STB FINANCE DOCKET NO. 32760 (SUB-NO.21)

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

OVERSIGHT

DECISION NO. 10

*Decided October 24, 1997*

The Board continues its oversight process and the Union Pacific and Southern Pacific Rail Corporation and the Burlington Northern and Santa Fe Railway Company shall adhere or continue to adhere to the imposed conditions.

BY THE BOARD:

## INTRODUCTION

*Oversight Condition.* In *Union Pacific/Southern Pacific Merger,* 1 S.T.B. 233 (1996)(*UP/SP*), *Decision No. 44*, we approved the common control and merger of Union Pacific and Southern Pacific Rail Corporation.[1] Because an unconditioned merger raised serious competitive issues in various transportation corridors, our approval was subject to numerous conditions addressing the

[1] We gave authority for merger and common control of all of the carriers controlled by Union Pacific Corporation and by Southern Pacific Transportation Company. Where we are discussing pre-merger service, references to "UP" include only service by carriers controlled by Union Pacific Corporation. Otherwise "UP" refers to all of the carriers to which we gave merger authority. "SP" refers to all of the railroads formerly controlled by Southern Pacific Rail Corporation.

competitive harm that the merger would otherwise have produced. In addition to the specific mitigation measures we imposed, one of our conditions provided for a 5-year oversight process. As explained in the decision authorizing the merger, the oversight condition was intended to "examine whether the conditions we have imposed have effectively addressed the competitive issues they were intended to remedy." *See UP/SP, Decision No. 44,* 1 S.T.B. at 420.

The key competitive condition that we imposed required UP to grant extensive trackage rights to The Burlington Northern and Santa Fe Railway Company (BNSF). In light of the breadth of the trackage rights condition imposed, we indicated that we would closely monitor BNSF's operations, particularly in certain corridors. We also specifically reserved the authority to impose additional remedial conditions as necessary to alleviate unanticipated competitive harm, if the trackage rights or the other specific conditions were shown to be ineffective.

As part of this oversight condition, UP and BNSF have filed quarterly reports beginning October 1, 1996. More recently, the Board, on May 7, 1997, initiated a specific oversight proceeding in which UP and BNSF filed extensive progress reports on July 1, 1997, to which 34 parties filed comments, and to which, in turn, UP, BNSF, and certain other parties replied. This decision represents the Board's findings and recommendations based on the record compiled in this first formal oversight proceeding regarding the competitive conditions imposed by the Board.

*Summary of Findings.* The record indicates that thus far the merger, with the conditions we imposed, has not caused any substantial competitive harm. The record also shows that, after a somewhat slow start with regard to certain lines, BNSF had already initiated by July 15, 1997, what appear to be viable competitive operations over each of its key trackage rights lines. We emphasize that these conclusions are preliminary, and that our oversight is continuing. As numerous commenters have pointed out, it is too early in the process to determine with certainty just how vigorous the competition between UP and BNSF will be over the long term, and whether BNSF's operations will be efficient and responsive to shipper needs.

While the record to date does not reflect any serious competitive problems, commenters have raised concerns, which applicants readily acknowledge, about UP's service and safety performance during the period following the

consummation of this transaction.[2] These service and safety deficiencies are quite serious and disturbing, and in response, we are taking the unusual step of convening a special hearing so that parties may address these problems and discuss proposals to resolve them.[3] However, the oversight record does not indicate that these service problems have resulted from any new market power conferred by our approval of the underlying merger. Thus, the evidence submitted does not indicate any reduction in competition in the markets that UP serves, which is the focus of the oversight condition imposed by the Board in its approval of the merger. Rather, the record reflects that disruptions have been caused by a variety of factors, including UP's efforts to rehabilitate the deteriorating SP system and establish facilities that will ultimately benefit shippers with improved service, and by other system integration efforts that have not proceeded as they should have.

*Board Action.* As explained in more detail below, nothing presented on this record indicates to us that any major adjustments in the conditions we have imposed to assure continued competition are necessary, although we will impose certain additional requirements and include certain directives to ensure that the existing conditions are implemented more efficiently. Several parties have claimed reduced competition in their efforts to reargue, or to assert for the first time, an entitlement to special protective conditions, but we have examined those arguments carefully, and find them to be without merit. *See* section V below. However, our oversight will remain vigilant: we will require both UP and BNSF to continue to report on their progress; we will continue to assess the evidence in those reports, and any other evidence that we may seek; and we will make any adjustments to the conditions that we find necessary.

## I.

## ARE THERE COMPETITIVE PROBLEMS?

The UP/SP railroad merger is unprecedented in scope, encompassing most of the western United States. If this merger had been effectuated without the settlement agreements and additional conditions that we imposed, it would have

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[2] Common control of the railroads was consummated on September 11, 1996.

[3] *Rail Service in the Western United States,* STB Ex Parte No. 573, served October 2, 1997.

led to substantial competitive harm. While several parties that opposed the merger predicted that the merger would result in substantial competitive harm even with the BNSF trackage rights proposed by applicants, so far, we have seen no evidence of the major and pervasive rate increases that various parties predicted.

Thus, although some of the commenters imply that competitive problems might result from the merger, in fact, the record shows impressive systemwide rate reductions on the UP since the transaction was consummated. UP's July 1 progress report (UP/SP-304, Confidential Appendix E) indicates rate reductions in each of the following categories: Utah and Colorado coal traffic, Gulf Coast plastics traffic, all 3-to-2 traffic, all 2-to-1 traffic,[4] Gulf Coast chemicals, and grain traffic. This systemwide evidence is confirmed by a substantial amount of evidence of particular rate reductions both on the UP system and on the BNSF trackage rights segments.

Not surprisingly, there have been several requests by individual shippers for additional competitive conditions. None, however, has been justified, and there has been no complaint by shippers of rate increases on the UP lines. Notwithstanding the speculation and concern reflected in some of the comments, as the Department of Justice (DOJ) notes, it is too early to tell whether any competitive problems will emerge, and we will therefore continue to monitor the situation.

## II.

## ARE THE BNSF TRACKAGE RIGHTS CONDITIONS WORKING?

*BNSF Activities.* In approving this merger, we stated that the competition provided by the BNSF trackage rights would be one of the key matters to be considered in our oversight proceedings. We directed BNSF to begin trackage rights operations over the essential corridors between Houston, TX, and New

[4] In *Decision No. 44*, we awarded BNSF access to shippers located along its trackage rights only where, as a result of the merger, shippers previously served by two carriers would now be served by only one carrier (2-to-1 points). We did not give BNSF access to shippers that had previously been served by only SP or UP (1-to-1 points), or where shippers previously served by three carriers would now be served by only two (3-to-2 points).

Orleans, LA; between Houston, TX, and Memphis, TN; and in the Central Corridor. We warned that a failure by BNSF to do so could result in a termination of these trackage rights and substitution of (or even divestiture to) another carrier.

In this regard, BNSF noted in its July 1, 1997 progress report that, since the merger transaction was consummated, it has implemented direct train service through trackage rights over all of the routes to which it received access, with the exception of the 150-mile segment between Corpus Christi and Brownsville, TX, and the I-5 Corridor on the west coast. Subsequent to the filing of that report, however, service over the I-5 Corridor began on July 15, 1997. BNSF also indicated that it increased the total number of trackage rights trains in operation over the various corridors from 392 trains in May to 468 trains in July. As of June 30, 1997, BNSF had instituted the following train service: daily intermodal and daily manifest service between Houston and New Orleans; daily manifest service between Houston and Memphis, and Temple and Corpus Christi, TX; 5-day-a-week service between Denver, CO, and Provo, UT; 3-day-a-week service between Provo, UT, and Stockton, CA, and over the Eagle Pass corridor, a gateway into Mexico. BNSF-PR-4, v.s. Rickershauser at 4. It is evident that BNSF has been able to garner a significant amount of traffic already, and both BNSF and UP anticipate that BNSF's traffic levels will continue to grow.[5]

In the crucial corridor between New Orleans and Houston, BNSF has purchased the segment between Iowa Junction and Avondale, LA, and has made significant capital improvements to upgrade this line. (UP has retained trackage rights over this line segment.) As explained below, operational problems have greatly hampered both BNSF and UP service over this corridor, which will be further explored in the service proceeding initiated by the Board. However, BNSF's commitment to providing competitive service in this corridor appears solid.[6]

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[5] Some parties have argued that BNSF has "inflated its traffic figures by including traffic that BNSF handled before the merger and has now rerouted over the trackage rights lines." As DOJ notes, however, such rerouted traffic does contribute to the density necessary to make competitive service possible. DOJ-2 at 7, n.1.

[6] BNSF has raised concerns that UP service problems are adversely affecting BNSF's competitiveness, *see* BNSF-2 at 9-12, and UP has responded, *see* UP/SP-314. BNSF has not

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The only corridor on which BNSF's emergence as a competitive force has been somewhat slow developing — as confirmed by the comments by the California Public Utility Commission (CPUC), National Industrial Transportation League (NITL), and Sierra Pacific Power Company (SPP) — is the Central Corridor.[7] CPUC claims that BNSF has made little use of the Central Corridor to handle intermodal trains. But on July 14, 1997, BNSF did institute 7-day-a-week manifest service on the Central Corridor, which seems to be a sufficient service frequency to give BNSF a competitive presence over this corridor. In addition, UP notes that now BNSF handles a substantial amount of intermodal traffic from Salt Lake City, UT, on a daily basis. Although we are somewhat concerned that much of the traffic that BNSF is hauling in these trains consists of empty cars, BNSF's opening of its brand new I-5 Corridor[8] service should make available additional traffic flows for this line.

One commenter, Kansas City Southern Railway Company (KCS), argues that the BNSF trackage rights should not ultimately be considered successful unless BNSF is able to capture the same share of the market as SP enjoyed prior to the merger. We disagree with this approach, and agree with the assessment of the Department of Transportation (DOT) in its submission that "BNSF market share * * * should not be the decisive criterion by which the level of competition is judged. BNSF must have sufficient traffic to sustain service levels that allow it to be a realistic choice for shippers, but the traffic level could be far less than that of an independent SP." DOT notes in its comments that: "the most important indicator of the impact of the trackage rights conditions is the effect BNSF's presence in the market has on the rates offered by UPSP."

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[6](...continued)
requested that we take any action, but instead has explained that it is reviewing these issues with UP and will seek recourse from us only if workable operating procedures are not adopted.

[7] Because of concerns raised by various parties that UP's plans to route both its own and BNSF's central corridor traffic over its Moffat Tunnel line might lead to undue congestion and delay, we permitted UP to discontinue service over its alternative route (the Tennessee Pass line), but we withheld our approval for abandonment. The Public Service Company of Colorado asks that we continue oversight on the question of whether the Central Corridor traffic can be adequately served by the Moffat Tunnel route. We agree with that commenter that it is too early to tell whether the Moffat Tunnel is capable of handling traffic diverted from the Tennessee Pass line.

[8] As part of the BNSF Settlement Agreement imposed by the Board as a condition of the merger, both BNSF and UP were able to offer for the first time a single-line service along the west coast.

Another commenter, the United States Department of Agriculture (USDA), conducted "Listening Sessions" in Dodge City and Wichita, KS, concerning the impacts of the merger. Based on those sessions, USDA contends that BNSF is not providing effective competition on grain movements from points in Kansas, Oklahoma, and Texas to the Gulf of Mexico. In particular, USDA notes that both BNSF and UP increased their rates $200 per car on September 1, 1997. USDA further claims that the Texas Mexican Railway Company (Tex Mex) has been receiving inferior haulage rights service from UP connecting KCS with Tex Mex; it argues that we erred in permitting abandonment of the "Pueblo line" in Colorado; and it raises concerns about the car supply practices of all of the western railroads.

The one concrete example of a rate increase that USDA provides as support for its argument that BNSF is not providing effective competition is a seasonal adjustment that the grain-hauling carriers have been making each year in anticipation of the heavy demand during the harvest season. This increase does not appear to be anything out of the ordinary. Indeed, UP points out that, systemwide, grain rates have decreased since the merger, and there is no evidence presented by any grain shipper of increased rates on this record.

Regarding its other arguments, we note first that USDA is mistaken about the nature of the rights that Tex Mex received between Beaumont and Corpus Christi. Tex Mex received trackage rights, not haulage rights, and there has been no showing that those rights are inadequate, or that there is any other basis on this record to revisit the extent of the access granted to Tex Mex.

Second, USDA seeks to reargue the merits of the abandonment permitted by the Board between NA Junction and Towner Junction, CO. We granted that abandonment based upon a substantial record in *UP/SP, Decision No. 44,* 1 S.T.B. at 494-497. There, we found that traffic on the line was extremely light and that the carrier was experiencing a yearly loss on the line of over $2.6 million. USDA has presented no evidence to cast doubt on those findings.

Finally, the issues that USDA raises about the car supply practices of railroads in general are not related to this merger oversight proceeding.

Another commenter, International Paper Company (IP), argues that BNSF is not an effective competitor over the trackage rights lines. Notwithstanding the fact that it has tendered substantial traffic to BNSF at Camden and Pine Bluff, AR, IP asserts that it cannot tender a greater percentage of its traffic to BNSF because that carrier has failed to supply the equipment the shipper desires. BNSF responds that it has met with IP representatives, and has agreed to work

to meet IP's equipment and service needs. BNSF has also indicated that IP has agreed to make additional traffic available to BNSF. We see no basis on which to intervene in this matter now.

*Summary.* The record to date indicates that BNSF has actively pursued its trackage rights, and there is no evidence that UP has deliberately hampered BNSF's ability to provide service over its trackage rights. There is also no evidence that to date BNSF has not been working hard to become the effective competitor envisioned by the trackage rights condition. Nevertheless, as part of our ongoing oversight condition, we will continue to monitor carefully the efficacy of the BNSF trackage rights.

## III.

## ARE THERE DETAILS ABOUT IMPLEMENTATION OF THE CONDITIONS IMPOSED BY THE BOARD THAT NEED TO BE FURTHER WORKED OUT?

a. *Definition of 2-to-1 points.* BNSF has noted that it and UP still have not agreed upon a definitive list of 2-to-1 shipper facilities to which BNSF is entitled to access under our merger conditions. It suggests that we establish a presumption that all shippers at 2-to-1 points were served by both UP and SP prior to the merger, and thus that UP bears the burden of showing that this was not the case in particular instances. Arguing that all questions about which shippers at 2-to-1 points may be served by BNSF should have been resolved by now, DOJ and DOT suggest that BNSF should be given access to all shippers at 2-to-1 points regardless of whether those shippers had access to both UP and SP service prior to the merger. Their view is that ensuring BNSF access to additional traffic will enhance BNSF's potential traffic base and hence its ability to be an effective competitor. As a result, they conclude that, even if some shippers obtain a windfall, no shipper that is entitled to BNSF service would be deprived of it.

UP claims that BNSF has greatly overstated any difficulties that the two railroads are having in identifying 2-to-1 points. UP notes that, after the merger was approved, it provided BNSF with an initial listing of 2-to-1 points and 2-to-1 shortlines, and that the carriers have been engaged in an ongoing process of refining that list. UP asserts that, when BNSF has inquired concerning a particular shipper that it is prepared to serve, UP has responded promptly. UP

also notes that BNSF has requested confirmation of the 2-to-1 status of a long list of shipper facilities that BNSF research indicates received two-carrier service through reciprocal switching at some time in the past. UP states that it is in the process of answering this request, and that fewer than 20 of the 250 facilities at issue moved any rail traffic this year, which it suggests makes this dispute more theoretical than real.

The possibility that BNSF may be unable to obtain a prompt determination of whether BNSF is entitled to serve a particular shipper facility is unacceptable. If BNSF has traffic that it would like to be able to move, then it would be inexcusable for UP not to give a prompt reply indicating whether UP believes that shipper may be served. We suggest that UP and BNSF establish a protocol for resolving such issues. For example, UP could be given 5-business days to respond. If it does not so respond, then BNSF would be authorized to provide service. If UP objects, then the issue could be resolved through arbitration or by us. UP and BNSF will have 30 days to decide on a protocol for resolving these issues and report back to us. If they are unable to agree, each carrier shall set forth the precise protocol it believes we should adopt and a brief argument in support of its position. We then will adopt a protocol for resolving 2-to-1 disputes.

We stand ready to resolve promptly all disputes concerning issues of whether BNSF may serve a particular shipper. It does not now appear, however, that we need to redefine 2-to-1 shippers just to give BNSF additional traffic. There is no evidence that BNSF lacks access to sufficient traffic to be an effective competitor, or that UP has unreasonably impeded BNSF's access to shippers. We should note that, so far, we have been asked to resolve only two disputes about whether a particular shipper could be served under our conditions, neither of which involved a simple determination of 2-to-1 shipper status. We quickly resolved one of these concerning an existing shipper that asked for an expedited ruling to move traffic immediately.[9] The other dispute concerns a shipper contemplating rehabilitating a facility located on the trackage rights lines, which we are resolving in another decision issued today.[10] BNSF has pointed to no circumstance where it has come to UP with a request for a

[9] *See*, Decision No. 73 in *UP/SP*, served August 14, 1997.

[10] *See*, BNSF-81 (*UP/SP*, Decision No. 75, ruling on the joint petition of BNSF and R.R. Donnelley & Sons Company filed August 12, 1997).

clarification with respect to an actual shipper that desired to tender traffic to BNSF concerning which UP did not promptly respond.

It is understandable that there is a healthy tension between UP and BNSF about the exact parameters of our various conditions. These carriers are direct competitors, and as we predicted, our approval of the merger has led to continued rivalry rather than collusion. If a dispute threatens to impede the ability of BNSF to provide competitive service — and that appears not to have been the case so far — we will take appropriate action.

b. *Contract reopener condition and related traffic density concerns.* Several parties have asked that we reinterpret and broaden the contract reopener provision. That provision requires UP to modify its contracts with shippers at 2-to-1 points so that BNSF will have access to at least 50% of the volume of each 2-to-1 shipper that was under contract with either UP or SP. The purpose of the contract reopener condition was to increase BNSF's potential traffic base during the early months of its trackage rights operations.[11]

At the same time, we recognized that, in at least some cases, shippers were given favorable contract terms only because UP could obtain efficiencies by virtue of it being able to handle the shipper's entire volume. To give BNSF the benefits of the contract reopener provision while also providing UP with the right to extricate itself from contracts that would be unfavorable at 50% volume levels, we adopted Guideline No. 9. Guideline No. 9 permits UP to release the entire volume under contract if a shipper elects to use the contract modification provision. *See UP/SP, Decision No. 57* (STB served November 20, 1996) at 12. Under Guideline No. 9, if UP notifies the shipper that it would release the entire contract, then the shipper has the choice of either enforcing its existing UP contract in its entirety, or negotiating a contract with BNSF for whatever volume of traffic the shipper chooses.

Certain parties have asked us to eliminate Guideline No. 9, on the ground that it has somehow impeded the use of the contract reopener provision and that little use has been made of this provision.[12] BNSF notes that it has been able to

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[11] The contract reopener provision was initially proposed in an agreement between the Chemical Manufacturers Association (CMA) and the UP. As initially structured, the provision was limited to CMA members in Louisiana and Texas. We broadened it to all 2-to-1 shippers.

[12] The suggestion of the CMA and the Society of the Plastics Industry, Inc. (CMA/SPI) that Guideline No. 9 is unlawful because the Board lacks authority to override a contract is without

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contract with fewer than 10 shippers whose traffic would otherwise have been under contract with UP.

We will not revisit the contract reopener provision and Guideline No. 9 at this time. In *Decision No. 44*, we broadened the contract reopener provision in response to arguments that, prior to the merger, UP and SP had locked up much of the traffic at 2-to-1 points in contracts. Certain parties argued that, because of this pre-merger contracting, BNSF would not have adequate traffic densities to provide competitive service over its trackage rights segments. We imposed the contract reopener condition to assure that BNSF would not be foreclosed from competing for sufficient traffic to allow it to provide efficient service, especially in the period immediately after the merger.

We never viewed the contract reopener provision as the linchpin of BNSF's ability to compete over these routes. Rather, as noted earlier, the most important role of the condition was to assure that the new entrant, BNSF, was not foreclosed from competing for adequate traffic during the early months of BNSF's operations.[13] The contract reopener provision, in fact, has enabled BNSF to obtain at least some additional traffic that would not otherwise have been available.[14] If the record had shown that BNSF has not been able to capture sufficient traffic for viable operations, then we would have been more disposed to modify the contract reopener provision or find some other means of giving BNSF additional traffic. No such showing, however, has been made.

In short, the contract reopener provision, with Guideline No. 9, has given BNSF additional competitive opportunities; it has protected UP; and it has guaranteed that shippers will be no worse off — and may well be better off — than they were before the merger, when they had UP/SP competition. We will not revisit this matter.

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[12](...continued)
merit because the shipper retains the option of enforcing its entire contract. Moreover, if Guideline No. 9 were unlawful, the contract reopener provision would suffer from the same defect.

[13] Moreover, UP and SP submitted evidence in the merger proceeding, which they also cite here, indicating that the majority of the relevant UP and SP contracts were of short duration (expiring in 1996), and that 94% of these existing UP/SP contracts would expire by their own terms by the end of 1997. None of the parties has challenged this evidence. Under those circumstances, BNSF's limited use of the provision is not surprising.

[14] At the same time, the record shows that shippers in many cases have been able to obtain lower contract rates, either from BNSF or from UP, because of the contract reopener provision.

In addition to the parties that have suggested that we should modify the contract reopener provision by eliminating Guideline No. 9, DOT contends that, even when all of UP's and SP's pre-merger contracts have expired, BNSF may continue to be hampered in its ability to contract for traffic because of its inability to offer discounts for serving all of a shipper's traffic at several different points. DOT argues that this problem stems from the fact that BNSF is only able to serve 2-to-1 shippers, not all of the shippers that UP serves. DOT is concerned that BNSF may not be able to amass sufficient traffic to provide competitive service over its trackage rights. Although they do not propose any remedy, CMA and SPI also express concern that UP's merger-enhanced "leveraging power" may impede BNSF's ability to build traffic densities sufficient to compete successfully via its trackage rights. Similarly, BNSF has argued that it should be given access to any exclusively served UP traffic that UP "bundles" with 2-to-1 traffic.

There is no basis on this record for us to conclude that the economies UP could achieve by serving several of a shipper's plants along BNSF's trackage rights routes are so substantial as to impair unduly BNSF's ability to compete for 2-to-1 traffic. To the contrary, it is just as likely -- indeed, probably much more likely -- that BNSF will be able to attract substantial traffic through the economies of scale that can be realized by serving all of a shipper's requirements at a single location. Therefore, while we will remain vigilant in assuring the effectiveness of BNSF's trackage rights, at this point and on this record, there is no reason to believe that BNSF will be unable to provide a competitive presence through its trackage rights service. Thus, no changes in our remedial conditions are needed at this time.

c. *New facilities and transloading condition.* The new facilities and transloading condition originated in the BNSF and CMA agreements. The condition gave BNSF the right to serve any facilities that are established after the merger on SP-owned lines over which BNSF receives trackage rights. We expanded the condition in *Decision No. 44* by giving BNSF the right to serve new facilities established on both UP-owned and SP-owned lines over which BNSF obtained trackage rights, and by specifying that new facilities would be defined to include new transload facilities, including those owned or operated by BNSF.

The purpose of this condition was to replicate indirect competition that was available prior to the merger to shippers considering new operations at locations defined as 1-to-1 points. Those shippers were not protected by BNSF's ability

to serve 2-to-1 shippers via its trackage rights. This and other similar conditions addressing the preservation of direct *and* indirect competition made divestiture unnecessary.[15] It was not our intention to open up UP's and SP's existing exclusively served traffic to direct BNSF service through this condition. That would have been a substantial overreach, and would have gone beyond remedying the competitive harm that was at issue.

Ordinarily, shippers can lock in the competitive benefits of their ability to locate new facilities on the lines of two or more independent railroads by negotiating a long-term contract with the railroad on which they ultimately will locate. Permitting BNSF to serve new facilities was intended to replace competition that was lost by shippers who before the merger had a choice to locate facilities at points served by UP or SP.

One aspect of the new facilities condition, on which some commenters have focused here, involves transloading facilities. In authorizing the merger, the Board permitted BNSF to serve new transloading facilities, in order to preserve the role that transloading played before the merger in limiting UP's and SP's market power at exclusively served points. For example, it protected shippers that were exclusively served by only one of the merging railroads (either UP or SP) but whose rates would have been constrained by their ability to transload to or from the other nearby railroad. With this condition in place, such shippers at 1-to-1 points have the opportunity to initiate transloading operations served by BNSF over its trackage rights.

UP and BNSF have been unable to reach agreement on a protocol for determining exactly when and how shippers will be able to take advantage of the important new facilities condition, and each has agreed that it might well be desirable for this dispute to be resolved by the Board. Particularly, they seem to be unable to agree on what constitutes a "new facility" or a "new transloading facility." With regard to new facilities, we noted in *Decision No. 61* (STB served November 20, 1996) at 9, merely that "new facilities" was defined in the CMA agreement, from which this condition originated, to exclude expansions of or additions to existing facilities. BNSF now asks that we determine that new facilities include:

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[15] We also saw this condition as another way to assure adequate traffic for BNSF on its trackage rights lines.

(1) vacant or existing rail-served facilities that undergo a change of ownership or lessee and (a) change the product shipped from or received at the facility, or (b) have not shipped or received by rail for at least 12 months prior to the resumption or proposed resumption of rail service;
(2) existing facilities constructing trackage for accessing rail service for the first time; and
(3) newly constructed rail-served facilities.

UP submits that only the third item in BNSF's proposed definition is appropriate, but concedes that, in an offer at compromise that has since been withdrawn, it had been willing to incorporate the second item as well.

We do not believe that it is necessary or appropriate for us to determine, in advance, the exact parameters of the new facilities condition. As we have noted, the underlying purpose of the condition is to replace competition that would have been lost pursuant to the merger. A determination of whether a new facility such as a transload facility addresses the loss of competition that this condition was intended to remedy, or whether it instead amounts to an overreach, however, is fact-specific; it cannot be made in a vacuum, nor can it be broadly defined. Rather, each determination will no doubt be unique, given the expected differences in each shipper's circumstances. Thus, in each case, we must examine the particular circumstances to determine whether the condition has been met. *See, e.g.*, our decision issued in *UP/SP*, *Decision No. 75,* 2 S.T.B. 697 (1997) (*Donnelley*). In *Donnelley*, we determined that a particular facility was covered by the "new facilities condition" because (a) prior to the merger, SP would have been able to offer a transloading alternative in competition with a direct UP movement into the shipper's plant; (b) the facility had not been served by rail for 4 to 5 years; and (c) the transloading operation will be entirely different in nature and purpose from that of the facility's prior use.

There are, of course, situations in which broad rules, policy guidelines, or agency declarations are necessary and appropriate to provide expedition or predictability in individual cases. Here, however, we do not believe that broadly applicable rules or declarations are warranted. There has not been a flood of new facility controversies; to the contrary, the condition has been in place for over a year, and to date, only one controversy has been brought to our attention. Moreover, we are confident that we can resolve any controversies that are brought before us quickly. We note that, in the only controversy that we have been asked to resolve, we were able to act in just over two months. *See*

*Donnelley, supra.*[16] We understand the parties' desire for predictability, and indeed, we believe that our decision in *Donnelley* should provide substantial guidance for the future. A rule or guideline to cover all possible fact patterns, however, is simply not feasible or appropriate now.[17]

## IV.

## WHAT ABOUT SAFETY AND SERVICE PROBLEMS?

Several commenters are understandably concerned about the significant post-merger service deterioration on UP's lines. They note problems in all segments of UP's system,[18] in terms of poor transit times and inadequate car supply and delivery performance. UP has also experienced three tragic train accidents in recent months, which have triggered concern and action by the Federal Railroad Administration (FRA).

UP acknowledges that operating problems have proven to be more severe than originally anticipated, and that they are creating significant difficulties for its customers. UP maintains, however, that its current post-merger service and safety problems are for the most part unrelated to the merger of the operations of its rail carriers.

In discussing the operational problems that it is experiencing, UP points to several causes. First, UP notes the poor condition of SP's plant. Also, because the labor agreements needed to implement the merger were not finalized until recently, UP has been largely precluded until now from even beginning its workforce integration. In addition, the new system-wide computerized control network needed to operate the merged system has not been fully in place; it is being implemented in phases, with the final implementation expected by March 1, 1998 (instead of the earlier projection of May 1998). Finally, UP cites several unrelated events that have exacerbated its operating and service problems. These events include delays for traffic moving to and from Mexico

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[16] Indeed, we would have acted more quickly in *Donnelley* had we not had to consider the broader request for relief being sought here by BNSF.

[17] *Cf.* the comments of DOJ and DOT, suggesting that the definition of "new facility" should be functional, in that it should turn on whether new service is being established rather than whether existing structures are being served.

[18] In particular, the Houston/Gulf Coast, the SSW Corridor, the Central Corridor, the I-5 Corridor, and the Powder River Basin area.

related to the recent privatization of that country's rail lines; a dramatic increase in the volume of plastics shipments requiring storage in transit; CSX problems east of New Orleans caused by hurricane Danny; a major flood in the nation's largest coal mine in the Powder River Basin; and the hiring of a number of former SP crew members by BNSF to staff its new operations, leaving UP with a shortage of skilled workers.

UP's July 1 progress report in this oversight proceeding outlines its implementation or planned implementation of a number of measures that will reduce the current operational difficulties. More recently, on August 29, 1997, UP issued a press release indicating that it has stepped up the measures outlined on July 1, which it has further modified in its October 1 progress report. As we would expect, UP has indicated that the prompt resolution of its service and safety problems is its highest corporate priority.

As noted above, we have instituted a proceeding to look into what should be done about the very real rail service problems in the western United States. With regard to safety, UP appears to be fully cooperating with FRA, the federal agency with responsibility for rail safety enforcement, in addressing concerns identified by that agency.

The essential point for the purposes of this oversight proceeding, however, is that the service and safety matters we have just discussed do not appear to be the result of a lack of adequate competition or the anticompetitive acts of the merging carriers, or, most specifically, the ineffectiveness of the competitive conditions imposed by the Board on the merger. Nevertheless, we will continue to monitor closely the competitive situation resulting from our approval of this merger.

## V.

## ARE ANY NEW CONDITIONS REQUIRED?

Our review of the record indicates that no major new conditions are required to assure the preservation of vigorous competition in the markets affected by the merger. Several parties have requested new conditions or have renewed condition requests that we previously denied. It is not the purpose of this oversight proceeding to give the parties an opportunity to relitigate our merger decision, and in the absence of a competitive problem, it would not be appropriate for us to reopen the merger and impose additional conditions. Our

resolution of various requests for additional conditions and our examination of specific concerns follows.

a. *Tex Mex's* contention that the trackage rights condition that we imposed may not be accomplishing its intended purpose is without support. Tex Mex is essentially rearguing the Board's decision to limit the trackage rights granted to it to traffic having a prior or subsequent movement over Tex Mex's lines. The Board granted these trackage rights to Tex Mex to assure that the merger would not erode its traffic base and undermine its ability to provide an alternative route to the Laredo gateway for traffic to and from Mexico. Tex Mex concedes, however, that the trackage rights have permitted it to increase its traffic since the merger. Thus, the condition we imposed is working as anticipated.

b. *Sierra Pacific Power Company and Idaho Power Company* (SPP) contend that UP and BNSF/Utah Railway (UR) competition for their coal traffic to the North Valmy Station in Nevada has been inadequate. SPP seeks essentially the same broad relief that it sought, and we denied, in the merger proceeding. SPP argued there, as it continues to argue here, that BNSF will not be able to provide an adequate substitute for SP's service and that SPP should be given the authority to choose another carrier to operate at reduced trackage rights fees (*i.e.*, fees lower than those now paid by BNSF) from all coal mines in Utah and Colorado served by SP.

SPP has not justified the broad relief it seeks, nor has it justified narrower relief directed to the situation at the North Valmy facility. The short answer to SPP's claims is that competition has not decreased because of the merger. UP proposed contract rates on SPP's traffic that were lower than those that prevailed before the merger, but SPP declined the offer. Subsequently, BNSF contracted with SPP to carry some coal to North Valmy. These events do not show any decrease in competition since the merger.

We are aware that SPP has filed a rate complaint against UP's rates between the loadout facilities at Sharp, UT, serving the Southern Utah Fuel Company (SUFCO) mine and the North Valmy station;[19] as part of that proceeding, SPP must show that UP is market dominant over SPP's traffic. We do not intend to prejudge that complaint here. We conclude, however, that, on this record, no

[19] UP is now moving SUFCO coal from the Sharp load-out to North Valmy under a newly established common carrier rate. SPP has challenged the reasonableness of that rate in *Sierra Pacific Power Company, et al. v. Union Pacific Railroad Company,* STB Docket No. 42012, filed August 1, 1997.

basis has been provided to disturb our original finding in *UP/SP, Decision No. 44,* that SPP'S competitive alternatives at North Valmy are not impaired by the merger. *Id.*, 1 S.T.B. at 471-72.

UP notes that the principal source of coal for the North Valmy facility is the SUFCO coal mine, which is served only by truck. SUFCO coal moves by truck 81 miles to the Sharp transloading facility on the UP lines, and then 460 miles by rail to Valmy. SUFCO coal can also move by truck 94 miles to the Savage transloading facility, and then 491 miles by rail to Valmy, using a UR/BNSF movement.[20] The availability of these apparently comparable routings indicates that there continues to be competitive rail service to allow SPP to receive its coal requirements from the SUFCO mine. Moreover, as UP notes, there are other BNSF/UR-served mines even closer to Savage than the SUFCO mine that could be used to meet North Valmy's needs, at least to the extent that they exceed its minimum contractual commitment to receive coal from SUFCO. The service SPP is now receiving from BNSF to move coal to North Valmy under contract is but one of the options that we observed in *UP/SP, Decision No. 44.*

In short, SPP has not shown that we should impose conditions to create additional competition for its traffic.

c. *Railco* operates a coal transloading facility near the Savage transloading facility in Utah. UP reached a settlement agreement with UR giving that carrier access to the Savage facility for the first time. The agreement did not give UR access to the Railco facility. This issue was decided in *UP/SP, Decision No. 44,* and again in *Decision No. 66* (STB served December 31, 1996), where we explained that:

> We realize that the [UR] agreement, by providing an increased rail option for one shipper but not for another, may disadvantage the one for whom the increased option has not been provided. That, however, is not the kind of harm that should be rectified under the 49 U.S.C. 11344(c) conditioning power, which was not used by the ICC and will not be used by us to equalize rates and service among competing shippers.

(*Id.* at 14). Railco has presented no reason here to disturb that determination.

d. *Cyprus Amax* is in the process of shifting production from the Plateau Mine to its new facility at Willow Creek, where UR, as the sole originating

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[20] As we explained in *UP/SP, Decision No. 44,* joint-line movements of unit-train coal are not inherently less efficient than single-line movements.

carrier, will provide equal competitive access to UP and BNSF. Cyprus Amax argues that BNSF's trackage rights for movements of coal from Utah origins to Los Angeles, CA, for export should be expanded. It maintains that BNSF should be granted trackage rights over UP's route to Los Angeles through Las Vegas, NV, or by some other means. Before the merger, Cyprus Amax used SP to haul coal, even though its route was 470 miles longer than UP's. Although BNSF service is available over the same route that SP previously used, Cyprus Amax claims that BNSF's rates are significantly higher than were SP's rates.

Given UP's substantial geographic advantage, it is not surprising that UP has been able to offer a lower rate on these movements than BNSF can. Although SP was evidently offering a low rate for these movements, BNSF has explained that SP's pricing package apparently reflected equipment backhauls that made the movement for Cyprus Amax economically viable, and UP states that BNSF has every opportunity and incentive to establish similar backhauls with shippers in the Utah Valley. Indeed, Cyprus Amax quotes approvingly from UP's original merger application that the export coal market "is intensely competitive with lower cost Australian coal(,) the leading contender in end-markets* * *." UP submitted evidence in its July 1, 1997 report indicating that its systemwide rates for export coal declined 4-5% over the last year. Thus, Cyprus Amax has shown no evidence here of competitive harm resulting from the merger that is sufficient to justify additional conditions.

e. *New Orleans*. In its July progress report and its August 1st filing, BNSF asserts that access by BNSF to former UP or SP customers at New Orleans through reciprocal switching has not been permitted by UP, allegedly disadvantaging shippers of westbound traffic out of New Orleans by denying them access to the competitive two-carrier service they enjoyed prior to this merger. BNSF indicates that it plans to file a separate petition concerning this matter. BNSF-PR-4 at. 12, BNSF-1 at 18. DOT urges us to inquire into this problem and to take whatever remedial action is necessary. DOT-1 at 6.

UP responds that this condition request by BNSF is (a) untimely, (b) contrary to the BNSF settlement agreement, and (c) wholly unjustified. UP argues that the request is unjustified because the relatively few shippers in New Orleans that are served by it and open to reciprocal switching are also open to KCS and Illinois Central Railway (IC), and thus those shippers did not lose rail competition as a result of the merger. UP notes that, contrary to DOT's statement, KCS and IC are free to handle traffic of these shippers that is bound

to or from points west of New Orleans. It notes that no New Orleans shipper has shown that the merger left it without any rail competition.[21]

BNSF has not presented any basis on this record for us to conclude that an additional condition is warranted at New Orleans. If BNSF files a petition concerning this matter, we will examine it in more detail.

f. *North American Logistics Services* (NALS) has attempted to reargue its request for direct BNSF service for its Wunotoo, NV, plant near Reno, NV, which was denied in *UP/SP, Decision No. 44*, 1 S.T.B. at 479. That plant was an exclusively served site before the merger, and continues to be exclusively served by UP. NALS has presented no new evidence or changed circumstances sufficient to support its request for direct BNSF service.

## VI.

## LABOR ISSUES

The United Transportation Union (UTU) alleges that there have been instances where UP has made certain labor changes prior to negotiating an implementing agreement to permit those changes. UP admits that there have been a handful of occasions where this has occurred, but states that when these matters have been brought to its attention, it has taken prompt corrective action. UP has now negotiated or arbitrated most of the necessary new agreements as contemplated by the *New York Dock*[22] conditions. While no further labor protective conditions have been justified, we admonish UP scrupulously to observe its *New York Dock* obligations.

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[21] UP indicates that it will offer a full response when and if BNSF's petition is filed.

[22] *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979) (standard labor protective conditions for mergers, consolidations, and control proceedings).

## VII.

## ARE WE GETTING ENOUGH INFORMATION?

Although the information that UP and BNSF submitted in their first three quarterly reports lacked sufficient detail, the reports that were filed on July 1, 1997, were much more comprehensive. We believe that we are now getting the appropriate type and amount of information.[23] UP and BNSF have proposed, and we agree, that the existing quarterly reporting schedule, with comprehensive summary presentations to be filed in the July 1, 1998 progress reports, should be continued. With respect to the July 1 reports, interested parties will then have 45 days from July 1, 1998, to comment on oversight issues, and replies by UP and BNSF will be due 15 days later. We will continuously monitor the quarterly reports, and we anticipate issuing another report concerning oversight issues following a review of the July 1 submissions and the comments. Of course, we always reserve the right to alter the reporting schedule or intensify the monitoring. Any parties seeking immediate, merger-related relief should use our ordinary formal complaint or declaratory order procedures.

There is no reason to open this proceeding for formal discovery procedures as some parties have suggested. Rather, the Board hereby directs that UP and BNSF shall make available their 100% traffic tapes by July 15, 1998. The type of data that would then be available for traffic from July 1 of the previous year to June 30 of the reporting year would permit interested persons to address whether the competitive conditions imposed by the Board are working as envisioned. Formal discovery procedures would add no new relevant information on competition and would complicate this oversight process unnecessarily.

We note that, on October 16, 1997, we issued an order prescribing the type of information that UP must file periodically in the proceeding involving service in the western United States. We will continue to examine that information, as

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[23] DOT and the National Railroad Passenger Corporation (Amtrak) have requested that UP provide detailed information in its quarterly reports on the effect that the merger has had on on-time passenger train performance. By statute, Amtrak is required to negotiate contractual incentives and penalties for on-time performance. UP and Amtrak are apparently in the midst of renegotiating their contracts. Except to the extent that we are required to do so under 49 U.S.C. 24308, we see no reason to interpose ourselves in this process, which is unrelated to the issue of competitive service for shippers, the focus of this oversight proceeding.

well as any filings that shippers and others make in that proceeding. In addition, shippers may continue the existing informal process of bringing individual rail service complaints to our Office of Compliance and Enforcement.

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

*It is ordered*:

1. UP and BNSF shall submit their proposed protocol(s) concerning identification of 2-to-1 points within 30 days.

2. UP and BNSF shall continue to report quarterly, with comprehensive summary presentations included in their progress reports due on July 1, 1998.

3. UP and BNSF shall make their 100% traffic tapes available by July 15, 1998.

4. Comments of interested parties concerning oversight will be due on August 14, 1998.

5. Replies will be due September 1, 1998.

6. This decision is effective on October 27, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.