

## 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. 86

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*Decided July 9, 1999*

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The Board clarifies the “new facilities” condition imposed in the 1996 Decision approving *Union Pacific/Southern Pacific* merger to mean that a facility on a *Union Pacific/Southern Pacific* line will be deemed to be open to competition if the facility is either adjacent to a trackage rights line or adjacent to a spur, industrial track, and/or a yard that is itself served by a trackage rights line.

## BY THE BOARD:

In *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) (*Decision No. 44*), we approved, subject to various conditions, the common control and merger of the rail carriers controlled by Union Pacific Corporation (UP) and those controlled by Southern Pacific Rail Corporation (SP).<sup>1</sup> The conditions we imposed included: the BNSF agreement that had been entered into by applicants and the predecessors of The Burlington Northern and Santa Fe Railway Company (BNSF); the CMA agreement among applicants, BNSF, and the Chemical Manufacturers Association (CMA);<sup>2</sup> and a “new facilities” condition giving BNSF the right to serve new facilities (including transload facilities, and

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<sup>1</sup> With respect to the period beginning September 11, 1996, when common control was consummated, UP refers to the combined UP/SP system.

<sup>2</sup> See, *Decision No. 44*, at 254 (description of the CMA agreement).

including transload facilities owned or operated by BNSF) on all track over which BNSF received trackage rights in the BNSF agreement.<sup>3</sup>

Here we are addressing a request by BNSF for a determination whether, under those conditions, it has the right to serve a particular shipper located within a UP yard that is adjacent to a line over which BNSF has trackage rights.<sup>4</sup> BNSF, supported by NITL and SPI, requests that we clarify that, under the new facilities condition, BNSF has the right to serve a new Four Star Sugar Co. (Four Star) facility in El Paso, TX. UP urges the rejection of BNSF's request.

#### BACKGROUND

*BNSF Agreement, As Of November 30, 1995.* An unconditioned UP/SP merger would have reduced competition at many points where rail service was provided by UP and SP and by no other carrier. Applicants, recognizing that a merger creating substantial 2-to-1 impacts was not likely to meet with regulatory approval, attempted to craft a solution to resolve these problems. When the merger application was filed on November 30, 1995, the BNSF settlement agreement was offered as the primary component of that solution. Under that agreement, BNSF would receive several thousand miles of trackage rights over UP/SP lines, and BNSF would obtain the right to serve all shippers whose rail transportation option would have gone from 2 to 1 as a result of the merger. *See, Decision No. 44*, at 243 and 252-54.

*CMA Agreement of April 18, 1996.* Various shipper interests argued that the BNSF agreement did not adequately solve the competitive problems that an unconditioned merger was likely to generate. Applicants, in an attempt to resolve various objections, entered into the CMA agreement, which broadened the BNSF agreement by: (1) expanding the scope of the trackage rights that

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<sup>3</sup> *See, Decision No. 44*, at 372-73 (third paragraph) and 419-20 (the "new facilities and transloading facilities" conditions). *See also, Decision No. 61* (STB served November 20, 1996), at 2.

<sup>4</sup> Specifically, we are disposing of the BNSF-86 petition filed May 12, 1999; the UP/SP-365 reply filed June 1, 1999; the NITL-25 reply filed June 1, 1999, by The National Industrial Transportation League (NITL); the SPI-26 reply filed June 2, 1999, by The Society of the Plastics Industry, Inc. (SPI); and the undesignated letter (in the nature of a reply to the NITL and SPI replies) filed June 8, 1999, by UP. In view of the minimal delay in filing the SPI-26 reply, SPI's request that we accept and consider this late-filed pleading will be granted. Because the NITL-25 reply seeks affirmative relief, the "reply to a reply" filed June 8, 1999, by UP will be accepted for filing and made part of the record. The reply filed June 14, 1999, by BNSF is a reply to a reply, and thus will not be considered. Nor need we consider NITL's reply to BNSF's June 14 pleading.

BNSF would receive under the BNSF agreement; and (2) granting 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." *Decision No. 44*, at 254.

*Our New Facilities Condition.* Merger opponents suggested that the BNSF agreement, even as modified, could not fully resolve all merger-related competitive problems including: (1) the loss of indirect competition, such as competition about where to site new plants; and (2) the lack of sufficient traffic density to permit BNSF to provide efficient and competitive operations on the trackage rights lines. We addressed these issues in *Decision No. 44* by imposing the new facilities condition and several other broad-based conditions. Our new facilities condition required that BNSF be granted the right to serve new facilities on both SP-owned and UP-owned track over which BNSF would receive trackage rights. It broadened the term "new facilities" to embrace transload facilities, including those owned or operated by BNSF. *Decision No. 44*, at 419-20.<sup>5</sup>

*Four Star's Noble Street Facility.* Four Star distributes corn syrup and other liquid sweeteners. Its Noble Street facility, built in 1998 and located on the south side of UP's (formerly SP's) Dallas Street Yard,<sup>6</sup> is primarily used to transload liquid sweeteners from rail tank cars to tank trucks for delivery to Coca-Cola bottlers in the El Paso area. The facility receives main line rail service via UP's (formerly SP's) El Paso-Sierra Blanca line (ESB line), which runs along the north side of the Dallas Street Yard. The facility is connected to the ESB line by an approximately 4,000-foot track that runs along the east side of the yard and that connects with the ESB line. BNSF contends that, because the trackage rights it received under the BNSF agreement include trackage rights over the ESB line, and because Four Star's Noble Street facility is a new facility located "on" that line, BNSF may serve the Noble Street facility.<sup>7</sup> UP, however, contends that the facility is located off the trackage rights line at the back of an active rail yard,

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<sup>5</sup> See also, *Decision No. 44*, at 372-73.

<sup>6</sup> See, BNSF-86, Attachment B (a map and a photograph). See also, UP/SP-365, V. S. Ransom, Ex. A (a map).

<sup>7</sup> BNSF's interests are focused on traffic originated by Cerestar USA, Inc. (Cerestar), a corn refiner that operates a BNSF-served corn wet milling facility in Dimmitt, TX (near Amarillo, TX). Cerestar, a prospective user of the Noble Street distribution facility, would like to obtain competitive service from BNSF.

and can only be reached by moving off the trackage rights line, through the yard, and over what it describes as an active line of railroad. It claims that the Noble Street facility is thus not located "on" the ESB trackage rights line, and that BNSF may not serve it.

#### DISCUSSION AND CONCLUSIONS

*Clarification vs. Arbitration.* We may clarify a prior decision whenever there is a need for a more complete explanation of the action taken. See, e.g., *Decision No. 61*, at 6. BNSF claims that there is a need for us to provide a more complete explanation of *Decision No. 44*. The matter is more complicated here, however, both because the BNSF agreement provides that all disputes arising thereunder shall be submitted to arbitration, and because we have previously suggested that all disputes arising under the BNSF agreement should be submitted to arbitration before being brought to us.<sup>8</sup> Nevertheless, the pleadings here make evident that some clarification is necessary to provide guidance to the parties and to arbitrators in interpreting the intended scope of our new facilities condition. To the extent that BNSF seeks a ruling as to whether this particular facility qualifies, however, it must seek arbitration pursuant to its agreement.

*New Facilities Condition: Clarification.* We will clarify that any new facility will be deemed to be "on" a trackage rights line, and open to BNSF service, if the facility is either: (1) adjacent to a trackage rights line; or (2) adjacent to a spur, an industrial track, and/or a yard that is itself served by a trackage rights line.<sup>9</sup>

Our new facilities condition was imposed to preserve indirect competition and to enable BNSF to achieve sufficient traffic density on the trackage rights lines. The trackage rights lines, however, are, for the most part, UP/SP main lines. As a practical matter, relatively few new facilities will be served directly

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<sup>8</sup> See, *Decision No. 81* (STB served October 5, 1998), at 5.

<sup>9</sup> As a threshold matter, UP contends that our adoption of any "generalized definition" is inconsistent with our holding in *Union Pacific/Southern Pacific Merger*, 2 S.T.B. 703 (1997) (*General Oversight Decision No. 10*), that it would be inappropriate "to determine, in advance, the exact parameters of the new facilities condition." But, in that decision, we were addressing whether a particular facility should be regarded as "new," not whether a particular facility should be regarded as being "on" a trackage rights line. We determined that the issue of whether a facility is new or just upgraded is not susceptible to a bright line test. The broad issues we have addressed here concerning whether a facility is "on" a trackage rights line are more appropriate for the promulgation of general guidelines.

from these lines, whereas a very large number of new facilities will be served directly from spurs, industrial tracks, and yards connected to these main lines.<sup>10</sup> We never intended to limit our condition to facilities served directly from a trackage rights line. That narrow interpretation would eviscerate the new facilities condition. It would also be inconsistent with the common sense understanding that a facility located adjacent to such a spur, industrial track, and/or yard is, for all practical purposes, "on" the line that connects with that spur, industrial track, or yard. *See, e.g., Decision No. 75.*<sup>11</sup>

UP has suggested that BNSF access is not needed here either to preserve indirect rail-to-rail siting competition or to enable BNSF to achieve sufficient traffic density. It argues that this particular facility should thus be construed not to be "on" a trackage rights line. But our new facilities condition does not apply only to those particular new facilities to which access can be shown to be required to achieve traffic density or to preserve some particular aspect of pre-merger competition. Our condition was intended to mitigate a general loss of competition due to the fact that shippers would have fewer two-railroad siting options by creating new options to replace those that were lost. Accordingly, the condition applies, by its terms, to all new facilities located "on" any trackage rights line.

UP also argues that the broad definition urged by BNSF would encompass a very large portion of the facilities on UP's lines, including virtually any new facility linked to a line over which BNSF received trackage rights. *See, UP/SP-365 at 2, 5.* UP is correct that the condition is broad, but it was intended to be. We remind UP, however, that the condition applies only to truly new facilities, and thus new traffic. Many new shippers might not have sited their facilities on the trackage rights lines but for the availability of two Class I rail carriers to serve the shipper. None of applicants' pre-merger solely served traffic was opened to new competition through this condition. Rather, our new facilities condition was merely intended to replace indirect competition that would otherwise have been lost as SP was absorbed into UP; it did not give BNSF direct rail access to shippers that received direct and exclusive rail service only from either UP or SP prior to the merger.

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<sup>10</sup> By and large, a rail car has to stand still, for a greater or lesser period of time, to allow freight to be loaded or unloaded. This is a regular occurrence on spurs, on industrial tracks, and on yard tracks; tracks of that sort are generally configured for pickups and deliveries. On main line tracks, however, drawn-out loading and/or unloading would bring main line traffic to a halt.

<sup>11</sup> *Union Pacific/Southern Pacific Merger*, 2 S.T.B. 697 (1997) (*Decision No. 75*).

UP contends that, because we recognized in *General Oversight Decision No. 13*, 3 S.T.B. 987 at 993-95, that "BNSF is providing fully competitive train service in every major trackage rights corridor, and is handling large and continually-increasing volumes of business using the rights it acquired in connection with the merger," the traffic density rationale can no longer "be taken seriously," UP/SP-365 at 2. UP's argument does not justify reopening of our decision imposing this condition. UP ignores the fact that some of the traffic that BNSF is already moving under its trackage rights is new traffic made available through our condition. The new facilities condition was intended to be a permanent solution for both traffic density and competitive problems, and it continues to be necessary for both purposes.

UP's assertion that the facility can be reached only by moving over a "line of railroad" over which BNSF does not have trackage rights raises an important factual issue that we will not resolve here. We will clarify, however, that, if a facility can be accessed only via a 49 U.S.C. 10901 "line of railroad" over which BNSF does not have trackage rights under our merger conditions, that facility would not be regarded as being "on" a trackage rights line. A 49 U.S.C. 10901 railroad line is not a spur, an industrial track, and/or a yard track; it is a rail line that requires our approval for construction, transfer or abandonment.

*NITL's Request For Affirmative Relief.* NITL alleges that UP, through its control of the trackage rights lines as landlord, is somehow frustrating our conditions. It argues that UP should be required to resolve all doubtful issues in favor of providing competition between BNSF and UP whenever and wherever possible. See, NITL-25 at 4. NITL has asked that UP be directed to implement a liberal interpretation of the merger conditions, and to cease frustrating their implementation. See, NITL-25 at 1-2.

We will reject NITL's request for affirmative relief. (1) As a procedural matter, the request has not been properly presented. A request for affirmative relief should be presented in a pleading in the nature of a petition (*i.e.*, a pleading to which an opposing party has a right to reply). A request for affirmative relief should not be presented in the form of a reply to a petition. (2) As a substantive matter, the request is unsupported. NITL asserts that UP has somehow used "its landlord status" to impede implementation of the merger conditions. See, NITL-25 at 4. This assertion has not been substantiated. NITL, if it intends to pursue this matter, should submit, in the upcoming third annual round of the general

oversight proceeding, evidence that further explains and substantiates its allegations here.<sup>12</sup>

*NITL's Request For Clarification.* In October 1997, we stated that we would continue to resolve, on a case-by-case basis, the issue of what operations qualify as new facilities, including new transload facilities, within the purview of the new facilities condition. *See, Decision No. 75*, at 702. In October 1998, however, we stated (as noted above) that "any further disputes between BNSF and UP arising under their settlement agreement should be arbitrated under the provisions of that agreement before bringing the matter to us to resolve." *See, Decision No. 81*, at 5. NITL, arguing that these two statements are inconsistent, asks that we clarify that our *Decision No. 81* statement was not intended to overrule our *Decision No. 75* statement. NITL claims that arbitration "will only be an invitation that will be seized by UP to delay and frustrate the rights of shippers to enjoy a replication of the competition that existed before UP's acquisition of SP." NITL-25 at 5.

We do not agree with NITL's analysis, and believe that arbitration is preferable for the resolution of disputed factual matters where the parties have agreed in advance to pursue this approach. As is the case here, an administrative proceeding might be preferable for the resolution of general matters with broad implications with respect to implementation of our conditions. We will also consider resolving disputes where both sides agree that a Board ruling would be preferable to arbitration.

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

*It is ordered:*

1. The late-filed SPI-26 reply is accepted for filing and made part of the record in this proceeding.
2. The undesignated "reply to a reply" letter filed June 8, 1999, by UP is accepted for filing and made part of the record in this proceeding.
3. The BNSF-86 petition is granted to the extent set forth in this decision.
4. This decision is effective on July 12, 1999.

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

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<sup>12</sup> Interested parties have until August 16, 1999, to file comments in the third annual round of the general oversight proceeding. *See, General Oversight Decision No. 13*, at 1004, ordering paragraph 4.