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 RAILROAD COMPANY (GENERAL OVERSIGHT)

Decision No. 15

Decided November 29, 1999

We discuss, in this decision, the issues that have been raised and the conclusions that we have reached in the third annual round of the UP/SP general oversight proceeding. Our review of this record indicates that the service crisis is over and that there have been no competitive problems resulting from the merger.

BY THE BOARD:

BACKGROUND

UP/SP Merger Proceeding. In a decision served August 12, 1996,[1] we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) subject to various conditions, including, among many others,

[1] *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996), *aff'd Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999) (*UP/SP Merger*).

a 5-year oversight condition and the terms of the BNSF agreement as supplemented by the CMA agreement and further expanded by the Board.[2] Common control was consummated on September 11, 1996, and the mergers we authorized were completed on February 1, 1998.[3]

First Annual Round Of General Oversight Proceeding. In a decision served October 27, 1997, we addressed the issues that had been raised in the first annual round of the general oversight proceeding. We concluded that the UP/SP merger, subject to the conditions we had imposed, had not caused any substantial competitive problems, and that there was no necessity for any major adjustments in the imposed conditions.[4]

Action Taken To Resolve UP's Service Problems. Although we had concluded that the UP/SP merger had not produced any substantial competitive problems as of mid-1997, it had then become evident that the UP rail system was experiencing serious service problems. In response to these problems, we took a range of actions, the most prominent of which were these: (1) we held, on October 27, 1997, a public hearing at which interested persons reported on the status of UP rail service and discussed proposals for solving UP's service problems;[5] (2) we issued, on October 31, 1997, a 30-day emergency service order (effective on November 5, 1997), that, among other things, authorized The Texas Mexican Railway Company (Tex Mex), an affiliate of The Kansas City Southern Railway Company (KCS), to provide expanded service in the Houston area, and directed UP and BNSF to take specific steps to facilitate the operations

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[2] "BNSF" refers to The Burlington Northern and Santa Fe Railway Company and its corporate predecessors. *See also, UP/SP Merger*, 1 S.T.B. at 247 n.15 (description of the BNSF agreement). "CMA" refers to the Chemical Manufacturers Association.

[3] With respect to the period ending September 10, 1996, "UP" refers to the rail carriers then controlled by Union Pacific Corporation, and "SP" refers to the rail carriers then controlled by Southern Pacific Rail Corporation. With respect to the period beginning September 11, 1996 (the date of consummation of common control), "UP" refers to the combined UP/SP system.

[4] *Union Pacific/Southern Pacific Merger*, 2 S.T.B. 703 (1997) *(General Oversight Dec. No. 10)*.

[5] *Rail Service In The Western United States*, STB Ex Parte No. 573 (STB served October 2, 1997, and published at 62 Fed. Reg. 52,373 (1997)) (announcing that a public hearing would be held on October 27, 1997). *See also, Rail Service In The Western United States*, STB Ex Parte No. 573 (STB served October 16, 1997) (to provide benchmarks to measure overall western service conditions and the extent to which service might be improving, we ordered UP to file weekly reports setting out information in numerous operational categories).

of other carriers in that area;[6] (3) by decision served December 4, 1997, we extended the emergency service order to March 15, 1998, and modified that order to address four additional matters (service involving Texas, California, western coal, and midwest agricultural shippers);[7] (4) by decision served February 25, 1998, we extended the emergency service order, as previously modified, to August 2, 1998 (the maximum time permissible under 49 U.S.C. 11123);[8] (5) by decision served March 31, 1998, we instituted a "Houston/Gulf Coast" oversight proceeding to consider long-term proposals for additional remedial conditions pertaining to rail service in the Houston/Gulf Coast region;[9] (6) by decision served July 31, 1998, we allowed the emergency service order to expire on August 2, 1998 (subject, however, to certain "wind down" arrangements that continued until September 17, 1998);[10] and (7) by decision served December 21, 1998, we adopted a "clear route" condition intended to facilitate the smooth movement of railcars through Houston, and provided for joint dispatching of trains in and around the Houston area.[11]

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[6] *Joint Petition For Service Order*, 2 S.T.B. 725 (1997). We took this action after concluding that there was a transportation emergency in the West and that the exercise of our 49 U.S.C. 11123 authority would facilitate the resolution of that emergency.

[7] *Joint Petition For Service Order*, 2 S.T.B. 744 (1997).

[8] *Joint Petition For Service Order*, 3 S.T.B. 44 (1998).

[9] The Houston/Gulf Coast oversight proceeding was initially instituted within the STB Finance Docket No. 32760 (Sub-No. 21) sub-docket. *See, 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 [Oversight]*, STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 12 (STB served March 31, 1998, and published at 63 Fed. Reg. 16,628 (1998) *(General Oversight Dec. No. 12)*. The Houston/Gulf Coast oversight proceeding was later transferred to the STB Finance Docket No. 32760 (Sub-No. 26) sub-docket. *See, 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 [Houston/Gulf Coast Oversight]*, STB Finance Docket No. 32760 (Sub-No. 26), Decision No. 1 (STB served May 19, 1998, and published at 63 Fed. Reg. 28,444 (1998)) (*Houston/Gulf Coast Oversight Dec. No. 1*).

[10] *Joint Petition For A Further Service Order*, 3 S.T.B. 612 (1998).

[11] *Union Pacific/Southern Pacific Merger*, 3 S.T.B. 1030 (1998) *(Houston/Gulf Coast Oversight Dec. No. 10)* (this decision effectively terminated the Houston/Gulf Coast oversight proceeding). UP has indicated that UP, BNSF, and Tex Mex have implemented the "clear route" condition: "The BNSF-UP joint dispatchers and UP dispatchers who control routes in the Houston terminal area are authorized to reroute trains from their normal routes whenever operating conditions warrant. They use this flexibility to enhance the efficiency of overall operations in the terminal." (continued...)

Second Annual Round Of General Oversight Proceeding. In another decision served December 21, 1998, we addressed the issues that had been raised in the second annual round of the general oversight proceeding. We concluded that the UP/SP merger, though its implementation had not proceeded operationally as smoothly as we had anticipated, had not thus far caused any substantial competitive harm, and that there was no need for any adjustment in the general conditions imposed in connection with the merger to preserve competition.[12]

This Decision: Pleadings Filed In The Third Annual Round Of The General Oversight Proceeding. Here, we have considered the issues raised in the following pleadings that were filed in the third annual round of the general oversight proceeding:[13] the UP/SP-366 "third annual report on merger and condition implementation" and the UP/SP-367 confidential appendices, both filed July 1, 1999, by UP; the BNSF-PR-12 "quarterly progress report," filed July 1, 1999, by BNSF; the DOT-4 comments filed August 16, 1999, by the United States Department of Transportation (DOT); the letter filed August 16, 1999, by The National Industrial Transportation League (NITL); the comments filed August 16, 1999, by the California Public Utilities Commission (CPUC); the UP/SP-368 reply filed September 3, 1999; and the BNSF-8 reply filed September 3, 1999. The matters discussed in these pleadings are summarized in Appendix A.

DISCUSSION AND CONCLUSIONS

OVERVIEW. The pleadings submitted in the third annual round of the general oversight proceeding reflect that the service crisis is over,[14] and that the merger is producing benefits for the shipping public (*i.e.,* better service and

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[11](...continued)
UP/SP-366 at 47.

[12] *Union Pacific/Southern Pacific Merger*, 3 S.T.B. 987 (1998) (*General Oversight Dec. No. 13*).

[13] In our decision addressing the issues that had been raised in the second annual round of the general oversight proceeding, we indicated: that UP and BNSF were to include comprehensive summary presentations in their progress reports due on July 1, 1999; that comments of interested parties concerning oversight would be due on August 16, 1999; and that any replies to such comments would be due on September 3, 1999. *See, General Oversight Dec. No. 13*, 3 S.T.B. at 1004.

[14] NITL, in its letter, states that "[r]eports from League members clearly indicate that the service problems experienced by the UP during 1997-98 have abated."

lower rates). There is no evidence that the merger has produced any competitive problems.[15]

UP has submitted ample and unrebutted evidence to demonstrate that it has overcome its service problems.[16] UP reports that its service "has recovered fully and continues to improve," and all of the information available to us confirms that analysis. Moreover, all indications are that both the UP/SP merger and the competitive conditions we imposed in *UP/SP Merger* are continuing to strengthen competition for railroad transportation in the West. Despite the participation of hundreds of shippers throughout the merger process and in our follow-up proceedings, no shipper has appeared here to even allege that this merger has resulted in any competitive harm. It appears that the merger is continuing to produce competitive benefits and improved service, and this assessment is shared by DOT. UP has submitted numerous examples to demonstrate new single-line service and shorter routings.[17] Equipment supply has improved, and switching charges have been reduced by an aggregate amount of $85 million during the first 3 post-merger years.

UP has made significant progress in merger implementation during the past year. It has successfully installed its Transportation Control System (TCS) and other support systems. It has continued to resolve issues necessary to the integration of its workforces. It has made substantial progress in consolidating and improving terminals and yards. Most notably, it has totally rebuilt Roseville Yard in Northern California. With guidance from the Federal Railroad Administration (FRA), UP has enhanced the safety of the merged system's operations; DOT has expressed satisfaction with UP's greatly improved safety record during this past year. UP has undertaken or completed merger-related capital investments, and indicates that, by the end of 1999, it will have spent, in the 3-year 1997-1999 period, more than $1 billion on such improvements. *See,* UP/SP-366 at 28.

[15] DOT, in its comments, states that "[r]ail service appears to have returned to normal levels" and that "competition between BNSF and UP/SP still seems to be vigorous." It concludes that "[i]mplementation of the merger thus appears to be proceeding satisfactorily" and that "it is not now necessary to revisit the conditions imposed by the STB." DOT-4 at 3-7.

[16] UP/SP-366 at 2.

[17] UP notes that the merger has made possible backhauls, triangulation, and more efficient equipment repositioning, which in turn have allowed UP to provide its shippers with more competitive rates and service.

The 2-to-1 shippers have continued to benefit both from access to BNSF resulting from our merger conditions[18] and from the rate and service initiatives UP has had to undertake to meet BNSF competition.[19] BNSF concurs that it has continued its efforts to provide reliable, dependable, and consistent service over the UP/SP trackage rights lines. This business has continued to grow steadily, and many shippers have benefitted from new merger-related access to BNSF, which we predicted would become a more vigorous competitor than the financially distressed SP. BNSF notes that it continues to be effective in marketing its services over the UP/SP trackage rights lines. Although BNSF has raised specific issues concerning UP's conduct towards it in terms of carrying out the merger conditions, these objections, which we discuss further below, do not detract from the overall merger implementation picture, which continues to be extremely positive.

ISSUES RAISED BY BNSF. The various issues raised by BNSF continue to involve issue-specific disputes that BNSF and UP ought to be able to resolve on their own, on a case by case basis, without our intervention.[20]

ISSUES RAISED BY CPUC. In *UP/SP Merger*, we imposed a 5-year oversight condition so that we could ensure that the remedial conditions we had imposed upon the merger would ameliorate any anticompetitive impacts that an unconditioned merger might have produced. CPUC alleges adverse impacts in three areas discussed below. Because the merger has not produced these adverse impacts, we will deny CPUC's requests for relief.

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[18] UP has submitted many examples of traffic handled by BNSF pursuant to our merger conditions. *See,* UP/SP-367.

[19] UP has submitted numerous examples of rate and service initiatives it has had to undertake to retain or regain 2-to-1 traffic. *See,* UP/SP-367.

[20] We have explained that arbitration is preferable for the resolution of disputed factual matters where the parties have agreed in advance to pursue that approach, as under the BNSF agreement, and that an administrative proceeding before us should be limited to the resolution of general matters with broad implications with respect to implementation of our conditions. *See, Union Pacific/Southern Pacific Merger,* 4 S.T.B. 304 (1999) (*Merger Dec. No. 86*), at 307 and 309-10. Furthermore, as we stated last year regarding the competitive relationship between the two carriers: "If for some reason BNSF continues to have complaints, however, and wants us to intervene, it should submit pleadings: (1) that demonstrate, with as much evidentiary detail as necessary, the existence of the problems it alleges, and that further demonstrate that these problems were either created or exacerbated by the merger; (2) that set forth, at length, the precise remedies it would have us impose; and (3) that explain, with as much detail as circumstances require, why it is that the desired remedies are necessary." *General Oversight Dec. No. 13*, 3 S.T.B. at 995 n.32.

The Interstate 5 Corridor. CPUC contends that, unless we grant BNSF trackage rights over UP between Marysville, CA, and Eugene, OR (or impose some similar remedy), there will continue to be, in the Interstate 5 (I-5) Corridor, a flawed type of north-south rail competition because UP's I-5 Corridor route will continue to be superior to BNSF's. Prior to the merger, however, there was no real north-south rail competition, flawed or otherwise, in the I-5 Corridor. Rail competition in the I-5 Corridor has not been weakened by the merger; rather, rail competition in the I-5 Corridor was created by the merger. *See, UP/SP Merger*, 1 S.T.B. at 565 ("The merger and BNSF agreement will create both a UP/SP through route and a BNSF through route in the I-5 Corridor, offering new rail options to shippers and a competitive alternative to water and truck transportation."). UP has explained that it "granted BNSF those concessions [in the I-5 Corridor] not to resolve any loss of competition as a result of the UP/SP merger, but as a *quid pro quo* in the negotiations between BNSF and UP * * *." UP/SP-368 at 9. Although the merger's procompetitive impact in the I-5 Corridor may not be as beneficial as CPUC might have preferred, the merger has not had an adverse impact in the I-5 Corridor.

The Calexico/Mexicali Border Crossing. CPUC contends that the public interest would be served if UP were required to improve the Niland-Calexico line for NAFTA rail transportation purposes.[21] But, the merger has changed nothing other than the line's ownership: it was an SP line; it is now a UP line. The merger, therefore, has not had an adverse competitive impact as respects rail operations at the Calexico/Mexicali border crossing.

The Central Corridor. CPUC contends that pre-merger UP vs. SP competition in the Central Corridor has not been effectively replicated by post-merger UP vs. BNSF competition, and that we should therefore begin a process to select another railroad that would be willing to take over the Central Corridor's secondary line between Northern California and the Midwest and reinstitute aggressive competition. Contrary to CPUC's claims, as discussed further below, we believe that, in the Central Corridor, pre-merger UP vs. SP competition *has* been effectively replicated by post-merger UP vs. BNSF competition.

(1) CPUC claims that BNSF's Central Corridor market share is substantially less than UP's. We have previously noted: that BNSF's market share is not the decisive criterion by which to judge the degree to which BNSF replicates the

[21] The North American Free Trade Agreement is commonly referred to as NAFTA.

competition that would otherwise have been lost through the merger; that, although BNSF must have sufficient Central Corridor traffic to sustain service levels that will allow it to be a realistic choice for shippers, its Central Corridor traffic level can be far less than that of an independent SP; and that the most important indicator of the impact of BNSF's Central Corridor trackage rights is the effect that BNSF's presence in the market has on the rates offered by UP. *See, General Oversight Decision No. 10*, 2 S.T.B. at 708. All indications are that BNSF's presence in the Central Corridor has required UP to compete vigorously for BNSF-accessible traffic requiring the use of that corridor. *See,* UP/SP-367 (examples, many of which involve the Central Corridor, of benefits to shippers where UP has retained or regained 2-to-1 traffic in competition against BNSF).

(2) CPUC claims that most of BNSF's California-Midwest traffic, and almost all of BNSF's California-Midwest intermodal traffic, continues to be routed via BNSF's Southern Corridor route (which BNSF refers to as its "Transcon Route").[22] As UP has observed: "CPUC offers no plausible explanation why BNSF's routing choice for Northern California-Midwest overhead shipments should be of any concern to shippers or to the State of California. If shippers are receiving competitive service and rates, routing of overhead traffic has no impact on the public interest. As a general matter, we should not be in the business of making railroad operating decisions." *See,* UP/SP-368 at 7.

(3) CPUC claims that BNSF's 1999 Central Corridor traffic levels have not kept pace with BNSF's 1998 Central Corridor traffic levels. But BNSF has explained that, in 1998, it "handled a one-time spot movement of coal for Utah Railway from Sierra Pacific Power at Valmy, NV, which temporarily increased BNSF's volumes on the Central Corridor." *See,* BNSF-8 at 5 n.3.

(4) CPUC claims that, although BNSF had previously indicated an intent to use its own crews west of Salt Lake City, BNSF has not yet begun to, and apparently no longer intends to, do so. BNSF has explained that UP crews are used to handling BNSF trains (with BNSF power) for certain of its Central Corridor trackage rights movements west of Provo, UT, that it has recently chosen to replace UP crews with BNSF crews for trains operating over the former SP route from Stockton and Roseville, CA, through Reno/Sparks, NV, and that "the rerouting of trains over the Transcon Route and the relief of congestion on the UP lines have made it unnecessary for BNSF to use its own crews on the Central Corridor." *See,* BNSF-8 at 6 n.4.

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[22] BNSF's Southern Corridor route is generally regarded as superior to any conceivable Central Corridor route, particularly for intermodal traffic.

(5) CPUC claims that BNSF has further minimized the use of its own crews in the Central Corridor by hiring the Utah Railway Company (URC) to switch cars and gather traffic for BNSF. As BNSF explains: "The combination of BNSF roadhaul service and Utah Railway pickup and delivery provides Utah customers with a viable, competitive service option." *See,* BNSF-8 at 9.

(6) CPUC claims that California shippers have not benefitted from the lower rates that strong Central Corridor competition would produce. This assertion is unsupported. There is no evidence on this record that the merger has resulted in any rate increases for California shippers, and there is no reason to believe that any shipper's rates would be reduced if BNSF were to shift traffic from its highly efficient Southern Corridor route to a less efficient Central Corridor route.

(7) CPUC claims that, because BNSF is not participating to any degree in the movement through the Central Corridor of container shipments from the Port of Oakland, that port (the nation's fourth largest container port) has become less attractive as a West Coast point of entry. This assertion is unsupported; there is no evidence that the Port of Oakland shares this concern, or that the Port of Oakland has actually become less attractive as a point of entry. In addition, this assertion overlooks the fact that, prior to the merger, SP routed most of its Oakland traffic via its own more efficient Southern Corridor route (and not via its less efficient Central Corridor route). As the Port of Oakland has itself explained: "It is, and always has been our understanding that BNSF trackage rights over the Central [C]orridor could not be used as a route to serve double-stack intermodal markets in and out of the Bay Area. This is because restricted tunnel clearances on the route make it impossible for BNSF to provide double-stack service * * *. We believe that the existing BNSF route out of Northern California through Barstow already provides excellent transit times."[23] CPUC claims that, as a practical matter, BNSF will never use its Central Corridor trackage rights to haul double-stack intermodal containers from/to the Port of Oakland. This may well be true, but, as we have already noted, the important point is that BNSF *will* be handling this traffic (via its more efficient Southern Corridor route).

(8) CPUC claims that, once UP has enlarged the tunnels on the Donner Summit route, portions of the Feather River Canyon route will become ripe for

[23] *See,* BNSF-8, Attachment 2 (letter dated June 30, 1998, from Mr. Raymond A. Boyle, Director of Maritime, Port of Oakland, to Mr. Ronald Ross, Western Governor's Association). Also, BNSF states that the Port of Oakland recently informed BNSF that the Port's position remains the same. *See,* BNSF-8 at 11 n.6.

abandonment. The anticipated abandonments are highly unlikely,[24] and, in any event, our jurisdiction as respects abandonments will allow us to deal with this matter if and when an abandonment is ever proposed.

GENERAL OVERSIGHT CONTINUED. The fourth annual round of the general oversight proceeding will be conducted in mid-2000, in accordance with the schedule indicated below.

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

It is ordered:

1. The requests for relief urged by CPUC are denied.
2. UP and BNSF shall continue to report quarterly, with comprehensive summary presentations included in their progress reports due on July 3, 2000. UP and BNSF shall make their 100% traffic waybill tapes available by July 17, 2000.
3. Comments of interested parties concerning oversight will be due on August 18, 2000.
4. Replies will be due on September 5, 2000.
5. This decision is effective on November 30, 1999.

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

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[24] *See,* BNSF-8 at 15-17.

APPENDIX A: SUMMARY OF PLEADINGS

THE UP/SP-366 REPORT. The evidence, UP argues, demonstrates that UP has overcome the service crisis,[25] and that both the UP/SP merger and the competitive conditions we imposed in *UP/SP Merger* have strengthened, and are continuing to strengthen, transport competition in the West. UP contends, in particular: that the merger is continuing to produce competitive benefits in the form of single-line service and shorter routings,[26] improved equipment supply,[27] and reduced switch charges;[28] and that 2-to-1 shippers have continued to benefit both from access to BNSF[29] and from the rate and service initiatives UP has had to undertake to meet BNSF competition.[30] UP further contends that the merger has not had adverse competitive effects on 3-to-2 traffic or on shippers of Utah and Colorado coal, Gulf Coast chemicals, or grain.[31]

THE BNSF-PR-12 REPORT. BNSF contends: that it has continued its efforts to provide reliable, dependable, and consistent service over the UP/SP trackage rights lines; that its capabilities and business have continued to grow steadily; and that, as a result, many shippers have benefitted from new merger-related access to BNSF. BNSF adds: that it continues to be effective in marketing its services over the UP/SP trackage rights lines; that its traffic volumes over these lines have continued to grow;[32] and that it remains committed to securing new business from new customers and additional business from existing customers.

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[25] UP insists that its service "has recovered fully and continues to improve." UP/SP-366 at 2.

[26] UP has submitted numerous examples to demonstrate that single-line service and shorter routings made possible by the merger have brought shippers lower rates and better service. *See,* UP/SP-367.

[27] UP claims that, among other things, the UP/SP merger has opened up numerous opportunities for backhauls, triangulation, and more efficient equipment repositioning, which in turn have allowed UP to provide its shippers with more competitive rates and service.

[28] UP estimates that the elimination and reduction of switching charges that were produced by the merger and the merger-related settlement agreements will amount to some $85 million during the first 3 post-merger years. UP/SP-366 at 53.

[29] UP has submitted numerous examples of traffic handled by BNSF pursuant to the conditions imposed in *UP/SP Merger*. *See,* UP/SP-367.

[30] UP has submitted numerous examples of rate and service initiatives it has had to undertake to retain or regain 2-to-1 traffic. *See,* UP/SP-367.

[31] The UP/SP-366 report also provides an update on merger implementation. UP claims that it has made progress during the past year: in installing its Transportation Control System (TCS) and other support systems; in integrating workforces; in consolidating and improving terminals and yards; in enhancing the safety of the merged system's operations; and in pursuing merger-related capital investments (UP indicates that, by the end of 1999, it will have made, in the 3-year 1997-1999 period, more than $1 billion in merger-related capital investments, *see,* UP/SP-366 at 28).

[32] *See,* BNSF-PR-12, Attachment 2 (this attachment reflects, for the 29-month period beginning January 1997, and ending May 1999, the total BNSF loaded units on the UP/SP lines to which BNSF received access in connection with the merger). *See also,* BNSF-PR-12, Attachments 3 to 12 (these attachments reflect, for that same 29-month period, the total BNSF loaded units for each of the major traffic lanes to which BNSF received access in connection with the merger).

BNSF raises four issues relating to its operations over the UP/SP trackage rights lines. *See,* BNSF-PR-12 at 21-25.[33]

Issue #1: Application of Agreements by UP. BNSF claims that, on a number of occasions, UP has applied the terms of various operating and other agreements in ways inconsistent with full competition by BNSF under the conditions imposed in *UP/SP Merger*.

BNSF has specified four such occasions. (a) BNSF claims that, in the Central Corridor, although UP is obligated to provide sufficient crews to BNSF, it has been UP's practice to crew its own trains first.[34] (b) BNSF claims that, on the Baytown Branch, although BNSF has the right to serve Econorail by UP reciprocal switch, UP has demanded that BNSF commence direct service to Econorail.[35] (c) BNSF claims that, in early June, UP announced that it would, effective immediately, refuse to allow BNSF to access a track in Eagle Pass designated as a Centralized Examination Station (CES), which had been used for customs inspection of incoming shipments when required by United States Customs inspectors. BNSF adds that, although an agreement respecting the Eagle Pass CES has been reached, UP's temporary refusal to allow BNSF to use this facility had a disruptive impact.[36] (d) BNSF claims that, in May 1999, UP advised Coastal Corporation, a 2-to-1 shipper, that, because Coastal was routing outbound asphalt via BNSF, UP would exercise an option to cancel Coastal's lease of UP property on which Coastal had located its asphalt railcar loading racks. BNSF also claims that UP further advised Coastal that the property lease would be extended if Coastal would return the asphalt traffic to UP.[37]

BNSF insists, in essence, that, in each of the cited instances, the actions taken by UP violated the terms of the various agreements that BNSF and UP have entered into in connection with the conditions imposed in *UP/SP Merger*. BNSF claims that such conduct will make it increasingly difficult to provide the fully effective competitive service we envisioned when we approved the UP/SP merger. BNSF adds that it is continuing to work with UP to resolve these matters on a case-

[33] BNSF has also mentioned two other issues. (i) BNSF indicates that certain "data issues" have arisen in connection with a new operating plan agreed upon by BNSF and UP respecting service to BNSF-accessible customers on the former SP Baytown and Cedar Bayou Branches between Dayton, TX, and Baytown, TX. These data issues, BNSF continues, have occurred because certain shippers have released cars for plastic storage without billing, and because UP has stored such cars intended for BNSF in remote storage-in-transit (SIT) facilities not directly accessible to BNSF. BNSF concedes, however, that these data issues have impacted both UP and BNSF, and that both carriers have generally been able to work through the problems caused by these data issues. *See,* BNSF-PR-12 at 10-11. (ii) Another issue mentioned by BNSF involves BNSF's claim that it has a right to access a Four Star Sugar Co. facility constructed in 1998 in El Paso, TX. *See,* BNSF-PR-12 at 18 n.2. We addressed this issue in a decision issued a few days after BNSF filed its BNSF-PR-12 report. *See, Merger Dec. No. 86.* UP and BNSF have advised, in their quarterly progress reports filed October 1, 1999, that, in light of the guidance provided in *Merger Dec. No. 86*, UP has agreed that BNSF has access to Four Star Sugar. *See,* UP/SP-369 at 4; BNSF-PR-13 at 11-12 n.2.

[34] *See,* BNSF-PR-12 at 21 (lines 11-13). *See also,* BNSF-PR-9 (filed October 1, 1998) at 34-35 (more extensive discussion of this asserted practice).

[35] BNSF contends that a direct service requirement, if applied in other instances, would impact BNSF's ability to provide competitive service to 2-to-1 shippers. Most rail shippers, BNSF observes, want to be served by one, not two, rail carriers, due to issues of coordination, potential downtime while a facility is switched, and record-keeping, and also due to safety issues.

[36] BNSF insists that it has a right to use the Eagle Pass CES.

[37] BNSF indicates that this issue was resolved in late June when UP agreed to extend the lease with Coastal and not require Coastal to switch its asphalt traffic from BNSF back to UP.

by-case basis, and that it will, in the absence of a successful resolution, pursue its remedies before the Board or otherwise.

Issue #2: Communications Between UP and BNSF. BNSF claims that, on a number of occasions, UP has "negotiated" with BNSF respecting BNSF's right to access particular shippers by "delivering messages" through the shippers. BNSF adds: that it has raised this concern with UP several times; that, however, UP has continued this practice; and that it has been, and remains, difficult for BNSF to deal with UP on such access issues when UP fails to communicate directly with BNSF.

Issue #3: Houston and Gulf Coast Area. BNSF contends: that, during the past year, BNSF has continued to use UP haulage to serve customers south of Corpus Christi; that, with the end of the service crisis, that haulage service has improved, and has enabled BNSF to provide competition to UP for shippers at Harlingen and Brownsville, and from/to a connection at Matamoros with Transportación Ferroviaria Mexicana, S.A. de C.V. (TFM); and that BNSF is monitoring its traffic levels to determine whether it should commence trackage rights operations between Robstown, Harlingen, Brownsville, and Matamoros. BNSF adds: that The Brownsville & Rio Grande International Railroad (BRGI) and BNSF remain concerned about the impacts that construction of the Port of Brownsville rail bypass will have on the routing of BNSF's trains; and that BRGI and BNSF are closely following the project so that any adverse impacts can be avoided or minimized.

Issue #4: Sacramento. BNSF claims: that the recent reopening, by UP, of Roseville Yard[38] did not improve service for shippers electing to route via BNSF from/to the Sacramento area, including those on the Central California Traction Company (CCT)[39] in the Lodi and Fruitridge/Polk area; that, because of the elimination of switching capacity on UP at Sacramento following the Roseville Yard reopening, cars from these shippers were sporadically moved by UP through Roseville, adding days and inconsistencies to transit times in conjunction with BNSF; and that, starting in mid-June, BNSF has been able to improve its service by operating its Stockton-Sacramento local entirely on the former SP route between those points (BNSF indicates that the prior operation used both the UP and SP routes). BNSF adds: that it "notes, and has handled for resolution on a shipment-specific basis with UP, the continuing sporadic movement of BNSF shipments through Roseville," BNSF-PR-12 at 24; and that it met with UP at the end of June to discuss these matters and to propose alternative interchange plans with UP to fully eliminate the unnecessary looping of BNSF Sacramento, Polk, and Fruitridge traffic through the reopened Roseville Yard.

THE DOT-4 COMMENTS. DOT's comments address three issues: the safety of UP rail operations; the adequacy of UP service levels; and the state of intramodal rail competition.

Issue #1: Safety. DOT contends that, over the past year, there has been a substantial improvement in safety on UP, and that, under the auspices of the FRA Safety Assurance and Compliance Program (SACP), a strong partnership dedicated to improving safety has been formed by UP, its unions, and FRA. Considerable progress, DOT claims, has already been made: only one employee fatality, DOT notes, occurred during the year 1998 as a result of train accidents or incidents, compared with nine such fatalities during the year 1997. DOT cites, among other things: the efforts UP has made to eliminate safety problems resulting from fatigue, including the hiring of 3,917 new employees into the Train Engine and Yard ranks during 1998, the establishment of training and education programs to combat problems stemming from fatigue, and the adoption of

[38] *See,* UP/SP-366 at 12-17 (Roseville Yard is now known as the Jerry R. Davis Yard).

[39] CCT is a UP-controlled switching railroad. *See, UP/SP Merger,* 1 S.T.B. at 255.

agreements to improve accommodations for away-from-home employees;[40] the steps UP has taken to reduce dispatcher workload, including the adjustment of workloads, the establishment of a dispatching center in Spring, TX, the creation of additional dispatcher positions, and the hiring of 114 new dispatchers in 1998; and the progress that UP has made toward improving signal reliability, safety training, and policies relating to maintenance-of-way personnel. DOT adds that, although UP no longer presents a singular safety concern to FRA, FRA will continue to monitor the safety of UP rail operations.

Issue #2: Service. DOT contends that UP rail service has returned to normal levels.

Issue #3: Competition. DOT contends that all indications thus far are that the conditions we imposed in *UP/SP Merger* have maintained intramodal rail competition. There is today, DOT advises, vigorous competition between UP and BNSF.

Conclusion. DOT contends that implementation of the merger appears to be proceeding satisfactorily, and that, given this circumstance, no significant modifications to the applicable conditions are now warranted. DOT adds, however, that we should continue this oversight proceeding for the entire 5-year period originally contemplated.

THE NITL LETTER. NITL concedes that the service problems experienced by UP during 1997-1998 have abated, and that BNSF's traffic over the trackage rights lines has grown since the merger was approved. NITL contends, however, that it is not yet possible to conclude that BNSF has been able to replicate completely and permanently the rail-to-rail competition that existed pre-merger. NITL therefore argues that oversight should be continued. NITL also asks that we continue to require UP and BNSF to file quarterly and annual reports, and that we instruct our staff to continue to analyze whether there is effective rail competition in the region affected by the merger.

THE CPUC COMMENTS. CPUC's comments address three issues: the Central Corridor; the I-5 Corridor; and the Calexico/Mexicali border crossing.

Issue #1: The Central Corridor. CPUC argues that, in the Central Corridor, pre-merger UP vs. SP competition has not been effectively replicated by post-merger UP vs. BNSF competition. CPUC, which contends that BNSF has done little with its Central Corridor trackage rights, notes: that the vast bulk of BNSF's California-Midwest traffic continues to be routed via BNSF's heavily traveled double-tracked Southern Corridor route; that BNSF has only an approximately 5% share of Central Corridor traffic moving between Northern California, on the one hand, and, on the other hand, Utah and points east of Utah;[41] that BNSF's 1999 Central Corridor traffic levels have not even kept pace with BNSF's 1998 Central Corridor traffic levels;[42] that, as regards Central Corridor traffic from/to California, BNSF crews handle such traffic only east of Salt Lake City (west of Salt Lake City, BNSF trains are manned by UP crews);[43] and that BNSF has further minimized the use of its own crews in the Central Corridor by hiring the Utah Railway Company (URC) to switch cars and

[40] DOT indicates that UP is now the only major railroad with a system-wide policy that provides train crews with guaranteed time off.

[41] CPUC adds that intermodal shipments by BNSF through the Central Corridor are virtually nonexistent.

[42] CPUC observes that, during the first 5 months of 1999, BNSF handled 3,250 fewer loaded units in the Central Corridor than it had handled during the first 5 months of 1998. *See,* BNSF-PR-12, Attachment 3.

[43] CPUC observes that BNSF had previously indicated an intent to use its own crews west of Salt Lake City. *See, General Oversight Dec. No. 13,* 3 S.T.B. at 1008 n.68 and 1009 n.73. CPUC claims, however, that, at present, BNSF has not yet begun to use its own crews west of Salt Lake City and apparently no longer intends to do so.

gather traffic for BNSF. CPUC insists that, today, UP dominates the Central Corridor; BNSF, CPUC claims, is providing only token competition.

CPUC claims that the lack of competition in the Central Corridor has already had a negative impact. CPUC contends that California shippers, receivers, and the public are not benefiting from the lower rates that strong Central Corridor competition would produce. CPUC further contends that, because BNSF is not participating to any degree in the movement through the Central Corridor of container shipments from the Port of Oakland, that port (the nation's fourth largest container port) has become less attractive as a West Coast point of entry.

CPUC further claims that the lack of competition in the Central Corridor is likely to have an even greater negative impact in the future. CPUC contends: that, although UP now controls both Central Corridor routes, UP itself does not need both routes;[44] that, when the current project to enlarge the tunnels on the Donner Summit route is completed, UP is likely to favor that route; and that, when this happens, portions of the Feather River Canyon route will become ripe for abandonment. CPUC further contends: that BNSF, which has only trackage rights on the Feather River Canyon route, will have little reason to invest in that route; and that, under the terms of the BNSF agreement, BNSF will have a disincentive to use the Donner Summit route for double-stack intermodal shipments.[45] CPUC argues, in essence, that, once the Central Corridor has become a one-route corridor, BNSF will never use its Central Corridor trackage rights to haul double-stack intermodal containers from/to the Port of Oakland.

CPUC therefore asks that we begin a process to select another railroad that would be willing to take over the Central Corridor's secondary line between Northern California and the Midwest and reinstitute aggressive competition.

Issue #2: The I-5 Corridor. CPUC argues that, in the I-5 Corridor connecting California and the Pacific Northwest, UP has a decided advantage over BNSF, because UP's I-5 Corridor route is superior to BNSF's I-5 Corridor route,[46] and also because UP's I-5 Corridor route provides more direct access from/to more major Pacific Northwest population centers.[47] CPUC contends that UP's advantage shows in a number of ways: in the fact that UP runs some 119 trains a week whereas BNSF runs only 31 trains a week; in the fact that BNSF's trains are smaller; and in the fact that BNSF's trains going from/to California in the I-5 Corridor include few, if any, intermodal

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[44] The focus of CPUC's interests in this regard appears to be on the portions of the two Central Corridor routes that lie between Sacramento, CA, and Weso, NV: the Feather River Canyon route (this is the northern route, which was operated by the pre-merger UP); and the Donner Summit route (this is the southern route, which was operated by the pre-merger SP).

[45] CPUC claims that, under the terms of the BNSF agreement, if BNSF were to send double-stack intermodal traffic via the Donner Summit route it would become liable for paying one-half the cost of the UP project whereby Donner Summit route tunnels are now being enlarged to accommodate double-stack containers.

[46] CPUC believes that BNSF's I-5 Corridor route (which CPUC generally refers to as BNSF's Inside Gateway route) does not lend itself to the faster delivery times generally required for intermodal service.

[47] CPUC concedes that, in one crucial respect, the situation in the I-5 Corridor is (from CPUC's perspective) better than the situation in the Central Corridor. In the Central Corridor, BNSF operates via trackage rights over UP/SP lines. In the I-5 Corridor, BNSF owns most, though not all, of the lines over which it operates (and operates via trackage rights only over relatively short segments of UP/SP lines). CPUC claims, however, that, even though BNSF has made a substantial investment in improving its I-5 Corridor route, UP still has an advantage vis-à-vis BNSF on account of the greater circuity involved in routings via BNSF's I-5 Corridor route.

shipments. Intermodal competition in the I-5 Corridor, CPUC claims, is essentially nonexistent: almost all of the substantial amount of intermodal traffic that moves in that corridor is transported by UP.

CPUC therefore contends that, in order to intensify BNSF's presence in the I-5 Corridor and expand BNSF's participation in rail traffic west of the Cascades, BNSF should be granted trackage rights over UP between Marysville, CA,[48] and Eugene, OR. CPUC argues that such trackage rights: would substantially shorten BNSF's mileages to Portland, OR, Seattle, WA, and Vancouver, BC; and would thereby help develop a competitive I-5 Corridor intermodal service between points in California, on the one hand, and, on the other, points in the Pacific Northwest and in Western Canada. CPUC adds that, without such trackage rights, California will be left with inadequate north-south rail competition.

Issue #3: The Calexico/Mexicali Border Crossing. CPUC contends: that, prior to the merger, the SP line into Calexico (the line runs between Niland and Calexico) was not well maintained; that, at the time of the merger, CPUC hoped that new (*i.e.*, UP) ownership would bring capital improvements to the Niland-Calexico line and further develop it for NAFTA trade;[49] but that, despite extensive commercial development on both sides of the border, the Niland-Calexico line remains essentially as it was at the time of the merger. CPUC suggests that the public interest in rail competition in the California-Mexico border area would be served by a general rehabilitation of regional rail facilities, including the improvement of the line between Niland and Calexico[50] and the rehabilitation of the line of the San Diego & Imperial Valley Railroad (SDIV).[51] Improvement of the Niland-Calexico line, CPUC adds, could lead to rehabilitation of the SDIV line and other improvements in the region's rail facilities. CPUC therefore suggests that UP should improve the Niland-Calexico line for NAFTA rail transportation purposes.[52]

THE UP/SP-368 AND BNSF-8 REPLIES. UP and BNSF contend that we should reject the requests for relief urged by CPUC.

[48] Marysville is north of Sacramento.

[49] *See, UP/SP Merger*, 1 S.T.B. at 336-37 (CPUC asked that we stress the importance of developing the Calexico-Mexicali gateway to its fullest potential and that we urge UP/SP either to develop this gateway or to divest it to another carrier).

[50] CPUC indicates that the line, which runs through Calexico's central district, could benefit from a bypass.

[51] *See, UP/SP Merger*, 1 S.T.B. at 329 and n.79.

[52] CPUC has not actually asked that UP be required to improve the Niland-Calexico line, although this is apparently what CPUC has in mind.