. 32760 (Sub-No. 2) petition for exemption be denied; exemption by petition of the Sub-No. 2 line sales is no more inappropriate than exemption by notice of the Sub-No. 1 trackage rights.

Kansas City Southern Railway Company. We reject KCS' various challenges to our jurisdiction and to the manner in which this proceeding has been conducted. Our jurisdiction extends to rail traffic moving in foreign commerce. *See* old 49 U.S.C. 10501(a)(2)(G) (jurisdiction extends to transportation in the

---

[232] Trackage rights compensation conditions have been sought by WCTL, WSC, Entergy, CPSB, TUE, IPC, Cargill, CRA, PSCN, Governor Leavitt, DOT, and DOJ.

[233] UP/SP integration prohibition conditions have been sought by WCTL, WP&L, and WPS.

[234] We will not discuss the arguments raised by those parties not requesting conditions, including: TP&W, SCRRA, NCGA, ISRI, CP&L, IPA, LCRA/Austin, IES, Geon, USDA, and DOL.

United States between a place in the United States and a place in a foreign country) and new 49 U.S.C. 10501(a)(2)(F) (same). KCS' basic arguments respecting the protective order have already been answered. *See* Decision No. 2 (served September 1, 1995).[235] KCS had the right to challenge applicants' use of the "highly confidential" designation with respect to any particular item so designated; the challenge would have been heard first by the Administrative Law Judge (ALJ) and, on appeal, by us; and the fact that KCS made such challenges only rarely suggests that the "highly confidential" designation did not much impede KCS' ability to litigate this case.[236] KCS' constitutional arguments, to the effect that the "highly confidential" provision of the protective order worked a violation of due process rights under the Fifth Amendment and/or the right to petition for a redress of grievances under the First Amendment, are close to frivolous. As to KCS' arguments to the effect that applicants have not provided sufficient discovery, we note that KCS has not raised these arguments in the proper fashion (these arguments should have been raised first with the ALJ and, upon an unfavorable order, should have been brought to us).

We agree with KCS that the present decision has no retroactive effect, and therefore cannot insulate any pre-merger antitrust violations; but we will decline KCS' invitation to reopen the record in the *BN/SF* merger proceeding because KCS has presented no evidence that such proceeding was tainted by anticompetitive behavior.

CMTA. We will deny the conditions requested by CMTA. Because Longhorn does not have, and because its predecessors never had, two-carrier competition at the McNeil interchange, the merger will have no impact on the present or future competitive options available to Longhorn or to Giddings-Llano shippers. Pre-merger, their only Class I connection is UP at McNeil; post-merger, their only Class I connection will be UP/SP at McNeil; nothing will have changed. And the passenger service conditions sought by CMTA are not necessary to mitigate merger-related impacts because the merger will have no impact at all on CMTA's future passenger operations; any disruption to CMTA's future passenger operations will be caused by the revival at Giddings

[235] *See also,* Decision No. 5 (served October 27, 1995) (upholding the "highly confidential" provision of the protective order against challenges made by other parties).

[236] *Cf.* Decision No. 39 (served May 31, 1996) (the ALJ, on KCS' request, ordered public release of a passage from a UPC Board of Directors' presentation that applicants had designated "highly confidential;" applicants appealed; we upheld the ALJ's order).

(or at Elgin) of the additional Class I connection formerly provided at Giddings by SP.

We will, however, preserve the existing potential competition by providing Giddings-Llano shippers a Class I connection at Giddings. Pre-merger, Longhorn, by reactivating operations over the Smoot-Giddings segment, could achieve a second Class I connection (SP at Giddings). We will preserve this potential competition by providing that the operator of the Giddings-Llano line is to be regarded as a 2-to-1 shortline for purposes of Section 8i of the BNSF agreement (which provides, among other things, that BNSF shall have the right to interchange with any shortline which, prior to September 25, 1995, could interchange with both UP and SP and no other railroad).

Section 4b of the BNSF agreement, as amended by Section 3b of the second supplemental agreement dated June 27, 1996, provides that BNSF shall have the right to interchange at Elgin with the operator of the Giddings-Llano line, should service be reinstituted on that line to Elgin. CMTA has disparaged a connection at Elgin vis-à-vis a connection at McNeil (CMTA's brief at 19-22), but CMTA might prefer a connection at Elgin vis-à-vis a connection at Giddings. CMTA has a right to a connection with BNSF either at Giddings (because we will require such a connection) or at Elgin (because we will hold applicants to their representation that they will allow such a connection); but CMTA has no right to have two such connections because the potential competition that we seek to preserve is based upon a single connection. CMTA will therefore be required to choose between Giddings and Elgin, unless the parties agree otherwise.

We will allow the interested parties (CMTA, Longhorn, UP/SP, and BNSF) an opportunity to reach a negotiated settlement respecting the precise details of the condition we are imposing. We note, however, that one such detail (the choice between Giddings and Elgin) can be decided unilaterally by CMTA. Because time is not of the essence, we will allow the parties 120 days from the date of service of this decision (August 12, 1996), to submit agreed-upon terms respecting implementation of the condition we have imposed. If the parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation, and we will establish the terms.

Magma Copper Company's Rail Affiliates. We will deny the conditions sought by MCC. MCC is captive to SP; that captivity predates the merger and will not be exacerbated by it; and MCC's end-to-end foreclosure argument (to the effect that the merger will eliminate potential competition in the form of interline alternatives) has no evidentiary support.

Yolo Shortline Railroad Company. We will deny the conditions sought by Yolo. Pre-merger, Yolo has only one meaningful Class I connection (UP) and no prospect that it will ever have a second meaningful Class I connection (SP). Post-merger, Yolo will have only one meaningful Class I connection (UP/SP) and no prospect that it will ever have a second meaningful Class I connection (BNSF). The conditions sought by Yolo will not rectify any merger-related competitive harms because the merger will inflict no such harms upon Yolo. Nor will the conditions sought by Yolo rectify any operational harms attributable either to the merger or to the BNSF agreement because neither the merger nor the agreement will reduce the efficiency of operations in the West Sacramento area.

KJRY and PRC. We will not impose the conditions requested by KJRY and PRC because we think that the purposes that would be served thereby can be better served by holding applicants to their representation that UP/SP will accept the terms of the settlement agreement entered into by SP in the BN/SF merger proceeding. *See, UP/SP*-230 at 291.

Shipper Organizations.

Corn Refiners Association. We will deny the conditions sought by CRA because we believe that the conditions we have imposed will adequately preserve the rail competition that exists today in areas served by UP and SP. We note, however, that an element of CRA's second condition is reflected in our oversight condition.

MWBC, MFU, and Governor Racicot. We will deny the various conditions sought by MWBC, MFU, and Governor Racicot, most of which seek to broaden the reach, in one fashion or another, of the competitive options created by the BNSF PRA. We realize that the BNSF PRA, by providing increased rail options for some shippers but not for all, may work to the disadvantage of those for whom increased options have not been provided. That, however, is not be the kind of harm that should be rectified under the conditioning power, which was not used by the ICC and will not be used by us to equalize rates and service among competing shippers. MWBC, MFU, and Governor Racicot are not concerned that certain shippers are losing a transportation option, but that their competitors are gaining one. Given this context, a condition requiring that a settlement agreement be changed to improve the competitive situation of particular shippers is not proper. *See, BN/SF*, 10 I.C.C.2d at 782 (Bunge). We also add that there is no reason to believe that the BNSF PRA will undermine use of the Silver Bow gateway for movements for which it provides the shortest and most efficient route, that there is no merger-related justification for requiring

UP/SP to guarantee its service intentions on the Pocatello-Silver Bow Line for 20 years, that there is likewise no merger-related justification for requiring that the Pocatello-Silver Bow Line be sold to MRL, and that the oversight condition we have imposed is not intended to protect "the last vestiges of intramodal competition in Montana" because neither the UP/SP merger, nor the BNSF agreement in general, nor the BNSF PRA in particular, will adversely affect UP vs. BN (or UP/SP vs. BNSF) competition in Montana.[237] Rather, they will improve it.

Save The Rock Island Committee. We will deny the condition sought by STRICT. It is true, as STRICT alleges, that the ICC, in its 1980 decision allowing SP to acquire the Rock Island line, intended that SP would rehabilitate that line; and it is true that the ICC intended that a rehabilitated Rock Island line would provide competition to MPRR's parallel Kansas City-St. Louis line. *Tucumcari,* 363 I.C.C. at 327. STRICT neglects to mention, however, that the ICC, in its 1982 decision granting SP trackage rights over MPRR's parallel line, intended that these trackage rights would allow SP *not* to rehabilitate the Rock Island line. *UP/MP/WP,* 366 I.C.C. at 547 and 588 (approval of the trackage rights was intended to save SP the $100 million cost of rehabilitation). The 1980 *Tucumcari* decision was reversed by the 1982 *UP/MP/WP* decision (the ICC, upon examining a new and updated record, changed its mind). The UP/SP merger will not harm competition between the MPRR line and the Rock Island line; no such competition has existed for almost two decades, and there is no reasonable prospect that such competition will ever exist again. Nor will the merger harm competition in the corridor linking Kansas City and St. Louis; BNSF, NS, and GWWR also operate in that corridor.

Hoisington Chamber of Commerce. We will deny the labor protection conditions sought by HCC. The standard labor protection conditions that we have imposed fully satisfy the statutory requirements of 49 U.S.C. 11347.

Farmers Elevator Association of Minnesota. We will deny the conditions sought by FEAM. The first condition (that UP demonstrate its ability to operate

---

[237] The conditions sought by MWBC, MFU, and Governor Racicot will not alleviate competitive harms caused by the merger because the merger will not cause competitive harms in Montana; UP, as previously noted, has only a limited presence in Montana, and SP has no presence at all. The sought conditions are designed, for the most part, to alleviate the indirect effects of the BNSF PRA, but such indirect effects (in essence, the creation of new competitive options for some but not all shippers) are not among the kinds of competitive harms that our conditioning power is used to alleviate.

its existing system) is fulfilled; after an admittedly problematic start, UP has demonstrated its ability to operate the UP/CNW system. The second condition (that UP develop an operating plan to address service problems on the former CNW) has no connection to the UP/SP merger.

South San Antonio Chamber of Commerce. We will deny the various conditions sought by SSACC; these conditions are not directed to any problems even arguably caused by the UP/SP merger.

Shippers: Coal.

Entergy/Arkansas P&L/Gulf States Utilities. We will grant the build-out relief sought by Entergy vis-à-vis its White Bluff plant, and thereby preserve the White Bluff build-out status quo, 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, BN/SF,* 10 I.C.C.2d at 744-45 (OG&E) and 781 (PPC). Because applicants have made the BNSF agreement the vehicle for resolving merger-related competitive harms, there is no reason to require the negotiation of a separate trackage rights agreement for the White Bluff build-out. We note, however, that we are not imposing the trackage rights compensation terms advocated by Entergy; we believe that the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition.

We will deny the relief sought by Entergy vis-à-vis its Nelson plant. Pre-merger (but taking the soon-to-be-completed SGR line into account), Nelson has two destination carriers (SP and KCS), neither of which can offer single-line service from the PRB. Post-merger (and also taking the soon-to-be-completed SGR line into account), Nelson will still have two destination carriers (UP/SP and KCS), but one of them will be able to offer single-line service from the PRB. Post-merger, Nelson will have two entirely practicable routings (UP/SP single-line and BNSF-KCS joint-line). While Nelson will be losing the pre-merger BNSF vs. UP competition between the PRB and Fort Worth and also between the PRB and Kansas City, Nelson will be gaining a UP/SP single-line option; and there is no reason to conclude that the loss will be appreciably greater than the gain.

City Public Service Board of San Antonio. (i) We will hold applicants to their representation that the BNSF agreement will be amended to clarify that Elmendorf is a covered point. *See, UP/SP-230* at 257. *See also* Section 4a of the BNSF agreement, as amended by Section 3a of the second supplemental agreement dated June 27, 1996 (providing that BNSF can serve SP's line

between MP 0 and MP 12.6 for the sole purpose of serving the CPSB plants at Elmendorf; we are unable to ascertain, however, whether BNSF has also received trackage rights over the appropriate UP line between San Antonio and Ajax).

(ii) One of the conditions we have imposed in this decision confirms that BNSF will be allowed to serve all new facilities (not including expansions of or additions to existing facilities) located along the SP (and UP) lines over which BNSF receives trackage rights.

(iii) We will impose a condition to the effect that BNSF will be allowed to serve CPSB's Elmendorf Station, at CPSB's option, via CPSB's existing trackage rights agreement with SP. Pre-merger: SP owns the Elmendorf Line and can thereby provide service; CPSB has trackage rights over the Elmendorf Line, and UP can thereby provide service; and BNSF has haulage rights. Post-merger, but without CPSB's third condition: UP/SP will own the Elmendorf Line, and will thereby be able to provide service; BNSF will have, by virtue of the BNSF agreement, trackage rights over the Elmendorf Line, and it too will be able to provide service; but CPSB will have effectively lost its own trackage rights over the line, and, for this reason, BNSF will not be able to use the CPSB trackage rights in its operations over the line. It is not entirely clear why the CPSB trackage rights are important to CPSB, but to preserve the pre-merger status quo vis-à-vis these trackage rights we will require that BNSF be allowed to operate under such trackage rights over the 12-mile segment between SP Junction (Tower 112) and Elmendorf.

(iv) We conclude that CPSB is not a "2-to-1" shipper for purposes of the conditions imposed in this proceeding. We realize that an argument can be made that CPSB is really a 3-to-1 shipper because the BNSF agreement provides for the termination of the haulage rights by which the third carrier (BNSF) can now serve CPSB; and one could reasonably conclude that a 3-to-1 shipper ought to have access to the remedies available to a 2-to-1 shipper. But we think that CPSB is best regarded as a 3-to-2 shipper because the BNSF agreement replaces BNSF's haulage rights with trackage rights.

(v) We will not impose the compensation terms advocated by CPSB. We believe that the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition.

(vi) Because we are not certain whether anything more needs to be done with respect to condition (i) or whether time is of the essence with respect to conditions (i) and (iii), we think that the best course would be to assume, unless

told otherwise, that more needs to be done and that time is of the essence. We will therefore require the interested parties (CPSB, UP/SP, and BNSF) to submit, within 10 days of the date of service of this decision (August 12, 1996), either agreed-upon terms respecting implementation of conditions (i) and (iii) or separate proposals respecting such implementation. We realize that 10 days is a short time frame, but it will enable us, if necessary, to choose the better of the offered alternatives, or some variation thereof, in time for conditions (i) and (iii) to be effective when this decision is effective on September 11, 1996.[238]

Texas Utilities Electric Company. We will require that the BNSF agreement be amended to permit KCS and BNSF to interchange TUE coal trains: (a) at Shreveport, for movement by BNSF over SP's line between Shreveport and Tenaha; and (b) at Texarkana, for movement by BNSF over UP's line between Texarkana and Longview. Without this condition, all but one of TUE's PRB routings would involve UP/SP, and the one that would not would be excessively circuitous. We add that, although TUE sought only a Shreveport interchange, we are allowing a Texarkana interchange as well, to allow BNSF's routings of TUE coal trains to connect with the additional BNSF trackage rights provided for in the CMA agreement. This also will facilitate BNSF's directional running of these trains. We note, however, that we are not imposing the compensation terms advocated by TUE because the terms of the BNSF agreement will allow BNSF to compete effectively.

We will allow the interested parties (TUE, UP/SP, BNSF, and KCS) an opportunity to reach a negotiated settlement respecting the precise details of the condition we are imposing; and, because time is not of the essence, we will allow the parties 120 days from the date of service of this decision to submit agreed-upon terms respecting implementation of the condition we have imposed. If the parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation, and we will establish the terms.

Sierra Pacific Power/Idaho Power Company. We will deny the condition sought by SPP/IDPC. Post-merger, NVS will have, in addition to a UP/SP single-line option, two BNSF options: (1) a URC-BNSF joint-line haul, sourced from mines open to URC; and (2) a truck-BNSF joint-line haul, sourced from load-outs either at Provo or at other Utah points opened to BNSF under the

[238] If nothing more needs to be done with respect to condition (i) and time is not of the essence with respect to conditions (i) and (iii), on or before the 10th day after the date of service of this decision, UP/SP and CPSB may jointly request an extension of the 10-day deadline, and we will extend that deadline to a later date.

transloading condition we have imposed. It is true, of course, that, post-merger, SPP/IDPC will have only one single-line option (UP/SP) whereas now it has two (UP and SP); but the difference between single-line service and joint-line service is less important in the coal unit train context; and the URC-BNSF joint-line routing should be quite competitive, especially in consideration of the new coal sources opened to URC under the URC agreement.

Arizona Electric Power Cooperative. We will deny AEPCO's condition #1 (the request that AEPCO be given the right to obtain, and to contest the reasonableness of, a UP/SP rate for the Deming-Cochise segment) and its condition #4 (the request for clarification of the implications of the short-haul defense). AEPCO's basic problem is that, at Cochise, it is captive to SP pre-merger and will be captive to UP/SP post-merger; but this problem is not a consequence of the merger and will not be exacerbated thereby. AEPCO's preferred solution, of course, is the prescription of a proportional rate over the Deming-Cochise segment; but this proceeding is not the proper forum for considering the merits of that solution. We affirm what the ICC said in this regard in the *BN/SF* decision: "A number of utility parties have cases pending before us requesting prescription of a proportional rate over the destination bottleneck segment of their coal movements, and we are not prejudging those cases here. We note, however, that approval of this merger is not intended to foreclose any shipper's right to maximum rate relief." *BN/SF,* 10 I.C.C.2d at 753. We think it appropriate to add that, should we choose, we could eventually grant the relief requested by AEPCO by reopening the UP/SP merger proceeding and imposing that relief as a condition, even if the statutory long-haul/short-haul provision or other statutory provisions would otherwise preclude such relief.

We note, with respect to the other conditions requested by AEPCO: that AEPCO's condition #2 (either divest SP's Colorado lines or grant trackage rights over such lines) is both a Central Corridor divestiture condition and a Uinta Basin vs. PRB condition, and will therefore be denied for reasons previously discussed; and that AEPCO's condition #3 (disapprove the Tennessee Pass abandonments) will be granted in part (we are disapproving the abandonments but approving the discontinuances) for reasons also previously discussed.

Public Service Company of Colorado. PSCo's bifurcated condition respecting divestiture and trackage rights is both a Central Corridor divestiture condition and a Uinta Basin vs. PRB condition, and will therefore be denied for reasons previously discussed. PSCo's alternative conditions respecting the Tennessee Pass Line will be granted in part (we are disapproving the Tennessee

Pass abandonments but are approving the discontinuances) for reasons also previously discussed.

Rio Bravo Poso/Rio Bravo Jasmin. We will deny the conditions sought by Rio Bravo. Rio Bravo is either captive to BNSF at destination (insofar as Rio Bravo's coal simply must be unloaded at the Wasco facility) or it is not (insofar as Rio Bravo's coal can be unloaded at a facility on the nearby SP line). If, on the one hand, Rio Bravo is captive to BNSF today, the merger will have no effect at all on Rio Bravo's competitive options. *See, BN/SF,* 10 I.C.C.2d at 747-757 (extensive discussion of vertical effects). If, on the other hand, Rio Bravo is not captive to BNSF today, the merger, as conditioned by the BNSF and URC agreements, will preserve Rio Bravo's competitive options; post-merger, Rio Bravo will have access to a UP/SP single-line haul and a URC-BNSF joint-line haul.

Shippers: Plastics and Chemicals.

Dow Chemical Company. Dow is located on a UP line, but claims to have pre-merger build-out/build-in options to both BNSF and SP. The BNSF option will survive the merger; the SP option will not.

Dow's primary request has a familiar flaw: it would move the build-out point (both for BNSF and for the SP substitute) much closer to Dow (from a point in the vicinity of Texas City to a point in the vicinity of Angleton). This would greatly improve, rather than preserve, the pre-merger build-out/build-in status quo vis-à-vis both BNSF and the SP substitute; and Dow's claim that the benefits of a Texas City build-out to SP exceed the benefits of a Texas City build-out to any other carrier is not justified by the evidence of record. We will therefore deny Dow's primary request.

Dow's alternative request cures the familiar flaw by keeping the build-out point for the SP substitute in the vicinity of Texas City, but overreaches by asking that the SP substitute be given trackage rights to New Orleans and Memphis. The preservation of Dow's SP build-out option requires only that trackage rights run from the build-out point to a connection with an independent Class I carrier. We will therefore grant a modified version of Dow's alternative request, and condition the merger, by requiring that UP/SP grant trackage rights to a carrier to be named by Dow, subject to our approval, over UP's line from Texas City to Houston and over UP's or SP's line from Houston to connections with KCS and BNSF at Beaumont, with the right to connect to the build-out line in the vicinity of Texas City in order to serve Dow at Freeport and any other shippers located on the build-out line.

Montell USA Inc./Olin Corporation. The fourth and fifth sentences of Section 5b of the BNSF agreement, as amended by Section 4b of the second supplemental agreement dated June 27, 1996, read as follows (italics and underlining added):

> BNSF shall also have the right to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and West Lake, LA, and traffic of shippers open to SP and KCS at West Lake Charles, LA; *the foregoing rights at Lake Charles, West Lake, and West Lake Charles, LA shall be limited to traffic (x) to, from and via New Orleans, and (y) to and from points in Mexico, with routings via Eagle Pass, Laredo (through interchange with Tex-Mex at Corpus Christi or Robstown), or Brownsville, TX.* In addition to all other charges to be paid by BNSF to UP/SP herein, at West Lake and West Lake Charles, BNSF shall also be required to pay *a fee* to UP/SP equal to the fee that UP pays KCS as of the date of this Agreement to access the traffic at West Lake, adjusted upwards or downwards in accordance with Section 12 of this Agreement.

Elsewhere in this decision we have effectively granted all of the conditions requested by Montell and Olin by requiring: (1) that the italicized limitations in the fourth sentence be disregarded (the principal effect will be to allow BNSF to handle, via single-line service, traffic moving to Houston and to other points on BNSF); (2) that KCS be allowed to interchange with BNSF, at Shreveport and Texarkana, traffic that was originated by KCS at or that will be delivered by KCS to shippers at Lake Charles, West Lake, or West Lake Charles (the principal effect will be to substitute a post-merger KCS-BNSF joint-line routing via Texarkana and Shreveport for the pre-merger KCS-UP joint-line routing via Texarkana); and (3) that the BNSF agreement be modified to eliminate the underlined fee in the fifth sentence.

Quantum Chemical Corporation. (1) We will deny QCC's Chocolate Bayou conditions because these conditions would give QCC competitive options far in excess of those it has today. We note, however, that this denial is without prejudice to QCC's assertion of its rights under the build-out/build-in condition we are imposing upon the merger. (2) We will deny QCC's Williams' condition. QCC's claim that relief is necessary to preserve competition between its UP-exclusive Chocolate Bayou facility and its SP-exclusive Williams facility is misleading because QCC has neglected to mention that its La Porte, TX, facility (served by BNSF) has more than twice the polyethylene capacity of its Chocolate Bayou facility, and that its Morris, IL, facility (served by CSX and EJE) has even greater capacity than its La Porte facility. *See, UP/SP*-230 at 159. (3) QCC's Baytown condition has been satisfied by applicants' representation, which is consistent with our reading of Section 5b of the BNSF agreement, that the Seapac facility at Baytown will be served by BNSF. *See, UP/SP*-230 at 136.

(4) We will deny QCC's Strang condition. The two-railroad post-merger competition that will exist at Strang should suffice for QCC's purposes.

Union Carbide Corporation. We will deny UCC's first condition because BNSF trackage rights over the UP line would vastly improve (and not merely preserve) the build-out status quo.

We will grant UCC's second condition because BNSF trackage rights over the SP line will preserve the build-out status quo, as applicants themselves now appear to recognize. *See, UP/SP-230* at 19-20. *See also,* Section 4a of the BNSF agreement, as amended by Section 3a of the second supplemental agreement dated June 27, 1996 (providing that BNSF will have trackage rights over SP's Port Lavaca Branch).

Enterprise Products Company. We will deny EPC's condition #1, but without prejudice to EPC's right to invoke the build-out/build-in condition we have imposed on the merger. Condition #1 would require UP/SP to build the Mont Belvieu Branch proposed by UP; any such requirement would far exceed the relief heretofore afforded in the build-out context; and the excess is underscored by the fact that, as EPC itself concedes, the Mont Belvieu Branch, as initially proposed by UP, would not even have reached EPC.

We will also deny EPC's condition #2 (in essence, the insertion of a second carrier on SP's Baytown Branch). Condition #2 is not necessary to alleviate merger-caused competitive harms and would vastly improve EPC's competitive options. Pre-merger, EPC is rail-served solely by SP; post-merger, EPC will be rail-served solely by UP/SP; the merger will not result in a reduction of EPC's competitive alternatives.

Formosa Plastics Corporation, USA. We will deny FPC's "evenhandedness" condition. We realize that the conditions we have imposed, which may enable Dow, QCC, and UCC (and perhaps others) to attain increased competitive options via build-outs, may work to FPC's disadvantage. But that provides no "evenhanded" justification either for denying the relief awarded to Dow, QCC, and UCC or for granting matching relief to FPC. The harm that may befall FPC is not the kind of harm that the conditioning power was meant to rectify; we do not have a mandate to equalize the competitive situation among the industries served by rail carriers. FPC, after all, is not concerned that it is losing a transportation option, but that its competitors may be gaining one. *Cf., BN/SF,* 10 I.C.C.2d at 782 (Bunge).

PPG Industries Inc. We will deny PPG's requests respecting the WT&J, the WVRR, and the WLPRR; the competitive situations at Bacon, Lebanon, and Corvallis, respectively, will not be affected by the merger.

Huntsman Corporation. As HC believed was required, DOJ has conducted a complete review of the impacts of the merger and we carefully have considered its comments. The conditions we have imposed ensure that UP/SP will not achieve, by virtue of the merger, sole supplier status or unacceptable market power at any significant point or in any significant corridor. Moreover, the procedural schedule under which this proceeding has been handled has allowed ample time for all concerned.

Arizona Chemical Company. We will deny the conditions sought by ACC. ACC is not a 2-to-1 shipper (its Springhill plant is served solely by KCS); and the competition formerly provided by UP and SP past Shreveport will henceforth be provided by UP/SP and BNSF past various gateways.

Monsanto Company. We will deny Monsanto's condition #1. Monsanto has specifically referenced only two of its plants: its plant at Luling (served by both UP and SP); and its plant at Chocolate Bayou (served only by UP, but with access to SP via either barge or a truck transload). Monsanto's competitive options at Luling will not be affected by the merger because the Luling plant is on the Avondale Line to be sold to BNSF (over which UP/SP will retain local trackage rights). Monsanto's competitive options at Chocolate Bayou will not be affected either because BNSF will have (under the transload condition we have imposed) the right to operate new transload facilities on the nearby SP line.

We will also deny Monsanto's condition #4, which is not justified as a remedy to any particular competitive harm. *Cf.* new 49 U.S.C. 10701(d)(3) (directing us to complete the non-coal rate guidelines proceeding by January 1, 1997).[239]

Shell Chemical Company. We will deny the conditions sought by SCC. The market dominance condition has no particular connection to the merger; and, in any event, we note that a shipper with access to two railroads is not captive to either, and that many shippers served by UP/SP or BNSF exclusively are adequately protected by intermodal or geographic competition. The divestiture condition is a variation on the South Central/SP East divestiture theme.

Springfield Plastics/Brandt Consolidated. We reject SPBC's procedural argument respecting lack of evidence of the I&M trackage rights. As discussed elsewhere in this decision we are approving the Barr-Girard abandonment in its entirety; but we do so with the understanding that the line will be abandoned

[239] We are also denying Monsanto's conditions #2 and #3 (South Central/SP East and Central Corridor divestitures, respectively).

only if UP/SP first acquires the related trackage rights over I&M. The fact that such trackage rights have not yet been acquired (this appears to be the reason that evidence respecting such trackage rights has not been entered into the record) is not important; the fact that evidence respecting such trackage rights has not been entered into the record is likewise not important; what is important is that, as a very practical matter, the Barr-Girard abandonment cannot be consummated unless UP/SP has first acquired trackage rights over I&M.

Shippers: Other.

International Paper Company. (1) We will deny IPC's condition #1 (a variation on the South Central/SP East divestiture theme). (2) We will deny IPC's condition #2. Conditions intended to keep open existing junctions are overly intrusive and could delay, in certain respects, implementation of the increased efficiencies expected from the merger, and would deny UP/SP the freedom to adapt to new developments. *See, Traffic Protective Conditions,* 366 I.C.C. 112 (1982), *aff'd in relevant part Detroit, T. & I.R.R. v. United States*, 725 F.2d 47 (6th Cir. 1984). (3) Our action with respect to the conditions requested by Tex Mex largely satisfies IPC's condition #3. (4) We will deny IPC's condition #4. IPC is alleging (a) that CO&PR is captive to SP pre-merger and will be captive to UP/SP post-merger, and (b) that IPC's CO&PR-served (via LP&N) Gardiner plant will not benefit from the pro-competitive provisions of the BNSF agreement. We note, however, (a) that the CO&PR problem predates the merger and will not be exacerbated thereby, and (b) that IPC's claim of competitive harm does not warrant regulatory relief. *See, BN/SF*,10 I.C.C.2d at 782 (Bunge). (5) We will deny IPC's condition #5 (a variation on the Central Corridor divestiture theme). (6) We note that Turlock is a 2-to-1 point explicitly provided for in Section 8i of the BNSF agreement (the omnibus clause), and that applicants have represented that BNSF will serve 2-to-1 shippers at Turlock via haulage from Stockton. UP/SP-230 at 136 n.53; UP/SP-231, Part B, Tab 17 at 29.

United States Gypsum Company. Empire, NV. We will deny USG's Empire condition because the merger will have no appreciable impact at Empire. Pre-merger, USG is rail-served solely by UP; post-merger, USG will be rail-served solely by UP/SP; nothing will have changed. We add that the service problems of concern to USG are not really merger-related, but that, in any event, UP has made a commitment to stop one of its trains daily to pick up USG cars. UP/SP-230 at 307-08; UP/SP-232, Tab A at 39-40.

Plaster City, CA. We will deny USG's Plaster City condition #1 because the merger will have no appreciable impact at Plaster City. Pre-merger, USG is rail-

served solely by SP; post-merger, USG will be rail-served solely by UP/SP; nothing will have changed. We add that the pre-existing service problems of concern to USG are not merger-related, that there is no reason to expect that service will deteriorate post-merger, and that USG's claim of competitive harm (vis-à-vis its Nevada-based competitors) does not warrant regulatory relief. *See BN/SF*, 10 I.C.C.2d at 782 (Bunge). We will also deny USG's Plaster City condition #2, both for the reasons prompting our denial of its Plaster City condition #1 and also because we have no authority to impose conditions (a) on non-terminal trackage of a nonapplicant carrier, and (b) on a carrier with respect to track located in Mexico.

Southard, OK. We will deny USG's Southard condition, which is an attempt to solve a variation of a problem that surfaced last year in *BN/SF*, 10 I.C.C.2d at 776-78 this time, however, a feasible solution cannot be found. Once again, the 3-to-2 reduction in competitive alternatives faced by GNBC (BNSF, UP, and SP, pre-merger; BNSF and UP/SP, post-merger) is in reality more complicated than a simple 3-to-2 description would indicate. Because of the blocking provision, the reduction in competitive alternatives faced by GNBC can more accurately be described as going from three (two of which can handle only such traffic as BN itself could not have handled) to two (one of which can handle only such traffic as BN itself could not have handled). GNBC, that is to say, will not really be left with two unrestricted competitive alternatives. *BN/SF*, 10 I.C.C.2d at 776-77. In *BN/SF*, the ICC solved the problem by allowing SP to replace SF as a competitive alternative for GNBC. This time, however, the problem cannot be solved because the suggested substitute (CSX) is some 425 miles away; and we cannot imagine that the traffic available to GNBC will suffice to lure CSX into establishing an 850-mile round-trip connection. We generally resolve feasibility questions (as in the build-out context) by assuming feasibility and allowing the market to make the final determination; but this is not necessary when our clear assessment is that the condition sought (here, a GNBC-CSX routing) is utterly impractical.

Fort Dodge, IA. We will deny USG's Fort Dodge conditions because the merger will have no appreciable impact at Fort Dodge. Pre-merger, Fort Dodge is served by UP (formerly CNW) and IC (formerly CC&P); post-merger, Fort Dodge will be served by UP/SP and IC; and the competition that existed pre-merger will continue to exist post-merger. We add that, although UP admits that its service at Fort Dodge has been inadequate (UP/SP-232, Tab A at 39), this service problem is not merger-related.

North American Logistic Services. Section 1b of the BNSF agreement as amended by Section 1b of the second supplemental agreement dated June 27, 1996, provides that BNSF shall receive access to any existing or future transloading facility at points listed on Exhibit A to the BNSF agreement. Reno (this has reference to the point on the SP line) is listed in Exhibit A, but, prior to the second supplemental agreement, the Reno listing was qualified by the phrase "intermodal and automotive only." Section 10a of the second supplemental agreement dated June 27, 1996, changes the Reno listing in Exhibit A; the Reno listing is now qualified by the phrase "only intermodal, automotive, [BNSF must establish its own automobile facility], transloading, and new shipper facilities located on the SP line." We interpret this to mean that, even aside from the transloading condition we have imposed on the merger, Section 1b of the BNSF agreement allows BNSF to establish a transloading operation at Reno (on the SP line). Applicants apparently agree: "BNSF will be entitled under the agreement to set up a transload and serve new industries at Reno, Nevada." UP/SP-230 at 294.

We add that we understand that BNSF will have, at Reno, the reciprocal switching rights (if any) that UP had prior to the merger. Because, for Kal Kan's purposes, BNSF is replacing UP as a competitive possibility at Reno, it only makes sense that BNSF should be given, to the maximum extent possible, the rights formerly held at Reno by UP.

We will otherwise deny the conditions requested by NALS. The first condition (granting BNSF local trackage rights access to Wunotoo) is not necessary to preserve existing competition because UP presently has no such access to Wunotoo. The second condition (granting BNSF local trackage rights access to Reno over the UP line) is unnecessary in view of BNSF's local trackage rights access to Reno over the SP line; there is no indication that the UP line is in any way superior to the SP line for that purpose.

ASARCO. The merger will not have the competitive impacts feared by ASARCO. ASARCO's El Paso copper smelter will have access to two carriers (UP/SP and BNSF); ASARCO's Hayden copper smelter will be no more captive to UP/SP than it now is to SP; Section 4b of the BNSF agreement, as amended by Section 3b of the second supplemental agreement dated June 27, 1996, provides that BNSF's access and interchange rights at Corpus Christi shall be at least as favorable as the rights SP has currently; and competition for traffic moving from/to Mexico will remain vigorous.

CIC International Corporation. We will deny the conditions sought by CIC. (1) Class III railroads and their customers that rely on the Houston-Fair Oaks

line are rail-served exclusively by SP pre-merger, and will be rail-served exclusively by UP/SP post-merger; the merger will change nothing in this respect, and there is no reason to believe that new post-merger traffic flows will cause service problems. Direct access to BNSF, as sought by CIC, would vastly improve, not merely preserve, the competitive status quo. (2) CIC now has two reload options (UP at Palestine; BNSF at Cleveland), but the BNSF reload at Cleveland has clearly been the preferred option. *See,* UP/SP-230 at 287 (the BNSF reload received 93.4% of CIC's reload business between January and October 1995). CIC's claim that the BNSF reload may be eliminated as a post-merger competitive alternative in the wake of the various realignments triggered by the BNSF agreement is unjustified; if anything, this reload operation will be strengthened because of BNSF's ability to route reload traffic over UP/SP's Houston-Memphis lines.

Weyerhaeuser Company. We will deny Weyerhaeuser's conditions #1 and #2 (variations on the Central Corridor and South Central/SP East divestiture themes, respectively). We note, however, that, with our grant of trackage rights to Tex Mex, we have effectively granted Weyerhaeuser's condition #3.

We will deny Weyerhaeuser's condition #4, which is akin to IPC's condition #4 (discussed above). Weyerhaeuser is not alleging merger-related competitive harms; what Weyerhaeuser is alleging is either (a) that CO&PR is captive to SP pre-merger and will be captive to UP/SP post-merger, and/or (b) that Weyerhaeuser's CO&PR-served plants will not benefit from the pro-competitive provisions of the BNSF agreement. We note, however, (a) that the CO&PR problem predates the merger and will not be exacerbated thereby, and (b) that Weyerhaeuser's claim of competitive harm does not warrant regulatory relief. *See, BN/SF,* 10 I.C.C.2d at 782 (Bunge).

With respect to Weyerhaeuser's condition #5, we note that, in approving the merger, we have imposed several conditions, included among which are the provisions in the BNSF agreement that enhance rail-to-rail competition in the Pacific Coast Corridor.

Cargill. We will deny the conditions sought by Cargill: the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition; the reciprocal switching, rate guidelines, and open gateways conditions are, for the most part, not even merger-related, are overly intrusive, and could delay, in certain respects, implementation of the increased efficiencies expected from the merger, and would deny UP/SP the freedom to adapt to new

developments; and the condition respecting private rail cars "is certainly not merger-related." *BN/SF*, 10 I.C.C.2d at 783.

IBP, Inc. The conditions sought by IBP are directed to harms assertedly caused by the UP/CNW merger, not to harms that might be caused by the UP/SP merger. We will therefore deny the conditions sought by IBP.

Oregon Steel Mills, Inc. We will deny the conditions requested by OSM. These conditions are, by and large, directed to problems not caused by the merger, and, furthermore, are overly intrusive and could delay, in certain respects, implementation of the increased efficiencies expected from the merger, and would deny UP/SP the freedom to adapt to new developments.

Stimson Lumber Company. We will deny the conditions sought by SLC. Conditions #1 and #3 do not address merger-related competitive harms because SLC will not experience a merger-related reduction in competitive options. *See UP/SP*-230 at 297 (SLC's relevant facilities are located on a shortline that connects only to SP). Condition #2 is overly intrusive, and, besides, UP/SP will have every incentive to use its yards so as to maximize its competitiveness in moving Pacific Northwest lumber. Condition #4 is also overly intrusive, and, in any event, addresses a "problem" that is not merger-related; and, besides, applicants have committed to reducing the high reciprocal switch charges now imposed by SP. *See UP/SP*-230 at 19.

State and Local Interests.

Texas: RCT. (1) We note, with respect to RCT's Condition #1, that Tex Mex is being granted Corpus Christi-Beaumont trackage rights, and will therefore have a connection with KCS. (2) We will deny RCT's condition #2 (a variation on the South Central/SP East divestiture theme). (3) We will deny RCT's condition #3. The neutral terminal railroad proposal is a solution either to a problem that does not exist (because the conditions we have imposed will adequately preserve the rail competition that exists today in Texas) or to a problem that is not a consequence of the merger (because these neutral terminal railroads would create new rail competition far beyond that which exists today). (4) We will deny RCT's condition #4. This condition is unnecessary because the law we administer already provides numerous protections regarding abandonments. *UP/CNW,* slip op. at 99; *BN/SF,* 10 I.C.C.2d at 785.

We note, with respect to RCT's conditions #5 and #6, that we are imposing the following environmental mitigation conditions indicated in Appendix G: mitigation conditions #3, #4, #5, #6, #7, #15, #16, and #18.

Texas: Other Parties. The Port of Corpus Christi. (1) We are imposing the BNSF agreement as a condition. (2) We note that the trackage rights granted to

Tex Mex will, as a practical matter, allow KCS' affiliate, Tex Mex, to access Corpus Christi.

Texas State Representatives Robert Junell, John R. Cook, and Robert Saunders. (1) We will deny condition #1 (a variation on the South Central/SP East divestiture theme). (2) We are granting Tex Mex most of the rights sought in condition #2. (3) We note that the responsive application filed by Cen-Tex (the South Orient affiliate) was rejected as incomplete, and that its request for conditions was stricken from the record on account of its failure to comply with its discovery obligations. We add that the conditions we have imposed will adequately preserve the rail competition that exists today in Texas. (4) Condition #4 has been addressed in our discussion of the conditions sought by RCT.

Texas State Representative John R. Cook. We will deny Rep. Cook's request for a declaratory order respecting excursion trains. Whatever the merits of Rep. Cook's arguments respecting excursion train liability law, the subject has no connection at all to the merger.

California: CPUC. (1a) We will deny CPUC's "perpetual term" condition. The 99-year term provided by Section 8i of the BNSF agreement should suffice; a perpetual term hardly seems necessary. We note also that, under current law, a carrier conducting trackage rights operations that are subject to our jurisdiction can discontinue such operations only with our approval, *see* new 49 U.S.C. 10903(a)(1), even if the agreement providing for such trackage rights contains an expiration date. *See, Arkansas & Missouri R. Co. v. Missouri Pacific R. Co.*, 6 I.C.C.2d 619, 622 (1990). *See also, Dallas Area Rapid Transit Property Acquisition Corporation--Acquisition and Operation Exemption--Rail Lines of Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, and Dallas Terminal Railway and Union Depot Company,* Finance Docket No. 31786 (ICC served February 20, 1991) (similar holding); *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 (1946) (ICC can impose terms to ensure that existing trackage rights agreements are not frustrated).

(1b) We note that, by virtue of the oversight condition we have imposed, we will have sufficient power to take corrective action if we conclude that the BNSF agreement has not effectively addressed the competitive issues it was intended to address.

(2) We think it appropriate to note that, pursuant to the conditions we have imposed on the merger, BNSF will have access to all new facilities (including

transload facilities) located post-merger on any UP/SP-owned line over which BNSF receives trackage rights in the BNSF agreement.

(3) We believe that BNSF is committed to providing adequate competition in the Central Corridor.

(4) We will deny CPUC's condition #4. The Keddie-Stockton Line is the trackage rights segment of BNSF's new I-5 Corridor route (*i.e.*, the segment over which BNSF will operate pursuant to trackage rights provided for in the BNSF agreement), and condition #4 is apparently intended to ensure that BNSF will have the wherewithal to operate that route even in the teeth of UP/SP recalcitrance. The conditions we have imposed, however, address discrimination (Paragraph 9 of the CMA agreement provides that UP/SP shall agree with BNSF on a dispatching protocol) and maintenance (Section 9d of the BNSF agreement provides that the trackage rights lines shall be maintained at no less than a certain level), and applicants have represented that BNSF has the power under the settlement agreement to obtain any capital improvements it wants. *UP/SP*-230 at 270.

(5) We will deny CPUC's Modoc Line condition. A requirement of continued operation of the Modoc Line would be inconsistent with our approval of the abandonment of the Wendel-Alturas segment thereof.

(6) We will deny CPUC's NCRA condition. With or without the 140-mile Willits-Lombard line, NCRA connects solely to SP pre-merger and will connect solely to UP/SP post-merger; and CPUC's NCRA condition is therefore unrelated to any merger-caused harm.

(7) We note that, as a matter of general corporate law, UP/SP will succeed to SP's obligations respecting the Capitol Corridor and the Alameda Corridor. *See,* UP/SP-230 at 271-72 (acknowledgment that UP/SP will succeed to "all valid contractual obligations of SP").

(8) We note that UP/SP has indicated that it intends to develop the Calexico gateway. UP/SP-230 at 272.

(9) We will deny CPUC's labor protection proposal, which "implicates a matter better dealt with under the labor protective conditions" imposed in this proceeding. *BN/SF,* 10 I.C.C.2d at 785.

California: Other Parties. The City of Industry. We will deny the conditions requested by IUDA. Although IUDA's two parcels are "2-to-1" in an academic sense, the record does not indicate that there are any shippers on these parcels currently benefiting from direct competition between UP and SP.

County of Modoc and City of Alturas. With respect to the environmental issue raised by Modoc and Alturas, we will impose the various environmental

mitigation conditions indicated in Appendix G, including specific mitigation condition #45 (an abandonment-specific condition relative to the Wendel-Alturas abandonment). With respect to the "return the gift" issue raised by Modoc and Alturas, we note that real property ownership questions are generally a matter of state law.

County of Placer. With respect to the concerns raised by Placer, we will impose the various environmental mitigation conditions indicated in Appendix G, including the specific mitigation condition relative to Placer (mitigation condition #21).

East Bay District. With respect to the concerns raised by East Bay District, we will impose the various environmental mitigation conditions indicated in Appendix G, including the specific mitigation condition relative to East Bay District (mitigation condition #19).

City of Sacramento. With respect to the concerns raised by Sacramento, we will impose the various environmental mitigation conditions indicated in Appendix G.

Oregon: Or/DOT. With respect to Or/DOT's first condition (monitor competition in the Central Corridor), we note that the oversight condition we have imposed will allow us to do just that. With respect to Or/DOT's second condition (commence an investigation respecting open access), we note that this is not a merger-related issue.

Idaho: IBC/IWC. Pre-merger, much of Idaho is rail-served exclusively by UP; post-merger, much of Idaho will be rail-served exclusively by UP/SP. We are therefore confident that the merger will not cause competitive harms in Idaho. The BNSF PRA, we realize, may cause indirect harms to those Idaho shippers now rail-served exclusively by UP; but such indirect harms (in essence, the creation of new competitive options for shippers now rail-served exclusively by BNSF but not for shippers now rail-served exclusively by UP) are not among the kinds of competitive harms that our conditioning power is intended to alleviate. We will therefore deny IBC/IWC's conditions #1 and #2 (condition #1 would require approval of the MRL application and related relief; condition #2 would require that BNSF be granted access to shippers now rail-served exclusively by UP). We will also deny IBC/IWC's condition #3 (long-term oversight vis-à-vis captive shippers and UP/SP grain movements). The problems that condition #3 are intended to remedy (in essence, the problems of shippers now captive to UP) are not merger-related; neither the merger nor the

BNSF agreement in general nor the BNSF PRA in particular will deprive any shipper of competitive options available to that shipper today.

Nevada. We will deny PSCN's conditions #1 and #3; these "open access" conditions provide a solution either to a problem that does not exist (because the conditions we have imposed will adequately preserve the rail competition that exists today in Nevada) or to a problem that is not a consequence of the merger (because these conditions would create new rail competition far beyond that which exists today). We will deny PSCN's condition #2; the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition. We will deny PSCN's condition #4a; providing timely responses to inquiries might be a good business practice, but it has no connection to the merger.

With respect to PSCN's conditions #4b and #5, and also with respect to the concerns raised by Reno, Fernley, and Winnemucca/Humboldt, we will impose the following environmental mitigation conditions indicated in Appendix G: mitigation conditions #3, #4, #5, #7, #8, #12, #15, #16, #17, #18, and #22.

Kansas. We note, with respect to Ka/DOT's condition #1, that UP has represented that it may lease, but does not intend to sell, the Pueblo line, and that, if either a lease or a sale is considered, it will work with Kansas to ensure quality service. UP/SP-230 at 273.

We will deny Ka/DOT's condition #2. Post-merger, Wichita will benefit from vigorous competition between UP/SP and BNSF.

With respect to Ka/DOT's condition #3, and also with respect to the concerns raised by Sedgwick/Wichita, we will impose the following environmental mitigation conditions indicated in Appendix G: mitigation conditions #18 and #23.

With respect to the concerns raised by Abilene, we will impose the following environmental mitigation conditions indicated in Appendix G: mitigation condition #18.

Minnesota: Mn/DOT. We will deny Mn/DOT's conditions #1, #2, and #3; the problems these conditions seek to solve are not merger-related. We will deny Mn/DOT's condition #4; we believe that the conditions we have imposed (which will strengthen, to some extent, the BNSF trackage rights) will adequately preserve the rail competition that exists today in the South Central/SP East region and in the Central Corridor, and throughout the West. We will also deny Mn/DOT's condition #5; the applicable law "already provides numerous protections regarding abandonments and line sales," *BN/SF*, 10 I.C.C.2d at 785; and condition #5, insofar as it relates to labor protection,

implicates a matter better dealt with under the labor protective conditions imposed in this proceeding.

Washington: Wa/DOT. We think it appropriate to note that the oversight condition we have imposed is akin to the condition sought by Wa/DOT.

Utah. We will deny the conditions sought by Governor Leavitt. Condition #1 (a reduction in the BNSF trackage rights fees) is unnecessary; we believe that the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition. Condition #2 (in essence, that UP/SP rates in Utah be linked to rates in "competitive" markets) is likewise unnecessary because the merger will not reduce competitive options for any Utah shipper; and condition #2 is overbroad and not merger-related insofar as it is intended to apply to shippers now rail-served exclusively either by UP or by SP. Condition #3 (establish oversight for at least 15 years) envisions an oversight regime lasting far longer than we hope will be necessary.

Federal Parties.

United States Department of Justice. We are denying, for reasons provided elsewhere in this decision, DOJ's conditions #1 and #2 (South Central/SP East and Central Corridor divestitures, respectively). We are also denying DOJ's condition #3 that we require applicants to divest sufficient lines to preserve a third independent competitor between Los Angeles and the eastern gateways, particularly Chicago. Applicants and DOJ agree that the largest 3-to-2 traffic flow is Los Angeles-Chicago intermodal traffic. DOJ's numbers confirm that BNSF's premium service currently dominates these movements. BNSF's share of intermodal rail traffic in this corridor is over 50%. We believe applicants' plan to assign most expedited, service sensitive intermodal and automotive traffic to SP's Tucumcari Line and most slower manifest traffic to UP's Central Corridor Line will provide more effective competition to BNSF for all traffic moving between Los Angeles and the St. Louis and Chicago gateways. Shippers and numerous other affected California parties agree. Remarkably, DOJ, alone among the major parties, has concluded that competitive harm to this traffic is so significant that it can only be cured by divestiture of one of applicants' Los Angeles to Chicago routings. We strongly disagree.

United States Department of Transportation. DOT seeks: in the South Central/SP East region, a divestiture; and, in the Central Corridor, either a strengthening of the BNSF trackage rights (DOT's preferred condition) or a divestiture (DOT's back-up condition). With respect to the South Central/SP East region, we are denying, for reasons provided elsewhere in this decision,

DOT's divestiture condition. With respect to the Central Corridor, we are conditioning the merger by strengthening the BNSF trackage rights much in the fashion that DOT has suggested: we are preserving build-in/build-out and transloading options along the entire stretch of trackage rights without time limit; we are requiring UP/SP to open its contracts with shippers at all 2-to-1 points to allow BNSF access to 50% of the volume; and we are establishing an oversight procedure that, if future events require, may result in a divestiture or a transfer of trackage rights to another railroad, as necessary.

United States Department of Defense. DOD's concerns are limited to the 2-to-1 impact at five installations: Red River Army Depot and Lone Star Army Ammunition Plant, both at Defense, TX; Sierra Army Depot, at Herlong, CA; Sharpe Army Depot, at Lyoth, CA; and Defense Depot Tracy, at Lathrop, CA. With respect to Red River Army Depot and Lone Star Army Ammunition Plant, we note: that Defense, TX, is listed as a 2-to-1 point in Section 8i of the BNSF agreement (the omnibus clause); and that applicants have indicated that BNSF traffic moving from/to these two facilities will be moved by UP/SP between Defense and Texarkana. *UP/SP*-230 at 136. With respect to Sierra Army Depot, we note: that applicants have represented that this facility is covered by Section 8i of the BNSF agreement (the omnibus clause);[240] and that applicants have indicated that BNSF plans to serve Herlong via trackage rights, directly picking up and setting out Herlong traffic as an adjunct to its Oakland-Denver operations. UP/SP-230 at 136. With respect to Sharpe Army Depot and Defense Depot Tracy, we note that Lyoth and Lathrop, respectively, are listed in Section 8i of the BNSF agreement (the omnibus clause) as amended by Section 6a of the second supplemental agreement dated June 27, 1996.

ABANDONMENTS AND DISCONTINUANCES. As indicated earlier, applicants seek authorization to abandon, or to abandon and to discontinue operations over, 17-line segments that total approximately 584 miles. MPRR seeks to abandon 122.4 miles in Colorado, 40.24 miles in Kansas, 28.7 miles in Arkansas, 8.5 miles in Louisiana, and 7.5 miles in Texas. UPRR seeks to abandon 67.98 miles in Illinois, 12 miles in Utah, and 10.08 miles in California.

---

[240] Herlong was listed as a 2-to-1 point in Section 8i of the BNSF agreement dated September 25, 1995, but is not listed as a 2-to-1 point in Section 8i, as amended by Section 6c of the supplemental agreement dated November 18, 1995, and as further amended by Section 6a of the second supplemental agreement dated June 27, 1996. We expect, however, that applicants will adhere to their representation that Sierra Army Depot is covered by Section 8i.

SPT seeks to abandon 178.1 miles in Colorado, 85.5 miles in California, and 23.03 miles in Texas.

Public notice was properly given and, in Decision No. 9, served December 27, 1995, the ICC accepted the abandonment requests for consideration and adopted a procedural schedule in this proceeding.[241] Because the abandonment proposals were conditioned on consummation of the merger, the ICC stated in Decision No. 9 that the abandonment requests would be processed in accordance with the overall merger procedural schedule rather than the deadlines established in section 10904 and in our regulations. Decision No. 9, slip op. at 9-10; *see, UP/MKT*, 4 I.C.C.2d at 486 n.73. The records are complete and we will now consider the merits of each proposal under the applicable standards. Labor and environmental conditions are discussed elsewhere in the decision.

Applicants contend that the lines sought to be abandoned are presently used primarily (in a few instances, exclusively) for overhead traffic, and applicants insist, with respect to each line, that this overhead traffic will be rerouted by a commonly controlled UP/SP. Applicants add that the local traffic generated by these lines is minimal (in a few instances, non-existent), and they maintain that these lines simply cannot be sustained by the limited amounts of local traffic they generate.

As described below, we will publish all seven notices of exemption, grant all four requests for discontinuance, and grant five of six abandonment petitions and three of four abandonment applications. We are denying the petition and application relating to the abandonment of the Tennessee Pass Line for the reasons stated earlier in our discussion of conditions imposed directed to the Central Corridor and as set forth in our following discussion of specific abandonment authority being sought by applicants.

NOTICES OF EXEMPTION. As noted, applicants have filed seven abandonment notices of exemption[242] under 49 CFR 1152 Subpart F. The

---

[241] To the extent necessary, these abandonment proceedings are deemed to be investigations under 49 U.S.C. 10904 and 49 CFR 1152, or exemption proceedings under 49 U.S.C. 10505 and 49 CFR 1121 or 1152, as applicable.

[242] MPRR has filed two notices of exemption: Docket Nos. AB-3 (Sub-No. 132X) (Newton-Whitewater, KS); and AB-3 (Sub-No. 134X) (Troupe-Whitehouse, TX). UPRR has filed four notices of exemption: Docket Nos. AB-33 (Sub-No. 93X) (Whittier Junction-Colima Junction, CA); AB-33 (Sub-No. 94X) (Magnolia Tower-Melrose, CA); AB-33 (Sub-No. 97X) (DeCamp-

(continued...)

notices seek to invoke the 2-year out-of-service class exemption codified at 49 CFR 1152.50, pursuant to which an abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years, that any overhead traffic on the line can be rerouted over other lines, and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period.

No individual findings under 49 U.S.C. 10505 are necessary as to these seven notices because these lines fall within the class of lines exempted by 49 CFR 1152 Subpart F. According to applicants, there has been no local traffic on the lines for 2 years and any overhead traffic on the line can be rerouted over other lines.

Only one of the notices, Docket No. AB-3 (Sub-No. 132X), has received any protests. The Harvey County Board of Commissioners, the HCJDC, and Rep. Boston submitted comments in opposition, alleging that the abandonment of the Whitewater-Newton line in Kansas will have adverse economic consequences. Protestants did not contradict MPRR's contention that the line has had no local traffic for 2 years and that the line in all other respects qualifies for the class exemption. Nor did they address the revocation criteria in section 10505.

These exemptions will be effective on September 11, 1996 (unless stayed pending reconsideration). Petitions to stay and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) must be filed by August 22, 1996, and petitions to reopen must be filed by September 3, 1996. Because the notices were previously conditioned on the merger, which has now been approved, we will, consistent with our regulations, publish notice in the *Federal Register.*

PETITIONS FOR EXEMPTION. As noted, applicants have filed six abandonment petitions for exemption.[243] Our denial of the petition in Docket

---

(...continued)
SPT has filed one notice of exemption: Docket No. AB-12 (Sub-No. 187X) (Seabrook-San Leon, TX).

[243] MPRR has filed two abandonment petitions: Docket No. AB-3 (Sub-No. 129X) (Gurdon-Camden, AR); and Docket No. AB-3 (Sub-No. 133X) (Iowa Junction-Manchester, LA). SPT has
(continued...)

No. AB-12 (Sub-No. 189X) will be addressed in our discussion with the abandonment application below regarding the Tennessee Pass Line. We will grant the other five abandonment petitions for exemptions.

Under 49 U.S.C. 10903-04, a rail line may not be abandoned without prior approval. Under 49 U.S.C. 10505, however, we must exempt a transaction from regulation when we find that: (1) application of the statutory abandonment provisions is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the particular abandonment or discontinuance is of limited scope, or (b) the application of the statutory abandonment provisions is not needed to protect shippers from the abuse of market power.

Detailed scrutiny is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of filing abandonment applications, these exemptions will expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. 10101a(2) and (7). By allowing applicants to avoid the expense of retaining and maintaining lines that generate little or no traffic and to apply their assets more productively elsewhere on the system, these exemptions will foster sound economic conditions and encourage efficient management. 49 U.S.C. 10101a(3), (5), and (10). Other aspects of the rail transportation policy are not affected adversely.

Regulation is not necessary to protect shippers from an abuse of market power because all overhead traffic will be rerouted, and recurring traffic will have viable alternative transportation options available. Only one of these proceedings, Docket No. AB-3 (Sub-No. 129X), received a protest, which was filed by a shipper who had made only one shipment in the last 5 years, and who,

---

(...continued)
filed three abandonment petitions: Docket No. AB-12 (Sub-No. 189X) (Sage-Leadville, CO) and Docket No. AB-8 (Sub-No. 36X) (related discontinuance); Docket No. AB-12 (Sub-No. 184X) (Wendel-Alturas, CA); and Docket No. AB-12 (Sub-No. 185X) (Suman-Bryan (Benchley), TX). UPRR has filed one abandonment petition: Docket No. AB-33 (Sub-No. 98X) (Edwardsville-Madison, IL).

applicants contend, has a transportation alternative available to it.[244] No shippers are opposing the other abandonment petitions.[245]

Given our findings regarding the probable effect of the transactions on market power, we need not determine whether the transactions are of limited scope. Nevertheless, we note that four of these five proposed abandonments involve rail lines ranging from 8.5 miles to 28.7 miles in a single state with little local traffic, and the fifth one involves 85.5 miles of rail line in a single state with no recurring local traffic.

These exemptions will be effective on September 11, 1996 (unless stayed pending reconsideration). Petitions to stay and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) must be filed by August 22, 1996, and petitions to reopen must be filed by September 3, 1996.

APPLICATIONS. Four formal abandonment applications have been filed to become effective contingent upon approval of the merger. Three have been filed by UP[246] and one has been filed by SP.[247] Our denial of the application in Docket No. AB-12 (Sub-No. 188) will be discussed in the Tennessee Pass Line section, below. We will grant the other three abandonment applications, each of which has received some form of opposition.

---

[244] The Reader Railroad, a noncommon carrier tourist railroad, objected to the abandonment. According to applicants, however, it has made only one shipment (a steam locomotive on a flatcar) in the last 5 years; and this is the only local traffic that moved on the line. Applicants submit that such occasional movements of railroad equipment can be handled by "lowboy" trucks.

[245] In Docket No. AB-12 (Sub-No. 185X), the City of College Station raised concerns about negative impacts the proposed abandonment could have on northwestern Brazos County and the City of Bryan. Its opposition focuses only on general allegations of possible harm to the local area.

In Docket No. AB-12 (Sub-No. 184X), CPUC, Or/DOT, Lassen, Susanville, Modoc, and Alturas oppose the proposed abandonment of the Modoc Line. As applicants point out, however, no shippers that use this line to originate or terminate traffic have opposed the abandonment. Also, applicants are not proposing to abandon in Alturas (the abandonment limit is about 10 miles south of the area) and the concerns about the Sierra Army Depot at Herlong are unfounded because Herlong is not within the abandonment limits.

[246] MPRR and DRGW filed two applications to abandon and discontinue service, respectively, in Docket No. AB-3 (Sub-No. 130) (Towner-NA Junction, CO) and Docket No. AB-8 (Sub-No. 38) (related discontinuance); and Docket No. AB-3 (Sub-No. 131) (Hope-Bridgeport, KS) and Docket No. AB-8 (Sub-No. 37) (related discontinuance). UPRR filed an abandonment application in Docket No. AB-33 (Sub-No. 96) (Barr-Girard, IL).

[247] SPT and DRGW filed an application to abandon and discontinue service, respectively, in Docket No. AB-12 (Sub-No. 188) (Malta-Cañon City, CO) and Docket No. AB-8 (Sub-No. 39) (related discontinuance).

The statutory standard governing an abandonment, under 49 U.S.C. 10903, is whether the present or future public convenience and necessity require or permit the proposed abandonment. If the abandonment is unopposed, 49 U.S.C. 10904(b) requires that we make an affirmative finding and issue a certificate permitting the abandonment. Otherwise, we must weigh the potential harm to affected shippers and communities against the present and future burden that continued operation could impose on the railroad and on interstate commerce. *Colorado v. United States,* 271 U.S. 153 (1926). Essentially, this involves a question of whether, and to what degree, the shippers will be harmed if rail service is no longer available. For an abandonment application to be denied, protestants must show that the harm to shippers and communities outweighs the demonstrated harm to applicants and interstate commerce by continued operation of the line. *Cartersville Elevator, Inc. v. ICC,* 724 F.2d 668, *aff'd on reh'g en banc,* 735 F.2d 1059 (8th Cir. 1984).

In determining whether to grant or deny an abandonment application, we consider a number of factors, including operating profit or loss, other costs the carrier may experience (including opportunity/economic cost), and the effect on shippers and communities. No one factor is conclusive. *Id.*

Hope-Bridgeport Line (Kansas). In Docket No. AB-3 (Sub-No. 131), MPRR seeks by application to abandon its 31.25-mile Hope-Bridgeport Line. In the embraced Docket No. AB-8 (Sub-No. 37), DRGW seeks to discontinue its trackage rights operations over the line. We will grant the abandonment and the discontinuance. We will issue a certificate of interim trail use if no offer of financial assistance is timely made.

Train operations. Prior to October 16, 1995, the Hope-Bridgeport Line had local train service, including three cycles (six one-way trips) per week. The train originated at Herington, KS, operated over the subject line to Hoisington, KS, and returned to Herington the following day. Effective October 16, 1995, MPRR replaced this operation with a local train assignment operating three cycles a week from Hoisington to Bridgeport to Salina and return, with Bridgeport-Hope side trips as required.

In accordance with a waiver granted in Decision No. 3, served on September 5, 1995, applicants provided information relating only to local train service by MPRR. DRGW does not originate or terminate traffic on the line. Farm products are the principal commodities shipped over the line. For the three significant shippers/receivers on the subject line, 77 carloads were shipped in 1993 and 220 carloads in 1994. For the most current partial year available

(January 1, 1995, through June 30, 1995), a total of only five carloads were shipped. Applicants' projected forecast year traffic of 190 carloads is not challenged.

Revenue and cost data. As shown in the following table, applicants estimate that, for the forecast year November 1, 1995, through October 31, 1996, local traffic on the line will generate avoidable losses that can be avoided by abandonment and cessation of operations. Applicants' revenue and cost estimates, including return on value, are not contested. We summarize them as follows:

		(Forecast Year)
Total Revenue		$187,384
Total On-Branch Costs	$219,915	
Total Off-Branch Costs	110,495	
Total Avoidable Costs		330,410
Avoidable Loss, Excluding Return on Value		143,026
Return on Value		581,921
Avoidable Loss, Including Return on Value		$724,947

Revenues. Total revenues for the forecast year are projected to be $187,384. This is based on the movement of 190 carloads.

Avoidable Costs. Applicants' revenue and cost estimates are based on a service frequency averaging one cycle per week. Total on-branch costs are estimated to be $219,915, consisting primarily of maintenance-of-way and structure costs of $185,890. With respect to track maintenance costs, applicants estimate a normalized annual expenditure of $5,950 per main track mile to maintain the track at Federal Railroad Administration (FRA) class 1 standards, excluding maintenance costs associated with overhead traffic.

Opportunity Costs. Return on value is the opportunity cost of the resources committed by the railroad to provide service over the line subject to abandonment. Opportunity costs are estimated to be $581,921, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the

valuation of road property ($3,044,544) dedicated to the train operations conducted over the line and adjusting for a holding loss of $24,769.[248]

Projected Losses. Applicants project an avoidable loss, excluding opportunity costs, of $143,026. Including opportunity costs, losses are projected to be approximately $700,000 in the forecast year.

Alternative transportation. Applicants indicate that there is adequate alternative rail and motor transportation available to shippers after abandonment. There are other BNSF and UP/SP lines in the area. According to applicants, the principal shipper on the line, Agri-Producers, indicated in its discovery responses that the trucking companies it has used are too numerous to list.

Shipper and community interests. Applicants contend that this line is an insignificant part of the transportation network in the area. According to applicants, wheat is the only agricultural commodity produced in the area that moves on the line, and only about 4% or 5% of the area's wheat is transported on this line. The line's principal shipper, Agri-Producers, filed a notice of intent to participate without expressing a position on the abandonment, and it filed no evidence. The other shipper on the line, North Central Kansas Coop, did not file an individual statement, but it is a member of the Mountain-Plains Communities and Shippers Coalition which opposes the abandonment. Only one individual, Mr. Schwarz, alleges that crops would no longer be shipped by rail from his local elevator but would be moved at higher costs by motor carriers.

Discussion and conclusions. The applicable criteria weigh heavily in favor of abandonment and discontinuance. The line is unprofitable and is incurring substantial opportunity costs. There is an allegation of increased shipping costs, but shippers are using truck transport now, suggesting it is economical. Even if shippers incur some inconvenience and added expense, that by itself would be insufficient to outweigh the detriment to the public interest of uneconomic and excess facilities. We find that, on balance, the burden of operating this unprofitable line outweighs any inconvenience and the unspecified additional expense to shippers for using alternative transportation.

Towner-NA Junction Line (Colorado). In Docket No. AB-3 (Sub-No. 130), MPRR seeks to abandon its 122.4-mile Towner-NA Junction Line. In the embraced Docket No. AB-8 (Sub-No. 38), DRGW seeks to discontinue its

[248] A restatement of these numbers to take into account the Board's 1995 cost of capital determination, which results in a pre-tax cost of capital of 17.5%, produces a return on value of $557,564.

overhead trackage rights operations over the line. As noted earlier, this abandonment generated intense opposition, although relatively few of the opponents, applicants point out, are shippers who actually use the line. We will grant the abandonment and the discontinuance. We will issue a certificate of interim trail use if no offer of financial assistance is timely made.

Train operations. For the past 2 years, local train service on the Towner-NA Junction Line has consisted of local trains operating three cycles (six one-way trips) per week. The trains originated at Pueblo, operated over the subject line to Horace, KS, and returned to Pueblo the following day. Local service trains are operated with one locomotive, a practice applicants anticipate will continue. In accordance with Decision No. 3, applicants provided the revenue and cost information in the application relating only to local train service by MPRR. DRGW does not originate or terminate traffic on the line.

Wheat and barley are the principal commodities shipped over the line. The total carloads shipped, for the five shippers on the subject line, in 1993 and 1994 were 164 and 142 carloads, respectively. For the most current partial year available (January 1, 1995, through June 30, 1995), a total of only 30 carloads of wheat were shipped by MPRR. Applicants' projected forecast year traffic is 238 cars.

Revenue and cost data. As shown in the following table, applicants estimate that for the forecast year November 1, 1995, through October 31, 1996, local traffic on the line will generate avoidable losses that can be avoided by abandonment and cessation of operations. Applicants' cost estimates, including return on value, are not contested. We summarize them as follows:

		(Forecast Year)
Total Revenue		$ 237,676
Total On-Branch Costs	$922,012	
Total Off-Branch Costs	127,068	
Total Avoidable Costs		1,049,080
Avoidable Loss, Excluding Return on Value		811,404
Return on Value		1,867,795
Avoidable Loss, Including Return on Value		$2,679,199

Revenues. Total revenues for the forecast year are projected at $237,676 based on the movement of 238 cars. Protestants argue that there is a much

higher demand for local services than current traffic indicates. Citing a Colorado Department of Transportation study, protestants aver that potential traffic on the line could exceed 4,000 cars per year compared to the 238 cars projected. Absent specific commitments from other shippers for traffic over the line, we believe the higher 4,000 car estimate to be speculative. Applicants' revenue estimate is reasonable, and we have no basis on which to restate it.

Avoidable Costs. Applicants' cost estimates are based on a service frequency averaging one cycle per week. Total on-branch costs are estimated to be $922,012, consisting primarily of maintenance-of-way and structure costs of $613,650 and property taxes of $195,578. Because the line is classified at a level higher than FRA class 1, the line requires no rehabilitation.

Opportunity Costs. Opportunity costs are estimated to be $1,867,795, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property ($10,177,042) dedicated to the train operations conducted over the line and adjusting for a holding loss of $5,396.[249] The greater part of the property value committed to the operation of the line is the net salvage value of track structure, which is estimated to be $9,811,169. Land is valued at $450,955.

Projected Losses. Applicants project an avoidable loss, excluding return on value, of $811,404. Including return on value, losses are projected to be approximately $2.6 million in the forecast year.

Alternative transportation. Applicants indicate that there is adequate alternative rail and motor transportation available to shippers after abandonment. An alternate UP line (the "Kansas-Pacific" line) runs parallel to this line to the north. Running parallel to the line to the south is the BNSF line through Prowers County. According to applicants, shippers who responded to discovery requests indicated that the motor carriers they were using were too numerous to list.

Shipper and community interests. As described previously, this application was vigorously opposed by shippers, individuals, and communities. Opponents argue that the abandonment of the line would have a devastating economic effect based on lost rail service and lost tax revenues.

---

[249] A restatement of these numbers to take into account the Board's 1995 cost of capital determination, which results in a pre-tax cost of capital of 17.5%, produces an opportunity cost of $1,786,378.

Applicants argue, preliminarily, that the concerns of shipper and community interests have been addressed in an agreement between the State of Colorado and UP. As we have noted earlier, a letter of intent was signed by Governor Roy Romer of Colorado and Richard K. Davidson, Chairman of UP, in which UP agreed to serve active shippers on both the Tennessee Pass and Towner-NA Junction Lines for at least 6 months after the merger, and, in any case, until improvements described in the Operating Plan are completed on UP's "KP" line east of Denver to avoid congestion on the Moffat Tunnel line. Rail lines will be left in place for at least a year after the merger while other rail options are explored. This schedule can be modified by mutual agreement between Colorado and UP. For a year after merger, UP will sell the route to a new entity at net liquidation value if a viable rail option develops.

Applicants also argue that the abandonment will have little impact on shippers served by the line. They contend that most of the elevators mentioned in the submissions by farmers are not on the line, and, in any event, abandonment will cause no elevator to close.

Applicants contend that there will be only a 0.75% increase in heavy truck traffic. Finally, applicants argue that most of the tax revenue losses are not tax savings to UP because UP will be reallocating tax payments to other Colorado counties and other states. In any event, the ICC has held that the loss of taxes otherwise collectible from a line proposed for abandonment has no bearing on the public need for the line. *See, Burlington Northern Railroad Company - Abandonment - In Fergus, Judith Basin and Chouteau Counties, MT*, Docket No. AB-6 (Sub-No. 175) (ICC served July 30, 1984).

Discussion and conclusions. The line is incurring substantial losses and opportunity costs. We conclude that the burden on shippers and communities resulting from the abandonment is outweighed by the burden imposed on MPRR and DRGW and on interstate commerce by the financial losses that would result if the carriers were required to continue to operate this line. Given the magnitude of these losses, we conclude that the line is a burden on interstate commerce, and we will grant the abandonment.

Barr-Girard Line (Illinois). In Docket No. AB-33 (Sub-No. 96), UPRR seeks to abandon its 38.4-mile Barr-Girard Line. As noted, protestants request that this abandonment be denied in its entirety, or, in the alternative, that the abandonment be denied as to the 26.7-mile Barr-Compro segment. According to protestants, by using the Barr-Compro segment a carrier could obtain 100% of the traffic and revenues on the Barr-Girard Line while maintaining and operating only about 70% of the line. We will deny SPBC's alternative request

for a partial abandonment, and we will grant applicants' abandonment application. We will impose the requested 180-day public use condition. We will issue a certificate of interim trail use if no offer of financial assistance is timely made.

Train operations. The Barr-Girard Line is part of the former CNW's route from Chicago to St. Louis. As a result of the UP/CNW consolidation and the UP/SP consolidation, the merged system will have three Chicago-St. Louis through routes. As noted, the proposed abandonment results from a decision to reroute all Chicago-St. Louis traffic from the former CNW route to an allegedly superior UP/SP north-south route. Once this through traffic is rerouted, applicants believe that continued operation of the Barr-Girard Line for only local traffic would be uneconomical. Rerouting will be effected by exiting at Barr and operating under a trackage rights agreement over the I&M line from Barr to Springfield, then operating over the SP line from Springfield to St. Louis.

Local train service on the Barr-Girard Line over the past 2 years has been provided by through trains operating daily in both directions. Due to the very low volume of local traffic generated by the line, applicants believe a service frequency of one cycle per week would be adequate if the line were operated solely for local traffic. In accordance with Decision No. 3, applicants provided the revenue and cost information in the application relating only to local train service by UPRR.

A joint protest by Springfield Plastic, Inc. (SpPl) and Brandt Consolidated, Inc. (BCI) (again, collectively, SPBC) contests applicants' forecast year traffic estimates. Applicants claim that forecast year traffic will be the same as 1994 traffic on the line: 40 carloads of polyethylene received by SpPl and 3 carloads of anhydrous ammonia received by Brandt. SpPl claims forecast year traffic will amount to 46 carloads, and BCI submits that traffic will amount to 7 carloads. In applicants' rebuttal statement, UP revises its forecast to accept BCI's claim of 7 carloads, but UP maintains its projection of 40 carloads for SpPl. SpPl states that 18 carloads have been received in the first 4 months of the forecast year for an average of 4 carloads per month. Applying that average to the final 8 months of the forecast year, skipping a month to account for an inventory buildup, SpPl adds an additional projected 28 carloads to the 18 already received to arrive at 46 carloads. UP contends that inventory buildup periods are followed by downturns in activity that are more substantial than calculated by SpPl. UP examined SpPl's traffic statistics for the period 1994

through February 1996 to determine if there were other 7-month periods in which waybilled traffic totaled at least 28 cars (the amount projected by SpPl). For each of the 8-month periods following those examined, waybillings totaled just 20 cars. Therefore UP added the projected 20 carloads to the 18 already received to arrive at 38, substantiating their original projection of 40 carloads for SpPl. We accept UP's analysis because it more accurately reflects actual carload volume in the recent past.

Revenue and cost data. The following table reflects operations over the Barr-Compro segment, the scenario most favorable to protestants. Applicants' estimates are shown in the first column of figures. Our restatement, based on arguments raised by protestants, is shown in the second column of figures. Applicants estimate that for the forecast year November 1, 1995, through October 31, 1996, local traffic on the subject line will generate loses which can be avoided by abandonment and cessation of operations. Applicants' cost estimates are based on a service frequency of only 40 cycles per year from South Pekin-Compro and return, producing total revenues for the forecast year of $180,074. Total avoidable costs are estimated at $289,076 (including off-branch costs of $50,446). Total return on value is estimated at $803,300.

	Applicants' Estimates for Forecast Year	STB's Restated Forecast Year
Total Revenue	$180,074	$191,676
Total On-Branch Costs	$238,630	$170,075
Total Off-Branch Costs	50,446	54,790
Total Avoidable Costs	289,076	224,865
Avoidable Loss, Excluding Return on Value	109,002	33,189
Return on Value	803,300	543,383
Avoidable Loss, Including Return on Value	$912,302	$576,572

As discussed below, applicants' estimates of revenues and costs for the forecast year require restatement in light of arguments raised by protestants.

Revenues. Protestants claim that total SpPl revenues, based on 95-ton minimum rates, were understated for the forecast year by $2,040. Applicants agree with protestants but believe, on further analysis, that the understatement in revenue is $2,358.

For the additional traffic (10 carloads--6 for SpPl and 4 for BCI) that protestants estimate will be moved over the line, protestants calculate additional revenues of $42,270, based on average revenues per car of $4,227. As indicated above, we do not accept the additional 6 carloads for SpPl, and believe applicants' 40 carload figure is appropriate. While accepting the additional 4 carloads for BCI, applicants contend that, by using an average for both commodities instead of an average for each commodity, protestants' per-car revenues are erroneously high. Applicants' analysis represents a more refined approach than SpPl-BCI's use of broad averages. Applicants have developed a rate for fertilizer shipped for BCI from Lawrence, KS, of $29.63/ton. Applying the additional traffic of four BCI carloads at $29.63/ton, applicants computed additional revenues of $9,244. We agree with applicants' analysis of the additional revenues. The forecast year revenues would then be $191,676 ($180,074 original estimate + $9,244 additional revenues from increased traffic + $2,358 adjustment for SpPl traffic based on 95-ton minimum rates), as reflected in the second column of figures in the above table.

Avoidable Costs. Applicants' cost estimates are based on a service frequency averaging 40 cycles per year. Total on-branch costs are estimated to be $238,630, consisting primarily of maintenance-of-way and structure costs of $202,581 and transportation costs of $30,192. Protestants argue that transportation costs have been overstated because of an incorrect assumption by applicants that UPRR will operate the subject line at the FRA class 1 speed limit of 10 mph. Protestants contend that the appropriate speed is that permitted for FRA class 3 track (40 mph). Applicants have presented no evidence that the subject line cannot be operated at the higher speed. It is also unreasonable to assume that the crews would be required to operate at less than optimum operating speeds. We agree with protestants. At the higher speed, locomotive hours of operation would decrease from 228 hours to 72 locomotive hours. This would decrease transportation costs by $5,794, maintenance costs by $750, and return on investment (ROI) expense for locomotives by $2,088.

With respect to track maintenance costs, applicants' estimate of $202,581 is comprised of $119,936 for nonprogram maintenance for the Barr-Compro segment, $69,263 for program maintenance for the Barr-Compro segment, and $13,382 for nonprogram maintenance on the Compro-Girard segment. Protestants argue that the Compro-Girard maintenance ($13,382) should be eliminated because that segment would be abandoned even if abandonment of the Barr-Compro segment were denied. Also, the protestants contend the Barr-

Compro program maintenance ($69,263) should be eliminated since the line is now classified at the FRA class 3 level and should be allowed to evolve to FRA class 1 by eliminating maintenance. The nonprogram maintenance costs of $119,936 are not contested and appear to be reasonable. We agree with protestants that the Compro-Girard nonprogram maintenance ($13,382) should be eliminated. In their rebuttal statement, applicants contend that UPRR would incur an absolute minimum of $22,722 for program maintenance on the Barr-Compro segment (versus applicants' program maintenance estimate of $69,263). We agree with applicants' revised lower maintenance cost estimate. Accordingly, the revised maintenance cost for the Barr-Compro segment would be $142,658 annually ($119,936 for nonprogram maintenance and $22,722 for program maintenance). This would be $5,343 per mile, which is reasonable for FRA class 1 track. Because the line is classified at a level higher than FRA class 1, the line requires no rehabilitation.

Protestants argue that trackage rights payments to I&M should be treated as an offset to avoidable costs because such payments reduce the amount that would be saved as a result of the abandonment. Trackage rights compensation to I&M, however, concerns the movement of rerouted overhead traffic, which is irrelevant to our analysis. As we have discussed, in Decision No. 3 we waived the filing of revenues and costs associated with overhead traffic. Even if we were to consider the trackage rights payment, for a complete analysis we would also have to consider the revenues generated by the overhead traffic and other costs incurred in moving this traffic, such as fuel and crew wages. In other words, the amount saved by abandonment might not be reduced if both the revenues and costs associated with overhead traffic and trackage rights were considered.

We have restated total avoidable costs to reflect the adjustments to transportation costs and maintenance-of-way costs discussed above. These adjustments reduce forecast year on-branch avoidable costs from $238,630 to $170,075. Off-branch avoidable costs are increased to $54,790 for the forecast year to reflect costs associated with the forecasted additional carloads.

Opportunity Costs. Opportunity costs are estimated by applicants to be $803,300, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property ($4,155,986) dedicated to the train operations conducted over the line and adjusting for a holding loss of

$42,755.[250] The greater part of the property value committed to the operation of the line is the net salvage value of track structure, which UPRR estimates to be $2,761,100. Another component is land, which applicants value at $1,490,000. Below we discuss these two components.

Net salvage - Protestants argue that the net salvage value of almost $2 million for the Barr-Compro segment would be more than offset by the $2.6 million cost UPRR would incur to upgrade existing connections and crossings to allow implementation of UPRR trackage rights from Barr to Springfield as a result of the abandonment. If this offset is not applied, SPBC argues that net salvage for the Barr-Compro segment should be calculated by multiplying applicants' net salvage value for the line by 0.6953 (26.7 miles from Barr to Compro ÷ 38.4 miles from Barr to Girard). We believe that costs associated with upgrading existing connections should not be included in the net salvage calculations because the through traffic will be rerouted regardless of whether the line is abandoned. Moreover, if we were to consider construction costs for rerouting through traffic, it would also be necessary to consider the savings achieved by rerouting. We agree with protestants that net salvage should be prorated to take into account that no maintenance is required for the line segment between Compro and Girard. The resulting restated net salvage for the Barr-Compro line segment is $1,919,827 ($2,761,100 x 0.6953).

Land value - Applicants estimate land value for the Barr-Girard Line to be $1,490,000. Protestants argue that, because UPRR did not furnish property deeds, it has failed to prove the quality of its title. Furthermore, protestants say that, if land value is not set at zero, it should be prorated using mileage, as was done for net salvage. Protestants failed to identify specific deeds to which UPRR incorrectly claimed fee title or to provide alternative property values. Because applicants' acreage calculations and unit values appear to be reasonable, we accept applicants' land value. Furthermore, we accept protestants' method of prorating the Barr-Compro land value because applicants did not provide a separate land value for that segment. The Barr-Compro segment will be valued at $1,036,016 ($1,490,000 x 0.6953).

The sum of the restated net salvage value and land value is net liquidation value ($2,955,843). Total valuation of property is the sum of working capital

---

[250] Applicants used the ICC's 1994 cost of capital because it was the most current return when the application was prepared. Since that time, the Board has made its 1995 cost of capital determination.

($3,998), income tax consequences (negative $99,112) and net liquidation value. Based on this total property valuation ($2,860,729), the nominal return on value is $500,628 (computed by multiplying property valuation by the 1995 pre-tax cost of capital rate of 17.5%). This is adjusted by a holding loss of $42,755 to produce a total return on value shown in the second column of the table of $543,383.

Projected Losses. Applicants project an avoidable loss, excluding return on value, of $109,002. Including return on value, losses are projected to be $912,302 in the forecast year. A restatement of these numbers using the Board's 1995 cost of capital determination and changes resulting from arguments raised by protestants produces the following numbers: an avoidable loss, excluding opportunity costs, of $33,189 and losses, including opportunity costs, of $576,572 in the forecast year.

Alternative transportation. Protestants are located at Compro, which, according to applicants, is about 6 miles from Interstate 55, a major Chicago-Springfield-St. Louis truck route. SpPl claims that, if the line were abandoned, it would incur at least $100,000 in added freight and handling charges. BCI's cost of receiving shipments would allegedly increase $10,000 per year if the line were abandoned. Applicants respond that, if SpPl used a rail-to-truck transfer operation in the St. Louis area, the additional cost would be $66,480, which is allegedly a very small portion of the company's profits. SpPl replies that the increased costs would reduce SpPl's yearly profit by 3.8%, while the line's claimed operating loss is less than 0.02% of UP's net income.

Shipper and community interests. Protestants argue that the $110,000 increase in costs for SpPl and BCI indicates that there would be substantial harm to local interests caused by an abandonment. The Economic Development Council for Greater Springfield contends that the abandonment will cause negative economic impacts for any business that relies heavily on rail service. Applicants contend that abandonment will not have a significant effect on shipper and community interests because the only shippers on the line will not incur significant additional transportation charges.

Discussion and conclusions. The applicable criteria weigh in favor of granting the abandonment and denying the request for a partial abandonment. We have restated the revenue and cost evidence based on the Barr-Compro segment in the scenario most favorable to protestants. Under our restatement, the avoidable loss is $33,189 based on revenues of $191,676. When opportunity costs are included, the total loss is $576,572. Although the avoidable losses are relatively low, they amount to over $700 a carload. Moreover, there are large

opportunity costs. There is no evidence that there will be a significant increase in traffic in the future.

We recognize, and applicants concede, that the shippers will experience increased costs. Both the ICC and the Board have held, however, that the fact that shippers are likely to incur some inconvenience and added expense is insufficient by itself to outweigh the detriment to the public interest of continued operation of uneconomic and excess facilities. The situation in this proceeding is unusual because the loss to shippers is approximately twice as great as the avoidable loss of $33,189. As noted, however, when opportunity costs are included, the economic loss is over $575,000. Moreover, in considering the fact that only 47 cars are projected for the forecast year, applicants' avoidable loss amounts to over $700 a car, a significant subsidy by the carrier.

We therefore conclude that the burden on shippers and communities resulting from abandonment is outweighed by the burden imposed on UPRR and on interstate commerce by the financial losses that would result if UPRR were required to continue to operate this line. Given these losses, we must conclude that the line is a burden on interstate commerce, and we will grant the abandonment.

Tennessee Pass Line Abandonments. SPT seeks to abandon and discontinue operations over, and DRGW seeks to discontinue operations over, two segments of the Tennessee Pass Line.[251] We will grant the applications and petitions for exemption to the extent to allow for discontinuance, but will deny the application and petition for abandonment authority. Because we are granting discontinuance authority, we will not consider trail use requests or impose public use conditions. We will discuss the discontinuance issues before addressing the abandonment requests.

Discontinuances granted: 10505 petitions. To the extent that SPT seeks to discontinue service in Docket No. AB-12 (Sub-No. 189X) and DRGW seeks to discontinue service in AB-8 (Sub-No. 36X), we find that SPT and DRGW have met the criteria for discontinuance exemptions.

Detailed scrutiny is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of filing discontinuance applications,

---

[251] SPT and DRGW, respectively, filed applications in Docket Nos. AB-12 (Sub-No. 188) and AB-8 (Sub-No. 39), for the abandonment and discontinuance of service over the 109-mile Malta-Cañon City, CO line; and petitions for exemptions in Docket Nos. AB-12 (Sub-No. 189X) and AB-8 (Sub-No. 36X), for the abandonment and discontinuance of service over the 69.1-mile Sage-Malta-Leadville, CO line.

these exemptions will expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. 10101a(2) and (7). These exemptions will foster sound economic conditions and encourage efficient management by allowing the carriers to discontinue uneconomic service on the line. 49 U.S.C. 10101a(3), (5), and (10). Other aspects of the rail transportation policy are not affected adversely.

Regulation is not necessary to protect shippers from an abuse of market power. No shipper that actually uses the line to originate or terminate traffic has opposed the discontinuances. Applicants claim that the major recurring source of local traffic on the line has been salvaged rolling stock and cargo from train accidents. No local traffic is expected to be generated on the line in the future.

Given our findings regarding the probable effect of the transactions on market power, we need not determine whether the transactions are of limited scope. Nevertheless, we note that the transactions involve 69.1 miles of line in a single state. Under 49 U.S.C. 10505, we will exempt from the prior approval requirements of 49 U.S.C. 10903-04, the discontinuance by both SP and DRGW of operations on the Sage-Malta-Leadville Line.

Discontinuances granted: applications. To the extent that SPT seeks to discontinue service in Docket No. AB-12 (Sub-No. 188) and DRGW seeks to discontinue service in AB-8 (Sub-No. 39), we find that SPT and DRGW have met the criteria for discontinuance. Most of the opposition to the abandonment and discontinuance applications for the Malta-Cañon City Line are from interested parties concerned about the rerouting of traffic. Also, the major shipper on the line, ASARCO, has expressed concern about the applications.

The statutory standard governing a discontinuance under 49 U.S.C. 10903 is whether the present or future public convenience and necessity require or permit the proposed discontinuance. As in abandonment proceedings, we must weigh the potential harm to affected shippers and communities against the present or future burden that continued operation could impose on the railroad and on interstate commerce. *Colorado v. United States,* 271 U.S. 153 (1926). In this proceeding, the record indicates that the Malta-Cañon City Line is incurring significant losses, described below.

Train operations. Pursuant to Decision No. 3, applicants provided information relating only to local train service. Service to shippers is usually provided by through trains operating 7 days per week. Minerals, chemicals, and scrap metal are the principal commodities shipped over the line.

Due to the very low volume of local traffic generated by the line, a service frequency of one cycle per week would be adequate if the line were operated

solely for local traffic. The total carloads shipped for the nine significant shipper/receivers on the subject line in 1993 and 1994 were 574 and 528, respectively. For the most current partial year available (January 1, 1995, through June 30, 1995), a total of 258 carloads (predominantly minerals) were shipped. Applicants' projected forecast year traffic of 492 cars is not challenged.

Revenue and cost data. As shown in the following table, applicants estimate that for the forecast year November 1, 1995, through October 31, 1996, local traffic on the line will generate avoidable losses that can be avoided by abandonment and cessation of operations. Applicants' cost estimates, including return on value, are not contested. We summarize them as follows:

		(Forecast Year)
Total Revenue		$1,286,649
Total On-Branch Costs	$891,239	
Total Off-Branch Costs	915,777	
Total Avoidable Costs		1,807,016
Avoidable Loss, Excluding Return on Value		520,367
Return on Value		1,259,808
Avoidable Loss, Including Return on Value		$1,780,175

Revenues. Total revenues for the forecast year are projected to be $1,286,649. This is based on the movement of 492 cars.

Avoidable Costs. Total on-branch costs are estimated to be $891,239, consisting largely of maintenance-of-way and structure costs, estimated by applicants to be $555,114. With respect to these track maintenance costs, applicants estimate a normalized annual expenditure of $5,093 per main track mile to maintain the track at FRA class 1 standards, excluding maintenance costs associated with overhead traffic. Because the line is classified at a level higher than FRA class 1, no rehabilitation is required. Review of applicants' calculations indicates that the maintenance estimate of $555,114, and the quantities and unit costs used to develop the estimate, appear to be reasonable.

Opportunity Costs. Opportunity costs are estimated to be $1,259,808, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property ($6,809,017) dedicated to the train

operations conducted over the line, and adjusting for a holding loss of $13,758. The majority of the property value committed to the operation of the line is the net salvage value of track structure, which is estimated to be $7,079,625. Land is valued at $378,000.

Projected Losses and Estimated Subsidy. Applicants project an avoidable loss, excluding opportunity costs, of $520,367. Including opportunity costs, losses are projected to be almost $1.8 million in the forecast year. A restatement of these numbers to take into account our 1995 cost of capital determination, which results in a pre-tax cost of capital of 17.5%, produces opportunity costs of $1,205,336. Losses, including opportunity costs, would be approximately $1.73 million.

Alternative transportation. The main shipper served by the line is ASARCO, whose traffic accounts for 477 of the 492 carloads of lead and zinc ore projected for the forecast year. ASARCO and SPT have discussed building a new transload facility at a site in the Cañon City area where ASARCO could truck the ore following an abandonment or discontinuance of service. ASARCO does not claim transloading is infeasible or that its mine would not be able to operate. It does suggest, however, that the new arrangements would not be as satisfactory as the current one. No other customers who receive or ship traffic on the line filed comments. Applicants contend that trucking of ore was common when the area was much more heavily mined, and that it should not be difficult to build a transloading facility in Cañon City comparable to the one in Malta.

Shipper and community interests. As noted, no shippers besides ASARCO filed comments. CWAC argues that there is a much higher demand for local shipping than current traffic indicates. Applicants claim that the projected traffic is unrealistic, arguing that some of the movements are being shipped by truck and that some of the movements originate or terminate at Florence, CO, which is not on the line.

Discussion and conclusions. The applicable criteria weigh in favor of discontinuance. The line is incurring heavy operating losses and claims of significantly increased traffic have not been substantiated. Accordingly, the potential harm to shippers and communities from discontinuance of service is outweighed by the burden on the carriers and on interstate commerce from continued operations. Both SPT and DRGW may discontinue service over the subject line.

Abandonments not granted. In most situations, the lack of shipper opposition, little local traffic, and significant losses over the Malta-Cañon City

Line, discussed above, would also support a grant of the petition and the application to allow for abandonment. Here, however, there is a significant factor that militates against granting abandonment: indications in the record that the Moffat Tunnel Line may lack the capacity to handle overhead traffic rerouted from the Tennessee Pass Line.

We have discussed this issue earlier. It is clear that, because of the importance of this through route, permitting abandonment now would be inconsistent with the rail transportation policy. We will accordingly deny the petition for exemption to the extent it seeks abandonment authority. Moreover, because of questions raised about the ability of the Moffat Tunnel Line to handle the rerouted overhead traffic, we cannot find that the present or future public convenience and necessity permit the abandonment of the Malta-Cañon City Line. We will therefore deny the abandonment application to the extent it seeks abandonment authority.

PUBLIC INTEREST CONDITIONS.

Trail Use. Requests for issuance of certificates or notices of interim trail use (CITUs or NITUs) to acquire rights-of-way under the National Trails System Act, 16 U.S.C. 1247(d), were filed in 10 proceedings: Docket Nos. AB-3 (Sub-No. 130, 131, and 133X), AB-33 (Sub-Nos. 96, 97X, 98X, and 99X), and AB-12 (Sub-No. 184X, 188, and 189X). We will not issue a CITU or NITU in the two Tennessee Pass Line proceedings, Docket Nos. AB-12 (Sub-Nos. 188 and 189X), because we are denying the requested abandonments and are issuing only discontinuance authority. No trail use or public use conditions may be imposed where only discontinuances are being granted. *Southern Pacific Transportation Company--Discontinuance of Service Exemption--In Ventura County, CA*, Docket No. AB-12 (Sub-No. 143X) (ICC served November 20, 1992). We will issue a CITU or NITU in the other eight proceedings.[252] The criteria for imposing trail use and rail banking have been met. The parties have submitted statements of willingness to assume financial responsibility for the rights-of-way and acknowledged that use of the rights-of-way are subject to

[252] The CITUs will be issued within 45 days of the service of this decision if no offer of financial assistance is timely made. The NITUs are being issued as part of this decision.

future reactivation for rail service in compliance with 49 CFR 1152.29. Applicants have indicated their willingness to negotiate trail use agreements.[253]

The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, further Board approval is not necessary. If no agreement is reached within 180 days, applicants may fully abandon the line, provided the conditions imposed in the applicable proceeding are met. 49 CFR 1152.29(c) and (d). Use of the rights-of-way for trail purposes is subject to restoration for railroad purposes.

Our issuance of the NITUs does not preclude other parties from filing interim trail use requests within 10 days after publication of the notice of exemption in the *Federal Register*. If, within the 10-day period following publication of the notices of exemption, additional trail use requests are filed, applicants are directed to respond to them within 10 days.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10905. As stated in *Rail Abandonments--Use of Rights-of-Ways as Trails*, 2 I.C.C.2d 591 (1986) (*Trails*), offers of financial assistance (OFAs) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use.[254] Accordingly, the effective date of the decisions may be postponed during the OFA process. *See* 49 CFR 1152.27(c), (e) and (f). Finally, if the line is sold under the OFA procedures, the abandonment application or the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

Public Use. Various parties in eight proceedings have sought public use conditions under 49 U.S.C. 10906. They have met the criteria for imposing a public use condition by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the time period. 49 CFR

---

[253] Applicants state that, for non-Colorado lines proposed for abandonment, they are willing to negotiate trail use with any or all of the parties that have made requests. For Colorado abandonments, applicants are willing to negotiate trail use with the State or any of its designees. They are also willing to negotiate with other parties requesting trail use for Colorado abandonments so long as the State of Colorado is agreeable. Applicants have also submitted letters in various proceedings indicating their willingness to negotiate trail use.

[254] The statement in *Trails* that section 10905 does not apply to abandonment exemptions has since been superseded by adoption of rules allowing for the use of OFAs in exemption proceedings. *See* 49 CFR 1152.27.

1152.28(a)(2). Accordingly, a 180-day public use condition will be imposed in Docket Nos. AB-3 (Sub-No. 133X), AB-12 (Sub-Nos. 184X), and AB-33 (Sub-Nos. 96, 98X, and 99X). A 90-day public use condition, as parties have requested, will be issued in Docket Nos. AB-3 (Sub-No. 134X) and AB-12 (Sub-Nos. 185X and 187X).

Madison County Transit and RTC ask that we impose Trails Act and public use conditions for a period of 180 days after the carrier consummates the abandonment. We will deny these requests. In issuing the NITUs and CITUs and imposing the public use conditions, we will follow our usual practice and have the 180-day Trails Act period run from the service date of the decision, while the public use condition will run from the effective date of the decision.

Continued operation of the line will not preclude the negotiation of an agreement for interim trail use. Our jurisdiction to issue rail banking or other appropriate orders will not terminate until an abandonment has finally been consummated. The maximum period that a public use condition can extend under 49 U.S.C. 10906 is 180 days from the effective date of the order authorizing abandonment. Even if applicants continue to operate during that 180-day period, this will not preclude a public use agreement from being negotiated and finalized during that statutory period.

Persons may file for both trail use and public use conditions. If a trail use agreement is reached on a portion of the right-of-way, applicants must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, applicants are not required to deal exclusively with parties who have filed requests but may engage in negotiations with other interested persons. Additional public use requests are unnecessary where the full 180-day period has been imposed.

OTHER CONDITIONS REQUESTED. We now turn to other conditions requested in the various abandonments proceedings.

The City of Florence, CO. We are denying the requested conditions. The first condition sought by the City of Florence is a variation on the Central Corridor divestiture theme. We believe that the conditions we are imposing will adequately preserve the rail competition that exists today in the Central Corridor. Concerning the other two conditions Florence seeks, there is no

statutory authority for imposition of a 24-month stand-still condition or a right-of-first-refusal condition. In any event, UP has made various commitments to the State of Colorado that address at least some of the concerns expressed by the City of Florence. *See, UP/SP*-232, Tab G at 7-8.

The City of Fruita, CO. We are denying the requested condition as it pertains to labor-related impacts because it "implicates a matter better dealt with under the labor protective conditions" imposed in this proceeding. *BN/SF,* 10 I.C.C.2d at 785. Insofar as it pertains to continued rail service, it fails because the City of Fruita has demonstrated neither (a) that the merger will cause competitive harms that should be ameliorated, nor (b) that local traffic on the Colorado lines targeted for abandonment is sufficient to sustain these lines once overhead traffic has been rerouted.

The U.S. Department of Agriculture, Rocky Mountain Region, and the U.S. Department of the Interior, Bureau of Land Management, Colorado State Office. With respect to conditions (1), (2), and (6), we are denying the conditions because there is no statutory authority for their imposition. Environmental conditions (3), (4), (5), and (7), insofar as they pertain to the Sage-Malta-Leadville and Malta-Cañon City Lines, are moot because we are denying the abandonments. With respect to conditions (3), (4), (5), and (7), insofar as they pertain to the Towner-NA Junction Line, we are imposing environmental mitigation conditions that should alleviate concerns expressed. These are indicated in Appendix G: general environmental mitigation conditions #26, #27, #28, #32, and #37, and specific environmental mitigation conditions #47 and #48.

Towner-NA Junction Parties. We are denying the condition sought because there is no statutory authority for a stand-still condition. We note, however, that the concerns raised by these parties have been addressed, to some extent, by the various commitments UP has made to the State of Colorado. *See, UP/SP*-232, Tab G at 7-8.

The Town of Avon. We note that, as a practical matter, the two segments of the Tennessee Pass Line have been treated as a single entity in this proceeding, and that there is no reason to believe that the outcome of this proceeding would have been in any way different had applicants filed a single application with respect to the entire Tennessee Pass Line.

The Upper Arkansas Area Council of Governments. We are denying these conditions, and note that many of these conditions have been mooted by the denial of the Tennessee Pass abandonments. Moreover, there is no statutory authority for imposition of a 24-month stand-still condition or a replace-lost-

taxes trust fund condition, although commitments UP has made to the State of Colorado address at least some of the concerns to which these conditions are directed, *see, UP/SP*-232, Tab G at 7-8.

The Colorado Department of Public Health and Environment and the United States Environmental Protection Agency, Region VIII; RTC; and the Leadville Coalition. With the denial of the Tennessee Pass abandonments, these various Tennessee Pass environmental conditions are moot.

Viacom International Inc. (1) We are imposing, as indicated in Appendix G, specific environmental mitigation condition #46 to provide continued access for Viacom to the Eagle Mine site.

(2) Viacom's second condition has been mooted by the denial of the Tennessee Pass abandonments.

ENVIRONMENTAL CONSIDERATIONS.

EXTENSIVE ENVIRONMENTAL REVIEW PROCESS. Under the National Environmental Policy Act (NEPA) and related environmental laws, the environmental effects of the merger and the ancillary abandonment and construction projects that were proposed by applicants must be considered, and we have thoroughly done so. Our environmental staff, the Section of Environmental Analysis (SEA), conducted various public outreach activities to inform the public about the proposed merger and to encourage and facilitate public participation in the environmental review process.[255]

As part of its environmental review, SEA prepared detailed analyses not only of the systemwide effects of the proposed merger, but also of particular merger-related activities that would affect individual rail line segments, rail yards, and intermodal facilities to a degree that would meet or exceed our thresholds[256] for environmental analysis. *See,* 49 CFR 1105.7(e)(5)(i) and (ii).[257]

---

[255] SEA sent approximately 400 consultation letters to various agencies seeking their comments. In addition, SEA consulted with federal, state, and local agencies, affected communities, UP and SP, and UP/SP's environmental consultants to gather and disseminate information about the proposal, identify potential environmental impacts, and develop appropriate mitigation measures.

[256] These thresholds ensure that those rail line segments and facilities that would experience a substantial increase in traffic as a result of the transaction are thoroughly analyzed for potential air quality, noise, transportation, and safety impacts.

[257] SEA and its independent third-party consultant conducted approximately 150 site visits. They also analyzed UP/SP's Environmental Report, operating plan, Preliminary Draft

(continued...)

SEA conducted a thorough independent analysis, which included verifying projected rail operations; verifying and estimating noise level impacts; estimating increases in air emissions; assessing potential impacts on safety; and performing land use, habitat, surface water and wetlands surveys, ground water analyses, and historic and cultural resource surveys.

Based on the information provided by the parties and other agencies, SEA issued a comprehensive Environmental Assessment (EA) on April 12, 1996. SEA received approximately 160 comments following issuance of the EA. To address those comments and the other environmental comments received throughout the environmental review process (approximately 400 in total), SEA undertook additional environmental analysis, which culminated in the issuance of a detailed Post Environmental Assessment (Post EA) on June 24, 1996, refining some of the discussion and mitigation recommended in the EA.

As a result of its investigation, SEA concluded that the merger would result in several environmental benefits, including a systemwide net reduction of 35 million gallons of diesel fuel consumption (based on 1994 figures) from rail operations and truck-to-rail operations, systemwide improvements to air quality from reduced fuel use, and a reduction in long-haul truck miles, highway congestion and maintenance, and motor vehicle accidents.

SEA also concluded that the merger and related rail abandonments and constructions could have potential environmental effects regarding safety, air quality, noise, and transportation, including the transportation of hazardous materials, and, in the EA, SEA proposed mitigation measures addressing the environmental concerns that were raised. In the Post EA, based on further analysis and review of the environmental comments, SEA developed more comprehensive and specifically tailored mitigation recommendations. As a result of consultations with SEA, UP/SP agreed to undertake particular mitigation measures. In addition, several local communities negotiated memoranda of understanding with UP/SP to implement mitigation measures and take other appropriate actions to address their particular environmental concerns.

SEA concluded that, with the Post EA mitigation measures, the proposed merger would not significantly affect the quality of the human environment on a systemwide, regional, or local basis. We agree that the conditions recommended in the Post EA will adequately mitigate the potential

---

(...continued)
Environmental Assessment and other pleadings, all of the settlement agreements entered into during the environmental review process, and technical studies.

environmental impacts identified during the course of the environmental review, and we will impose those conditions here (*see* Appendix G).[258] We also adopt SEA's environmental analysis and the conclusions reached in the EA and the Post EA.

NO NEED FOR ENVIRONMENTAL IMPACT STATEMENT. We have considered the arguments of some parties that an environmental impact statement (EIS) is required here, but do not believe that one is needed. An EIS is required only for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C).[259] Under our environmental rules, 49 CFR 1105.6(b)(4), an EA is normally sufficient environmental documentation in rail merger cases to allow us to take the requisite "hard look" at the proposed action.[260] Moreover, interested parties received essentially the same benefits they would have received with an EIS. As the EA and Post EA show, SEA conducted a thorough and comprehensive environmental review. There was extensive notice and opportunity for input from the public and appropriate agencies throughout the process. In addition to the EA, SEA issued a detailed Post EA which contains SEA's individual responses to the comments on the EA and thus reflects not only the work of SEA but also the critical views of interested parties and agencies.

Finally, the environmental mitigation we are imposing here is far reaching and comprehensive.[261] As appropriate, it addresses impacts on a variety of

---

[258] We note that the mitigation recommended in the Post EA for two proposed abandonments in Colorado (Sage to Leadville and Malta to Cañon City) has been modified to reflect our decision to permit only discontinuance of rail service, and not abandonment, at this time. Other clarifying changes have been made as well.

[259] The identification of such actions is a matter for the agency to determine, as long as the determination is not arbitrary or capricious. *See, Goos v. ICC*, 911 F.2d 1283, 1292 (8th Cir. 1990), *citing, Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989).

[260] While this merger involves somewhat more trackage than other merger proposals that have come before our predecessor agency, the ICC, that does not mean that the qualitative environmental effects of this merger are greater (or different) than those of the other railroad mergers that have been considered. Similarly, the extensive trackage rights that we are granting in this decision to preserve competition generally will not create additional traffic (or potentially significant environmental impacts). Traffic that can be efficiently handled by train would be handled by train whether or not the trackage rights at issue here were granted.

[261] For example, with respect to safety, our mitigation includes more frequent track and train car inspections, signs on grade crossings identifying toll free numbers to call in the event of a signal malfunction, and a requirement that UP/SP provide emergency response personnel with

(continued...)

levels: systemwide, rail corridor-specific, and local. There is mitigation for particular rail line segments, rail yards, intermodal facilities, and rail abandonments and constructions. In short, no EIS is required because our environmental mitigation conditions specifically address the potential environmental impacts associated with the merger and ensure there will be no significant environmental effects.[262]

RENO AND WICHITA. As discussed in the Post EA, in developing mitigation for two cities, Reno, NV, and Wichita, KS, SEA concluded that further, more focused mitigation studies are warranted, notwithstanding the extensive analysis (including site visits and meetings with city officials, emergency response representatives and business interests) that already has been done to identify environmental concerns and arrive at appropriate mitigation for these two communities. Nothing in the record here, however, suggests that the potential environmental effects of the merger in Reno or Wichita are so severe that implementation of the merger should not proceed prior to the completion of the studies.[263] To the contrary, in both Reno and Wichita the environmental impacts are limited to the effects of an increase in traffic on existing rail lines. Also, the mitigation conditions that we are imposing now assure that, while SEA

(...continued)
information regarding anticipated train movements and work with communities to develop plans to deal with the transportation of hazardous materials, emergencies, and the upgrading of grade crossing signals. In addition, UP/SP will be required to equip certain trains carrying hazardous materials with two-way end-of-train devices to enhance braking capabilities on particular line segments. In response to concerns involving air pollution, UP/SP will have to reduce idling of locomotives, close box car doors on empty cars, and use more efficient locomotives when the equipment becomes available.

[262] *See, e.g., Sierra Club v. DOT*, 753 F.2d 120, 127 (D.C. Cir. 1985); *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982).

[263] We note that the Supreme Court has rejected arguments that NEPA demands the formulation and adoption of a plan that will fully mitigate environmental harm before an agency can act. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989). Rather, the deferral of a decision on specific mitigation steps until more detailed information is available is embraced in the procedures promulgated under NEPA. *See, Public Utilities Comm'n of California v. FERC*, 900 F.2d 269, 282-3 (D.C. Cir. 1990). NEPA "does not require agencies to adopt any particular internal decisionmaking structure." *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 100 (1983). It is well settled that NEPA does not repeal other statutes by implication and that if the agency meets NEPA's basic requirements, it may fashion its own procedural rules to discharge its multitudinous duties. *Vermont Yankee v. NRDC*, 435 U.S. 519 (1978); *United States v. SCRAP*, 412 U.S. 669, 694 (1973).

conducts these studies, the environmental status quo will essentially be preserved in Reno and Wichita.[264]

As the EA and Post EA show, SEA already has carefully assessed the impact of the merger on Reno and Wichita and identified its likely environmental effects. Based on its analysis, SEA concluded that, with the systemwide and corridor-specific mitigation already imposed and the conditions to be arrived at following the independent mitigation studies, there will be no significant environmental impacts to Reno and Wichita, and we agree.

The sole purpose of the mitigation studies will be to arrive at specifically tailored mitigation plans that will ensure that localized environmental issues unique to these two communities are effectively addressed. For example, with respect to vehicular and pedestrian safety, SEA has determined that separated grade crossings and pedestrian overpasses and/or underpasses will be needed to address safety concerns on the existing rail lines in Reno and Wichita. Accordingly, the studies will identify the appropriate number and precise location of highway/rail grade separations and rail/pedestrian grade separations in Reno and Wichita. With respect to air quality, we have imposed mitigation measures that reduce locomotive fuel consumption and air pollution, call for more efficient railroad equipment and operating practices, and require consultation with air quality officials.[265] As further insurance, the studies will consider additional mitigation to address the air quality effects unique to Reno and Wichita. In this merger, noise impacts would result from more frequent exposure to horn noise rather than greater intensity of sound. No additional types of noise would be introduced. To address noise impacts, we are requiring UP/SP to consult with affected counties to develop focused noise abatement plans. As the Post EA notes, however, safety dictates that railroads sound their horns at grade crossings.[266] Any attempt significantly to reduce noise levels at grade crossings would jeopardize safety, which we consider to be of paramount importance.

---

[264] The courts have recognized that there is no violation of NEPA where proposed actions will not effect a change in the status quo. *See, Sierra Club v. FERC*, 754 F.2d 1506, 1509-10 (9th Cir. 1985).

[265] Because trains are mobile, rather than stationary sources, air quality impacts associated with locomotive emissions are spread over a large area. Therefore, the impacts at any individual location are typically relatively minor.

[266] SEA indicates that FRA has been directed by the Swift Act generally to require that horns be sounded at all grade crossings.

The studies will be conducted by SEA with the assistance of an independent third party contractor. Although retained by UP/SP, SEA will select the contractor. The contractor will work under the sole supervision, direction, and control of SEA.

The mitigation studies will include consultations with the affected communities, counties, and states, Native American tribes, the FRA, and other appropriate agencies, as well as UP/SP. There will be public notice and participation. The public will be consulted regarding the range of additional mitigation to most effectively address increased rail traffic on the existing rail lines in Reno and Wichita. SEA will prepare draft mitigation studies and make them available to the public for review and comment. After SEA assesses the comments, it will design the most effective mitigation for these particular communities to add to the mitigation that has already been imposed.

SEA's final mitigation studies and its recommended mitigation plans for Reno and Wichita will be made available to the public and will be submitted to us for our review and approval. We will then issue a decision imposing specific mitigation measures. This entire process will be completed within 18 months of consummation of the merger.

In the meantime, as explained in the Post EA, during the 18-month study period UP/SP will be permitted to add only an average of two additional freight trains per day to the affected rail line segments (Chickasha, OK, to Wichita and Roseville, CA, to Sparks, NV),[267] which is below the threshold level for environmental analysis.[268] UP/SP will be prohibited from increasing traffic to the levels they projected under the merger (11.3 daily trains for Reno and 7.4

[267] For nonattainment areas such as Reno, our rules permit railroads to operate up to three additional trains per day. The threshold for attainment areas such as Wichita is normally an increase of eight trains or more a day. Here, we are taking a more conservative approach and will permit for Wichita only an average increase of two trains per day. In short, these limited increases for Reno and Wichita are at or below the threshold levels, and the environmental status quo will essentially be maintained. This addition of an average of two trains a day includes BNSF trains but does not include Amtrak trains, which are unrelated to the merger.

[268] We note that an existing railroad can increase its level of operations without coming to us, and without limitation. Thus, if UP and SP had not proposed this merger, SP on its own could have increased the number of trains on its line in Reno to any level it considered appropriate. Allowing an increase of up to two trains per day during the interim period takes into account that the number of trains going through Reno and Wichita might have been increased even without the merger.

trains for Wichita) without our approval.[269] Thus, there will be no significant adverse environmental impacts to these communities while SEA, the Board, and the parties work to arrive at additional tailored mitigation for those cities.

It should be noted that the studies will focus only on the mitigation of the environmental effects of additional rail traffic through Reno and Wichita resulting from the merger. Mitigation of conditions resulting from the preexisting development of hotels, casinos, and other tourist-oriented businesses on both sides of the existing SP rail line in Reno, or the preexisting switching operations that are a primary source of the congestion associated with the existing UP line in Wichita, are not within the scope of the studies. Similarly, the construction of a new rail line now under consideration by Reno is too preliminary to be assessed now.[270]

The studies will carefully examine private and public funding options, as we believe that the cost of mitigation for Reno and Wichita should be shared. Finally, the studies will provide the parties with additional time to pursue and agree to independent and innovative mitigation plans (such as the memorandum of understanding executed by UP/SP and Truckee, CA, whereby UP/SP will share in the cost of an underpass construction project and contribute to a fund to buy back obsolete wood burning stoves).

In sum, pending determination of the exact mitigation measures to be required for Reno and Wichita, UP/SP will be subject to a traffic cap on the affected rail lines to ensure that no adverse effects to the environment will occur and existing environmental conditions will essentially remain unchanged. Because we already know the nature and general parameters of the appropriate mitigation measures for Reno and Wichita, based on our analysis of the environmental impacts and imposition of systemwide and regional mitigation, we find that, with the more specific mitigation that will be developed, the merger will not significantly affect the quality of the environment in those two locations.

---

[269] UP/SP will be required to file verified copies of station passing reports of train movements for Reno and Wichita on a monthly basis with SEA for the duration of the study period. We will review them to ensure compliance.

[270] Plans for such a line are only in the development stage. SEA indicates that such a project could take up to 10 years to finalize. If the contemplated construction reaches the stage of an actual proposal requiring our approval, SEA would prepare an appropriate environmental document at that point. *See, Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20 (1976); *Crounse Corp. v. ICC*, 781 F.2d 1176, 1193-96 (6th Cir. 1986).

COMMENTS OF EPA. On July 12, 1996, we received comments from the United States Environmental Protection Agency (EPA) on various aspects of the EA and the Post EA.[271] EPA notes that, in analyzing air quality, the EA failed specifically to identify "maintenance" areas,[272] which it believes may have caused air quality concerns to be overlooked.[273] But maintenance areas were not ignored in SEA's analysis. For those areas that were not classified as nonattainment, SEA applied the EPA conformity emission threshold levels applicable to maintenance areas. This means that SEA analyzed both attainment and maintenance areas under the more rigorous standards applicable to maintenance areas, and that, if anything, the anticipated effects of the proposed merger on air quality are conservative. We believe that air quality has been thoroughly analyzed, and that the mitigation we are imposing here, along with the more specific measures which will be arrived at in the further mitigation studies for Reno and Wichita,[274] adequately mitigates any potential adverse air impacts.

EPA further states that the EA used the terms NO_2 and NO_x incorrectly. We recognize that NO_x is not a criteria pollutant under EPA and state ambient air quality standards. In assessing air quality emissions, SEA looked at emission factors applicable to NO_x, instead of NO_2, because NO_x emission factors are readily available through EPA documents and other sources, while NO_2 emissions are not. SEA based its calculations on the conservative assumption that all NO_x emissions are composed of NO_2. This conservative approach,

---

[271] SEA agreed to EPA's request for an extension of time to comment on the Post EA. We welcome EPA's input after reviewing our environmental analysis, since, as EPA notes, it generally does not comment on EAs.

[272] There are three classifications for air quality: attainment areas, in which levels of certain pollutants are considered equal to or better than federal and state ambient air quality standards; nonattainment areas, in which levels of one or more pollutants do not meet federal and state ambient air quality standards; and maintenance areas, which were at one time nonattainment areas but have subsequently improved their air quality and are now in attainment for the relevant pollutant(s).

[273] We note that EPA does not disagree with SEA's determination that the proposed merger is not subject to EPA's regulations entitled "Determining Conformity of General Federal Actions to State or Federal Implementation Plans" (General Conformity). The General Conformity criteria do not apply directly to railroad operations, except for future locomotive emission standards. SEA properly concluded that the proposed merger does not meet the definitions in the General Conformity regulations at 40 CFR 51.852 because, as a regulatory agency, the Board does not maintain program control over railroad emissions as part of its continuing responsibilities.

[274] SEA will take into account EPA's concerns and consult with them in conducting its mitigation studies for Reno and Wichita.

which is widely accepted, ensured that the criteria pollutant NO_2 was adequately assessed in SEA's analysis. Moreover, by using this approach, SEA used higher NO_2 emissions than would actually be emitted.

EPA also expressed some difficulty understanding SEA's estimates of the projected net increase and decrease in air emissions with the mitigation measures we are imposing. While we believe that the text of the Post EA adequately explains the data in Tables 3-5 and 4-4, we have generated and attached as Appendix H an additional table to further clarify the net emissions reflecting mitigation.

EPA notes that some of the proposed rail line abandonments in Colorado run through or near EPA-designated Superfund sites. EPA is troubled that soil in and around the railroad lines could require remediation, that UP/SP might not be obligated to honor a consent decree, and that possible future trail use could expose the public to hazardous substances. These concerns are premature because, as discussed above, we are permitting only the discontinuance of rail service, and not abandonment of the involved lines. Thus there will be no salvage of these lines or opportunity for trail use unless and until UP/SP obtains our authority to abandon these lines.[275]

While trail use requests can be made if the abandonments are granted, any trail arrangement would not supersede the requirements of the specific laws that govern Superfund sites.[276] Nor would we thereby become involved in negotiating or enforcing consent decrees involving remediation of those sites.

EPA does not view requiring UP/SP to comply with existing federal, state, and local regulation as mitigation. We believe, however, that requiring compliance with other laws and regulations, such as FRA's safety regulations, can assist in reducing the potential environmental impacts of the actions before us. If the railroad fails to comply with conditions that we have imposed, parties can notify us and request that we (as well as the agency that has promulgated the regulation) take appropriate action.

In any event, the mitigation we are imposing here goes well beyond requiring compliance with other laws and regulations. For example, it includes more frequent track and train car inspections to reduce anticipated safety

---

[275] At that point, we will analyze the potential environmental impacts of the proposed abandonments.

[276] *See, Union Pac. R.R. -- Abandonment -- Wallace Branch, ID*, Docket No. AB-33 (Sub-No. 70) (ICC served December 2, 1994).

impacts and reduced idling of locomotives and the use of more efficient locomotives to offset air pollution emissions associated with the merger. Moreover, to enhance safety, UP/SP will be required to equip certain trains carrying hazardous materials with two-way end-of-train devices to improve braking capabilities on particular line segments.

EPA suggests that we failed to discuss the environmental impacts associated with the handling and disposal of waste materials for the proposed abandonments and constructions. But we have included detailed mitigation for these actions. *See* Appendix G, including conditions #26, #27, #62 and #63.

EPA questions whether SEA considered all the settlement agreements reached with competing railroads and trade associations. SEA specifically took all settlement agreements into account in its analysis, as the EA and Post EA show.

Finally, we disagree with EPA's suggestion that SEA should revisit its consultation efforts with Native American tribes. SEA's efforts to contact and consult with Native American tribes have been extensive. As part of its outreach activities, SEA contacted approximately 11 area offices of the Bureau of Indian Affairs to inform them about the proposed merger; three offices commented and provided the names of tribes that should be contacted. Both the EA and Post EA were distributed to 31 American Indian tribes. In addition, there was newspaper and *Federal Register* notice to inform all affected tribes and communities about the proposed merger and how they could participate. To ensure continued participation, SEA will contact the affected Native American tribes when initiating its mitigation studies for Reno and Wichita and invite them to participate.

FINDINGS

In Finance Docket No. 32760, we find: (a) that the acquisition by UPC, UPRR, and MPRR of control of SPR, SPT, SSW, SPCSL, and DRGW through the proposed transaction, as conditioned herein, is within the scope of 49 U.S.C. 11343 and is consistent with the public interest; (b) that the transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the transaction has requested inclusion in the transaction, and that failure to include any such railroad will not adversely affect the public interest; (d) that the transaction will not result in any guarantee or assumption of payment of dividends or of fixed charges, or any increase in total fixed charges, except as specifically approved herein; (e) that the interests of

employees affected by the proposed transaction does not make such transaction inconsistent with the public interest, and any adverse effect will be adequately addressed by the conditions imposed herein; (f) that the transaction, as conditioned herein, will not significantly reduce competition in any market; and (g) that the terms of the transaction are just, fair, and reasonable. We further find that the competitive conditions imposed in Finance Docket No. 32760, including but not limited to those embraced in the BNSF,[277] CMA, and URC agreements, and further including but not limited to the various modifications we have required with respect to the terms of the BNSF and CMA agreements (particularly with respect to new facilities, transloading facilities, build-out/build-in options, contracts at 2-to-1 points, and SIT facilities), are consistent with the public interest. We further find that the oversight condition imposed in Finance Docket No. 32760 is consistent with the public interest. We further find that any rail employees of applicants or their rail carrier affiliates affected by the transaction authorized in Finance Docket No. 32760 should be protected by the conditions set forth in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979), unless different conditions are provided for in a labor agreement entered into prior to consummation of the transaction authorized in Finance Docket No. 32760, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In Finance Docket No. 32760 (Sub-No. 1), we find that the trackage rights provided for in the BNSF agreement and included in the Sub-No. 1 notice filed November 30, 1995, are exempt from prior review and approval pursuant to 49 CFR 1180.2(d)(7). We further find that any rail employees of applicants or their rail carrier affiliates or of BNSF or its rail carrier affiliates affected by the transaction authorized in Finance Docket No. 32760 (Sub-No. 1) should be protected by the conditions set forth in *Norfolk and Western Ry. Co.--Trackage*

---

[277] Again, by BNSF agreement, we mean the agreement dated September 25, 1995 (*UP/SP*-22 at 318-347), as modified by the supplemental agreement dated November 18, 1995 (*UP/SP*-22 at 348-359), and as further modified by the second supplemental agreement dated June 27, 1996 (*UP/SP*-266, Exhibit A). We wish to clarify, however, that in imposing the BNSF agreement as a condition to this merger, we will require applicants to honor all of the amendments, clarifications, modifications, and extensions thereof described in: (1) the April 18th CMA agreement (UP/SP-219); (2) the April 29th rebuttal filings (*UP/SP*-230 at 12-21; *UP/SP*-231, Part C, Tab 18 at 5-11; *see also UP/SP*-260 at 8-9, summarizing the clarifications and amendments described in the April 29th rebuttal filings); (3) the June 3rd brief (*UP/SP*-260 at 23 n.9); and (4) the June 28th filing that accompanied the second supplemental agreement (*UP/SP*-266 at 3).

Rights--BN, 354 I.C.C. 605, 610-15 (1978), as modified in *Mendocino Coast Ry., Inc.--Lease and Operate,* 360 I.C.C. 653, 664 (1980), unless different conditions are provided for in a labor agreement entered into prior to consummation of the transaction authorized in Finance Docket No. 32760 (Sub-No. 1), in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In Finance Docket No. 32760 (Sub-No. 2), we find that the three line sales provided for in the BNSF agreement, and operation by BNSF of these lines, are exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a or to protect shippers from the abuse of market power. We further find that any rail employees of applicants or their rail carrier affiliates or of BNSF or its rail carrier affiliates affected by the transaction authorized in Finance Docket No. 32760 (Sub-No. 2) should be protected by the conditions set forth in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979), unless different conditions are provided for in a labor agreement entered into prior to consummation of the transaction authorized in Finance Docket No. 32760 (Sub-No. 2), in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In Finance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6, and 7), we find that acquisition and exercise of control of A&S, CCT, OURD, PTRR, and PTRC, respectively, by applicants is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because each such control transaction is limited in scope, and because, in each instance, review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a or to protect shippers from the abuse of market power. We further find that any rail employees of applicants or their rail carrier affiliates affected by the transactions authorized in Finance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6, and 7) should be protected by the conditions set forth in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979), unless different conditions are provided for in a labor agreement entered into prior to consummation of the transactions authorized in Finance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6, and 7), in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In Finance Docket No. 32760 (Sub-No. 8), we find that (i) common control of UP and the two motor carriers controlled by SP, and (ii) common control of SP and the one motor carrier controlled by UP, is exempt from prior review and

approval pursuant to 49 U.S.C. 10505 because each such control transaction is limited in scope, and because, in each instance, review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32760 (Sub-No. 9), we find that the terminal area trackage rights sought therein are practicable and in the public interest and will not substantially impair the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business.

In Finance Docket No. 32760 (Sub-No. 10), we find that the responsive application filed by CMTA is not consistent with the public interest.

In Finance Docket No. 32760 (Sub-No. 11), we find that the responsive application filed by MRL is not consistent with the public interest.

In Finance Docket No. 32760 (Sub-No. 12), we find that the responsive application filed by Entergy is consistent with the public interest to the extent the application seeks to require 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. In all other respects, we find that the responsive application filed by Entergy is not consistent with the public interest.

In Finance Docket No. 32760 (Sub-No. 13), we find that the responsive application filed by Tex Mex is consistent with the public interest with respect to traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. We further find that the responsive application filed by Tex Mex is not consistent with the public interest with respect to traffic not having such a prior or subsequent movement. We further find that any rail employees of Tex Mex affected by the trackage rights authorized in Finance Docket No. 32760 (Sub-No. 13) should be protected by the conditions set forth in *Norfolk and Western Ry. Co.--Trackage Rights--BN,* 354 I.C.C. 605, 610-15 (1978), as modified in *Mendocino Coast Ry., Inc.--Lease and Operate,* 360 I.C.C. 653, 664 (1980), unless different conditions are provided for in a labor agreement entered into prior to commencement of operation of the Finance Docket No. 32760 (Sub-No. 13) trackage rights, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In Finance Docket No. 32760 (Sub-No. 14), we find that the terminal area trackage rights sought therein are practicable and in the public interest, with respect to traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line, and, with respect to such traffic, will not

substantially impair the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business.

In Finance Docket No. 32760 (Sub-No. 16), we find that the responsive application filed by WEPCO is not consistent with the public interest.

In Finance Docket No. 32760 (Sub-No. 17), we find that the responsive application filed by MCC and its rail affiliates is not consistent with the public interest.

In Docket No. AB-3 (Sub-No. 129X), we find that the abandonment by MPRR of railroad lines between MP 428.3 near Gurdon, AR, and MP 457.0 near Camden, AR, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power.

In Docket Nos. AB-3 (Sub-No. 130) and AB-8 (Sub-No. 38), we find that the abandonment by MPRR of, and the discontinuance of trackage rights by DRGW on, railroad lines between MP 747.0 near Towner, CO, and MP 869.4 near NA Junction, CO, is permitted by the present or future public convenience and necessity and will not have a serious adverse impact on rural and community development. The property may be suitable for recreation and trail use. However, we note that no party has requested a public use condition, and we will not impose one at this time.

In Docket Nos. AB-3 (Sub-No. 131) and AB-8 (Sub-No. 37), we find that the abandonment by MPRR of, and the discontinuance of trackage rights by DRGW on, railroad lines between MP 459.20 near Hope, KS, and MP 491.20 near Bridgeport, KS, is permitted by the present or future public convenience and necessity and will not have a serious adverse impact on rural and community development. The property may be suitable for recreational use as an extension of a trail. However, we note that no party has requested a public use condition, and we will not impose one at this time.

In Docket No. AB-3 (Sub-No. 132X), we find that the abandonment by MPRR of railroad lines between MP 485.0 near Newton, KS, and MP 476.0 near Whitewater, KS, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket No. AB-3 (Sub-No. 133X), we find that the abandonment by MPRR of railroad lines between MP 680.0 near Iowa Junction, LA, and MP 688.5 near Manchester, LA, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the

transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power.

In Docket No. AB-3 (Sub-No. 134X), we find that the abandonment by MPRR of railroad lines between MP 0.50 near Troup, TX, and MP 8.0 near Whitehouse, TX, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket Nos. AB-8 (Sub-No. 36X) and AB-12 (Sub-No. 189X), we find that the discontinuance by DRGW and SPT, respectively, of operations on railroad lines (1) between MP 335.0 near Sage, CO, and MP 271.0 near Malta, CO, and (2) between MP 271.0 near Malta, CO, and MP 276.1 near Leadville, CO, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power. In Docket No. AB-12 (Sub-No. 189X), however, we further find that the abandonment by SPT of railroad lines (1) between MP 335.0 near Sage, CO, and MP 271.0 near Malta, CO, and (2) between MP 271.0 near Malta, CO, and MP 276.1 near Leadville, CO, is not exempt from prior review and approval because review is necessary to carry out the transportation policy of 49 U.S.C. 10101a.

In Docket Nos. AB-8 (Sub-No. 39) and AB-12 (Sub-No. 188), we find that the discontinuance by DRGW and SPT, respectively, of operations on railroad lines between MP 271.0 near Malta, CO, and MP 162.0 near Cañon City, CO, is permitted by the present or future public convenience and necessity and will not have a serious adverse impact on rural and community development. In Docket No. AB-12 (Sub-No. 188), however, we further find that the abandonment by SPT of railroad lines between MP 271.0 near Malta, CO, and MP 162.0 near Cañon City, CO, is not permitted by the present or future public convenience and necessity.

In Docket No. AB-12 (Sub-No. 184X), we find that the abandonment by SPT of railroad lines between MP 360.1 near Wendel, CA, and MP 445.6 near Alturas, CA, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power.

In Docket No. AB-12 (Sub-No. 185X), we find that the abandonment by SPT of railroad lines between MP 117.6 near Suman, TX, and MP 105.07 near Benchley, TX, is exempt from prior review and approval pursuant to 49 U.S.C.

10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power.

In Docket No. AB-12 (Sub-No. 187X), we find that the abandonment by SPT of railroad lines between MP 30.0 near Seabrook, TX, and MP 40.5 near San Leon, TX, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket No. AB-33 (Sub-No. 93X), we find that the abandonment by UPRR of railroad lines between MP 0.0 near Whittier Junction, CA, and MP 5.18 near Colima Junction, CA, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket No. AB-33 (Sub-No. 94X), we find that the abandonment by UPRR of railroad lines between MP 5.8 near Magnolia Tower, CA, and MP 10.7 near Melrose, CA, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket No. AB-33 (Sub-No. 96), we find that the abandonment by UPRR of railroad lines between MP 51.0 near Barr, IL, and MP 89.4 near Girard, IL, is permitted by the present or future public convenience and necessity and will not have a serious adverse impact on rural and community development.

In Docket No. AB-33 (Sub-No. 97X), we find that the abandonment by UPRR of railroad lines between MP 119.2 near DeCamp, IL, and MP 133.8 near Edwardsville, IL, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket No. AB-33 (Sub-No. 98X), we find that the abandonment by UPRR of railroad lines between MP 133.8 near Edwardsville, IL, and MP 148.78 near Madison, IL, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power.

In Docket No. AB-33 (Sub-No. 99X), we find that the abandonment by UPRR of railroad lines between MP 0.0 near Little Mountain Junction, UT, and MP 12.0 near Little Mountain, UT, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket Nos. AB-3 (Sub-Nos. 129X, 130, 131, 132X, 133X, and 134X), AB-8 (Sub-Nos. 36X, 37, 38, and 39), AB-12 (Sub-Nos. 184X, 185X, 187X, 188, and 189X), and AB-33 (Sub-Nos. 93X, 94X, 96, 97X, 98X, and 99X), we further find that any employees affected by the abandonments and

discontinuances authorized therein should be protected pursuant to *Oregon Short Line R. Co.--Abandonment--Goshen,* 360 I.C.C. 91, 98-103 (1979), unless different conditions are provided for in a labor agreement entered into prior to consummation of the relevant abandonment or discontinuance, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

We further find that this action, as conditioned by the environmental mitigation conditions set forth in Appendix G, will not significantly affect the quality of the human environment or the conservation of energy resources.

We further find that all conditions requested by any party to this proceeding but not granted herein are not in the public interest and should not be imposed.

CHAIRMAN MORGAN, commenting:

Introduction

The proposed merger of the Union Pacific (UP) and the Southern Pacific (SP) railroad systems -- creating the Nation's largest rail system -- stands as a true test of the statutory authority of the Surface Transportation Board (Board) to permit transportation-related transactions that are in the public interest. In determining the public interest in a rail merger case, the Board must carefully balance the benefits flowing from the consolidation against the anticompetitive consequences that may result. In this case, the transportation benefits are clear. And although the anticompetitive effects of approving this merger without conditions could be significant, the Board, through the conditioning authority granted by Congress, can and has imposed conditions to address the potentially significant adverse consequences of the merger.

Throughout this merger proceeding, the Board has heard from a broad cross-section of interests about the potential impacts, both positive and negative, associated with this merger. We have heard from shippers who support the merger and shippers who oppose the merger. We have heard from railroads that are for the merger and railroads that are against it. We have heard from some state and other governmental officials who are for it and some who are against it. We have heard from employees who support it and employees who do not. The Board's challenge has been to weigh all of the extensive evidence and to arrive at a balanced decision that addresses the potentially significant harm while preserving the significant transportation benefits that this merger will produce. I believe that the Board has met that challenge in this decision.

Outright Denial

Some parties have argued that this case should be easy to decide: if there is a competitive problem, you "just say no" and deny the whole application, leaving it to the private parties to attempt to work out a solution more acceptable to the government. With all due respect, while that may be the easy answer here, particularly given the opposition, I do not believe that it is the right answer in this case. Government's role in today's world, in my view, should be to work in partnership with industry to empower it to take the steps necessary to compete. When private industry comes forward in good faith with what it believes to be a stimulus for economic growth and development, we should not presume collusion in the first instance and dismiss the proposal altogether. Rather, we must attempt to craft a response that balances the many competing interests.

There are clear and real pluses to this merger. First, the merger permits UP and SP to realize tremendous transportation efficiencies and other benefits. History has shown that restructuring in the rail industry has strengthened the rail transportation system in the form of better service and lower rates, and this merger should be no exception.

Second, the merger ensures that shippers on the SP system will continue to receive competitive service. Some parties have argued that we should not be concerned about SP's financial condition. However, the State of California, on behalf of its shippers, and the United Transportation Union, on behalf of its employee members, are worried, and the record, as discussed in our decision, supports their concerns. Denying the merger and risking a downsized SP or an SP broken up into pieces is not what they want. And it is not a risk that we, as guardians of the public interest under our statute, should be willing to take. Rather, consistent with the statute, the Board should strive to allow the far-reaching benefits promised by this merger and to save the SP system as a viable competitive force.

Divestiture

Some parties have argued that there is another simple, quick, and obvious way to fix the potentially significant competitive problems associated with this merger: divestiture. Divestiture may be an obvious fix to some, but it is not an obvious fix for me in this case. First, as presented, it would be a drastic solution in this case, and one that we should pursue only if there is clearly no other viable alternative. Railroads, with their network economies, are different from other industries, and taking away part of their network takes away part of their economies of operation. As the Board's decision demonstrates, there is clear

evidence on this record that divestiture of the sort suggested by some of the parties would significantly undercut the transportation benefits and efficiencies associated with this merger.

Moreover, the divestiture proposals discussed in this case are far-reaching, with one proposal even suggesting the divestiture of 1200 miles. This remedy goes beyond the harm to be addressed, and it does not distinguish between those shippers that will lose direct and indirect competition and those whose competitive position will not be substantially affected by the merger. Government remedies, under our statute or any other law, should not overreach and must be specifically tailored to the identifiable harm.

Furthermore, divestiture is not necessarily simple and quick. To the contrary, it could lead to more government intrusion, more regulatory oversight, and, ultimately, more litigation when the unsuccessful suitors seek relief. This is particularly true given the fact that certain divestiture proposals were not even formally presented in the record of this proceeding. Divestiture here could mean another proceeding and more delay, creating the type of uncertainty and unpredictability for business that the government of today, and certainly this Board, are trying to avoid.

In short, divestiture poses substantial problems of its own in this case.

Appropriate Conditions

Divestiture, with all of these potential problems, might be more palatable if there were no other way to fix the competitive harm in this case. However, there are other ways.

The applicants admit that there is much overlapping track, and they have sought to address this competitive issue by providing a private sector solution through the granting to Burlington Northern Santa Fe (BNSF) of extensive trackage rights. Parties have complained that those trackage rights will not produce as much competition as an independent SP. I disagree. BNSF is a strong competitor that wants to compete and that knows how to compete. Trackage rights are used successfully throughout the industry, and there is no evidence that, because of their nature and scope, the trackage rights here would not be an effective competitive alternative. Furthermore, as the record shows, the trackage rights agreement provides significant transportation benefits of its own. If managed properly -- and the Board has the means and the mandate to make sure that they are -- these trackage rights can replicate SP's existing competitive presence and can provide market discipline for the merged UP/SP system.

The BNSF agreement is clearly strengthened by the privately negotiated agreement with the Chemical Manufacturers Association (CMA). However, the Board has concluded, and rightly so, that more is needed to address the potential competitive harm. The Board has augmented conditions in the important areas of build-ins and build-outs, transloads, new facilities, storage-in-transit facilities, and contract service. We have responded to the concerns of various shipper groups and specific shippers, particularly western coal interests, plastic and chemical shippers, and grain and other NAFTA trade. Our conditions are carefully crafted to preserve competitive alternatives existing today without undermining the benefits of the merger.

We also provide for 5 years of oversight. Parties have attacked oversight on the one hand as a meaningless gesture. On the other hand, they have criticized oversight as burdensome overregulation. Which is it? The answer is that it is neither. The conditions that the Board has imposed require the applicants and BNSF to report periodically to demonstrate to the Board that the protective conditions are in fact working. The Board will not depend upon shippers and affected parties to do its monitoring. If competitive harm becomes a problem, we can and will act. The divestiture option will remain available during the entire oversight period. The Board has taken this case very seriously from the beginning and will continue to do so.

Closing

I believe that our decision is a balanced one that recognizes the many competing issues in this case. It preserves the transportation benefits of the transaction, benefits that the Board has a mandate not to ignore. It ensures a strong and effective competitive alternative for shippers and communities served by SP -- we owe them no less. It recognizes the importance of the transaction to the employees, for it is they who have much at stake. It mitigates as appropriate the competitive harm without the risk of potentially more intrusive governmental action. It recognizes and affirms the importance and the benefit of market-based proposals and private sector negotiations among the various sectors of the transportation community, including management and labor. On balance, this decision is a sound one; it represents good government; it is good for transportation; and it is good for the economy.

VICE CHAIRMAN SIMMONS, commenting:

I was a member of the Interstate Commerce Commission when, in 1986, that body denied the application of the Santa Fe Southern Corporation to acquire

and merge with the Southern Pacific Railroad (*SF/SP*). Arguably, many of the competitive problems of the ill-fated *SF/SP* merger exist in this case, leading one to conclude that the two cases are similar. However, I believe that it was irresponsible for some parties to conclude, summarily, that the proposed merger here is anti-competitive and ill-advised merely because applicants' lines are parallel.

Such an inflexible view with respect to this industry is abhorrently narrow minded. More important, such an unyielding view ignores the economic realities of this present day industry and the economic realities that favor a merger in this instance, but that did not favor a merger in *SF/SP*.

There are striking material differences between the two cases that require additional examination or analysis. First, unlike the applicants in *SF/SP*, here, at the outset, UP and SP have identified areas that will face a reduction in competition and have voluntarily negotiated settlements that offer remedial solutions. Second, the applicants have factually demonstrated, persuasively, that the economic forces in play today demand such a merger. Now more than ever, shippers are requiring railroads to provide seamless, single-line service, free of costly interchanges and reciprocal switching.

Thus, no one should be misled by opposing shippers who refuse to see beyond their singular concerns, thereby pitting their parochial interests against a broader public interest that demands increased efficiencies throughout the surface transportation system.

Likewise, we should also not be misled by the self-serving and centralized views of opposing railroads, who, after all, are merely bartering for a greater slice of the economic pie.

Here, as in similar cases, the analysis must be -- what as a whole is in the public interest. It is this analysis and none other that controls the debate.

Railroads have made significant productivity gains as a result of the Staggers Act, ICC actions, and improved labor agreements. However, there is sufficient evidence to credit railroad consolidations with many of the efficiency gains. This merger will further the productivity gains already achieved in the rail industry. Mergers reduce interchanges and excess equipment. Mergers also, as preferred by shippers, traditionally result in single-line operations capable of providing uninterrupted, seamless service.

Today, the single fastest growth segment for railroads is intermodal and its transportation requires certain characteristics that UPSP can deliver. This will continue to be the growth segment for the industry. While carriers can limp along on the strength of their traditional commodities of coal, lumber, grain, automobiles, etc., and have increases in revenues and profits, they need new sources of traffic and revenues in order to grow and attract capital. Intermodalism is that source. Granted, there are no large profits in intermodal service, but that will change as the traffic increases and railroads become expert and efficient in delivering this type of service. In order for the benefits of intermodalism to realize their full potential, this merger should be approved.

Simply offering single-line service, however, is not enough in the long run to attract and hold intermodal traffic. Intermodal transportation requires substantial capital investments to operate efficiently, including large funds for clearances, double-tracking, constant maintenance of track, modernization of yards, and labor improvements, all to move this traffic at top-notch speed. The Board's analysis places emphasis on the important role this merger would play in advancing those goals of promoting intermodalism. As railroads increasingly attract this traffic, there will be less highway congestion, improvements in air quality, reduction in accidents, and better time management, as workers spend less time in costly highway tie-ups.

Intermodalism requires capacity and infrastructure. The UPSP merger will provide synergies, network efficiencies, and financial capability that are necessary to develop intermodal service. A combined UPSP will have thousands of route miles that could be exploited for high quality intermodal service. Recognizing that intermodalism is the key for future growth, applicants have committed to invest $250 million in intermodal terminals, and $500 million to upgrade key routes for intermodal movements: the Sunset, Texas and Pacific, and Tucumcari routes.

I agree with the applicants' insistence that their market coverage is incomplete. As a result of the merger, however, UPSP will have improved and shorter routes throughout the West, and will operate on a level playing field equal to BNSF. The railroad will be able to reduce hundreds of miles in travel time in such areas as California's I-5 corridor, SP's Chicago-Southern California route, and so on.

UPSP makes much of the fact that the catalyst for this merger was the consolidation of the Burlington Northern and the Santa Fe. Indeed, I tend to agree that the BNSF merger was the event that altered the competitive situation of the rail industry in the West. It particularly changed conditions for SP as that

carrier was not fully positioned to deal with the competitive impacts of the BNSF. SP can continue the current situation, but given the low costs and operating ratios of BNSF and UP, the old strategy developed by SP cannot achieve the intended results and keep pace with the BNSF. It cannot just cut rates to maintain existing traffic or attract new traffic, that strategy would only further cause SP's deterioration. SP would continue to exist, but for the most part, it would effectively be eliminated as a market force, and would no longer be a significant player in the market. UP and BNSF, because of their sheer sizes, will continue to lower costs, attract traffic and investment, while SP will simply fall further behind.

Parties opposing the merger argue that SP does not need this merger to survive, that it can continue to operate on a stand alone basis and attract the necessary capital to prosper. In order to remain a stand alone railroad, however, SP would probably abandon those areas where SP has little to no negotiating leverage and focus on areas where the carrier can make a return decent enough to satisfy investors, that is in those areas where SP is the dominant or sole carrier, and need not compete as vigorously. This strategy, while economically sound, would only further marginalize SP and prevent it from being a competitive market force in the territories it serves. SP could provide service in a few narrowly defined markets, and not play much of a competitive role in the broader markets of the West. The restructuring of the SP would mean less competition in some markets, and the possibility of abandonment of marginal lines.

Some of the opponents are calling for divestiture of key SP routes as a way to satisfy competitive problems. Conrail, Kansas City Southern, National Industrial Traffic League (NITL), Montana Rail Link, and others seek divestiture of various SP routes. History reflects that the ICC has never used divestiture of portions of an *existing network* as a method to preserve competition. This is so, in part, because experience shows that divestiture is not a proper remedy in the context of the rail industry. Divestiture has been ordered in *other* industries, where the merging partners are generally required to divest themselves of a subsidiary or some other business not necessary for the operation of the core business.

Here, by contrast, proponents of divestiture seek to destroy a unified SP system consisting of routes and corridors that are vital to its core business of providing railroad transportation. I have strong reservations against such a divestiture here, as it would cause more problems than it would actually solve.

Specifically, the SP's value is as a single system, and because of the value of what is referred to as system integration, a break up of SP would not make sense. Furthermore, on the whole, divestiture would not benefit shippers, inasmuch as many current single-line moves would become two-line or three-line moves, wiping out the efficiencies of single-line service. With a merger, shippers will have the option of using two financially sound rail systems, UPSP and BNSF. I am confident that the two mega systems will compete fiercely. One only need look for evidence in the Powder River Basin and the intermodal business from the Pacific Northwest to Chicago. The competition to serve automobile plants is a constant battle between rail carriers. Western shippers can best benefit from two railroads with equal ability, resources, geographic coverage and reach, as opposed to a weak SP, whose competitiveness in the future is doubtful.

In my view, the proponents of divestiture have imprudently and irresponsibly narrowed their focus on the preservation of competition. But in so doing, they have ignored the special role overall that healthy railroads play in promoting the public interest. This perhaps can be said of no other industry. Indeed, the surface transportation industry case law, agency precedent, and common experience, requires that no one, including Federal regulators, should exalt or substitute the preservation of competition, just for the sake of having it, over the combination of other factors contributing to the public interest.

We should not forget that with respect to this industry, the Nation's antitrust laws do no more then help form the debate. They do not control the debate, as the public interest standard is much broader. *See, Northern Merger Lines Case,* 396 U.S. 491, at 506-516 (1970). Indeed, it is well settled that federal regulators can approve rail consolidations that violate the antitrust laws. *See, generally United States v. I.C.C.,* 361 U.S. 491 (1970).

No one should be that alarmed or dismayed that the merger may produce a lessening of competition, as some lessening of competition is a logical and natural consequence of any merger. However, as history has shown, the primary concern of this federal body must be the effects of the rail consolidation on the adequacy of transportation services available to the public. Thus, since modern times the agency has been encouraged to favor mergers, consolidations, and joint use of facilities that tend to rationalize and improve the Nation's rail system. *See, Missouri-Kansas-Texas R. Co. v. United States,* 632 F.2d 392, 396 (5th Cir. 1980).

In this case, competition will be preserved with the settlement agreements and the additional conditions recommended by this Board. Burlington Northern

Santa Fe has the ability to offer vigorous competition to shippers at 2-to-1 points. Thus, I find arguments that trackage rights cannot work as a substitute for real competition extremely unpersuasive. Properly structured and their terms reviewed by the Board, trackage rights can provide effective competition. Both history and common experience uphold this position.

Nevertheless, opponents imprudently argue that trackage rights here will not be feasible and that the competition offered thereby is illusory, because of the so-called unprecedented length in miles involved in the trackage rights.

Such arguments not only defy good business logic, they also miss the pro-competitive public benefits to be derived from such trackage rights. Here, the trackage rights will not just allow BNSF to compete with the merged carriers for local traffic, they will also allow BNSF to fill links within its own system and provide it with the opportunity to add SP served shippers on to its existing hauls.

To the contrary, some parties argue trackage rights compensation here is set so high that BNSF will become less then enthusiastic, and as such, it will not truly offer competitive alternatives to the merged UPSP. Whether that is so remains to be seen. But agency policy has always been to encourage parties to voluntarily negotiate compensation. It is difficult to accept the notion that BNSF would have agreed to a level of compensation high enough so as to effectively cut-off its competitive options and additional sources of revenue. Why agree to the deal? BNSF could have joined others in protesting the merger and as such been a formidable foe. Because of its financial strengths and routes, BNSF is the best choice to serve those shippers in the 2-to-1 markets. If UPSP wanted little to no competition, it could have chosen weaker carriers with limited geographic reach.

The Department of Justice is concerned that the trackage rights compensation is based on usage, and would rather see BNSF make a substantial payment up-front to serve as an inducement to vigorously compete in order to recoup its investment. While initially a provocative idea, I see no need to worry under these circumstances about BNSF competing. It should be noted that BNSF has substantial fixed and common costs on its own system. That system will connect or fill in the gaps with the trackage rights, and hence additional traffic will help defray BNSF's existing costs.

Merger opponents also insist that there is not sufficient density for BNSF to compete. Again, I reject this assertion. In their rebuttal, applicants thoroughly demolish this argument by demonstrating that opponents presented flawed studies to prove their point with regard to traffic density. For example, they

exclude all intermodal, grain and coal traffic from the study. Besides being misleading on available commodities, the opponents also impose geographic restrictions, failing to include local traffic flowing within Texas, Arkansas, and Louisiana. Furthermore, as UPSP point out, protestants to the merger exclude all traffic between Mexico and Texas, Louisiana, Arkansas, as well as all traffic between Mexico or those States and points in the Western United States and Canada. BNSF could use a lot of this traffic in conjunction with the western portion of its rail network, but the opponents' study excludes all of this traffic from their calculations.

All in all, the handicaps cited -- trackage rights compensation and lack of sufficient traffic -- have not been validated. Opponents assert that BNSF will be unable to develop significant market shares, which will render it unable to develop the volumes necessary to achieve economies of density and scale. It is my view that the opposition ignores what I view as a crucial point: whether BNSF will be able to be at least as competitive as SP is on those routes. According to the best evidence of record, where there are parallel lines, and UP and SP compete head-to-head, SP has the low market share. BNSF, which has lower costs than SP, could garner at least the same amount of traffic as SP. With BNSF's larger system, financial strength, and market share, BNSF has the ability to develop even greater market share than SP currently possesses.

Nevertheless, in keeping with the congressional mandates of past and present, to ensure that competition is meaningful, the Board will actively monitor the transaction for the next five years. I want the applicants, BNSF, and all shippers to know that we are very serious about monitoring. This Board is prepared to take further action should the BNSF not live up to its common carrier obligation to effectively compete or if UPSP undertakes actions that impede BNSF's ability to compete.

Overall, the positions of DOJ and other commenting federal regulators appear to be based on the following premise: prices become higher as the number of competitors decrease. But as aforementioned, this premise is predicated on theories that do not readily apply to the railroad industry.

The evidence is conclusive, that although the number of Class I railroads have fallen, prices, for the most part have declined since enactment of the Staggers Act. There is no clearer an example of this point than the healthy competitive environment in the Southeast, where there are only two Class I railroads.

By contrast, for the West, UPSP and the State of California have presented persuasive evidence (much of which concurs with the Board's own tracking over

the years) that SP is the 3rd place rail carrier in many markets, and as such it contributes very little to the level of competition in those markets where it is the third carrier.

Similarly, much as been made of the fact that Southern Pacific is not a "failing firm." Whether it is a failing firm or not, SP is certainly a very weak competitor. It cannot come near to investing the huge sums UP and BNSF will spend on capital expenditures. Without investments in plant and equipment, SP will continue to fall further behind its competitors. There is evidence that in many markets where SP competes with BNSF and UP, it is simply a marginal player. Not only are SP's shippers threatened with continuing poor service, but its thousands of employees risk losing their jobs. That possibility is why SP unionized employees support this merger.

Shipper testimony confirms that in many markets, SP is unable to meet the service demands of shippers. This merger will produce efficiencies that would increase the competitive significance of SP's assets in the marketplace. This point is key to understanding what drives this merger and the strong shipper support. Undoubtedly, SP has very attractive assets and key routes, that with shrinking capital and the intense competition offered by BNSF (as witnessed by the number of SP shippers BNSF has acquired since its merger), the current management is not in a position to fully exploit. To let SP linger and hope for better times to appear, I believe, weakens the carrier further, and as traffic patterns adjust or alter as a consequence of BNSF and UP's relentless competitive activity at the expense of SP, the value of its assets would greatly diminish. DOJ claims that SP can continue to offer the same price-quality combinations it offers now, and that SP's position relative to the two other carriers would not change if we deny the merger. However, logic dictates that without substantial infusion of capital, SP will be unable to continue to provide those services in the few markets it has been able to do so. A rational SP would concentrate on those markets and routes where it has a competitive advantage and limit capital spending, while BNSF grows even more efficient.

Lastly, I believe that the transaction will strengthen the country's national defense. The Department of Defense supports the merger realizing that it will result in the creation of a strong rail network whose key routes will remain intact. Because of its weak financial condition over the last few years, SP has been an unreliable provider of rail service for DOD. A lack of capital investments has hampered SP's ability to provide efficient and timely service

to the military. The merger will improve quality while also offering an alternative to the service of the BNSF.

In sum, I believe that this merger will result in tremendous benefits and enhancements to the Nation's economy. The founders of the Nation's railroads were individuals of vision. Because of their foresight, the country went on to create the world's most efficient transportation system, which in turn helped to create the world's most powerful industrial base and strong agricultural economy. This merger will continue to advance our strong manufacturing and agriculture sectors, and strengthen this nation's competitiveness in the global economy. The benefits enunciated are real and will produce shorter routes, new services, lower costs, better car supply, and more efficient operations. Farmers served by UP will find new markets for their wheat. Coal producers in Utah and Colorado will be able to market their coal to utilities because the SP has already invested heavily in expanding the market for western coal, and UP will not do anything to jeopardize that success, especially since a substantial amount of that coal goes to Asian markets. Chemical and plastic shippers faced with the loss of a competitive alternative, will have the services of BNSF through the settlement agreement. Although many of those manufacturers fear the consequences of the merger, BNSF will want to provide service just to increase its own market share and revenues. Besides, these captive shippers have the added protection of being able to file a rate complaint against the UPSP with the Board. Add that to the fact that the Board will monitor the transaction for the next five years to determine if BNSF is offering viable competition.

Finally, I want to personally commend the applicants here in an additional area. Specifically, I am confident that in the future we will look back at this entire episode -- at the continued advancement of the surface transportation industry -- as a sterling example of a moment in time where railroads, shippers, and labor[278] met at the conference table beforehand, and forged a marvelous market based private solution to further the industrial interests of this nation. That, coupled with the very special measured expertise of the dedicated staff of

[278] I believe that the Labor Unions deserve a special commendation here. Labor should take special pride in the level of commitment it exacted from UPSP in reconciling competing interests. The level of commitment made by the railroads to Labor is a credit to Labor's diligent efforts in striking a proper balance between its interests and the overall compelling public benefits of the merger. History will show that here, Labor's participation in the debate resulted in a win-win situation for everybody.

a beleaguered but valiant Federal agency, has produced an excellent result that will benefit the public for decades to come.

COMMISSIONER OWEN, commenting:

Since passage of the Transportation Act, 1920, it has been the public policy of the United States to encourage railroad mergers and consolidations that are in the public interest.[279] The 1920 congressional directive was restated by the Transportation Act of 1940, which provided that railroad mergers and consolidations be "consistent" with the public interest.[280] Again in 1976, Congress encouraged "efforts to restructure the [rail] system on a more economically justified basis, including * * * an expedited procedure" for mergers and consolidations.[281] And in 1980 and again in 1995, Congress voted to retain in the Interstate Commerce Act the provision that mergers and consolidations among two or more Class I railroads "shall" be approved if they are found by the Surface Transportation Board to be "consistent with the public interest."[282]

The recurring term "public interest" may be found in the National Transportation Policy, which instructs the Surface Transportation Board to promote safe and efficient rail transportation and to foster sound economic conditions.[283] The Supreme Court has held:[284]

> The term public interest * * * is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service * * * [and to] best use of transportation facilities * * *.

Congress provides us with additional direction -- specifically, that five factors be considered when reviewing railroad merger and consolidation applications:[285]

---

[279] Transportation Act, 1920, 41 Stat. 456 (1920).

[280] Transportation Act of 1940, 54 Stat. 899, 905 (1940).

[281] Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, 90 Stat. 31 (1976) at Section 101(a)(2). *See also, Report of the Committee on Conference on S. 2718*, S. Rep. No. 94-595, 94th Cong., 2d Sess., January 27, 1976, at 34.

[282] Staggers Rail Act, 94 Stat. 1895 (1980), and ICC Termination Act of 1995, 109 Stat. 803 (1995), now codified at 49 U.S.C. 11324(c).

[283] 49 U.S.C. 10101.

[284] *New York Central Securities v. United States*, 287 U.S. 12, 25 (1932).

[285] 49 U.S.C. 11324(b).

1) The effect of the proposed transaction on the adequacy of transportation to the public; 2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; 3) the total fixed charges resulting from the proposed transaction; 4) the interest of rail carrier employees affected by the proposed transaction, and; 5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

Railroads were the first major industry where merger and consolidation was promoted by the federal government. Noted Justice Brandeis as to the reason:[286]

The new purpose was expressed in unequivocal language * * * to secure a fair return on capital devoted to the transportation service.

The Court later held:[287]

Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern.

Moreover, Congress repeatedly has directed that railroad merger and consolidation applications be measured by a different standard than is used by the Justice Department. As the Supreme Court explained:[288]

[T]here can be little doubt that the [Surface Transportation Board] is not to measure proposals for all-rail or all-motor [mergers and consolidations] by the standards of the antitrust laws. Congress authorized such [mergers and] consolidations because it recognized that in some circumstances they were appropriate for effectuation of the National Transportation Policy.

With regard to this alternative test for railroad mergers and consolidations, the Court observed:[289]

[The Surface Transportation Board] must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.

Indeed, the Supreme Court repeatedly has instructed the Justice Department to leave to the Interstate Commerce Commission and its successor Surface

---

[286] *New England Divisions*, 261 U.S. 184, 189 (1923).
[287] *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118, 124 (1948).
[288] *McLean Trucking Co. v. United States*, 321 U.S. 67, 84-85 (1944).
[289] *Id.*, at 87.

Transportation Board the complex and specialized task of weighing the public benefit of railroad mergers and consolidations against the competitive harm. For example, in 1965 the Court ruled:[290]

> It matters not that the merger might otherwise violate the antitrust laws; the [Interstate Commerce] Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria * * * that such a merger would be 'consistent with the public interest.'

Again in 1970 the Court held:[291]

> We do not enquire whether the merger satisfies our own conception of the public interest. Determination of the factors relevant to the public interest is entrusted by the law primarily to the [Interstate Commerce] Commission, subject to the standards of the governing statute.

In fact, twice in recent years -- in 1980 and again in 1995 -- Congress rejected suggestions that it shift to the Justice Department regulatory authority over railroad mergers and consolidations.[292] In rejecting Justice Department oversight in 1980, Congress agreed with the Senate Commerce Committee's former chief counsel who had become chairman of the Interstate Commerce Commission, A. Daniel O'Neal:[293]

> [The Justice Department approach] would likely be quite different, as it probably would assume that [more railroads rather than fewer railroads] produces the best service for users. This is not always true. In some rail markets there may not be sufficient traffic to support multiple carriers, in which case service to all shippers may suffer.

The Supreme Court agrees that railroad mergers and consolidations be approved not just to protect financially weak railroads, but to make rail operations more efficient and more competitive with trucks and barges. As the

---

[290] *Seaboard Air Line R. Co. v. United States*, 382 U.S. 154, 156-157 (1965).

[291] *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486, 498-499 (1968).

[292] "Administration's Rail Merger Position Hit by AAR, ICC in Senate Hearing," *Traffic World*, June 25, 1979, at 10; and "DOT Says Justice Should Review Rail Mergers," *Traffic World*, January 30, 1995, at 10.

[293] "Administration's Rail Merger Position Hit by AAR, ICC in Senate Hearing," *Traffic World*, June 25, 1979, at 10.

Court observed in 1970, rail mergers and consolidations are not to be confined "to combinations by which the strong rescue the halt and the lame," adding:[294]

> [A] rail merger that furthers the development of a more efficient transportation unit and one that results in the joining of a 'sick' with a strong carrier serve equally to promote the long-range objectives of Congress * * *.

When railroad operations can be made more efficient and less costly, the savings are shared through lower freight rates -- or a forbearance to raise those rates -- which are reflected in lower consumer prices for everything from electricity to automobiles to food to clothing.

These public benefits, however, must be balanced against competitive harm, and the Surface Transportation Board has the authority to mitigate competitive harm by imposing a broad range of reasonable conditions, such as trackage rights.[295]

In this decision, the Surface Transportation Board has balanced the verifiable public benefits of the proposed transaction against the potential competitive harm; and while determining that the competitive harm is outweighed by the public benefits has nonetheless addressed each allegation of competitive harm and imposed conditions to mitigate that harm.

Overwhelming evidence was presented that this merger will result in broad public benefits such as substantial operating cost savings, improved rail service, renewed financial strength for Southern Pacific and more effective rail competition. This is important to existing and future customers of these railroads as well as the ultimate consumers of the products hauled who will reap the lower consumer prices stemming from transportation-cost savings. More efficient, lower-cost railroads also make American industry more competitive in world markets and make American jobs more secure. Furthermore, efficient railroads attract freight from the highway, relieve traffic congestion, reduce highway accidents, save lives, decrease pavement damage caused by heavy trucks, conserve fuel and improve the environment. Each is a worthy public goal.

Nonetheless, this agency is obliged to consider the likelihood of competitive harm. Indeed, competitive harm is likely to be substantial in certain important markets.

---

[294] *Northern Lines Merger Cases*, 396 U.S. 491, 508 (1970).
[295] 49 U.S.C. 11324(c).

Therefore, we imposed extensive conditions to mitigate that competitive harm. Among the conditions is a 5-year oversight provision and a requirement that both the merged railroads as well as Burlington Northern Santa Fe -- which is being given extensive trackage rights -- make periodic progress reports to this agency. During this oversight period we have authority to impose additional conditions and we will be an alert and aggressive policeman.

With regard to oversight, there are two specific issues that are perennial problems in the railroad industry and that I do not intend to treat lightly if they recur as a result of this merger. One is the freight railroads' treatment of Amtrak passenger trains; the other is the railroads' respect for their unionized employees.

I remind the applicants that the Rail Passenger Service Act of 1970 requires that Amtrak trains have preference over freight traffic and that the conditions we have imposed temporarily limiting rail traffic in certain corridors applies to freight trains only and not to Amtrak passenger trains.[296]

Furthermore, I remind the applicants' of their assurances given during oral argument that their merged railroad will move immediately to correct persistent Amtrak service problems on Southern Pacific lines. I encourage Amtrak to keep this agency aware of every failure on the part of the applicants to translate those words into deeds.

With regard to labor relations, I note that this is the only railroad merger in recent history to receive widespread labor-union support. Railroads operate the largest outdoor factory in America, often stretching tens of thousands of miles. The existence of a well-trained, motivated and loyal workforce is essential to safe and efficient train operations. Employee support of this transaction will be a crucial factor in its economic success. The applicants are to be applauded for their sincere efforts at reaching out toward their employees and including them in the planning process. All too often, in recent years, labor relations in the railroad industry have been unnecessarily acrimonious.

The applicants entered into a number of good-faith agreements with their dedicated employees in which both sides vowed to cooperate in implementing this merger. Specific pledges were made in a series of letters exchanged between the applicants and their unions.

---

[296] The requirement that Amtrak passenger trains receive priority handling by freight railroads is found at Rail Passenger Service Act of 1970, 84 Stat. 1327, as amended through 1982, Section 402(e)(1).

Among those pledges is that the applicants will use the immunity provision of 49 U.S.C. 11341(a), now 49 U.S.C. 11321(a), only to seek those changes in collective bargaining agreements that are actually "necessary" -- and I read the word "necessary" to mean "required" -- to implement the transaction and not merely as a convenient means of achieving cost savings or, as a federal appeals court noted, "merely to transfer wealth from employees to their employer."[297]

The very fact that the applicants addressed this matter positively in their agreement with the United Transportation Union is evidence that the issue has merit. The purpose of implementing agreements is to permit consummation of a merger or consolidation, not to achieve other objectives properly handled through collective bargaining under the Railway Labor Act.

Finally, there is an interest group that rarely is recognized but is essential to making our capitalist system function. They are the investors who make possible more efficient transportation, American competitiveness in world markets and more secure jobs.

It is the investors who spend less than they earn and lend the difference -- their savings -- to companies such as railroads so that they might build, renew and expand and become more efficient.

In recent months, Union Pacific stockholders repeatedly have been asked to give up portions of the projected merger savings -- to share them with shippers, unionized employees and communities.

Union Pacific has negotiated in good faith and entered into concessionary agreements. They have gone the extra mile with regard to environmental concerns.

The stockholders and management of Union Pacific -- the capitalists -- are to be congratulated. Capitalism is about building and creating. It always has been; it always will be.

It is ordered:

1. The UP/SP-262 motion to strike (and request for sanctions) is denied.
2. The BN/SF-61 motion to strike is denied.

---

[297] *See, e.g., Railway Labor Executives Association v. United States*, 987 F.2d 806, 814, 815 (D.C. Cir. 1993). The D.C. Circuit held (at 814) that, "at a minimum," an arrangement cannot be considered fair if it modifies a collective bargaining agreement more than is necessary to effectuate the transaction.

3. BNSF's request (BN/SF-54 at 32-33) that a certain document relied upon by KCS (KCS-33 at 72) be stricken from the record is denied.

4. The EBT/KCOSA joint motion dated May 10, 1996, is granted, and the new evidence tendered therewith is made part of the record in this proceeding.

5. Charles W. Downey is permitted to intervene in this proceeding and to become a party of record.

6. In Finance Docket No. 32760, the application filed by UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL, and DRGW is approved, subject to the imposition of the conditions discussed in this decision. Such conditions include but are not limited to those embraced in the BNSF, CMA, and URC agreements, and further include but are not limited to the various modifications we have required with respect to the terms of the BNSF and CMA agreements (particularly with respect to new facilities, transloading facilities, build-out/build-in options, contracts at 2-to-1 points, and SIT facilities). The Board expressly reserves jurisdiction over the Finance Docket No. 32760 proceeding and all embraced proceedings in order to implement the oversight condition imposed in this decision and, if necessary, to impose further conditions or to take such other action, including the ordering of divestiture, as may be warranted.

7. If applicants consummate the approved transaction, they shall confirm in writing to the Board, within 15 days after consummation, the date of consummation. Where appropriate, applicants shall submit to the Board three copies of the journal entries recording consummation of the transaction.

8. All notices to the Board as a result of any authorization shall refer to this decision by date and docket number.

9. No change or modification shall be made in the terms and conditions approved in the authorized application without the prior approval of the Board.

10. Applicants are hereby directed to file a progress report and an implementing plan on or before October 1, 1996, as discussed in this decision, and to file further progress reports on a quarterly basis thereafter.

11. BNSF is hereby directed to file a progress report and an operating plan on or before October 1, 1996, as discussed in this decision, and to file further progress reports on a quarterly basis thereafter.

12. In Finance Docket No. 32760 (Sub-No. 1), the trackage rights referenced in the Sub-No. 1 notice filed November 30, 1995, are exempted pursuant to 49 CFR 1180.2(d)(7).

13. Applicants and BNSF are hereby directed to file, no later than September 4, 1996, a 49 CFR 1180.2(d)(7) class exemption notice covering the trackage rights added to the BNSF agreement in accordance with the amendments required by the CMA agreement.

14. Applicants and URC are hereby directed to file, no later than September 4, 1996, a 49 CFR 1180.2(d)(7) class exemption notice covering the trackage rights provided for in the URC agreement.

15. In Finance Docket No. 32760 (Sub-No. 2), the petition for exemption is granted.

16. In Finance Docket No. 32760 (Sub-No. 3), the petition for exemption is granted.

17. In Finance Docket No. 32760 (Sub-No. 4), the petition for exemption is granted.

18. In Finance Docket No. 32760 (Sub-No. 5), the petition for exemption is granted.

19. In Finance Docket No. 32760 (Sub-No. 6), the petition for exemption is granted.

20. In Finance Docket No. 32760 (Sub-No. 7), the petition for exemption is granted.

21. In Finance Docket No. 32760 (Sub-No. 8), the petition for exemption is granted.

22. In Finance Docket No. 32760 (Sub-No. 9), the application for terminal area trackage rights is approved. BNSF and KCS shall jointly submit, by August 22, 1996, the agreed-upon terms respecting implementation of the Sub-No. 9 terminal trackage rights. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such terminal trackage rights. The Board will then choose the better of the proposals, or some variation thereof, and make it effective on September 11, 1996.

23. In Finance Docket No. 32760 (Sub-No. 10), the responsive application filed by CMTA is denied.

24. In Finance Docket No. 32760 (Sub-No. 11), the responsive application filed MRL is denied.

25. In Finance Docket No. 32760 (Sub-No. 12), the responsive application filed by Entergy is approved to the extent the application seeks to require that the BNSF agreement be amended to allow BNSF to transport coal to and from White Bluff via the White Bluff-Pine Bluff build-out line. In all other respects, the Sub-No. 12 responsive application is denied.

26. In Finance Docket No. 32760 (Sub-No. 13), the responsive application filed by Tex Mex is approved, subject to this restriction: all freight handled by Tex Mex pursuant to its Sub-No. 13 trackage rights must have a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. Tex Mex and UP/SP shall jointly submit, by August 22, 1996, the agreed-upon terms respecting implementation of the Sub-No. 13 trackage rights. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such trackage rights. The Board will then choose the better of the proposals, or some variation thereof, and make it effective on September 11, 1996.

27. In Finance Docket No. 32760 (Sub-No. 14), the terminal trackage rights application filed by Tex Mex is approved, subject to this restriction: all freight handled by Tex Mex pursuant to its Sub-No. 14 terminal trackage rights must have a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. Tex Mex and HB&T shall jointly submit, by August 22, 1996, the agreed-upon terms respecting implementation of the Sub-No. 14 terminal trackage rights. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such terminal trackage rights. The Board will then choose the better of the proposals, or some variation thereof, and make it effective on September 11, 1996.

28. In Finance Docket No. 32760 (Sub-No. 16), the responsive application filed by WEPCO is denied.

29. In Finance Docket No. 32760 (Sub-No. 17), the responsive application filed by MCC and its rail affiliates is denied.

30. With respect to the conditions imposed in this decision respecting CPSB, the interested parties (CPSB, UP/SP, and BNSF) shall jointly submit, by August 22, 1996, the agreed-upon terms respecting implementation of such conditions. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such conditions. The Board will then choose the better of the proposals, or some variation thereof, and make it effective on September 11, 1996.[298]

---

[298] As previously noted, CPSB and UP/SP may jointly request, by August 22nd, an extension of the August 22nd deadline.

31. With respect to the condition imposed in this decision respecting CMTA, the interested parties (CMTA, Longhorn, UP/SP, and BNSF) shall jointly submit, by December 10, 1996, agreed-upon terms respecting implementation of such condition. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such condition.

32. With respect to the condition imposed in this decision respecting TUE, the interested parties (TUE, UP/SP, BNSF, and KCS) shall jointly submit, by December 10, 1996, agreed-upon terms respecting implementation of such condition. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such condition.

33. In Docket No. AB-3 (Sub-No. 129X), the petition for exemption is granted.

34. In Docket Nos. AB-3 (Sub-No. 130) and AB-8 (Sub-No. 38), the application is granted.

35. In Docket Nos. AB-3 (Sub-No. 131) and AB-8 (Sub-No. 37), the application is granted.

36. In Docket No. AB-3 (Sub-No. 132X), the notice is accepted.

37. In Docket No. AB-3 (Sub-No. 133X), the petition for exemption is granted, and an NITU is hereby issued.

38. In Docket No. AB-3 (Sub-No. 134X), the notice is accepted.

39. In Docket No. AB-8 (Sub-No. 36X), the petition for exemption is granted. In Docket No. AB-12 (Sub-No. 189X), the petition for exemption is granted in part (discontinuance authority is granted) and denied in part (abandonment authority is denied).

40. In Docket No. AB-8 (Sub-No. 39), the application is granted. In Docket No. AB-12 (Sub-No. 188), the application is granted in part (discontinuance authority is granted) and denied in part (abandonment authority is denied).

41. In Docket No. AB-12 (Sub-No. 184X), the petition for exemption is granted, and an NITU is hereby issued.

42. In Docket No. AB-12 (Sub-No. 185X), the petition for exemption is granted.

43. In Docket No. AB-12 (Sub-No. 187X), the notice is accepted.

44. In Docket No. AB-33 (Sub-No. 93X), the notice is accepted.

45. In Docket No. AB-33 (Sub-No. 94X), the notice is accepted.

46. In Docket No. AB-33 (Sub-No. 96), the application is granted.

47. In Docket No. AB-33 (Sub-No. 97X), the notice is accepted, and an NITU is hereby issued.

48. In Docket No. AB-33 (Sub-No. 98X), the petition for exemption is granted, and an NITU is hereby issued.

49. In Docket No. AB-33 (Sub-No. 99X), the notice is accepted, and an NITU is hereby issued.

50. In Docket Nos. AB-3 (Sub-Nos. 132X and 134X), AB-12 (Sub-No. 187X), and AB-33 (Sub-Nos. 93X, 94X, 97X, and 99X), notice will be published in the *Federal Register* on August 12, 1996. In these proceedings:

> (a) Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, the exemptions will be effective on September 11, 1996, unless stayed pending reconsideration.
> (b) Petitions to stay, formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2), and trail use/rail banking requests under 49 CFR 1152.29[299] must be filed by August 22, 1996.
> (c) Petitions to reopen must be filed by September 3, 1996. Except in Docket No. AB-33 (Sub-Nos. 94X, 97X, and 99X), requests for public use conditions must be filed by September 3, 1996.
> (d) In Docket Nos. AB-33 (Sub-Nos. 94X, 97X, and 99X), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 180 days from the effective date of this decision to enable any state or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use.
> (e) In Docket Nos. AB-3 (Sub-No. 134X) and AB-12 (Sub-No. 187X), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 90 days from the effective date of this decision to enable any state or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use.

51. In Docket Nos. AB-3 (Sub-Nos. 129X and 133X), AB-8 (Sub-No. 36X), AB-12 (Sub-Nos. 184X, 185X, and 189X), and AB-33 (Sub-No. 98X),

---

[299] The Board will accept late-filed trail use requests so long as the abandonment has not been consummated and the abandoning railroad is willing to negotiate an agreement.

notice will be published in the *Federal Register* on August 12, 1996. In these proceedings:

(a) Provided no formal expression of intent to file an OFA has been received, the exemptions will be effective on September 11, 1996, unless stayed pending reconsideration.
(b) Petitions to stay, formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2), and [except in Docket Nos. AB-8 (Sub-No. 36X) and AB-12 (Sub-No. 189X)] trail use/rail banking requests under 49 CFR 1152.29[300] must be filed by August 22, 1996.
(c) Petitions to reopen must be filed by September 3, 1996. In Docket Nos. AB-3 (Sub-No. 129X) and AB-12 (Sub-No. 185X), requests for public use conditions must be filed by September 3, 1996.
(d) In Docket Nos. AB-3 (Sub-No. 133X), AB-12 (Sub-No. 184X), and AB-33 (Sub-No. 98X), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 180 days from the effective date of this decision to enable any State or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use.
(e) In Docket No. AB-12 (Sub-No. 185X), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 90 days from the effective date of this decision to enable any State or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use.

52. In Docket Nos. AB-3 (Sub-Nos. 130 and 131) and AB-33 (Sub-No. 96), notice of the findings made with respect to the abandonment authorizations sought therein will be published in the *Federal Register* on August 12, 1996. In these proceedings:

(a) An OFA to allow rail service to continue must be received by the railroad and the Board by August 22, 1996. The offeror must comply with 49 U.S.C. 10905 and 49 CFR 1152.27(c)(1).

---

[300] The Board will accept late-filed trail use requests so long as the abandonment has not been consummated and the abandoning railroad is willing to negotiate an agreement.

(b) OFAs and related correspondence to the Board must refer to the appropriate abandonment proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "OFFICE OF PROCEEDINGS, AB-OFA."

(c) Subject to any conditions set forth and provided no offer for continued rail operations is received, an appropriate certificate will be issued. An abandonment may not be effected prior to the effective date of the certificate.

(d) In Docket No. AB-33 (Sub-No. 96), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 180 days from the effective date of this decision to enable any State or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use.

(e) In Docket No. AB-3 (Sub-Nos. 130 and 131), requests for public use conditions must be filed by September 3, 1996.

53. In Docket Nos. AB-8 (Sub-Nos. 37, 38, and 39) and AB-12 (Sub-No. 188), notice of the findings made with respect to the discontinuance authorizations sought therein will be published in the *Federal Register* on August 12, 1996. In these proceedings:

(a) An OFA to allow rail service to continue must be received by the railroad and the Board by August 22, 1996. The offeror must comply with 49 U.S.C. 10905 and 49 CFR 1152.27(c)(1).

(b) OFAs and related correspondence to the Board must refer to the appropriate abandonment proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "OFFICE OF PROCEEDINGS, AB-OFA."

(c) Subject to any conditions set forth and provided no offer to subsidize continued rail operations is received, an appropriate certificate will be issued. Discontinuance may not be effected prior to the effective date of the certificate.

54. In Docket Nos. AB-3 (Sub-No. 133X), AB-33 (Sub-Nos. 96, 97X, 98X, and 99X), and AB-12 (Sub-No. 184X), the exemption authority granted is subject to the additional condition that the carrier(s) comply with the following terms and conditions for implementing trail use/rail banking:

(a) If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full

responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad from any potential liability), and the payment of any and all taxes that may be levied or assessed against the right-of-way.

(b) Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

(c) If interim trail use is implemented, and subsequently the user intends to terminate trail use, the user must (i) send the Board a copy of the cover page of this decision and the page(s) containing this Ordering Paragraph 56, and (ii) request that Ordering Paragraph 56 be vacated in relevant part on a specified date.

(d) If an agreement for interim trail use/rail banking is reached by the 180th day after the date of service of this decision, interim trail use may be implemented. If no agreement is reached by that time, the carrier may fully abandon the line, provided any conditions imposed are met.

55. In Docket Nos. AB-3 (Sub-Nos. 130 and 131) and AB-33 (Sub-No. 96), subject to the conditions set forth above and provided no offer for continued rail operations is received, a CITU will be issued. Applicant may not effect abandonment and material salvage until permitted under the terms of the CITU.

56. Approval of the application in Finance Docket No. 32760 is subject to the labor protective conditions set out in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979).

57. The trackage rights exempted in Finance Docket No. 32760 (Sub-No. 1) are subject to the labor protective conditions set out in *Norfolk and Western Ry. Co.--Trackage Rights--BN,* 354 I.C.C. 605, 610-15 (1978), as modified in *Mendocino Coast Ry., Inc.--Lease and Operate,* 360 I.C.C. 653, 664 (1980).

58. The line sales exempted in Finance Docket No. 32760 (Sub-No. 2) are subject to the labor protective conditions set out in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979).

59. The terminal railroad control transactions exempted in Finance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6 and 7) are subject to the labor protective conditions set out in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979).

60. The trackage rights approved in Finance Docket No. 32760 (Sub-No. 13) are subject to the labor protective conditions set out in *Norfolk and Western Ry. Co.--Trackage Rights--BN,* 354 I.C.C. 605, 610-15 (1978), as modified in *Mendocino Coast Ry., Inc.--Lease and Operate,* 360 I.C.C. 653, 664 (1980).

61. The abandonments and discontinuances authorized in Docket Nos. AB-3 (Sub-Nos. 129X, 130, 131, 132X, 133X, and 134X), AB-8 (Sub-Nos. 36X, 37, 38, and 39), AB-12 (Sub-Nos. 184X, 185X, 187X, 188, and 189X), and AB-33 (Sub-Nos. 93X, 94X, 96, 97X, 98X, and 99X), are subject to the labor protective conditions set out in *Oregon Short Line R. Co.--Abandonment--Goshen,* 360 I.C.C. 91, 98-103 (1979).

62. Approval of the transactions authorized in the Finance Docket No. 32760 proceeding and in the various embraced proceedings are subject to the environmental mitigation conditions set forth in Appendix G.

63. All conditions that were requested by any party in the Finance Docket No. 32760 proceeding and/or in the various embraced proceedings but that have not been specifically approved in this decision are denied.

64. This decision shall be effective on September 11, 1996. (This decision will be served on August 12, 1996.)

65. With respect to the proceedings docketed in Finance Docket Nos. 32760 and 32760 (Sub-Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, and 17):

The requirement of an initial decision is waived pursuant to 49 U.S.C. 11345(f). The decisions embraced herein are final decisions within the meaning of 49 U.S.C. 10327. Any administrative appeal will be entertained only under 49 U.S.C. 10327(g), which permits appeal only on the basis of material error, new evidence, or substantially changed circumstances.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen. Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen commented with separate expressions.

APPENDIX A: EMBRACED PROCEEDINGS

This decision covers *both* the Finance Docket No. 32760 lead proceeding *and* the following embraced proceedings: 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. 3), *Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Alton & Southern Railway Company;* Finance Docket No. 32760 (Sub-No. 4), *Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Central California Traction Company*; Finance Docket No. 32760 (Sub-No. 5), *Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Ogden Union Railway & Depot Company*; Finance Docket No. 32760 (Sub-No. 6), *Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Terminal Railroad Company*; Finance Docket No. 32760 (Sub-No. 7), *Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Traction Company;* Finance Docket No. 32760 (Sub-No. 8), *Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Overnite Transportation Company, Southern Pacific Motor Trucking Company, and Pacific Motor Transport Company*; Finance Docket No. 32760 (Sub-No. 9), *Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Terminal Trackage Rights--Kansas City Southern Railway Company*; Docket No. AB-3 (Sub-No. 129X), *Missouri Pacific Railroad Company--Abandonment Exemption--Gurdon-Camden Line In Clark, Nevada, and Ouachita Counties, AR*; Docket No. AB-3 (Sub-No. 130), *Missouri Pacific Railroad Company--Abandonment--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO*; Docket No. AB-3 (Sub-No. 131), *Missouri Pacific Railroad Company--Abandonment--Hope-Bridgeport Line In Dickinson and Saline Counties, KS*; Docket No. AB-3 (Sub-No. 132X), *Missouri Pacific Railroad Company--Abandonment Exemption--Whitewater-Newton Line In Butler and Harvey Counties, KS;* Docket No. AB-3 (Sub-No. 133X), *Missouri Pacific Railroad Company--Abandonment Exemption--Iowa*

Junction-Manchester Line In Jefferson Davis and Calcasieu Parishes, LA; Docket No. AB-3 (Sub-No. 134X), *Missouri Pacific Railroad Company--Abandonment Exemption--Troup-Whitehouse Line In Smith County, TX;* Docket No. AB-8 (Sub-No. 36X), *The Denver and Rio Grande Western Railroad Company--Discontinuance Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO*; Docket No. AB-8 (Sub-No. 37), *The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Hope-Bridgeport Line In Dickinson and Saline Counties, KS;* Docket No. AB-8 (Sub-No. 38), *The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO*; Docket No. AB-8 (Sub-No. 39), *The Denver and Rio Grande Western Railroad Company--Discontinuance--Malta-Cañon City Line In Lake, Chaffee and Fremont Counties, CO*; Docket No. AB-12 (Sub-No. 184X), *Southern Pacific Transportation Company--Abandonment Exemption--Wendel-Alturas Line In Modoc and Lassen Counties, CA*; Docket No. AB-12 (Sub-No. 185X), *Southern Pacific Transportation Company--Abandonment Exemption--Suman-Bryan Line In Brazos and Robertson Counties, TX;* Docket No. AB-12 (Sub-No. 187X), *Southern Pacific Transportation Company--Abandonment Exemption--Seabrook-San Leon Line In Galveston and Harris Counties, TX;* Docket No. AB-12 (Sub-No. 188), *Southern Pacific Transportation Company--Abandonment--Malta-Cañon City Line In Lake, Chafee, and Fremont Counties, CO*; Docket No. AB-12 (Sub-No. 189X), *Southern Pacific Transportation Company--Abandonment Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO;* Docket No. AB-33 (Sub-No. 93X), *Union Pacific Railroad Company--Abandonment Exemption--Whittier Junction-Colima Junction Line In Los Angeles County, CA;* Docket No. AB-33 (Sub-No. 94X), *Union Pacific Railroad Company--Abandonment Exemption--Magnolia Tower-Melrose Line In Alameda County, CA*; Docket No. AB-33 (Sub-No. 96), *Union Pacific Railroad Company--Abandonment--Barr-Girard Line In Menard, Sangamon, and Macoupin Counties, IL*; Docket No. AB-33 (Sub-No. 97X), *Union Pacific Railroad Company--Abandonment Exemption--DeCamp-Edwardsville Line In Madison County, IL*; Docket No. AB-33 (Sub-No. 98X), *Union Pacific Railroad Company--Abandonment Exemption--Edwardsville-Madison Line In Madison County, IL*; Docket No. AB-33 (Sub-No. 99X), *Union Pacific Railroad Company--Abandonment Exemption--Little Mountain Jct.-Little Mountain Line In Box Elder and Weber Counties, UT*; Finance Docket No. 32760 (Sub-No. 10), *Responsive Application--Capital Metropolitan Transportation Authority;* Finance Docket No. 32760 (Sub-No. 11), *Responsive Application--Montana Rail Link, Inc.;* Finance Docket No. 32760 (Sub-No. 12), *Responsive Application--Entergy Services, Inc., Arkansas Power & Light Company, and Gulf States Utility Company;* Finance Docket No. 32760 (Sub-No. 13), *Responsive Application--The Texas Mexican Railway Company;* Finance Docket No. 32760 (Sub-No. 14), *Application for Terminal Trackage Rights Over Lines of The Houston Belt & Terminal Railway Company--The Texas Mexican Railway Company*; Finance Docket No. 32760 (Sub-No. 15), *Responsive Application--Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd.*;[301] Finance Docket No. 32760 (Sub-No. 16), *Responsive Application--Wisconsin Electric Power Company*; and Finance Docket No. 32760 (Sub-No. 17), *Responsive Application--Magma Copper Company, The Magma Arizona Railroad Company, and The San Manuel Arizona Railroad Company.*

---

[301] In Decision No. 29 (served April 12, 1996), the responsive application filed by Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd. was rejected as incomplete.

APPENDIX B: ABBREVIATIONS

A&S	The Alton & Southern Railway Company
AAR	Association of American Railroads
ACC	Arizona Chemical Company
Acquisition	UP Acquisition Corporation
AEPCO	Arizona Electric Power Cooperative
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
AGNC	Associated Governments of Northwest Colorado
ALK	ALK Associates, Inc.
AP&L	Arkansas Power & Light Company
ARU	Allied Rail Unions
ASARCO	ASARCO Incorporated
ATDD	American Train Dispatchers Department, BLE
AUNW	Austin Railroad Company, d/b/a Austin Northwest Railroad
BC Rail	BC Rail Ltd.
BCI	Brandt Consolidated, Inc.
BEA	Business Economic Area
BLE	Brotherhood of Locomotive Engineers
BMWE	Brotherhood of Maintenance of Way Employees
BN	Burlington Northern Railroad Company
BNSF	BN and SF
Board	Surface Transportation Board
BRGI	The Brownsville and Rio Grande International Railroad
BRS	Brotherhood of Railroad Signalmen
Cargill	Cargill, Incorporated
CBA	Collective Bargaining Agreement
CBRY	Copper Basin Railway Company
CC&P	Chicago Central & Pacific Railroad Company
CCRT	Coalition for Competitive Rail Transportation
CCT	Central California Traction Company
CDPHE	Colorado Department of Public Health and Environment
Cen-Tex	Cen-Tex Rail Link, Ltd., and South Orient
CIC	Champion International Corporation
CIPSC	Central Illinois Public Service Company
CITU	Certificate of Interim Trail Use or Abandonment
CMA	Chemical Manufacturers Association
CMTA	Capital Metropolitan Transportation Authority
CMW	Chicago, Missouri & Western Railway Company
CN	Canadian National
CNW	Chicago and North Western Railway Company
CNWT	Chicago and North Western Transportation Company
CO&PR	Central Oregon and Pacific Railroad
COFC	Container-on-flatcar
COGA	COGA Industries, L.L.C.
Conrail	Consolidated Rail Corporation
CP	Canadian Pacific Limited
CP&L	Central Power & Light Company
CPSB	City Public Service Board of San Antonio

CPUC ..... Public Utilities Commission of the State of California
CRA ..... The Corn Refiners Association, Inc.
CRD ..... Crop Reporting District
CSX ..... CSX Corporation, CSX Transportation, Inc., CSX Intermodal, Inc., and Sea-Land Service, Inc.
CTC ..... Centralized Traffic Control
CWAC ..... Colorado Wheat Administrative Committee
DM&E ..... Dakota, Minnesota & Eastern Railroad Corporation
DOD ..... United States Department of Defense
DOL ..... United States Department of Labor
DOJ ..... United States Department of Justice
DOT ..... United States Department of Transportation
Dow ..... The Dow Chemical Company
DRGW ..... The Denver and Rio Grande Western Railroad Company
EA ..... Environmental Assessment
EBT ..... The Enid Board of Trade
EDC ..... Economic Development Council for Greater Springfield
EJE ..... Elgin, Joliet and Eastern Railway
EIS ..... Environmental Impact Statement
Entergy ..... ESI, AP&L, and GSU
EPA ..... United States Environmental Protection Agency
EPA Region VIII ..... United States Environmental Protection Agency, Region VIII
EPC ..... Enterprise Products Company
ESI ..... Entergy Services, Inc.
FCP ..... Ferrocarriles Nacionales de Mexico - Region Pacifico
FEAM ..... Farmers Elevator Association of Minnesota
FERC ..... Federal Energy Regulatory Commission
FNM ..... Ferrocarriles Nacionale de Mexico
FPC ..... Formosa Plastics Corporation, USA
FPP ..... Fayette Power Project
FRA ..... Federal Railroad Administration
Freeman ..... Freeman United Coal Mining Company
FTC ..... Federal Trade Commission
Geon ..... The Geon Company
GNBC ..... Grainbelt Corporation
GSU ..... Gulf States Utilities Company
GTRR ..... Georgetown Railroad Company
GTW ..... Grand Trunk Western Railroad
GWWR ..... Gateway Western Railway Company
HB&T ..... Houston Belt & Terminal Railway
HC ..... Huntsman Corporation
HCC ..... Hoisington Chamber of Commerce
HCJDC ..... Harvey County Jobs Development Council, Inc.
HHI ..... Herfindahl-Hirschman Index
Ia/DOT ..... Iowa Department of Transportation
IBC/IWC ..... Idaho Barley Commission/Idaho Wheat Commission
IBP ..... IBP, Inc.
IBT ..... International Brotherhood of Teamsters

IC ..... Illinois Central Railroad Company
ICC ..... Interstate Commerce Commission
ICTF ..... Intermodal Container Transfer Facility
IDPC ..... Idaho Power Company
IES ..... IES Utilities
ILP ..... Illinois Power Company
IPA ..... Intermountain Power Agency
IPC ..... The International Paper Company
ISRI ..... The Institute of Scrap Recycling Industries, Inc.
IUDA ..... Industry Urban-Development Agency
JIT ..... Joint Intermodal Terminal
JSC ..... Joint Shippers Coalition
Ka/DOT ..... Kansas Department of Transportation
Kal Kan ..... Kal Kan Foods, Inc.
KCOSA ..... Kansas-Colorado-Oklahoma Shippers Association
KCS ..... The Kansas City Southern Railway Company
KCSI ..... Kansas City Southern Industries, Inc.
KJRY ..... Keokuk Junction Railway
L&D ..... Louisiana and Delta Railroad
LCRA/Austin ..... Lower Colorado River Authority and the City of Austin, TX
Longhorn ..... Central of Tennessee Railway & Navigation Company Incorporated, d/b/a Longhorn Railway Company
LP&N ..... Longview, Portland & Northern Railroad
MAA ..... Magma Arizona Railroad Company
Mars ..... Mars, Incorporated
MCC ..... Magma Copper Company
MCT ..... Madison County Transit
MFU ..... Montana Farmers Union
MKT ..... Missouri-Kansas-Texas Railroad Company
Mn/DOT ..... Minnesota Department of Transportation
Monsanto ..... Monsanto Company
Montell ..... Montell USA Inc.
MP ..... Milepost
MPCSC ..... Mountain-Plains Communities & Shippers Coalition
MPRR, MP ..... Missouri Pacific Railroad Company
MRL ..... Montana Rail Link, Inc.
MRLAC ..... MRL's Acquisition Company
MWBC ..... Montana Wheat and Barley Committee
NAFTA ..... North American Free Trade Agreement
NALS ..... North American Logistic Services
NCGA ..... National Corn Growers Association
NCRA ..... North Coast Railroad Authority
NEPA ..... National Environmental Policy Act
NITL ..... The National Industrial Transportation League
NITU ..... Notice of Interim Trail Use or Abandonment
NS ..... Norfolk Southern Corporation
NVS ..... North Valmy Station
OFA ..... Offer of Financial Assistance
OKT ..... Oklahoma-Kansas-Texas Railroad Company

Olin ..... Olin Corporation
Or/DOT ..... Oregon Department of Transportation
OSM ..... Oregon Steel Mills
OURD ..... The Ogden Union Railway & Depot Company
Overnite ..... Overnite Transportation Company
PE ..... Polyethylene
PMT ..... Pacific Motor Transport Company
Post EA ..... Post Environmental Assessment
PP ..... Polypropylene
PPG ..... PPG Industries, Inc.
PRA ..... Proportional Rate Agreement
PRB ..... Powder River Basin
PRC ..... Pioneer Railcorp
PSCN ..... Public Service Commission of the State of Nevada
PSCo ..... Public Service Company of Colorado
PTRA ..... Port Terminal Railway Association
PTRC ..... Portland Traction Company
PTRR ..... Portland Terminal Railroad Company
QCC ..... Quantum Chemical Corporation
RCAF ..... Rail Cost Adjustment Factor
RCT ..... Railroad Commission of Texas
Rio Bravo ..... Rio Bravo Poso and Rio Bravo Jasmin
RLA ..... Railway Labor Act
Rock Island ..... Chicago, Rock Island and Pacific Railroad Company
ROI ..... Return on Investment
RTC ..... Rails to Trails Conservancy
SCC ..... Shell Chemical Company
SCRRA ..... Southern California Regional Rail Authority
SDIV ..... San Diego & Imperial Valley Railroad
SEA ..... Section of Environmental Analysis
SF ..... The Atchison, Topeka and Santa Fe Railway Company
SFETF ..... Serenata Farms Equestrian Therapy Foundation
SIT ..... Storage-In-Transit
SLC ..... Stimson Lumber Company
SMA ..... San Manuel Arizona Railroad Company
Soo ..... Soo Line Railroad Company
Southern Pacific ..... SPR, SPT, SSW, SPCSL, and DRGW
SP ..... SPT, SSW, SPCSL, and DRGW
SpPl ..... Springfield Plastics, Inc.
SPBC ..... Springfield Plastics, Inc. and Brandt Consolidated, Inc.
SPCSL ..... SPCSL Corp.
SPI ..... The Society of the Plastics Industry, Inc.
SPLC ..... Standard Point Location Code
SPMT ..... Southern Pacific Motor Trucking Company
SPP ..... Sierra Pacific Power Company
SPP/IDPC ..... SPP and IDPC
SPR ..... Southern Pacific Rail Corporation
SPRB ..... Southern Powder River Basin

SPT	Southern Pacific Transportation Company
SSACC	South San Antonio Chamber of Commerce
SSW	St. Louis Southwestern Railway Company
STB	Surface Transportation Board
STCC	Standard Transportation Commodity Code
STRICT	Save the Rock Island Committee, Inc.
TCSC	Texas Crushed Stone Company
TCU	Transportation•Communications International Union
Tex Mex	The Texas Mexican Railway Company
TMM	Transportation Maritima Mexicana
TOFC	Trailer-on-flatcar
TP&W	Toledo, Peoria & Western Railway Corporation
TRA	Trackage Rights Agreement
TTD	Transportation Trades Department, AFL-CIO
TUE	Texas Utilities Electric Company
TUMC	Texas Utilities Mining Company
UCC	Union Carbide Corporation
Union Pacific	UPC, UPRR, and MPRR
UP	UPRR and MPRR
UPC	Union Pacific Corporation
UPMF	Union Pacific Motor Freight Corporation
UPRR, UP	Union Pacific Railroad Company
URC	Utah Railway Company
URCS	Uniform Railroad Costing System
USDA	United States Department of Agriculture
USG	United States Gypsum Company
UTU	United Transportation Union
Viacom	Viacom International Inc.
WC	Wisconsin Central Ltd.
WCTL	The Western Coal Traffic League
WEPCO	Wisconsin Electric Power Company
Weyerhaeuser	Weyerhaeuser Company
WIFE	Women Involved in Farm Economics
WLPRR	Willamette Pacific Railroad
WP&L	Wisconsin Power & Light Company
WPRR, WP	The Western Pacific Railroad Company
WPS	Wisconsin Public Service Corporation
WSC	Western Shippers Coalition
WT&J	Wichita, Tillman & Jackson Railway
WVRR	Willamette Valley Railroad
Yolo	Yolo Shortline Railroad Company

APPENDIX C: SUB-NO. 1 TRACKAGE RIGHTS

The trackage rights provided for in the BNSF agreement (not including the additional trackage rights provided for in the CMA agreement) are covered by the notice of exemption filed in Finance Docket No. 32760 (Sub-No. 1), and are divided into six categories: Western Trackage Rights; South Texas Trackage Rights; Eastern Texas/Louisiana Trackage Rights; Houston, TX, to Memphis, TN, Trackage Rights; St. Louis Area Coordinations; and Trackage Rights Grants to UP/SP.

Western Trackage Rights. BNSF will receive trackage rights over UP: between Salt Lake City, UT, and Ogden, UT; between Salt Lake City, UT, and Alazon, NV; between Alazon, NV, and Weso, NV; between Weso, NV, and Stockton, CA; between Riverside, CA, and Ontario, CA; and between Basta, CA, and Fullerton and La Habra, CA. BNSF will receive trackage rights over SP: between Denver, CO, and Salt Lake City, UT; between Ogden, UT, and Little Mountain, UT; between Alazon, NV, and Weso, NV; between Weso, NV, and Oakland, CA (via the "Cal-P" line between Sacramento and Oakland); and between Oakland, CA, and San Jose, CA. The trackage rights specified in this paragraph are bridge rights for the movement of overhead traffic only, except for local access to industries served by UP and SP and no other railroad at the following points: Provo, UT; Salt Lake City, UT; Ogden, UT; Ironton, UT; Gatex, UT; Pioneer, UT; Garfield/Smelter/Magna, UT (access to Kennecott private railway); Geneva, UT; Clearfield, UT; Woods Cross, UT; Relico, UT; Evona, UT; Little Mountain, UT; Weber Industrial Park, UT; points on paired track between Weso, NV, and Alazon, NV; Reno, NV (intermodal and automotive only); Herlong, CA; Johnson Industrial Park at Sacramento, CA; Farmers Rice at West Sacramento, CA; Port of Sacramento, CA; points between Oakland, CA, and San Jose, CA (including Warm Springs, CA, Fremont, CA, Shinn, CA, Elmhurst, CA, Kohler, CA, and Melrose, CA); San Jose, CA; Ontario, CA; La Habra, CA; Fullerton, CA; and access to the Oakland Joint Intermodal Terminal (JIT), or similar public intermodal facility, at such time as the JIT is built.

South Texas Trackage Rights. BNSF will receive trackage rights over UP: between Ajax, TX, and San Antonio, TX; between Houston (Algoa), TX, and Brownsville, TX; between Odem, TX, and Corpus Christi, TX; between Ajax, TX, and Sealy, TX; between Kerr, TX, and Taylor, TX; between Temple, TX, and Waco, TX; between Temple, TX, and Taylor, TX; and between Taylor, TX, and Smithville, TX. BNSF will receive trackage rights over SP: between San Antonio, TX, and Eagle Pass, TX; and between El Paso, TX, and Sierra Blanca, TX. The trackage rights specified in this paragraph are bridge rights for the movement of overhead traffic only, except for local access to industries served by UP and SP and no other railroad at the following points: Brownsville, TX; Port of Brownsville, TX; Harlingen, TX; Corpus Christi, TX; Port of Corpus Christi, TX; Sinton, TX; San Antonio, TX; Halsted, TX (LCRA plant); Waco, TX; and points on the Sierra Blanca, TX - El Paso, TX, line.

Eastern Texas/Louisiana Trackage Rights. BNSF will receive trackage rights over UP: between Avondale, LA, and West Bridge Jct., LA; and between West Bridge Jct., LA (MP 10.2), and the Westwego, LA, intermodal facility (MP 9.2). BNSF will receive trackage rights over SP: between Houston, TX, and Iowa Jct., LA; between Dayton, TX, and Baytown, TX; between Avondale, LA (MP 16.9), and West Bridge Jct., LA (MP 10.5); and over Bridge No. 5-A at Houston, TX. The trackage rights specified in this paragraph are bridge rights for the movement of overhead traffic only, except for local access to industries served by UP and SP and no other

railroad[302] at the following points: Baytown, TX; Amelia, TX; Orange, TX; Mont Belvieu, TX (Amoco, Exxon, and Chevron plants); Eldon, TX (Bayer plant); and Harbor, LA.

Houston, TX, to Memphis, TN, Trackage Rights. BNSF will receive trackage rights over UP: between Fair Oaks, AR, and Bridge Jct., AR; and between North Little Rock, AR, and Pine Bluff, AR. BNSF will receive trackage rights over SP: between Houston, TX, and Fair Oaks, AR (via Cleveland, TX, and Pine Bluff, AR); and between Brinkley, AR, and Briark, AR. The trackage rights specified in this paragraph are bridge rights for the movement of overhead traffic only, except for local access to industries served by UP and SP and no other railroad[303] at the following points: Camden, AR; Pine Bluff, AR; Fair Oaks, AR; Baldwin, AR; Little Rock, AR; North Little Rock, AR; East Little Rock, AR; and Forrest City, AR.

St. Louis Area Coordinations. BNSF will receive overhead trackage rights over UP in St. Louis, MO (between Grand Avenue and Gratiot Street).

Trackage Rights Grants to UP/SP. UP/SP will receive trackage rights over BNSF: between Chemult, OR, and Bend, OR (overhead rights only); between Barstow, CA, and Mojave, CA (overhead rights only); between West Memphis-Presley Jct., AR (overhead rights only); between Saunders, WI, and Superior, WI (overhead rights only, with access to MERC Dock in Superior); and over the Pokegama connection at Saunders, WI (*i.e.*, the southwest quadrant connection at Saunders, including the track between BN MP's 10.43 and 11.14). UP/SP will retain trackage rights over BNSF: at Keddie, CA (MP 0 to MP 2; to turn equipment; UP/SP will retain trackage rights between these mileposts over the Bieber-Keddie Line to be sold to BNSF); between Dallas, TX, and Waxahachie, TX (overhead rights and exclusive right to serve local industries; UP/SP will retain trackage rights after sale of the Dallas Line to BNSF); and between Iowa Jct., LA, and Avondale, LA (overhead rights and the right to serve all local industries, with right for Louisiana and Delta Railroad to serve as UP/SP's agent between Iowa Jct. and points served by L&D; UP/SP will retain trackage rights after sale of the Avondale Line to BNSF).

---

[302] As respects the Eastern Texas/Louisiana trackage rights, the Sub-No. 1 notice filed by applicants refers to "local access to industries served by *UP/SP* and no other railroad," *see, UP/SP*-26 at 004-005 and 060-061 (italics added). The context, however, indicates, and all concerned have understood, that the reference was intended to be to local access to industries served by *UP and SP* and no other railroad, *see, e.g.*, *UP/SP*-22 at 325.

[303] As respects the Houston, TX, to Memphis, TN, trackage rights, the Sub-No. 1 notice filed by applicants refers to "local access to industries served by *UP/SP* and no other railroad," *see,* UP/SP-26 at 005 and 061 (italics added). The context, however, indicates, and all concerned have understood, that the reference was intended to be to local access to industries served by *UP and SP* and no other railroad, *see, e.g.*, *UP/SP*-22 at 327.

APPENDIX D: DETAILS OF PUBLIC BENEFITS

Summary. As explained below, the merger will result in clear transportation benefits that will ensure competitive rail service for commodities that are sensitive to intermodal competition, and improved service to all the commodities affected by the merger.

1. IMPROVED ROUTINGS:

California-Dallas-Memphis. UP/SP will be able to assemble segments of UP and SP lines via El Paso to create the shortest route from Los Angeles to Memphis, as well as fully competitive routes from Oakland and Stockton to the South Central region, in competition with BNSF, which previously had the best routes in those corridors.

Northern California-Midwest. SP has the most direct route between Northern California and Ogden, UT, while UP has the most direct routes from Ogden to the Midwest. The merged system will assemble these segments into a through route 180 miles shorter than either existing route, permitting UP/SP to match BNSF's now-dominant intermodal service.

BNSF will gain a new trunk line traversing the Central Corridor between Northern California and Denver, providing access to western natural resources industries and shippers to and from Nevada and Utah, and routing flexibility for intermodal and other traffic between California and the Midwest.

Southern California-Midwest. The merger will make SP's route between Southern California and the Midwest more competitive. Between Los Angeles and El Paso, SP's current route is severely congested, and SP has not been able to provide adequate capacity to meet its shippers' needs. From El Paso into Kansas, SP's route lacks Centralized Traffic Control and adequate sidings. To upgrade the entire route, UP/SP will spend more than $360 million--funds that SP has not generated, and cannot generate, on its own.

Pacific Northwest-Texas. BNSF now has the only direct route between the Pacific Northwest and Texas. The merged carrier will link the UP and SP route networks in Texas with SP's route from Ft. Worth to Denver and UP's routes from Denver to Utah, Idaho, Montana, Oregon and Washington. This will make UP/SP a real competitor for this traffic and provide entirely new single-line services to shippers in the Intermountain West.

Colorado/Utah Coal Route. SP carries growing volumes of coal from Colorado and Utah to the Midwest on two alternate circuitous routes. One route climbs Tennessee Pass, the nation's steepest main line grade, while the other uses a crowded joint line with BNSF along the Front Range of the Rockies. Both routes require helper locomotives. UP/SP will be able to reroute this traffic directly east from Denver to Kansas City.

Kansas City Bypass. UP currently must handle increasing volumes of PRB coal and heavy grain unit trains through the congested Kansas City terminal area. By using an SP line in Central Kansas and upgrading UP's OKT line from north of Wichita to Ft. Worth, UP/SP can reroute this traffic out of Kansas City and speed shipments, not only for coal and grain shippers, but also for other shippers now using the Kansas City gateway.

California-Laredo. Trade between California and Mexico offers great promise under NAFTA. UP's route from California to Laredo, the premier Mexican gateway, via Utah and Wyoming can be reduced by 1,000 miles. SP does not reach Laredo and had tried, ineffectively, to move intermodal traffic by truck from San Antonio. The merger will permit UP/SP to link SP's line from Los Angeles to San Antonio with UP's line to Laredo, providing a very efficient route for this growing business.

2. EXPANDED SINGLE-LINE SERVICE:

Canada/Pacific Northwest-California/Mexico. Western Canada will receive much-improved rail links with the United States and Mexico. Substantial parts of the Pacific Northwest, including

Seattle/Tacoma and the Vancouver/Alberta Canadian gateways, have never been connected to California by a direct single-line rail route. The merger and BNSF agreement will create both a UP/SP through route and a BNSF through route in the I-5 Corridor, offering new rail options to shippers and a competitive alternative to water and truck transportation.

UP/SP will offer new single-line service between many UP points in the Northwest and many UP and SP points throughout California, Arizona, New Mexico, and West Texas (including the Mexican gateways of Calexico, Nogales, and El Paso). Eastbound traffic will also gain a shorter route, via Colorado and the Texas Panhandle, to Dallas, Houston and New Orleans. BNSF will have new single-line routes from the Vancouver and Sumas gateways to California, the Southwest, and the San Diego and El Paso gateways to Mexico.

Competition will also be stronger for traffic moving in interchange with CN via Duluth/Superior and CP via the Twin Cities because all SP points will now be accessible on a single-line basis from those interchanges.

California-Gulf Coast-Midwest. As a result of this merger, California will be connected to the New Orleans gateway and large parts of the Texas Gulf Coast by a second single-line rail route, as BNSF will gain its own line to New Orleans and access to Corpus Christi, Brownsville, and numerous competitive points along the Texas coast.

BNSF also will gain direct routes between Houston and Memphis and Houston and East St. Louis. These routes, which will link with existing routes in the South Central United States, will make BNSF better able to compete for Gulf Coast petrochemical shipments to the Midwest and Northeast. BNSF will also have extensive new access to customers in Arkansas.

Mexican Gateways. (Brownsville, Eagle Pass, Laredo, El Paso, Nogales, and Calexico). Laredo is the premier Eastern Mexico gateway because of its excellent infrastructure and customs facilities. Shippers will gain single-line access between Laredo and SP points. Shippers will have access also to the new Tex Mex trackage rights connection with KCS at Beaumont, TX, and to BNSF as a replacement for SP for Laredo traffic routed over Tex Mex. There will also be new single-line intermodal and carload service between Laredo and the West Coast. Shippers via El Paso will have two strengthened rail alternatives, with UP/SP and BNSF single-line service to the Pacific Northwest and Western Canada, upgrading of the SP lines west to Colton and northeast to Kansas City, new BNSF single-line service to New Orleans, and shorter routes for Southern Idaho grain, Wyoming soda ash and other products. Finally, shippers via the Western Mexico gateways that are solely served by SP--Nogales and Calexico--will gain single-line access to hundreds of UP points, including Midwest grain origins, Pacific Northwest points and Canada gateways.

BNSF will also gain trackage rights access to Brownsville, and shippers will gain single-line access to BNSF points via that gateway, rather than having single-line access only to UP and SP points. At Eagle Pass, the settlement will convert BNSF's access from haulage via a Caldwell junction to more direct trackage rights, efficiently linking Eagle Pass with all points on the BNSF system, including New Orleans. BNSF will also serve San Antonio en route to Eagle Pass, which will allow it to mount a more effective operation.

3. EXPANDED MARKET COVERAGE

The expanded coverage that common control promises will have numerous beneficial impacts.

International Markets. The UP/SP merger transaction will foster the goal of North American economic integration embodied in the NAFTA agreement by greatly strengthening competition for traffic to and from both Canada and Mexico. The proportional rate arrangement will allow UP/SP to compete via Portland for traffic to and from BNSF's Western Canada gateways, including lumber originating on BC Rail and Alberta grain and chemicals originating on CN. There will be stronger rail competition at every UP and SP gateway to Mexico as a result of the merger and the BNSF agreement, and the Tex Mex trackage rights we have imposed. Overall, BNSF's much-expanded access to Mexico, as well as within Texas and at New Orleans, will bring greater balance to the

competition for Mexican rail traffic, which at present is largely handled by SP to and from points to the west and UP to and from points to the north and east.

The more efficient Mexican routings for both UP/SP and BNSF will help improve the rail share of traffic to and from Mexico. Today, trucks dominate this traffic. Even at Laredo, the most efficient Mexican rail gateway, trucks handle approximately 86% of the cross-border traffic. Upgrading the Southern Corridor lines, instituting new Laredo-California intermodal service, and greatly improving the efficiency of operations in the Laredo-Memphis-St. Louis-Chicago corridor will give rail a much better ability to capture a larger share of this market.

Intermodal. The merger and the BNSF agreement will create competitive benefits for intermodal shippers: third-morning services that will for the first time challenge BNSF's dominance in the Midwest-California markets; the ability of both UP/SP and BNSF to link all the West Coast ports with short, fast routes to all the midcontinent gateways from Chicago to New Orleans; construction of a new Inland Empire terminal east of Los Angeles; two new, truck-competitive, single-line services in the I-5 Corridor from Seattle/Tacoma to Los Angeles, where none exists now; new Pacific Northwest-Phoenix-El Paso-Texas service, made possible in part by the ability to support train connections at the new Inland Empire terminal near Colton rather than at Los Angeles; better terminal access for UP/SP in Chicago, Portland and Seattle, and for BNSF in Oakland and Los Angeles; better equipment availability, thanks to new repositioning capability and other efficiencies; new California-Laredo service; much-improved Twin Cities-Kansas City-Texas service; new Upper Midwest-Phoenix service; faster and more frequent Los Angeles-Dallas and Los Angeles-Memphis service; higher-quality service in many lanes as a result of combining and improving UP and SP terminals; and improved schedules, train frequency, and reliability in virtually every rail corridor in the West.

Intermodal is perhaps the area where BN and SF gained their greatest competitive advantage by merging, and where a UP/SP merger is most needed to meet the competitive challenge of the new BNSF system. By merging, BNSF created a rail system that serves all major West Coast ports, with superior service to Chicago, Kansas City, St. Louis, Memphis, Dallas and Houston, new single-line service to Birmingham, outstanding terminals at all of those points (*e.g.*, the new SF Alliance terminal near Dallas/Fort Worth), and the financial strength to invest in further technological and service improvements.

SP is especially vulnerable in this area. Because of its service weaknesses, it has been unable to compete for high-end transcontinental intermodal traffic. In part because of the advantageous location of its ICTF facility in Los Angeles, SP has held on to a large share of its international container business, particularly in the Southern Corridor, but now major shipping companies have created, or are in the process of creating, on-dock loading capability at the Ports of Los Angeles and Long Beach, which will undercut the advantage that the well-located, state-of-the-art ICTF facility has conferred on SP since it opened in 1984.

Food Products. Competition will be stronger for food products shipments throughout the West. California and Pacific Northwest perishables, frozen foods, canned goods and other food products will move over shorter, faster routes to the Midwest, and on new north-south single-line routes in the I-5 Corridor. Equipment supply, which is crucial to food products shippers, will be greatly improved. With the rectification of SP's inadequate service and the institution of new carload train services such as a new direct Roseville-Chicago carload train and a second daily North Platte-Conrail run-through train, large volumes of food products will return to boxcar handling on the merged system. Upper Midwest food products producers will gain single-line access to SP markets in the West and Southwest, and to additional Mexican gateways. And, BNSF, which is already a very strong competitor for this traffic, will be even stronger after the settlement, with new I-5 and Central Corridor routes.

Forest Products. Lumber and wood products originate primarily in the Pacific Northwest and Western Canada, and in the Southeast. Canadian products, handled to the Midwest by CN, CP and BNSF, have increasingly been eclipsing Pacific Northwest products. South Central and Southeastern output has also been making inroads against the Pacific Northwest. SP's service in Oregon and Northern California has deteriorated, and much SP volume has been lost to reload centers and trucks.

The merger will greatly benefit lumber and wood products producers. SP Pacific Northwest producers will gain much shorter routes to the Midwest and the South Central region, and single-line service to UP destinations in the Midwest and elsewhere. UP Pacific Northwest producers will gain new access to California and Arizona, a shorter route to Texas, Louisiana and Eastern Mexico, and single-line access to SP receivers. SP's poor service and equipment supply problems will be remedied, enabling lumber shippers to avoid the added expense of truck-rail reload programs. South Central and Southeastern producers will gain shorter routes to Southern California, better service in the Houston-Memphis-St. Louis-Chicago corridor, better equipment supply, and wider access to end markets. The BN/SF merger is further strengthening BNSF's already very strong position as a competitor for lumber and wood products traffic, and the efficiencies of the merged UP/SP will enable it to meet that competitive challenge.

There will be a similar enhancement of competition for paper and paper products traffic. New paper production tends to be concentrated in the South Central and Southeast regions (where KCS, IC and BNSF, among others, are strong competitors) and in the Upper Midwest and Canada. South Central and Southeastern paper mills will enjoy the same service and equipment benefits as lumber producers in those regions, and 2-to-1 mills will receive stronger competition from UP/SP and BNSF as a result of the settlement. Upper Midwest paper producers will have shorter, faster routes to Northern California and better service to the South Central region. Scrap paper moves in a variety of markets, and will benefit from the elimination of interchanges between UP and SP and better equipment supply.

Autos. Two decades ago, SP was the dominant automotive carrier in the West, with large volumes to Portland, the Bay Area, Los Angeles, Phoenix, and Texas, and direct service to and from four automobile assembly plants in California. Since then, SP has fallen to a very small share of western rail-handled auto movements (less than 10% of automotive business handled by western railroads in 1994) as a result of the closure of three of the four California plants, deregulation (which has allowed for more creative contracting by the auto companies), the general decline in SP's service levels, and its financial inability to make major investments in new auto facilities and auto-handling freight cars.

As in the intermodal arena, the UP/SP merger will create a real competitive contest of equals for automotive traffic, rather than one in which BNSF is dominant and SP is a weak third. UP/SP will be able to tie points such as Seattle and Phoenix into an efficient, comprehensive transportation network for auto shippers, as BNSF already can. Shorter routes and expanded single-line service will speed the handling of motor vehicles, yielding major savings in inventory and equipment costs. For example, UP/SP will run a new through 70-hour auto train from Chicago to the merged system's Milpitas facility in the Bay Area, with blocks of automobile-carrying freight cars for Denver, Salt Lake City, Martinez (to serve the Benicia facility) and Milpitas, and a similar through train from Kansas City to the Bay Area.

The upgrading of the Tucumcari line, and of the Colton-El Paso line, will make UP/SP more competitive in the key Kansas City-Los Angeles corridor, with new through auto trains both from Kansas City to Southern California and from Chicago to Southern California. There will also be dedicated auto trains from Dallas/Fort Worth to Conrail destinations; from Chicago to San Antonio, including Mexican business; and from GTW at Chicago to the major auto facilities at Reisor, Louisiana, and Arlington, Texas.

The merged system will be able to offer the combined strengths of UP's and SP's auto ramps, and will have the financial wherewithal to make improvements in those ramps and to invest in new ones. The merged system will be better able to invest in improved bi-level and other specialized cars, and to reduce shippers' equipment costs by improving cycle times and efficiently repositioning equipment. Service to and from Mexico, where many of the auto companies have located manufacturing facilities, will be improved and, under the BNSF agreement and Tex Mex trackage rights, competition for Mexican traffic will be strengthened. Shipper concerns about the quality of SP service will be overcome.

Chemicals/Plastics. The merger and the BNSF agreement will greatly increase UP/SP competitiveness for chemical and plastic traffic, both in the Gulf Coast and elsewhere, enhancing the position of UP/SP-served chemical and plastic producers in their end markets. A particular concentration of chemical and plastic production is on the Texas/Louisiana Gulf Coast, where UP and SP, as well as BNSF, KCS and IC, each serve numerous plants. Most of the Texas and Louisiana plants are located on water, and can and do use low-cost water transportation for their incoming and outgoing product in lieu of rail if rail is not fully competitive.

Both UP and SP producers will gain greatly improved operations, including new run-through operations to eastern roads in the Houston-Memphis-St. Louis-Chicago corridor, shorter routes to the Pacific Northwest, faster turn times on costly, shipper-owned equipment, and additional SIT yard opportunities. Gulf Coast shippers will save a day in transit time to and from both the Memphis/St. Louis/Chicago gateways and the West Coast. Also, under the BNSF agreement and additional conditions we have imposed, BNSF will be a much stronger competitor for Gulf Coast traffic with new access to major chemical and plastic plants at, among other locations, Mont Belvieu, Eldon, Bayport, Corpus Christi, Orange, and Amelia, TX, and Lake Charles, LA; new single-line access to New Orleans; a new direct route to Memphis; and shorter routes to the key gateways of St. Louis and Chicago.

Chemical producers elsewhere also will benefit competitively. For example, Wyoming soda ash producers will gain shorter routes to Northern California markets, Texas and Louisiana markets, and new single-line service to Arizona, New Mexico, SP-served Mexican gateways, and other SP destinations not served by UP.

Grain. UP is a major originator of wheat, corn, barley and other grains, whereas SP, which originates very little grain, serves major end markets for grain that UP cannot reach. Among these are the feeder markets in California's San Joaquin and Imperial Valleys, Arizona, the Texas Panhandle, and Mexico. BNSF is a major grain originator and serves all of these end markets. Thus, the merger will create new single-line service opportunities for UP grain producers and SP grain consumers, and will provide stronger competition to BNSF in grain markets it already serves on a single-line basis. The merger also will create a new capability to move 286,000-lb. cars of wheat and feed grains to Houston and other ports for export, another capability that BNSF already has.

Coal. The merger, by creating new single-line routing opportunities and operating efficiencies, will benefit producers and consumers of both the Utah and Colorado coals that SP originates and the PRB coal that UP originates.

Utah and Colorado coal will particularly benefit. Smoother operations in Utah and a direct single-line route to the Ports of Los Angeles and Long Beach will promote Utah and Colorado coal exports to Pacific Rim countries. There will also be a much shorter single-line route from Utah to domestic coal users in Southern Nevada and Southern California. Single-line access to UP-served consumers in the Midwest and South Central regions and to Mississippi River barge terminals will promote additional domestic and export opportunities. Handling of eastbound movements of Utah and Colorado coal via Denver, and thence on either UP's "KP" line across Kansas or the UP

mainline from North Platte to Chicago, will provide much better service than SP's current route via Pueblo, Topeka, and Kansas City, which is mountainous, slow, and congested. Also, coal producers on the URC will have access to BNSF, which will open up new domestic and export opportunities.

PRB coal users will benefit also from the new Kansas City bypass and from other efficiencies that will shorten cycle times and increase reliability.

Metals and Minerals. Metals and minerals producers throughout the West will enjoy more competitive rail service as a result of the merger. The Arizona and New Mexico copper industry will benefit from the upgrading of the Colton-El Paso and El Paso-Dallas lines and shorter routes to Memphis and the Southeast. The varied minerals producers in Wyoming, Utah and Nevada will benefit from improved operations of the merged system across the Central Corridor, and in other ways as well. Nevada barites producers and Utah and Nevada copper producers will be served by both UP/SP and BNSF, opening up new single-line opportunities for their production and inputs. Midwest steel producers will benefit from shorter routes to Northern California and improved service to the South Central region. Traders and consumers of metal scrap will gain a multiplicity of new single-line service opportunities. SP metals shippers will benefit from access to UP's gondola fleet. More metals and minerals will move at lower cost as a result of the merged system's expanded triangulation and backhaul opportunities.

APPENDIX E: DUOPOLY ISSUES

OVERVIEW

It is true that tacit collusion is more likely in two-firm markets, where one firm can anticipate the other's response, than in multi-firm markets. Multi-market contact, which will take place here, can also facilitate tacit collusion. Nevertheless, other important factors indicate that these carriers are more likely to compete than tacitly collude. One significant factor here is the heterogeneity of rail service,[304] which would make it very difficult to maintain a tacitly agreed rate level.

Another factor making tacit collusion unlikely is the secrecy about rail price and service offerings that now characterizes the rail industry. Contracts between railroads and shippers for major movements are now the rule, and railroads are no longer required to file public tariffs for the remainder of their traffic. Contracts often incorporate detailed specifications for a wide variety of service aspects. Confidentiality clauses in those contracts effectively deter collusive action because information about these competitive actions is shielded from competitors.[305]

The significant economies of density and of scope exhibited by railroads also make tacit collusion less likely. A given increment of traffic represents not only the contribution to be earned from that increment, but additional contribution on other traffic, whose average costs are reduced. These economies create strong incentives for railroads to compete for all profitable volumes, rather than tacitly agreeing to an above-market rate level that restricts service. Given all these factors, we do not think that tacit collusion is a likely outcome for this traffic.

We do not believe that trackage rights agreements tend to facilitate collusion either. Although the landlord is in a position to be somewhat better informed than it might otherwise be--it knows the tenant's capacity limitations and some elements of its cost structure, and it can more readily observe its market participation--trackage rights tenants and landlords do keep secret many aspects of service from each other in bidding for traffic. We do not believe that trackage rights, even on the scale involved here, will dampen competition.

EMPIRICAL RATE STUDIES

STUDIES AIMED AT MEASURING 3-TO-2 EFFECTS. Here we assess a number of studies submitted by parties and aimed at estimating whether shippers whose rail alternatives are reduced from three to two by this merger are likely to face increased rates. In general, the studies compare rates in markets served by three railroads with rates in markets served by two. One common problem with these studies is the use of a static context to project post-merger rate increases. Protestants' studies neglect to account for a key dynamic element of this merger, the dramatic cost reductions it will make possible. They generally fail to acknowledge that any limited ability this merger creates to raise rates over costs will be offset to the extent the merger results in significant

---

[304] Service dimensions include car types and supply, schedules, terminal support, and car repositioning for customers. The various dimensions of service constitute different avenues of response available to rivals, complicating any one firm's efforts at inflicting retaliatory losses on the other to enforce non-competitive rate levels.

[305] Indeed, this is the main reason for the protective orders that we have entered in this proceeding.

reductions in applicants' costs. Another dynamic element of this merger, the deteriorating condition of SP and the effect this has on rail pricing, is discussed in a separate section.

As we explain below, each study also suffers from specific infirmities. McDonald's study (for KCS) has limited utility because it is based solely on rail grain movements. Even for that commodity, certain data limitations have led to an upward bias in its 3-to-2 rate projections. Majure's study (for DOJ) updates certain of McDonald's results for western wheat originations. This study is so inherently flawed that it cannot be given much substantial weight. KCS witness Grimm's 1992 study does not present sufficient information for us to use its results to measure merger-related competitive harm in this proceeding. Further, it contains key findings that were recently rejected by the ICC in *BN/SF*, 10 I.C.C.2d at 751 n.94. And Kwoka's study (for Dow) must be given little weight because it is not based on rail industry data.

a. MACDONALD. KCS witness MacDonald analyzed rail movements of wheat, corn, and soybeans. His analysis resulted in estimates of rate differentials between markets served by three carriers and markets served by two carriers of 6.7% for corn, 10.9% for wheat, and intermediate results for soybeans. To put these numbers in perspective, we note that, even under DOJ's broad definition, there would be only $129 million of 3-to-2 wheat traffic, and $50 million of 3-to-2 corn traffic that could be affected by this merger.

MacDonald used 1983 ICC Waybill Sample data for one study, and 1981-85 data for another. The origin areas were Crop Reporting Districts (CRDs), criticized by applicants as unrealistically large. MacDonald's objective was to determine the statistical relationship between the number of origin rail carriers and rates. Another important feature of his analysis was the use of a variable representing distance from waterways.

MacDonald's use of the Waybill Sample was proper, despite strong criticism on this point from applicants.[306] Of somewhat greater concern is his use of CRDs, which may be so large that where MacDonald counts them as two railroad areas, they may be closer to one railroad area. This would tend toward overstatement of 3-to-2 effects.[307]

Another error that could result in overstatement of impacts on rates is his failure adequately to account for transit movements. In such movements, a first waybill is cut, based on a local rate that is normally relatively high on a per-mile basis, for the movement to the transit point. Because the destination has not yet been determined, it is impossible to determine what through rate might be applicable. When the grain is shipped from the transit point to its ultimate destination, the

[306] One charge was that MacDonald ignored this agency's guidelines respecting level of detail at which inferences can be drawn given sample variability. MacDonald replies, correctly, that his statistical analysis took proper cognizance of this in performing significance tests. The other was that waybill data mask true contract movement revenues. MacDonald not only replied, again correctly, that his data came from years when this was not a problem, but also performed special tests to verify lack of masking.

[307] An empirical analysis that overstates the geographic scope of rail markets understates the true level of concentration affecting rates. The way this bias affects estimates of rate changes in going from three to two railroads is as follows: the analysis classifies some markets as having three railroads when the underlying structure is that of two railroads; likewise, it classifies some markets as duopolies when the true underlying structure is monopoly. Then, rather than estimating the change from three to two railroads, as intended, the analysis actually measures a change from, say, 2.5 to 1.5 railroads. All the studies presented in this record indicate that 2-to-1 price effects are much larger than 3-to-2. For this reason, overstating the geographic scope of rail markets will tend to overstate 3-to-2 pricing effects.

movement is rebilled, usually at a lower rate per mile, as a through movement from origin to destination. When the second bill of lading is cut, only the transit balance, the difference between the original local rate and the ultimate through rate, is shown on the bill. This balance may be very low, and in some cases will be negative. And as applicants point out, there tend to be more railroads providing service associated with these movements from transit points, that are in turn attributed with deceptively low transit balance rates. The net effect is to accord too strong a rate effect to a reduction in the number of participating railroads. It also should be kept in mind that MacDonald's study is only useful for analyzing grain transportation markets.

b. MAJURE. Although Majure predicts more than $800 million of competitive harm from the merger, his study contains major conceptual errors that make it totally unreliable. Majure derives his estimate by predicting a 19.4% rate increase estimate for $1.5 billion of 2-to-1 traffic, and by predicting a 10.9% increase for $4.75 billion of 3-to-2 traffic. Even if we assume that those projected increases correctly predict the price effects of going from 2-to-1 and 3-to-2, and that DOJ has correctly measured the amount of 2-to-1 and 3-to-2 traffic at risk, there are still major problems with Majure's calculations. A basic flaw is that the $291 million rate increase predicted for 2-to-1 traffic presumes either total ineffectiveness of BNSF service under trackage rights or full collusion between UP/SP and BNSF, allowing both carriers to implement pure monopoly pricing. Because the conditions we are imposing will ensure that BNSF will be an effective replacement for SP with respect to this traffic, we cannot give any weight to Majure's estimate of 2-to-1 harm.

Concerning 3-to-2 traffic, we would begin by removing from the traffic base that Majure assumes will be affected the intermodal and automotive traffic, comprising over 70% of the total 3-to-2 traffic by DOJ's estimates. Shippers moving this traffic, which enjoys vigorous motor competition,[308] uniformly support the merger. There is simply no basis for assuming that these shippers will be charged higher rates after the merger.

We also reject Majure's application of the updated MacDonald study results, which were based only on wheat and corn traffic, to 3-to-2 traffic with markedly different transportation characteristics. The geographic market definition that is selected for a particular study strongly influences its estimated pricing results. Although applicants' definition focuses on carriers to which shippers have direct access, Majure and other protestants advocated a broader geographic definition intended to reflect distances that shippers can truck to competing railroads.[309] In the case of corn and wheat, we agree that the broader definition more accurately reflects the grain shippers' transportation options. (For some unexplained reason, however, in his own study Majure did not use the broad definition he advocates, but used a narrow definition, the 6-digit SPLC, in deriving his rate projections.)

---

[308] Evidence submitted by DOT shows why DOJ's assumption that trucks do not compete with rails at distances exceeding 500 miles even for truck-competitive intermodal traffic is incorrect:

A well-received 1990 study commissioned by DOT's Federal Railroad Administration determined that this [rail intermodal] service does not begin to compete with trucks (on a cost basis) until the rail linehaul exceeds 730 miles, and that assumes a dray of only 30 miles at either end of the move. DOT-4 at 17 n.17.

[309] Protestants have used the available geographic standards for collecting and disseminating relevant data (BEAs, SPLCs, or CRDs) that they believe most accurately reflect the ability of shippers to reach alternative carriers.

Almost all grain is trucked from the farm to grain elevators on rail sidings or to waterways for barge transport. This means that, within certain limits, a farmer can ordinarily truck the grain to whatever available carrier offers the price and service that it desires. If there are three railroads in a particular geographic area, it is likely that, all things being equal, they will compete on an equal basis for grain traffic. Although almost all grain shipments originate with a truck movement, truck movements of grain do not tend to be competitive over very long distances, and barge and rail options usually have a significant advantage for long hauls. The transportation market for other 3-to-2 commodities is very different from that for grain, and price effects derived from 3-to-2 grain studies will dramatically overstate 3-to-2 price effects for other commodities. As we have noted, some of these commodities are extremely truck competitive. In those cases, the number of available railroads is a much less important variable in the pricing equation, and any 3-to-2 pricing effect will be negligible. Further, for movements that are not truck competitive, the number of nearby railroads will provide far less effective competition, primarily via potential build-outs or transloading operations, than is the case for grain. In such situations, any 3-to-2 pricing impact derived from grain studies will again dramatically overstate the likely 3-to-2 price effect.

Majure merely updated MacDonald's study of western wheat originations, using 6-digit SPLCs rather than CRDs. He was unable to incorporate an explanatory variable for distance from waterways, as MacDonald did. He ran tests with data from those railroads that do not mask contract rate information.[310] His estimate of percentage rate impact of going from 3-to-2 railroads is 10.9%. Majure's study is undermined by his omission of a factor adjusting for distance from waterways. This omission results in an overstatement of 3-to-2 impacts. Nearby waterways significantly lower grain transportation rates. Majure has speculated that fewer railroads operate near waterways, since "whenever water transportation is in the market, fewer railroads could afford the fixed costs of participating in that market." DOJ-8 at 34 n.33. But, applicants have shown that areas near waterways are served by a greater number of railroads. Majure has failed to recognize that much of our nation's early urban growth centered on the confluence of rail and water transportation. UP/SP-231, VS Caron, at 3-5. Thus, the lower rail rates Majure ascribes to the presence of more railroads could just as well be caused by the presence of nearby barge competition. In sum, there are many reasons to conclude that his entire 3-to-2 traffic analysis is inherently flawed.

c. GRIMM. Some of KCS Witness Grimm's studies come under attack for relying on pre-Staggers Act data, but he has also conducted studies using post-Staggers Act data. Unlike MacDonald's study, Grimm's studies are not limited to grain. They use the number of independent routings between origin and destination as an explanatory variable. His 1992 published study was based on rate data obtained from railroads directly rather than from the Waybill Sample. He concluded that the number of independent routings affects rail rates. The study does not present sufficient information for us to use its results to measure merger-related competitive harm in this proceeding. Further, it contains key findings that were recently rejected by the ICC in *BN/SF*, 10 I.C.C.2d at 573 n. 94.

d. PETERSON. Applicants' witness Peterson contributes a study based on a 100% UP traffic data base. It compares UP's average revenue per ton-mile where (1) UP is the sole carrier serving; (2) UP and one other carrier serve; and (3) UP and two other carriers serve. The greatest differential, as expected, is between the one and two-railroad categories. But from 3-to-2 the differential was minimal: less than 1%. This result is not surprising to us. If a shipper has direct

[310] The railroads that mask their data by reporting coded contract revenues are CNW, Conrail, NS, CSX, and UP.

access to three railroads and must go down to two, it still has alternative rail service to which it can switch at low (if any) cost.

e. KWOKA. Dow's witness Kwoka reported on a 1979 cross-industry study showing that the market share of the top two firms better explains price/cost margins than more commonly used concentration measures such as the HHI. To Kwoka this underscores the need to inject a third mid-ranked firm more likely to compete than coordinate with the other two. Because Kwoka's approach is outside the realm of the rail industry, we find it difficult to make relevant inferences. The focus in this case is effects of fewer rail participants in individual markets, not of higher concentration across whole industries.

STUDIES ABOUT THE ROLE OF SP IN THE PRICING EQUATION. Though all the foregoing studies bear on the question of 3-to-2 pricing impacts generally, others focus on SP's role in particular 3-to-2 markets.[311] This is of special interest because it is SP's competitive presence that is being lost. There is much discussion in the record as to how aggressive a competitor SP is today. Applicants view SP as a constrained competitor, one unable to replicate the quality levels of competing railroads and whose effectiveness is further hampered by the higher cost structure associated with an antiquated plant. Protestants describe SP as a maverick, aggressively offering rate reductions in markets that would otherwise be much less competitive. We agree with applicants and interpret lower rate levels offered by SP in certain examples as indicative of the lower quality product it has been constrained to offer. Moreover, SP cannot continue to maintain its existing competitive presence in the long run because the revenues generated from its current pricing structure are not sufficient for it to maintain or replace its capital.

a. PLOTH. A study was submitted by Ploth for KCS concerning military traffic, on which very detailed bidding information is accessible where similar information from the private sector is highly secretive. Ploth used a DOD data base concerning its movements, which showed rail transport bids of various competing carriers. Ploth shows point-to-point summaries of pricing bids and routings. He finds SP to rank highest in average savings per bid. These results are not surprising, because, as applicants point out, special circumstances govern DOD procurement. DOD must award contracts to the lowest bidder. For repetitive business, however, the procedure is to line

---

[311] The studies by Peterson and by Majure discussed above do include an ancillary analysis of the difference made by SP. Peterson breaks down his 2-to-1 category of traffic (from the 100% UP 1994 traffic data) into a UP/SP category and a UP and one other railroad category. The category involving SP as the second competitor has a revenue per ton-mile that is higher than the category involving other carriers (UP/SP-231, RVS Peterson, at 92). A caveat to this analysis is that it does not correct for movement characteristics that might affect the level of rates but might differ between SP and other railroads (*e.g.*, commodity, costs, length of haul, etc.).

Majure included SP's identity as originating carrier as an explanatory variable in his analysis. He found essentially that SP was a less effective competitive restraint in two carrier markets than other carriers. (DOJ-8, VS Majure, at 36 n.37).

Applicants' witness Bernheim has explained that any lower prices offered by SP are likely due to its inferior service. He also notes that Majure's estimating equations contain a variable to adjust for cost differences among carriers. He asserts that this means that Majure has merely estimated that SP's rates would be lower than those other carriers if its costs were the same as the costs of other carriers. But, its costs are about 20% higher. UP/SP-260 (App. E), Bernheim Dep., at 139-42.

up back-up providers that can keep supplying if the initial provider fails to deliver. This happens often with SP; it runs out of equipment for a move, and other carriers are relied on for the balance of the business (UP/SP-231, RVS Gazzetta, at 11).

Bernheim for applicants criticizes Ploth's data. He argues that the number of independent routes, not the number of bids, should be the prime explanatory variable (to allow for potential as well as actual bids). In general, Bernheim's results show that rates are nearly 30% lower where there are two fully independent routes rather than just one. Beyond that, especially with inclusion of SP, Bernheim notes, the effect is negligible. The results do not show aggressive pricing on the part of SP. Bernheim's results appear in line with the general pattern we discern of SP as working under constraints making it unable to exert significant competitive pressure on other participants in the same market.

b. BERNHEIM. In addition to assessing other parties' rate studies, Bernheim also submitted, on behalf of applicants, a study that focuses on 3-to-2 impacts on automotive traffic, with special focus on SP's competitive influence. He used UP's 1994 100% traffic data base to explain the effects on UP's revenue per ton-mile of various categories of market participation. Bernheim found that the 2-to-1 differential is much greater when UP competes against a carrier other than SP. Where SP appears as a third competitor, rates are on average higher than when UP competes with a second carrier only, not SP (24%). Bernheim infers that three carrier markets likely involve dilution of density and higher unit costs and that SP's presence, again, is ineffective in pressuring rates down. This study seems to indicate that the loss of SP's competitive presence in 3-to-2 markets is relatively unimportant because of SP's poor service quality and high cost levels.

c. CONRAIL. Conrail adduces specific rate comparisons to demonstrate that SP is an aggressive competitor (CR-22, VS Bridges, at 2-3; CR-22, VS McNeil, at 5-6). It reports from the vantage point of a co-bidder on joint movements, where shippers receive bids for individual legs of the movements. The focus is on international container traffic from Southern California, through the Southwest, to the East Coast (land bridge movements) and automotive traffic moving West Coast to Midwest and Midwest to Mexico. Conrail claims SP has the best routes for such traffic and that its lower bids do put pressure on others, specifically, UP, to come up with lower bids than otherwise. Conrail's anecdotal evidence here is not very persuasive, especially when compared to applicants' rate study of all its 3-to-2 automotive traffic, which reaches the contrary result.

APPENDIX F: FINANCIAL RATIOS

Table 1
UPC/SPR
Various Pro Forma Results
(Dollars in millions)

	Base Year	Year 1	Year 2	Year 3	Year 4	Year 5	Normal Year
I. Pro Forma Fixed Charge Coverage Ratio							
1. Income Available for Fixed Charges	$1,798.0	$1,862.0	$2,094.3	$2,226.2	$2,257.5	$2,275.0	$2,275.6
2. Fixed Charges	594.1	722.6	761.8	777.1	765.9	744.9	711.4
3. Times Fixed Charge Coverage (L1/L2)	3.0	2.6	2.7	2.9	2.9	3.1	3.2
II. Pro Forma Cash Throw-Off-To-Debt Ratio							
1. Net Income	$744.2	$704.0	$823.7	$896.0	$922.4	$946.2	$967.3
2. Depreciation & Amortization	831.3	918.9	945.5	959.2	966.3	967.8	966.1
3. Deferred Income Taxes	253.9	247.5	292.5	283.2	274.6	259.4	246.2
4. Gain on Property Sales, Other, Etc.	19.1	(84.6)	(64.2)	3.2	10.3	11.2	12.3
5. Cash Flow From Operations (L1+L2+L3-L4)	1,848.5	1,785.8	1,997.5	2,141.6	2,173.6	2,184.6	2,191.9
6. Long-Term Debt Due Within One Year	581.7	581.7	581.7	581.7	581.7	581.7	581.7
7. Cash Throw-Off-To-Debt Ratio (L5/L6)	3.2	3.1	3.4	3.7	3.7	3.8	3.8
III. Pro Forma Operating Ratio							
1. Operating Revenues	$10,629.1	$10,698.7	$10,791.4	$10,814.6	$10,838.6	$10,861.0	$10,861.0
2. Operating Expenses	8,810.6	8,846.1	8,687.2	8,569.0	8,561.7	8,566.6	8,564.8
3. Operating Ratio (L2/L1)	82.9%	82.7%	80.5%	79.2%	79.0%	78.9%	78.9%
IV. Pro Forma Return on Equity							
1. Net Income	$744.2	$704.0	$823.7	$896.0	$922.4	$946.2	$967.3
2. Shareholders' Equity	7,423.6	7,383.4	7,463.0	7,614.9	7,793.1	7,995.2	8,218.3
3. Return on Equity (L1/L2)	10.0%	9.5%	11.0%	11.8%	11.8%	11.8%	11.8%
V. Pro Forma Debt to Debt Plus Equity Ratio							
1. Long-Term Debt Due After One Year	$7,447.5	$7,902.1	$8,074.8	$7,936.0	$7,682.4	$7,282.2	$6,884.5
2. Shareholders' Equity	7,423.6	7,383.4	7,463.0	7,614.9	7,793.1	7,995.2	8,218.3
3. Total Debt Plus Equity	14,871.1	15,285.5	15,537.8	15,550.9	15,475.5	15,277.4	15,102.8
4. Ratio of Debt to Debt Plus Equity (L1/L3)	50.1%	51.7%	52.0%	51.0%	49.6%	47.7%	45.6%

NOTES TO TABLE 1

Sources of Data

The data in this table were derived and computed from information contained in the following submissions by applicants: (1) Volume 1 of the Application, Appendix B (pro forma balance sheets for the base year, the first 5 years after the merger, and the normal year); and (2) Volume 1 of the Application, Appendix C (pro forma income statements for the base year, the first 5 years after the merger, and the normal year).

Base Year Data

The data shown in this table for the base year are from the 1994 10-K Annual Reports for UPC, CNWT, and SPR. These data were adjusted to account for the UP/CNW merger, which occurred during 1995. They were also adjusted to record after-tax losses and benefits associated with the BN/SF merger, elimination of CNWT's 1994 special charges, elimination of losses from discontinued operations associated with UPC's waste management operation (sold at year-end 1994), recordation of the spin-off of Union Pacific Resources, elimination of SP's after-tax gains on property sales, and elimination of the cumulative effect of accounting changes recorded by SPR in 1994.

Data Subsequent to Base Year

Data subsequent to the base year (*i.e.*, data for the first 5 years after the merger and the normal year) give effect to the estimated benefits from the merged operations, including net revenues from diverted traffic and net receipts from trackage rights which, while not recognized as public benefits, are private benefits realizeable from the merger. These data also incorporate changes to equipment costs, debt and interest expense, deferred income taxes, revenues, expenses, and income resulting from the merger.

APPENDIX G: ENVIRONMENTAL MITIGATING CONDITIONS

The environmental mitigating conditions imposed in Finance Docket No. 32760 are categorized as follows: (A) Systemwide, (B) Corridor-Specific, (C) Rail Line Segments, (D) Rail Yards and Intermodal Facilities, (E) Proposed Abandonments, and (F) Construction Projects. These mitigation conditions are numbered sequentially.

A. SYSTEMWIDE MITIGATION

The following systemwide mitigation conditions apply to rail line segments, rail yards, intermodal facilities, and rail line construction projects on new right-of-way.

1. UP/SP shall adopt UP's existing formula-based standards for track inspection for all rail lines of the merged system, which will increase the frequency of inspections on SP rail lines.
2. UP/SP shall adopt UP's existing tank car inspection programs for all appropriate facilities on the merged system.
3. For all highway grade crossing signals, UP/SP shall provide visible instructions designating an 800 number to be called if signal crossing devices malfunction.
4. UP/SP shall provide 800 numbers to all emergency response forces in all communities. These numbers shall provide access to UP/SP supervisors who shall provide train movement information and work cooperatively with communities in emergency situations. These numbers are not to be disclosed to the general public.
5. UP/SP shall participate on a systemwide basis in the TRANSCARE program to develop hazardous material and emergency response plans in cooperation with communities.
6. UP/SP shall redistribute personnel to respond to hazardous materials emergencies in unprotected areas on the SP rail lines, such as in Arizona, New Mexico, and West Texas.
7. UP/SP shall adopt UP's training program for community and emergency response personnel for locations on the SP rail lines, and include personnel from SP served locations in UP's school at Pueblo, CO, for additional emergency response training.
8. UP/SP shall adopt existing UP training and operating practices that are designed to reduce locomotive fuel consumption and air pollution. These include: throttle modulation, use of dynamic braking, increased use of pacing and coasting trains, isolating unneeded horsepower, shutting down locomotives when not in use for more than an hour when temperatures are above 40 degrees, and maintaining and upgrading SP locomotives to UP standards.
9. As suggested by UP/SP, UP/SP shall extend to SP rail lines UP's program of closing boxcar doors on empty cars before movement on the system in order to reduce wind resistance and, thereby, fuel consumption.
10. As suggested by UP/SP, UP/SP shall use its own security forces to conduct its own arrests and bookings, reducing reliance on local police forces.
11. UP/SP shall convert all railroad locomotives to the standards for visible smoke reduction that are established in the South Coast Air Quality Basin.
12. UP/SP shall adopt UP's existing policy of using head-hardened rail on curves in mountainous territory for SP rail lines to promote safer operations.
13. UP/SP shall comply with all applicable FRA rules and regulations in conducting rail operations on the merged system.

B. CORRIDOR MITIGATION

General

The following mitigation conditions apply to the Central, Southern, Northern, Illinois-Gulf Coast, and Pacific Coast (I-5) Corridors.

14. UP/SP shall implement the draft emissions standards for diesel-electric railroad locomotives that the Environmental Protection Agency (EPA) has developed. It is the Board's

understanding that EPA plans to propose these standards and make them available for public comment in December 1996. Under these standards, UP/SP shall utilize newly manufactured or re-built locomotives that are more fuel efficient and produce less emissions. When this equipment becomes available, UP/SP shall assign these locomotives on a priority basis to the corridors or portions thereof specified below:

- Southern Corridor:
  - Fort Worth, TX, to West Colton, CA.
- Central Corridor:
  - Cheyenne, WY, to Hinkle, OR.
  - Chicago, IL, to Fremont, NE.
  - Ogden, UT, to Roseville, CA.
  - Denver, CO, to Grand Junction, CO.
- Pacific Coast (I-5) Corridor:
  - Seattle, WA, to West Colton, CA.
  - Sacramento, CA, to Bakersfield, CA.

15. To further facilitate the improvement of air quality for specific locations, UP/SP shall consult with appropriate state and local air quality officials in the States of Arizona, California, Colorado, Illinois, Nevada, Oregon, Texas, Washington, and Wyoming, through which the Pacific (I-5), Southern, Central, and Northern Corridors extend in part. UP/SP shall advise SEA as to the status and the results of these consultations.
16. To address noise impacts, UP/SP shall consult with the affected counties that have communities that would experience an increase of 3 dBA or more as a result of the increased rail traffic over rail lines in the States of California, Colorado, Illinois, Kansas, Louisiana, Nebraska, Nevada, Oklahoma, and Texas. If appropriate, UP/SP shall develop a noise abatement plan. UP/SP shall submit the result of these consultations to SEA who will review these findings with FRA.

Specific

The following mitigation conditions apply to specific rail line segments within the Central, Southern, and Illinois-Gulf Coast Corridors.

17. UP/SP shall give priority to equipping key trains, as defined by Union Pacific Railroad Form 8620, on the corridor segments listed below with two-way end of train devices. This requirement also applies to BNSF key trains operating between Iowa Junction, LA, and Avondale, LA.
    - Central Corridor
      - North Platte, NE, to Oakland, CA (UP and SP).
      - Cheyenne, WY, to Denver, CO (UP).
    - Southern Corridor
      - Houston, TX, to Avondale (New Orleans), LA (SP).
      - Iowa Junction, LA, to Avondale, LA, via Kinder and Livonia (UP).
      - Houston, TX, to West Colton, CA (SP).
    - Illinois-Gulf Coast Corridor
      - St. Louis, MO, and East St. Louis/Salem, IL, to Houston, TX, and Avondale, LA (UP and SP).

C. RAIL LINE SEGMENT MITIGATION

General

The following mitigation conditions apply to all of the rail line segments in the states identified below.

18. UP/SP shall consult with the states and appropriate local officials as well as FRA to develop a priority list for upgrading grade crossing signals, where necessary, due to increases in rail traffic resulting from the proposed merger. This process shall be undertaken for all rail line segments in the States of Arkansas, California, Colorado, Kansas, Nevada, Oregon, and Texas. UP/SP shall advise SEA as to the status and the results of these consultations.

Specific

The following detailed mitigation conditions apply to the specific rail line segments and/or locations identified below.

MARTINEZ, CA, TO OAKLAND, CA:

East Bay Regional Park District

19. UP/SP shall comply with the terms of the Memorandum of Understanding executed with the East Bay Regional Park District and UP/SP.

ROSEVILLE, CA, TO SPARKS, NV:

Town of Truckee

20. UP/SP shall comply with the terms of the Memorandum of Understanding executed with the Town of Truckee and UP/SP.

Placer County

21. UP/SP shall comply with the terms of the Memorandum of Understanding executed with Placer County and UP/SP.

City of Reno

22a. UP/SP shall operate no more than a daily average count of 14.7 freight trains per day through the City of Reno. (This reflects the Base Year daily average of 13.8 trains -- 12.7 freight trains and 1.1 passenger trains -- plus 2 additional freight trains.) The addition of two freight trains per day does not exceed the Board's threshold for environmental analysis at 49 CFR 1105.7(e)(5)(ii). The 14.7 average freight train count per day does not include the following types of movements: (1) maintenance-of-way trains, (2) light locomotive movements, (3) local and industry switching train movements, (4) emergency trains operated under detour authority, for snow removal, for fire or other natural disaster purposes, and wreck removal purposes. This condition will be effective upon consummation of the merger and will continue in effect for 18 calendar months in total.

22b. For the purpose of monitoring the preceding condition, UP/SP shall file on a monthly basis with the Board verified copies of station passing reports of train movements through Reno, NV, for each day of each preceding month in the specified 18-month period. These reports shall also identify those train movements, specified in the above condition, that are excluded from the 14.7 trains per day average count.

22c. UP/SP, in consultation with and subject to the approval of SEA, shall retain an independent, third-party consultant to prepare a specific mitigation study to address the environmental effects on the City of Reno of the additional rail freight traffic projected as a result of the proposed merger. This study shall be prepared under the sole direction and supervision of SEA. It shall include a final mitigation plan based on a further study of the railway, highway, and pedestrian traffic flows and associated environmental effects on the City of Reno. This study would tailor mitigation to address environmental effects such as safety, hazardous materials transport, air quality, noise and water quality. UP/SP shall comply with the final mitigation plan developed under this study.

The study, which shall be completed within 18 months from the date of consummation of the merger, shall include the following:

- Projected post-merger increases in rail freight traffic on the Sparks to Roseville line segment.
- Consultations with the City of Reno, Washoe County, the Federal Railroad Administration, affected Native American Tribes, and other appropriate Federal, state and local agencies, and other interested parties.
- Consultations with UP/SP.
- Review of all existing information and studies including those prepared by the City of Reno, Washoe County and UP/SP.
- Independent analyses.
- With respect to vehicular and pedestrian safety, mitigation measures that identify the number and location of highway/rail grade separations and rail/pedestrian grade separations in downtown Reno.
- Funding options.
- Submission of a draft study to the public for review and comment and then issuance of a final mitigation study.

22d. SEA will submit the final mitigation study and its recommendations to the Board, which shall then issue a decision imposing mitigation. In the event UP/SP and the City of Reno and other appropriate parties reach agreement on a final mitigation plan, UP/SP and the City of Reno shall immediately notify SEA, and the Board will take appropriate action consistent with such an agreement.

CHICKASHA, OK, TO WICHITA, KS:

City of Wichita, Kansas

23a. UP/SP shall operate no more than a daily average count of 6.4 trains per day through the City of Wichita. (This reflects the Base Year daily average of 4.4 trains plus 2 additional trains.) The addition of two trains per day essentially maintains the environmental status quo. The 6.4 average train count per day does not include the following types of movements: (1) maintenance-of-way trains, (2) light locomotive movements, (3) local and industry switching train movements, (4) emergency trains operated under detour authority, for snow removal, for fire or other natural disaster purposes, and wreck removal purposes. This condition will be effective upon consummation of the merger and will continue in effect for 18 calendar months in total.

23b. For the purpose of monitoring the preceding condition, UP/SP shall file on a monthly basis with the Board verified copies of station passing reports of train movements through Wichita, KS, for each day of each preceding month in the specified 18-month period. These reports shall also identify those train movements, specified in the above condition, that are excluded from the 6.4 trains per day average count.

23c. UP/SP, in consultation with and subject to the approval of SEA, shall retain an independent, third-party consultant to prepare a specific mitigation study to address the potential environmental effects on the City of Wichita of the additional rail freight traffic projected as a result of the proposed merger. This study shall be prepared under the sole direction and supervision of SEA. It shall include a final mitigation plan based on a study of the railway, highway, and pedestrian traffic flows and associated environmental effects on the City of Wichita. This study would tailor mitigation to address environmental effects such as safety, hazardous materials transport, air quality, and noise. UP/SP shall comply with the final mitigation plan developed under this study.

The study, which shall be completed within 18 months from the date of consummation of the merger, shall include the following:

- Projected post-merger increases in rail freight traffic on the Chickasha to Wichita line segment.

- Consultations with the City of Wichita, Sedgwick County, the Federal Railroad Administration, affected Native American Tribes, and other appropriate Federal, state and local agencies, and other interested parties.
- Consultations with UP/SP.
- Review of all existing information and studies including those prepared by the City of Wichita, Sedgwick County and UP/SP.
- Feasibility of a bypass route.
- With respect to vehicular and pedestrian safety, mitigation measures that identify the number and location of highway/rail grade separations in Wichita.
- Funding options.
- Submission of a draft study to the public for review and comment and then issuance of a final mitigation study.

23d. SEA will submit the final mitigation study and its recommendations to the Board, which shall then issue a decision imposing mitigation. In the event UP/SP and the City of Wichita and other appropriate parties reach agreement on a final mitigation plan, UP/SP and the City of Wichita shall immediately notify SEA, and the Board will take appropriate action consistent with such an agreement.

D. RAIL YARDS AND INTERMODAL FACILITIES

24. UP/SP shall consult with appropriate state and local agencies to develop noise abatement plans for rail yards in the following cities: Herington, KS; Salem, IL; and Bellmead, TX. UP/SP shall advise SEA of the results of these consultations and provide SEA with a copy of any resulting noise abatement plans.

25. To further facilitate the improvement of air quality in the States of California and Illinois, UP/SP shall consult with appropriate state and local air quality officials concerning the intermodal facilities in East Los Angeles, CA, and the Global II and Canal Street intermodal facilities in Chicago, IL. UP/SP shall advise SEA as to the status and the results of these consultations.

E. ABANDONMENTS

The following 15 abandonments and two related discontinuances are subject to the mitigation conditions specified below:

- Gurdon to Camden, AR (UP) - Docket No. AB-3 (Sub-No. 129X).
- Whittier Junction to Colima Junction, CA (UP) - Docket No. AB-33 (Sub-No. 93X).
- Magnolia Tower to Melrose, CA (UP) - Docket No. AB-33 (Sub-No. 94X).
- Alturas to Wendel, CA (SP) - Docket No. AB-12 (Sub-No. 184X).
- Towner to NA Junction, CO (UP):
  - Docket No. AB-3 (Sub-No. 130) - UP Abandonment.
  - Docket No. AB-8 (Sub-No. 38) - Discontinuance of Service by SP.
- Edwardsville to Madison, IL (UP) - Docket No. AB-33 (Sub-No. 98X).
- DeCamp to Edwardsville, IL (UP) - Docket No. AB-33 (Sub-No. 97X).
- Barr to Girard, IL (UP) - Docket No. AB-33 (Sub-No. 96).
- Whitewater to Newton, KS (UP) - Docket No. AB-3 (Sub-No. 132X).
- Hope to Bridgeport, KS (UP):
  - Docket No. AB-3 (Sub-No. 131) - UP Abandonment.
  - Docket No. AB-8 (Sub-No. 37) - Discontinuance of Service by SP.
- Iowa Junction to Manchester, LA (UP) - Docket No. AB-3 (Sub-No. 133X).
- Seabrook to San Leon, TX (SP) - Docket No. AB-12 (Sub-No. 187X).
- Suman to Benchley, TX (SP) - Docket No. AB-12 (Sub-No. 185X).
- Troup to Whitehouse, TX (UP) - Docket No. AB-3 (Sub-No. 134X).

- Little Mountain Junction to Little Mountain, UT (UP) - Docket No. AB-33 (Sub-No. 99X).

General

At all abandonment locations, the general mitigation conditions listed below apply to reduce or avoid potential environmental impacts.

26. UP/SP shall observe all applicable Federal, state, and local regulations regarding handling and disposal of any waste materials, including hazardous waste, encountered or generated during salvage of the proposed rail line.
27. UP/SP shall dispose of all materials that cannot be reused in accordance with state and local solid waste management regulations.
28. UP/SP shall restore any adjacent properties that are disturbed during right-of-way salvaging activities to pre-salvaging conditions.
29. Before undertaking any salvage activities, UP/SP shall consult with any potentially affected American Indian Tribes adjacent to, or having a potential interest in, the right-of-way.
30. UP/SP shall use Best Management Practices to encourage regrowth in disturbed areas and to stabilize disturbed soils.
31. UP/SP shall use appropriate signs and barricades to control traffic disruptions during salvage operations at or near grade crossings.
32. UP/SP shall restore roads disturbed during salvage activities to conditions as required by state or local jurisdictions.
33. UP/SP shall comply with all applicable Federal, state, and local regulations regarding the control of fugitive dust. Fugitive dust emissions created during salvage operations shall be minimized by using such control methods as water spraying, installation of wind barriers, and chemical treatment during salvaging.
34. UP/SP shall control temporary noise from salvage equipment through the use of work hour controls and maintenance of muffler systems on machinery.
35. If previously unknown archaeological remains are found during salvage operations, UP/SP shall cease work in the area and immediately contact the appropriate State Historic Preservation Officer.
36. As appropriate, UP/SP shall use appropriate technologies, such as silt screens, to minimize soil erosion during salvaging. UP/SP shall disturb the smallest area possible around streams and tributaries and shall revegetate disturbed areas immediately following salvage operations.
37. As appropriate, UP/SP shall transport all hazardous materials generated by salvage activities in compliance with U.S. Department of Transportation Hazardous Materials Regulations (49 CFR parts 171 to 180).
38. As appropriate, UP/SP shall assure that all culverts are clear from debris to avoid potential flooding and stream flow alteration, in accordance with Federal, state and local regulations.
39. As appropriate, UP/SP shall obtain all necessary Federal, state, and local permits if salvaging activities require the alteration of wetlands, ponds, lakes, streams, or rivers, or if these activities would cause soil or other materials to wash into these water resources. UP/SP shall use appropriate techniques to minimize impacts to water bodies and wetlands, such as positioning salvaging equipment on barges, matting, or skids.

Specific

The following mitigation conditions specifically apply to the abandonment under which they appear.

GURDON TO CAMDEN, AR (UP)

DOCKET NO. AB-3 (SUB-NO. 129X)

40. UP/SP shall limit salvage activities within 1,000 feet of residences to daytime hours to mitigate noise impacts on nearby receptors.

41. To further assess the potential occurrence of threatened and endangered plants, UP/SP shall coordinate with U.S. Fish & Wildlife Service and the Arkansas Department of Game and Fish, prior to salvage activities, to determine whether surveys of vegetation types in areas of potential disturbance due to salvage activities are needed and shall conduct any such surveys during an appropriate time of year.
42. UP/SP shall retain its interest in and take no steps to alter the through-plate girder bridge at MP 436.70, until the Section 106 process of the National Historic Preservation Act (16 USC 470f, as amended) has been completed for this structure.
43. Prior to the start of salvage operations in the vicinity of the three Emergency Response Notification System (hazardous waste) spill sites, UP/SP shall contact the Arkansas Pollution Control and Ecology Department, Hazardous Waste Division, to confirm that remediation has been completed to agency satisfaction.

WHITTIER JUNCTION TO COLIMA JUNCTION, CA (UP)
DOCKET NO. AB-33 (Sub-No. 93X)

No specific mitigation is imposed.

MAGNOLIA TOWER TO MELROSE, CA (UP)
DOCKET NO. AB-33 (SUB-NO. 94X)

44. UP/SP shall retain its interest in and take no steps to alter the Magnolia Tower or WP Oakland Depot until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for these structures.

ALTURAS TO WENDEL, CA (SP)
DOCKET NO. AB-12 (SUB-NO. 184X)

45. UP/SP shall retain its interest in and take no steps to alter the integrity of the 9 eligible and 11 potentially eligible prehistoric sites along this abandonment until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for these sites.

SAGE TO LEADVILLE, CO (SP)
DOCKET NO. AB-8 (SUB-NO. 36X) - DISCONTINUANCE OF SERVICE BY SP

46. UP/SP shall provide continued access for Viacom International, Inc. to the Eagle Mine site to facilitate ongoing remediation activities.

MALTA TO CANON CITY, CO (SP)
DOCKET NO. AB-8 (SUB-NO. 39) - DISCONTINUANCE OF SERVICE BY SP

No specific mitigation is imposed.

TOWER TO NA JUNCTION, CO (UP)
DOCKET NO. AB-3 (SUB-NO. 130) - ABANDONMENT BY UP
DOCKET NO. AB-8 (SUB-NO. 38) - DISCONTINUANCE OF SERVICE BY SP

47. To further assess the potential occurrence of the seven threatened and endangered species of plants and animals, UP/SP shall coordinate with U.S. Fish & Wildlife Service and the Colorado Department of Natural Resources to determine if surveys in areas of potential disturbance due to salvage activities are needed and shall conduct any such surveys during an appropriate time of the year.
48. UP/SP shall consult with the Colorado Department of Public Health and Environment to confirm that assessment and remediation has been completed to the agency's satisfaction.

EDWARDSVILLE TO MADISON, IL (UP)
DOCKET NO. AB-33 (SUB-NO. 98X)

49. Prior to the start of abandonment activities in the vicinity of any known hazardous waste sites, UP/SP shall consult with the Illinois Environmental Protection Agency to assess procedures necessary to address issues related to the sites.

DECAMP TO EDWARDSVILLE, IL (UP)
DOCKET NO. AB-33 (SUB-NO. 97X)

50. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the one historic bridge until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) is completed.

BARR TO GIRARD, IL (UP)
DOCKET NO. AB-33 (SUB-NO. 96)

51. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the three historic bridges until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) is completed.

WHITEWATER TO NEWTON, KS (UP)
DOCKET NO. AB-3 (SUB-NO. 132X)

No specific mitigation is imposed.

HOPE TO BRIDGEPORT, KS (UP)
DOCKET NO. AB-3 (SUB-NO. 131) - UP ABANDONMENT
DOCKET NO. AB-8 (SUB-NO. 37) - DISCONTINUANCE OF SERVICE BY SP

No specific mitigation is imposed.

IOWA JUNCTION TO MANCHESTER, LA (UP)
DOCKET NO. AB-3 (SUB-NO. 133X)

No specific mitigation is imposed.

SEABROOK TO SAN LEON, TX (SP)
DOCKET NO. AB-12 (SUB-NO. 187X)

52. U.S. Fish & Wildlife Service indicated a possible desire to obtain permission to determine if Windmill-grass is present along the rail line. Should U.S. Fish & Wildlife Service follow up with such a request, UP/SP shall cooperate in granting the necessary authorizations.

53. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the through-plate girder bridges at MPs 31.99 and 38.77 until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for these structures.

54. UP/SP shall continue Section 106 consultation with the Texas State Historic Preservation Officer to determine the need and extent of a recovery and treatment program for the three known archaeological sites along this segment.

55. Prior to the start of abandonment activities in the vicinity of any known hazardous waste sites, UP/SP shall contact the Texas Natural Resources Conservation Commission, Waste Management Office, to assess procedures necessary to address issues related to the sites.

56. UP/SP shall limit construction work within 1,000 feet of residences to daytime hours to mitigate noise impacts on nearby receptors.

SUMAN TO BENCHLEY, TX (SP)
DOCKET NO. AB-12 (SUB-NO. 185X)

57. To further assess the potential occurrence of Navasota Ladies'-tresses (*Spiranthes parksii)*, a federally listed endangered species, UP/SP shall conduct a survey and consult with the U.S. Fish & Wildlife Service and the Texas Parks and Wildlife Department prior to salvage operations to determine if this species is present in any areas to be cleared or modified by the proposed abandonment.

58. UP/SP shall continue Section 106 consultation with the Texas State Historic Preservation Officer to determine the need and extent of a recovery and treatment program for the known archaeological site.
59. Prior to the start of abandonment activities in the areas containing copper slag ballast, UP/SP shall contact the Texas Natural Resources Conservation Commission, Waste Management Office, as required to assess procedures necessary to address issues related to the sites.
60. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the three deck plate girder bridges at MPs 109.73, 112.96, and 117.55, until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for these structures.

TROUP TO WHITEHOUSE, TX (UP)
DOCKET NO. AB-3 (SUB-NO. 134X)

61. Prior to the start of abandonment activities in the vicinity of any known hazardous waste sites, UP/SP shall contact the Texas Natural Resources Conservation Commission, Waste Management Division, and other appropriate agencies as necessary to assess procedures for addressing issues related to the sites.

LITTLE MOUNTAIN JUNCTION TO LITTLE MOUNTAIN, UT (UP)
DOCKET NO. AB-33 (SUB-NO. 99X)

No specific mitigation is imposed.

F. CONSTRUCTION PROJECTS

General

The following mitigation conditions apply to all new construction sites not on existing right-of-way and also apply to the new construction projects that result from the BNSF agreement.

62. UP/SP shall observe all applicable Federal, state, and local regulations regarding handling and disposal of any waste materials, including hazardous waste, encountered or generated during construction of the proposed rail line connection.
63. UP/SP shall dispose of all materials that cannot be reused in accordance with state and local solid waste management regulations.
64. UP/SP shall consult with the appropriate Federal, state and local agencies if hazardous waste and/or materials are discovered at the site.
65. UP/SP shall transport all hazardous materials in compliance with U.S. Department of Transportation Hazardous Materials Regulations (49 CFR parts 171 to 180). UP/SP shall provide, upon request, local emergency management organizations with copies of all applicable Emergency Response Plans and participate in the training of local emergency staff for coordinated responses to incidents. In the case of a hazardous material incident, UP/SP shall follow appropriate emergency response procedures contained in its Emergency Response Plans.
66. UP/SP shall use appropriate signs and barricades to control traffic disruptions during construction.
67. UP/SP shall restore roads disturbed during construction to conditions as required by state or local jurisdictions.
68. UP/SP shall obtain all necessary Federal, state, and local permits if construction activities require the alteration of wetlands, ponds, lakes, streams, or rivers, or if these activities would cause soil or other materials to wash into these water resources. UP/SP shall use appropriate techniques to minimize impacts to water bodies and wetlands.
69. UP/SP shall use Best Management Practices to control erosion, runoff, and surface instability during construction, including seeding, fiber mats, straw mulch, plastic liners, slope drains, and other erosion control devices. Once the track is constructed, UP/SP shall establish

vegetation on the embankment slope to provide permanent cover and prevent potential erosion. If erosion develops, UP/SP shall take steps to develop other appropriate erosion control procedures. UP/SP shall use Best Management Practices to encourage regrowth in disturbed areas and to stabilize disturbed soils.

70. UP/SP shall use only EPA-approved herbicides and qualified contractors for application of right-of-way maintenance herbicides, and shall limit such application to the extent necessary for rail operations.
71. UP/SP shall comply with all applicable Federal, state, and local regulations regarding the control of fugitive dust. Fugitive dust emissions created during construction shall be minimized by using such control methods as water spraying, installation of wind barriers, and chemical treatment.
72. UP/SP shall control temporary noise from construction equipment through the use of work hour controls and maintenance of muffler systems on machinery.
73. UP/SP shall restore any adjacent properties that are disturbed during construction activities to their pre-construction conditions.
74. Before undertaking any construction activities, UP/SP shall consult with any potentially affected American Indian Tribes adjacent to, or having a potential interest in, the right-of-way.
75. If previously undiscovered archaeological remains are found during construction, UP/SP shall cease work and immediately contact the State Historic Preservation Officer to initiate the appropriate Section 106 process.

Specific

The following mitigation conditions apply to the specific construction sites identified below.

ARKANSAS - CAMDEN

76. UP/SP shall restrict mechanized equipment to upland areas to complete construction activities. UP/SP shall obtain and comply with all applicable permits for any construction activity within streams or wetlands. Also, UP/SP shall submit its final construction plans to appropriate state and local agencies for review.
77. Prior to construction, UP/SP shall provide final plans to the Arkansas Department of Transportation (Arkansas DOT) and appropriate local agencies for review.

ARKANSAS - FAIR OAKS

78. Prior to construction, UP/SP shall provide final plans to the Arkansas DOT and appropriate local agencies for review.

ARKANSAS - PINE BLUFF(EAST)

79. Prior to construction, UP/SP shall provide final plans to the Arkansas DOT and appropriate local agencies for review.

ARKANSAS - PINE BUFF (WEST)

80. Prior to construction, UP/SP shall provide final plans to the Arkansas DOT and appropriate local agencies for review.

ARKANSAS - TEXARKANA

81. Prior to construction, UP/SP shall provide final plans to the Arkansas DOT and appropriate local agencies for review.

CALIFORNIA - LATHROP

82. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the Sharpe Army Depot, until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for this property.

CALIFORNIA - STOCKTON (EL PINAL)

83. UP/SP shall monitor noise resulting from train operations over the connection and implement mitigation measures to control excessive wheel squeal.

CALIFORNIA - WEST COLTON (UP TO SP)
No specific mitigation is imposed.
CALIFORNIA - WEST COLTON (SP TO UP)
No specific mitigation is imposed.
COLORADO - DENVER (UTAH JCT.)
84. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the North Yard water tower, until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for this property.
COLORADO - DENVER
85. In and near the South Platte River and associated wetland areas, UP/SP shall restrict mechanized equipment to the area required to complete construction activities.
86. UP/SP shall perform hydrologic and hydraulic analyses for any modifications to the South Platte River bridge, to ensure the changes would have no effect on the 100-year floodplain.
87. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.
ILLINOIS - GIRARD
88. UP/SP shall consult with the District Soil Scientist of the U.S. Department of Agriculture, Natural Resources Conservation Service, for recommendations to reduce impacts to prime farmland soils.
89. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.
ILLINOIS - SALEM
90. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.
KANSAS - HOPE
91. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.
LOUISIANA - KINDER
92. In and near the areas of Kinder Ditch and the fringe wetlands, UP/SP shall restrict mechanized equipment to the area required to complete construction activities.
93. UP/SP shall design all drainage structures to maintain existing flows for the Kinder Ditch.
LOUISIANA - SHREVEPORT
94. UP/SP shall coordinate the design and construction of the U.S. Highway I-71 overpass pier replacement with the Louisiana Department of Transportation and the Louisiana Division of the Federal Highway Administration.
95. UP/SP shall monitor noise resulting from trains operating over the curved section of the connection and implement mitigation measures to control excessive wheel squeal.
96. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.
MISSOURI - DEXTER
97. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.
98. In and near the two small wetland areas, UP/SP shall restrict mechanized equipment to the area required to complete construction activities.
MISSOURI - PARONT
99. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.

100. In and near the wetland areas, UP/SP shall restrict mechanized equipment to the upland areas to complete construction activities.
101. UP/SP shall coordinate with the Missouri Department of Conservation prior to final design of the project to avoid adverse impacts to the state-endangered gold-striped darter. UP/SP shall not conduct in-stream construction activities during the breeding season of this species.

TEXAS - CARROLLTON

102. UP/SP shall monitor noise from train operations over the new connection and implement mitigation measures to control excessive wheel squeal.

TEXAS - WEST POINT

No specific mitigation is imposed.

TEXAS - HOUSTON (TOWER 26)

103. UP/SP shall monitor noise resulting from train operations over the new connection and implement mitigation measures to control excessive wheel squeal.

TEXAS - HOUSTON (TOWER 87)

104. UP/SP shall store all construction equipment, petroleum products, and other hazardous materials outside the area of the 100-year floodplain.
105. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.

TEXAS - HOUSTON (SP TO UP)

106. UP/SP shall monitor noise resulting from train operations over the new connection and implement mitigation measures to control excessive wheel squeal.

TEXAS - FORT WORTH (NEY YARD)

107. UP/SP shall monitor noise resulting from train operations over the new connection and implement mitigation measures to control excessive wheel squeal.

TEXAS - FORT WORTH (UP TO SP)

108. UP/SP shall monitor noise resulting from train operations over the new connection and implement appropriate mitigation measures to control excessive wheel squeal.

Constructions That Result from the BNSF Agreement

RICHMOND, CA

No specific mitigation is imposed.

STOCKTON, CA

No specific mitigation is imposed.

ROBSTOWN, TX

No specific mitigation is imposed.

APPENDIX H: NET EMISSIONS (AIR QUALITY)

NET EMISSIONS CONSIDERING MITIGATION MEASURES

AQCR	STATE NAME	HC	CO	NOX	SO2	PM-10
20	AR Northeast Arkansas	49.07	152.56	1142.00	62.75	24.76
501	AZ Southeast Arizona	10.17	53.99	159.83	28.74	8.71
502	AZ Pima	15.31	71.35	270.73	38.70	8.37
503	AZ Mohave-Yuma	10.89	64.29	143.86	34.87	6.32
505	AZ Central Arizona	11.41	62.65	151.93	30.93	7.06
24	CA Metropolitan Los Angeles	13.21	65.40	219.61	35.40	7.32
27	CA Northeast Plateau	14.61	80.34	32.67	7.84	14.79
28	CA Sacramento Valley	-4.30	-9.39	-114.36	-5.09	-2.06
30	CA San Francisco Bay Area	-18.23	-39.90	-484.66	21.64	-8.76
31	CA San Joaquin Valley	10.78	39.39	184.33	12.43	7.22
33	CA Southeast Desert	12.69	124.73	-43.70	61.38	9.88
508	CA Mountain Counties	37.82	180.82	682.62	98.08	20.80
34	CO Commanche	-8.29	64.50	-446.84	28.72	0.66
35	CO Grand Mesa	-3.07	-9.54	-71.44	-5.18	-1.85
36	CO Metropolitan Denver	-80.91	-198.49	-2084.93	-106.04	-39.31
37	CO Pawnee	41.51	148.26	877.82	76.69	22.14
40	CO Yampa	22.61	70.29	526.11	38.12	11.61
88	IA Northeast Iowa	18.93	76.06	275.03	41.25	8.75
91	IA Southeast Iowa	-35.60	29.73	- 1337.25	16.13	-14.20
93	IA Southwest Iowa	-5.43	4.82	-206.60	2.61	-2.15
65	IL Burlington-Keokuk	-37.70	102.92	-1669.40	55.60	-13.08
66	IL East Central Illinois	-4.93	-15.33	-116.74	-8.31	-2.49
67	IL Metropolitan Chicago	12.26	38.12	288.34	20.68	6.19
69	IL Metropolitan Quad Cities	2.01	100.68	-508.98	12.22	11.24
70	IL Metropolitan St. Louis	-28.46	29.78	-1088.87	16.15	-11.16
71	IL North Central Illinois	-2.64	-1.11	-142.00	-11.41	0.82
73	IL Rockford-Janesville-Beliot	-9.39	23.57	-408.82	12.79	-3.31
74	IL Southeast Illinois	-7.48	32.22	-373.86	17.47	-2.27
94	KS Metropolitan Kansas City	37.05	115.19	862.25	62.48	18.69
95	KS Northeast Kansas	39.20	-114.98	-990.68	-72.88	-17.68
96	KS North Central Kansas	-64.72	-201.23	-1506.28	-109.15	-32.66
97	KS Northwest Kansas	-28.66	-89.11	-667.05	-48.33	-14.46
99	KS South Central Kansas	3.00	9.33	69.81	5.06	1.51
100	KS Southwest Kansas	57.98	180.28	1349.43	97.78	29.26
138	MO Southeast Missouri	-42.10	-130.90	-979.81	-71.00	-21.24
85	NE Metro Omaha-Council Bluffs	8.53	26.53	198.58	14.39	4.30
145	NE Lincoln-Beatrice-Fairbury	-19.99	-15.28	-634.30	-8.29	-8.82
146	NE Nebraska	1.72	5.38	40.05	2.90	0.87
12	NM New Mexico Southern Border	58.10	211.58	1240.49	114.76	30.15
154	NM Northeastern Plains	29.47	147.27	485.37	79.88	16.37
155	NM Pecos-Permian Basin	11.88	36.94	276.50	20.06	5.99
147	NV Nevada	7.64	23.75	177.75	12.88	3.85
148	NV Northwest Nevada	-22.61	152.87	-1330.41	82.92	-5.37
184	OK Central Oklahoma	-10.17	0.83	-353.66	0.45	-4.25
185	OK North Central Oklahoma	34.84	108.31	810.77	8.75	17.58
187	OK Northwestern Oklahoma	22.23	69.11	517.32	37.49	11.22
189	OK Southwestern Oklahoma	13.39	41.64	311.72	22.59	6.76
190	OR Central Oregon	20.69	64.32	481.44	34.89	10.44
191	OR Eastern Oregon	13.59	48.21	294.93	26.15	7.02
193	OR Portland	-50.35	42.63	-1889.72	23.12	20.02
22	TX Shreveport-Texarkana-Tyler	36.77	139.61	679.92	59.05	22.25
106	TX So. Louisiana-SE Texas	49.69	154.49	1156.43	83.80	25.07
153	TX El Paso-Las Cruces-Alamogordo	18.90	58.75	439.80	31.87	9.53
210	TX Abilene-Wichita Falls	13.78	122.61	33.33	66.50	9.11
211	TX Amarillo-Lubbock	45.00	194.89	849.01	105.71	24.19
212	TX Austin-Waco	39.51	122.85	919.59	66.63	19.94
215	TX Metropolitan Dallas-Ft. Worth	-27.02	-84.00	-628.74	-45.56	-13.63
217	TX Metropolitan San Antonio	-4.37	21.72	-260.23	5.64	-0.14
218	TX Midland-Odessa-San Angelo	-43.63	-131.00	-1067.91	-78.12	-20.61
219	UT Utah	28.03	159.27	392.35	86.39	16.09
220	UT Wasatch Front	15.97	108.60	159.18	58.91	9.65
228	WA Olympic-Northwest Washington	-85.51	-257.43	-2020.39	-139.63	-42.92
229	WA Puget Sound	0.79	3.42	15.03	1.86	0.43
239	WI Southeastern Wisconsin	4.58	19.99	67.68	7.25	3.12
242	WY Metropolitan Cheyenne	0.81	2.51	18.82	1.36	0.41
243	WY Wyoming	8.89	110.03	-89.92	59.68	6.72
		-27.81	158.91	-1531.43	86.19	-7.39