

STB SERVICE ORDER NO. 1518 (SUB-NO. 1)¹

JOINT PETITION FOR A FURTHER SERVICE ORDER

Decided July 30, 1998

The Board provides for continued operational monitoring of service in the western United States, but denies request for a further service order. Based on the operational data it has received, and direct field observations by Board personnel, the Board finds that, while service throughout the West is not at uniformly improved levels, the service emergency is over, and that there is thus no legal basis for a further service order.

BY THE BOARD:

In *Joint Petition for Service Order*, 2 S.T.B. 725 (1997), we took a number of actions in response to railroad service problems in the West. As most pertinent here, we augmented the data collection activities that we had initiated pursuant to our orders in *Rail Service in the Western United States*, Ex Parte No. 573, and we temporarily ordered certain changes in the way in which rail service is provided in and around the Houston area. Among its other provisions, the service order, as modified in subsequent orders,² authorized the Texas Mexican Railway (Tex Mex) to provide expanded service in and around Houston; it directed Union Pacific Railroad Company (UP) to release certain UP shippers from their contracts so that they could be served by Tex Mex or by Burlington Northern and Santa Fe Railway Company (BNSF), which had existing authority to serve Houston; and it provided that certain operations could be modified to

¹ This proceeding also embraces *Rail Service in the Western United States*, Ex Parte 573 and *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*, STB Finance Docket No. 32760.

² *Joint Petition For Service Order*, 2 S.T.B. 744 (1997), 3 S.T.B. 28 (1998) and 3 S.T.B. 44 (1998). These decisions, among other things, expanded the amount of data that UP was required to file, and also required data filing by BNSF.

help route traffic around Houston. The service order, which has been extended for the maximum period permitted under section 11123 (so that it will have been in effect for a total of 270 days), is now set to expire on August 2, 1998.

On July 17, 1998, three shipper groups that had been involved with the issuance of the original service order — the Society of the Plastics Industry, Inc. (SPI), the National Industrial Transportation League (NITL), and the Chemical Manufacturers Association (CMA) (collectively SPI petitioners) — filed a petition asking us to issue a further emergency service order. Citing language from the Board's decision initiating a review of proposals to restructure UP's network and operations in the Houston/Gulf Coast area,³ and the data that we have been receiving as part of our monitoring of the situation, the SPI petitioners allege that the service emergency has not ended, and that therefore the service order should be continued, or a new one established, until the Board issues a final decision in the *Houston/Gulf Coast Oversight* proceeding. United States Congressmen Nick Lampson (D-TX), Gene Green (D-TX), and Max Sandlin (D-TX) filed a letter urging the Board to consider continuing the service order, but in any event to monitor the situation and take further action immediately should rail service deteriorate. United States Congressman Bill Archer (R-TX) filed a letter expressing concern that a recurrence of serious rail congestion in Houston be prevented. The Greater Houston Partnership filed a letter in support of the SPI/NITL/CMA proposal. The Western Coal Traffic League filed a letter in support of both the SPI/NITL/CMA proposal and the Entergy petition.⁴

On July 28, 1998, a further petition for a continuing service order was filed by Entergy Services, Inc. and Entergy Arkansas, Inc. (Entergy). Entergy, an electric utility with a coal-fired generating plant near Redfield, Arkansas (the White Bluff plant), asserts that UP's coal transportation services to its plant are seriously deficient, and have put its continued generation operations at risk. In its petition, Entergy notes that it has, on three separate occasions in the past 8 months, asked the Board to grant BNSF, which has overhead trackage rights over a nearby UP line, direct access to the White Bluff plant, but that the Board

³ *Union Pacific Corp. -- Control and Merger -- Southern Pacific Rail Corp.*, STB Finance Docket No. 32760 (Sub-No. 26), Decision No. 1 (*Houston/Gulf Coast Oversight*) (STB served May 19, 1998) at 3-4.

⁴ On July 30, 1998, a reply in support of the SPI/NITL/CMA petition (actually a rebuttal to UP's response) was filed by the Texas Mexican Railway Company and the Kansas City Southern Railway Company (Tex Mex reply). While challenging UP's assertion that service to the Houston area has improved substantially, the Tex Mex reply asserts that the improvements in service to the Houston area resulted from the service order, and that service levels will deteriorate if the service order lapses.

has not acted on its requests. It states that the Board should continue the entire service order for 6 months, and should expand it so as to permit BNSF access to the White Bluff plant as well.

On July 29, 1998, a petition was filed by Southern California Regional Rail Authority (SCRRA). SCRRA asked the Board to address delays in commuter service operations in Southern California by augmenting UP's data filing requirements to include, for all lines that UP shares with SCRRA, the following information: blocked sidings; blocked main lines; and number of crews unable to complete scheduled operations due to expiration of permitted work periods. SCRRA also asked the Board to require UP to undertake certain specified capital projects that it concludes would increase the capacity of the lines UP shares with SCRRA, in the event that commuter service operations do not reach certain levels.

UP responded in opposition to the SPI/NITL/CMA proposal and to the Entergy petition, and it filed a letter indicating that it would respond to the SCRRA petition shortly. In its extensive response to the SPI/NITL/CMA petition, UP states that its service is vastly improved, generally and in Houston, and that, because there is no longer a service emergency in the area primarily affected by the service order, we have no authority to impose the requested relief. UP also notes that, at a time when UP has suffered three consecutive quarters of extensive losses, continued diversion of its traffic base to the far more profitable BNSF, and to Tex Mex, will weaken its ability to be a strong competitor to BNSF, which it notes is rapidly becoming the dominant railroad in the West.

United States Senator J. Robert Kerrey (D-NE) filed a letter in support of UP's position, noting the improved service in the Houston area and the importance of allowing UP to prove itself under normal operating conditions. United States Senator Chuck Hagel (R-NE) filed a letter expressing concern that extending the service order could hinder UP's efforts to provide good service and its ability to invest in its infrastructure. United States House Transportation and Infrastructure Committee Chairman Bud Shuster (R-PA) filed a letter urging the Board to weigh carefully the impact that diversion of UP traffic to other carriers will have on UP's financial condition. Charles L. Little, International President of the United Transportation Union (UTU), which represents many of UP's employees working in the Houston area, filed a letter stating that Houston area rail lines are close to normal, and asking that the order not be extended, because UP is now prepared to move additional traffic given the marked improvement in the Houston/Gulf Coast rail situation.

DISCUSSION AND CONCLUSIONS

The SPI petitioners do not differentiate between the data filing requirements that our service order and our Ex Parte No. 573 order imposed on UP, on the one hand, and the requirement that UP give other carriers access to its lines and traffic base, on the other. In our view, however, while both requirements were important and necessary responses to the service emergency, circumstances have changed. As things stand today, continued data reporting by UP and BNSF is necessary and appropriate, but given the significant improvements in Houston area rail service, there is no longer any basis on which we could issue an emergency service order requiring UP to give up traffic to other carriers in that region. We will address data filing first. We will then respond to the request that we continue to provide for expanded service by BNSF and Tex Mex. Finally, we will address the petitions filed by Entergy and SCRRA.

A. *Operational Monitoring - Data Filing.* Throughout the service emergency, the data that we have been receiving from UP and BNSF have been extremely helpful to us in evaluating the progress of the service recovery, the location and severity of service problems, and the appropriate Board response, if any, to concerns about service. Although service has improved throughout the West in general, and on the UP system in particular, as railroads have made necessary investments in equipment, personnel, and infrastructure, it is still not at uniformly improved levels, as reflected by the recent congestion in Southern California.⁵ We intend to be vigilant, and to intervene as appropriate to ensure reasonable service levels throughout the West, particularly in view of the impending need to move grain and seasonal traffic. Because informational filings will be helpful to us in monitoring continued improvement in service levels, or in the event that action on our part is necessary to respond to future emergency situations, as part of our ongoing Ex Parte No. 573 proceeding, we will direct UP and BNSF to continue filing information.

We recognize, however, that information filing can be burdensome, particularly as it is currently configured, and that it can divert resources away from the transportation issues that face UP and BNSF. Therefore, after reviewing our prior data requirements, and consistent with the approach we are

⁵ In its most recent weekly data filing, UP states that the congestion in Southern California has lessened. Our staff, which is currently on site in Southern California, confirms UP's statement in this regard.

following in the Conrail acquisition proceeding,⁶ we have decided to reconfigure the reporting by (a) reducing the reporting frequency to bi-weekly; (b) eliminating the requirement that copies of the reports be served on all parties to the service order proceeding; (c) revising individual reports to eliminate superfluous information; (d) requiring that the filing of future monitoring reports be made directly with the Director of the Board's Office of Compliance and Enforcement, who will place the non-confidential information (all of the information except for that covered by items 10 and 13 of the Appendix to this decision) in the docket in the Ex Parte No. 573 proceeding. These data filing requirements are what is necessary to continue to give us a thorough picture of the service situation in the West, reflecting the need to protect commercially sensitive information. Our specific data requirements are set forth in detail in the Appendix to this decision.

B. *Service in Houston.* The provisions of 49 U.S.C. 11123 authorize us to issue emergency service orders, but only when we determine that a "failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States." The statute, on its face, does not give us *carte blanche* to direct service simply because a party would prefer to be served one way rather than another; rather, Congress intended that the power be used sparingly and in a focused way. Late last year, we issued our unprecedented emergency service order, but only because we found that there was a transportation emergency affecting service throughout the West, and that we could help mitigate the emergency by adding service options in and around Houston, which we found was the source of the crisis.

Here, notwithstanding the SPI petitioners' perfunctory assertion that the service emergency persists, we see no basis on which we could lawfully extend the Houston provisions of the service order. The SPI petitioners have, as we noted, cited data that show that, on a systemwide basis, UP service has not returned to the levels it was at before the emergency began, and they and the Tex Mex reply have cited remarks disparaging to UP service made by some of the parties to the *Houston/Gulf Coast Oversight* proceeding that have asked for additional transportation options for the Houston area on a permanent basis. But viewed objectively, it is inescapable that service to Houston has improved

⁶ *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388.

significantly, and that continuation of the operations provided by BNSF and TexMex under the service order is not necessary to address a service emergency.

Indeed, the Houston area is fluid, and has been for several weeks. UP points out (response at 15-18, and Duffy Verified Statement) that transit times for UP's major shippers from the Houston/Gulf area to midcontinent gateways have been reduced by 50% and are near or better than pre-emergency levels; switching is timely in most instances; car inventory in Texas and Louisiana, and trains held south of Kansas City, are at their lowest reported levels since the current reporting was instituted, and within normal ranges; blocked sidings have been significantly reduced and are within normal ranges; train speeds on Houston corridors have improved by from 50 to nearly 100%; dwell times at yards such as Englewood and Settegast have been reduced;⁷ and cross-border traffic at Laredo is moving normally.⁸ Notwithstanding Tex Mex's position that the improvements are overstated, the information that UP reports in its reply is consistent with the data that we have received and the observations of our staff during site visits made to the Houston area on various occasions throughout the period of the emergency order.

In short, it is clear to us that service in the Houston/Gulf Coast area has shown significant improvement, and we believe that this improvement has promoted, and will continue to promote, service improvements throughout the UP system. Any service problems that may exist elsewhere on the UP system will not be remedied further by continuing the service order provisions for the Houston area. If circumstances in Houston change, as the Tex Mex reply predicts, we can and will intervene, to the extent it is appropriate to do so. But there is no basis for continuing to do so now.⁹ Indeed, had the current situation in Houston been in effect last Fall, we would not have ordered the additional transportation options as part of the service order proceeding.

We are, of course, aware that, in the *Houston/Gulf Coast Oversight* proceeding, the Board received several substantial pleadings suggesting, on competitive grounds, permanent changes to the ownership and operation of the

⁷ As UP points out, and as our staff observed during site visits to the Houston area, dwell times at Settegast are inflated by the substantial number of empty shipper-owned cars being stored at the owners' request.

⁸ UP points out (reply at 19-22) that the measurements submitted by the SPI petitioners are either not current, not based on a valid "baseline," or systemwide rather than Houston/Gulf Coast-related.

⁹ Moreover, many actions taken during the term of the service order that have proven particularly helpful, including directional running and joint dispatching, will continue in effect regardless of whether we extend the order.

rail facilities in and around the Houston area. Some of those pleadings request that the operations authorized under the service order be made permanent and indeed expanded. We are receiving public comment on those pleadings through the middle of October 1998, and we expect to rule on the matter by the end of the year. Implicit in the SPI/NITL/CMA petition is a suggestion that, even if we do not find a continued transportation emergency in Houston, we should use our injunctive authority to continue the remedies provided in the service order until we complete the *Houston/Gulf Coast Oversight* proceeding.¹⁰

We do not believe that such relief would be appropriate. We are not in a position to prejudge the outcome of the *Houston/Gulf Coast Oversight* proceeding, and yet, requiring continuation of the operations under the service order in the absence of a service-based reason would appear to do just that. Moreover, given the current improved level of UP service in the area, there is no reason to believe that the carrier will not respond adequately to all Houston area shippers that make reasonable requests for service. Finally, there is some basis for UP's concern over the effect that continuation of the service order could have on its financial condition, particularly after three quarters of significant losses. Although the traffic and revenue diversion associated with the service order, in and of itself, might not be financially devastating, it is not trivial either in light of the UP's current weakened state. Absent a service emergency, we must be mindful of the risk that continued government intervention into the business of an important going concern, such as UP, could impede the company's ability to raise the capital needed to continue to make the kinds of infrastructure investments that the West needs, and that UP has pledged to make.

Our conclusion to deny further emergency relief given the improved state of service in the Houston area should not be taken as indifference to the harms that shippers have suffered as a result of the service problems in the West, or as a lack of will to remain vigilant and to address any significant service issues that may arise. Indeed, we are continuing to require reporting, and we are keeping the *Rail Service in the Western United States* proceeding open so that we can take appropriate action as needed. The statute, however, requires specific

¹⁰ Noting that the SPI petitioners tie the duration of their proposed service order to completion of the *Houston/Gulf Coast Oversight* proceeding, rather than improvements in service to Houston, UP suggests in its reply that the SPI petition is really motivated more by litigation strategy than by service issues. Our decision here is based on the merits of the request for emergency relief; it has nothing to do with the merits of the *Houston/Gulf Coast Oversight* proceeding.

findings before we can issue emergency service orders, and we simply cannot defensibly make those findings here insofar as the Houston area is concerned.¹¹

For all of these reasons, we deny the request that the emergency service order be continued, or that a new one be issued. Particularly in light of the rail service instability that has existed in the West, however, we recognize that shippers may need some time to reorganize their transportation arrangements in a way that will minimize disruption and re-establish service expectations. Accordingly, we will provide a 45-day "wind-down" period. Thus, pursuant to the provisions of 49 U.S.C. 11327, we authorize Tex Mex, until September 17, 1998, to continue providing the type of service authorized in the Service Order No. 1518 proceeding, and we direct UP, also until that date, to continue to release Houston shippers that are switched by the Houston Belt Terminal Railroad (HBT) and the Port Terminal Railroad Association (PTRA) from their contracts so that they can be served by Tex Mex and BNSF.¹²

C. *Entergy*. Entergy has not shown that it is entitled to emergency relief. Like the SPI petitioners, it asks the Board to impose a systemwide service order. Its petition, however, provides no basis for continuing the Houston-based relief in the existing service order, nor does it request anything other than giving BNSF access to Entergy's White Bluff plant for a period of 6 months.¹³ Thus, in effect, it is a request for a new service order centered on Entergy's facility alone.

As we noted in responding to the SPI petitioners' request, and in a decision issued today in *Rail Service in the Western United States*, STB Ex Parte No. 573 (STB served July 31, 1998), our authority to issue an emergency service order is limited to emergency situations. Throughout the emergency service order proceedings, we have viewed the service emergency broadly, and have fashioned relief in a way that would benefit all shippers the Houston area, and, ultimately, the West. We have not, however, found circumstances appropriate for relief on a shipper-by-shipper basis.

In this case, service may not be at the levels that Entergy would prefer, but that does not entitle it to an emergency service order. UP states that it has

¹¹ The SPI petitioners cite BNSF's comments about service concerns that were made in the context of oversight of the *UP/SP* merger. But there is a difference between ongoing service issues and a transportation emergency, and BNSF's comments, although they reflect some differences between BNSF and UP, do not indicate a transportation emergency in the Houston area.

¹² Data filing, of course, will continue until further notice.

¹³ We will consider Entergy's request for a condition affording BNSF permanent access to White Bluff, filed October 23, 1997, in the upcoming *UP/SP* general oversight proceeding, Finance Docket No. 32760 (Sub-No. 21), but we will not award it emergency service relief now.

delivered more trains to Entergy's power plants during the first 5 months of 1998 than it did during the comparable months of 1997 when there were no service problems on the UP system. Moreover, unlike other utilities, Entergy has apparently refused to support operational changes to minimize congestion or pursue other UP-suggested transport alternatives that would have increased its coal deliveries. Finally, as UP notes, the imminent completion of its \$400 million track improvements and capacity expansion in the Central Corridor over routes used for Entergy shipments will reduce cycle times and provide the increased capacity that Entergy seeks.

D. *SCRRA*. As UP notes, SCRRA's request for augmented data reporting and a requirement that UP commit to specific capital projects at some time in the future does not require immediate action. As UP has not had an opportunity to review the situation, we will await UP's response and defer action on SCRRA's filing at this time.

It is ordered:

1. STB Ex Parte No. 573 is continued.
2. UP and BNSF shall provide bi-weekly reports according to the terms of this decision.
3. Until September 17, 1998, Tex Mex may continue to accept traffic routed to it by Houston shippers that are switched by HBT and PTRA, and to continue providing the type of service authorized under the Service Order No. 1518 proceeding.
4. Also until September 17, 1998, UP shall continue to release Houston shippers that are switched by HBT and PTRA from their contracts so that they can be served by Tex Mex and BNSF.
5. The petitions of SPI/NITL/CMA and Entergy are denied.
6. Action on SCRRA's request is deferred at this time.
7. This decision is effective on July 31, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

APPENDIX: OPERATIONAL MONITORING - DATA REQUIREMENTS

UNION PACIFIC:

1. On Line Rail Car Inventory - System, Foreign, Private
2. System Car Terminal Dwell Time
3. System Train Speed
4. System Coal Cycle Days
5. Sidings Blocked - System, Kansas City South, Tucson to West Colton
6. Multiple Mains Blocked
7. Trains Held By Cause - Power, Crews
8. Locomotive Fleet Size / Productivity - Gross Ton Miles Per Horse Power Day
9. USDA Report - Grain Cars Loaded By State / System Velocity - Loaded Cars
10. * Terminal Processing Report - [12 Terminals] - Cars On Hand, Switched, Dwell
11. Port Terminal Condition Report - ICTF, East Los Angeles, Houston
12. Interchange Activity - Laredo
13. * Powder River Basin Coal Cycle Days - Northern Tier/Southern Tier

BURLINGTON NORTHERN/SANTA FE:

USDA Report - Grain Cars Loaded By State / System Velocity - Loaded Cars

Note: Data restricted from web site publication or docket inclusion are marked with an asterisk.