

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. 21

Decided December 19, 2001

The Board addresses the remaining unresolved issues raised in the fifth annual round of the UP/SP general oversight proceeding. On finding no significant evidence of competitive harm resulting from the merger, the Board concludes, as scheduled, its formal oversight for the merger.

BY THE BOARD:

We address in this decision the remaining unresolved issues raised in the fifth annual round of the UP/SP “general oversight” proceeding. We also find that, overall, the evidence demonstrates that the conditions we imposed on the UP/SP merger have effectively remedied, as intended, any competitive harm that would otherwise have been associated with that transaction. Thus, we are now concluding, as scheduled, our formal oversight process for the UP/SP merger.

BACKGROUND

On August 12, 1996, we authorized the common control and merger of the rail carriers controlled by Union Pacific Corporation (collectively UP) and the rail carriers controlled by Southern Pacific Rail Corporation (collectively SP), subject to various conditions,¹ including a 5-year oversight process and the terms

¹ See *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) (*Merger Dec. No. 44*), *aff'd sub nom. Western Coal Traffic League*, 169 F.3d 775 (D.C. Cir. 1999). UP's acquisition of
(continued...)

of the BNSF Agreement as supplemented by the CMA Agreement² and as further expanded by the Board.

Previously, in this fifth oversight round, we reviewed UP and BNSF's jointly submitted "restated and amended" version of the BNSF Agreement.³ See UP/SP-386, BNSF-92 (Joint Submission). This updated version incorporates the conditions in the BNSF Agreement that we had adopted and imposed in *Merger Dec. No. 44*, as clarified and supplemented in subsequent Board decisions. It also incorporates certain agreements that UP and BNSF had reached relating to those conditions and other matters. But, in addition to the matters on which UP and BNSF reached agreement, the restated and amended agreement includes conflicting proposals with respect to five issues on which the carriers did not agree, including: the Houston-Memphis-St. Louis corridor trackage rights; the definition of "2-to-1" points; the definition of "Existing Transload Facilities" and "New Transload Facilities;" BNSF's access to "new facilities" on the Stockton-Elvas trackage rights line; and BNSF's right to purchase or lease "team tracks" at 2-to-1 points. In *General Oversight Dec. No. 19*⁴ and *General Oversight Dec. No. 20*,⁵ we addressed the conflicting proposals submitted by UP and BNSF and resolved those issues. In this decision, we address all remaining issues.⁶

¹(...continued)

common control was consummated on September 11, 1996, and the merger was completed on February 1, 1998.

² BNSF refers to The Burlington Northern and Santa Fe Railway Company. The BNSF Agreement refers to the agreement entered into by the UP/SP applicants and BNSF on September 25, 1995, as modified by the supplemental agreement dated November 18, 1995, and as further modified by the second supplemental agreement dated June 27, 1996. *Merger Dec. No. 44*, 1 S.T.B. at 247 n.15. The CMA Agreement refers to the agreement that UP and SP entered into on April 18, 1996, with BNSF and the Chemical Manufacturers Association (CMA), which amended the BNSF Agreement. *Id.* at 243, 254-55.

³ BNSF indicates that trackage rights agreements have been finalized for all of the UP/SP lines over which BNSF received trackage rights pursuant to the BNSF Agreement, and that the trackage rights agreements will be restated and amended, as necessary, to reflect the terms and conditions of the restated and amended BNSF Agreement, as approved by the Board.

⁴ *Union Pacific Corp. — Control & Merger — Southern Pacific Corp.*, STB Finance Docket 32760 (Sub-No. 21), Decision No. 19 (STB served Nov. 8, 2001).

⁵ *Union Pacific/Southern Pacific Merger*, 5 S.T.B. 1159 (2001) Decision No. 20.

⁶ Comments addressing the remaining issues are found in: UP/SP-384, UP's oversight progress report; UP/SP-385, UP's report on BNSF settlement agreement issues; BNSF-PR-20, BNSF's progress report; UP/SP-386/BNSF-92, the carriers' joint submission of the restated and amended BNSF settlement agreement; the ACC-1 comments filed August 17, 2001, by the American Chemistry Council (ACC) (formerly CMA); the CPSB-15 comments filed by the City Public Service Board of San Antonio, TX (CPSB); the CRDC-1 comments filed by the Cowboy (continued...)

DISCUSSION AND CONCLUSIONS

FORMAL OVERSIGHT PROCESS IS CONCLUDED. When we approved the UP/SP merger in 1996, we established a 5-year oversight process “to examine whether the various conditions we have imposed have effectively addressed the competitive issues they were intended to address,” and we expressly reserved jurisdiction “to impose additional remedial conditions if, and to the extent, we determine that the conditions already imposed have not effectively addressed the competitive harms caused by the merger.” *Merger Dec. No. 44*, 1 S.T.B. at 248. Because the evidence submitted in this fifth annual oversight round demonstrates that the conditions we imposed are working as intended, we are now concluding, as scheduled, our formal oversight of the UP/SP merger.

Vigorous Competition In The West. We agree with DOT that the record demonstrates that the conditions we imposed on the UP/SP merger have maintained and fostered rail competition in the Western United States. DOT submits, and we agree, that the carriers’ progress reports reflect in detail the continued robust competition between UP and BNSF, and that the general absence of contrary evidence and argument, particularly when compared with the volume of adversarial contentions made in years past, reflects that fact. DOT contends, and we agree, that again the record supports a conclusion that our conditions have served their intended purposes, and that competition between UP and BNSF, as we found in prior oversight rounds,⁷ remains strong.

Competition Has Been Strengthened. The evidence submitted by UP demonstrates that the merger has resulted in strengthened competition for 2-to-1 shippers,⁸ 3-to-2 shippers, shippers of key commodities affected by the merger,⁹

⁶(...continued)

Railroad Development Company (CRDC); the undesignated comments filed by the State of Utah; the undesignated comments filed September 14, 2001, by Utah Central Railway Company (UCRC); the DOT-6 and DOT-7 comments filed by the United States Department of Transportation (DOT); UP/SP-388 and UP/SP-389, UP’s replies; and BNSF-94 (initial reply statement, filed September 19, 2001, and corrected on September 21, 2001) and BNSF-96, BNSF’s replies.

⁷ See, e.g. *Union Pacific/Southern Pacific Merger*, 5 S.T.B. 388 (2000) (*General Oversight Dec. No. 16*), at 393.

⁸ UP’s evidence demonstrates that the BNSF Agreement has allowed BNSF to access (generally via trackage rights and line purchases) all 2-to-1 shippers and shortline connections; that, as a result of the BNSF Agreement, all 2-to-1 shippers (the majority of whom are located in Texas, (continued...))

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and shippers in every rail corridor and region affected by the merger.¹⁰ The evidence submitted by UP further demonstrates: that the public benefits that the UP/SP applicants predicted have been achieved; that rail competition has been enhanced; that UP rates (adjusted for inflation) have either declined or remained unchanged in every relevant market; and that BNSF, Tex Mex, and Utah Railway Company (URC) have competed and are continuing to compete effectively against UP. And, as UP notes, no one has presented any evidence of competitive harm or any evidence that our conditions have been less than fully effective.

BNSF Is An Effective Competitor. The evidence submitted by UP and BNSF demonstrates that BNSF has competed vigorously for the traffic opened up to it by the BNSF Agreement and has become an effective competitive replacement for the competition that would otherwise have been lost or reduced when UP and SP merged. The evidence shows that BNSF, in serving the traffic opened to it by virtue of the BNSF Agreement and the conditions we imposed on the merger, and in extending the benefits of its network reach and its competitive products and services to more than 1,300 customers on the UP/SP lines, has “grown” this traffic (in terms of carloadings and revenues) to the size and scale of a Class I railroad in its own right. And the evidence submitted by BNSF demonstrates that BNSF, in its marketing and sales campaigns, has identified more than 500 2-to-1 shipper facilities, more than 430 customers on 17 2-to-1 shortlines, 17 existing transload facilities at 2-to-1 points, more than 60 shipper

⁸(...continued)

Arkansas, Utah, Nevada, and California) have access to two competitive rail systems with comprehensive networks that can provide efficient single-line access to far more points than either UP or SP served before the merger; that the competition between UP and BNSF for 2-to-1 traffic has been vigorous; and that BNSF service to 2-to-1 shippers has proven to be highly efficient and competitive with UP service.

⁹ UP’s evidence demonstrates that rail competition for Colorado coal, Utah coal, Gulf Coast chemicals, Gulf Coast petroleum products, Houston-area aggregates, soda ash, and grain is stronger than it was prior to the transaction.

¹⁰ UP’s evidence demonstrates that the merger, with the conditions we imposed, has strengthened competition in the three major West Coast-Midwest/Northeast corridors (the corridors that run between the Pacific Northwest, Northern California, and Southern California, on the one hand, and, on the other hand, the Midwest gateways of Chicago, Kansas City, and St. Louis and the regions served via those gateways); in the Houston-Memphis-St. Louis corridor; and in the Houston-New Orleans corridor. UP’s evidence further demonstrates that the merger, with the conditions we imposed, has strengthened competition for international traffic to and from Canada and Mexico. And, as UP notes with respect to Mexico, our condition that UP afford The Texas Mexican Railway Company (Tex Mex) trackage rights between Robstown and Beaumont, TX, has resulted in the creation of a third competitive rail route to and from Eastern Mexico.

facilities accessed by virtue of conditions in the CMA Agreement, nearly 150 shipper facilities accessed on the “50/50 Line” between Dawes, TX, and Avondale, LA,¹¹ 16 shipper facilities on lines purchased from UP in Louisiana, and more than 20 new shipper facilities on the UP/SP trackage rights lines that BNSF can now serve in its capacity as a replacement competitor.

The End Of Our Formal Oversight Process. Because the record demonstrates that the conditions we imposed on the UP/SP merger have worked as intended, and in view of our resolution of all outstanding issues raised by the parties in this oversight proceeding, we are now concluding, as scheduled, our formal oversight process for this merger. Although DOT has recommended that a more limited form of oversight be continued,¹² we do not think that continuation of a formal oversight process beyond the 5-year period originally envisioned is necessary or appropriate. The oversight process we imposed in 1996 was intended, absent evidence of ongoing problems, to be temporary, not permanent. Thus, we conclude our formal oversight with the issuance of this decision.

AUTHORITY TO ENFORCE MERGER CONDITIONS CONTINUES. Although we are concluding our formal oversight process for the UP/SP merger, we will continue to have authority to enforce the conditions we imposed on the merger. Under 49 U.S.C. 11327, we have continuing authority to enter supplemental orders and to modify decisions entered in merger and control proceedings under 49 U.S.C. 11323. See *Union Pacific/Southern Pacific Merger*, 2 S.T.B. 251 (1997) (*General Oversight Dec. No. 1*), at 253 n.3. Thus, the conclusion of the formal oversight process does not preclude any party from invoking our jurisdiction to address any merger-related concerns arising out of our conditions. See, e.g., *Canadian National Ry. — Control — Illinois Central*

¹¹ The former SP mainline between Dawes (east of Houston) and Avondale (west of New Orleans) is referred to as the “50/50 Line” in recognition of its joint ownership by BNSF and UP, which resulted from a February 12, 1998, BNSF-UP agreement that was consummated on September 1, 2000.

¹² DOT has suggested that we continue to provide for what it describes as a “less burdensome” and “more passive” oversight mechanism, that would nevertheless allow interested parties a formal mechanism to draw our attention to any alleged instances of anticompetitive conduct or conditions that are not working as intended. As discussed in this decision, despite the conclusion of our formal oversight process, parties will continue to have the opportunity to request that we address merger-related concerns. Also, our Office of Compliance and Enforcement continues to monitor the rail industry generally and to make its Rail Consumer Assistance Program available to consider informal complaints involving railroads.

Corp. (General Oversight), STB Finance Docket No. 33556 (Sub-No. 4), Decision No. 3 (STB served Nov. 7, 2001), slip op. at 4 (“we have authority independent of the formal oversight process to enforce or revise merger conditions as warranted upon request or on our own initiative.”).

Accordingly, notwithstanding the conclusion of the formal oversight process, we remain available — into the indefinite future — to consider and promptly resolve any disputes of general applicability relating to BNSF’s access to shippers under the BNSF Agreement, or other issues relating to the parties’ compliance with the conditions we imposed on the UP/SP merger, subject to any applicable requirement to arbitrate. In this regard, we note that shippers have a right (independent of any rights and interests BNSF may have under the BNSF Agreement) to seek Board intervention to ensure that the conditions we imposed on the merger are implemented in a manner that effectively preserves pre-merger competition. *See, e.g., Union Pacific/Southern Pacific Merger*, 2 S.T.B. 276 (1997) (*Merger Dec. No. 72*), at 287 n.18.

RESTATED AND AMENDED VERSION OF BNSF AGREEMENT. The restated and amended BNSF Agreement will be approved, insofar as its terms are consistent with the conditions imposed in *Merger Dec. No. 44*, as such conditions have been interpreted, clarified, and/or supplemented in subsequent decisions. UP and BNSF should submit, no later than March 1, 2002, a *final* restated and amended version of the BNSF Agreement. This final version should incorporate: the changes required by *General Oversight Dec. No. 19*, the changes required by *General Oversight Dec. No. 20*, and the changes necessary to accommodate the interests of the City Public Service Board of San Antonio, TX (CPSB) and otherwise to be consistent with this decision.¹³

Adjustment Issues. (1) Trackage Rights Fee Adjustments. Section 12 of the restated and amended BNSF Agreement provides, in pertinent part, that “[a]ll trackage rights charges under this Agreement shall be subject to adjustment upward or downward July 1 of each year by the difference in the two preceding years in UP/SP’s system average URCS costs for the categories of maintenance and operating costs covered by the trackage rights fee. ‘URCS costs’ shall mean costs developed using the Uniform Rail Costing System.” *See Joint Submission*,

¹³ CPSB has pointed out, and UP and BNSF have acknowledged, that the conditions we imposed to protect certain CPSB interests that otherwise would have been adversely impacted by the UP/SP merger are not correctly memorialized in the version of the restated and amended BNSF Agreement submitted to us.

at 47-48. As DOT notes, it is important that the trackage rights fee adjustment mechanism work as intended, so that any increases or decreases in UP's costs are properly reflected in the agreed-upon adjustments to the trackage rights fee.

A dispute has arisen between BNSF and UP regarding UP's method of adjustment to the trackage rights fee in certain critical areas. But, at this point, there does not appear to be a need for any action on our part with respect to this matter because the dispute is now under active negotiation between BNSF and UP, and none of the parties that have expressed an interest in this matter (BNSF, UP, DOT, and ACC) has made a specific request for relief. Consistent with our policy favoring privately negotiated solutions, we believe that a settlement negotiated by the two parties involved (BNSF and UP) would be preferable, for all concerned, to a solution imposed by order of the Board. Thus, we will take no action at this time regarding the trackage rights fee adjustment dispute.¹⁴

(2) *I-5 Proportional Rate Agreement Issues.* In connection with the merger, the UP/SP applicants and BNSF entered into an I-5 Proportional Rate Agreement (herein referred to as the I-5 PRA) for UP to participate in joint rates with BNSF for traffic moving to or from points in an area north of Portland, OR, and west of Billings and Havre, MT, and points in an area extending from Oregon to West Texas. *Merger Dec. No. 44*, 1 S.T.B. at 253. Under the I-5 PRA, BNSF is to provide UP with rate factors for BNSF service north of Portland competitive with the rates BNSF offers for its own single-line services. The agreement contemplates that UP would then use the BNSF rates in combination with its own rates south of Portland to compete with BNSF by replicating the pre-merger BNSF-SP interline route in the I-5 Corridor.

While BNSF contends that it is properly implementing the I-5 PRA, UP disputes that contention. However, neither UP nor BNSF (nor any other party) has requested relief as to the I-5 PRA dispute, and we see no reason to intervene at this time. As with the trackage rights fee adjustment dispute discussed above, an I-5 PRA settlement negotiated by BNSF and UP would be preferable, for all concerned, to a solution imposed by order of the Board. We therefore encourage the parties to continue to negotiate in an effort to arrive at a settlement.

¹⁴ As requested by ACC, however, we will confirm that its right (provided for in the CMA Agreement) to audit the adjustment calculations of the trackage rights fee charged by UP to BNSF shall continue under the restated and amended version of the BNSF Agreement.

*Other Issues.*¹⁵ (1) *The State Of Utah.* We will deny the requests made by the State of Utah that we extend our oversight process for at least another year, and that, during that time, we continue to monitor the competitive impacts of the merger on the Central Corridor in general and on Utah in particular.

Insofar as Utah's requests concern the implementation of the Utah rail rates agreement that Utah reached with UP during the course of the merger proceeding, extending our oversight process is unnecessary. UP agreed that, for 10 years following consummation of the merger, the carrier would not increase its rail rates to shippers terminating or originating traffic in Utah by a percentage greater than increases for comparable shippers located in other states in the UP rail system. Moreover, the agreement contains an enforcement mechanism (a rate audit) and a remedy (restitution to affected shippers) for the rate pledge provided for in the agreement. And, as noted by UP, Utah and UP have already begun exploring how to conduct a rate audit efficiently and cost-effectively, and we expect that effort to result in a rate audit mechanism expeditiously.

Extended oversight is likewise not required for Central Corridor competitive issues. Rather, the evidence submitted throughout the course of the 5 years of formal oversight has demonstrated that BNSF is indeed an effective competitor in the Central Corridor, and that its presence has placed a competitive discipline on UP's rates both in the Central Corridor in general and with respect to Utah/Colorado coal. Utah has not presented evidence to challenge those findings. Utah coal producers and customers have benefitted significantly from the merger, which created a shorter, single-line route between SP-served Utah coal producers and domestic coal users in Southern Nevada and Southern California, as well as the Ports of Los Angeles and Long Beach for export to the Pacific Rim. The merger and our conditions also have strengthened competition

¹⁵ In its filings, BNSF has mentioned, but has not requested relief with respect to, a number of operational issues. These include: access to the Broken Arrow Environmental solid waste transload facility at Aragonite, UT; demurrage charges at Carlin, NV; access to the Newmont Gold Company facility at Dunphy, NV; access to the Railhead Industrial Spur at Durham, CO; access to the House Track at Fernley, NV; slow orders in the Houston-Brownsville corridor, on the lines south of Algoa, TX; weight limits in the Houston-Brownsville corridor, on bridges between Angleton and Odem, TX; slow orders in the Central Texas Corridor, particularly on the Taylor-Smithville and Smithville-Sealy lines; local switching service at Lake Charles, West Lake Charles, and Westlake, LA; access to the Joint Intermodal Terminal at Oakland, CA; and operational difficulties on the trackage rights lines between Temple and Eagle Pass, TX. We believe that such issues should be resolved (and, indeed, BNSF's own filings indicate that at least some of the cited issues have already been resolved) by cooperative action by BNSF and UP, without assistance from the Board. *See, e.g., Union Pacific/Southern Pacific Merger*, 3 S.T.B. 987 (1998) at 996 n.34.

for Utah coal by providing URC with greater access to Utah coal. Thus, Utah has failed to justify its request for relief.

(2) *Cowboy Railroad Development Company*. CRDC, which takes its name from the Cowboy Line that once extended across northern Nebraska, describes itself as a “grassroots” entity formed by shippers for the purpose of developing alternative railroad transportation for Powder River Basin (PRB) coal moving to the central part of the United States. CRDC suggests that the UP/SP merger removed any economic incentive to develop a third rail route (apparently a revitalized “Cowboy Line” route) for PRB coal moving to the Central United States. While CRDC’s plans are not yet sufficiently developed to support a specific request for relief, it asks that we extend our formal oversight of the merger in order to preserve an opportunity to impose a trackage rights condition that would allow traffic to access this route.

CRDC’s request is beyond the scope of the oversight process, which was established “to examine whether the various conditions we have imposed have effectively addressed the competitive issues they were intended to address,” and we expressly reserved jurisdiction “to impose additional remedial conditions if, and to the extent, we determine that the conditions already imposed have not effectively addressed the competitive harms caused by the merger.” *Merger Dec. No. 44*, 1 S.T.B. at 248. That purpose has been met, and we have determined—through the oversight process—that the conditions we imposed have indeed effectively addressed the competitive issues they were intended to address and the competitive harms that might otherwise have been caused by the merger. In any event, CRDC has not shown why we could or should impose new conditions, long after the UP/SP merger has been consummated, that are designed to create additional competition. Thus, we will not consider the CRDC request further.

(3) *McClellan Park, CA*. McClellan Park is a new business and industrial park that is being developed on the site of the former McClellan Air Force Base, located between Sacramento and Roseville, CA. It is anticipated that McClellan Park will include rail-served public reload and warehouse facilities that will be switched by the Yolo Short Line Railroad.

It appears that whatever dispute existed between BNSF and UP as to BNSF’s access to this facility has been resolved. Nonetheless, based on what it

maintains were undue delays in gaining access to McClellan Park¹⁶ and other similar experiences, BNSF asks us to confirm that UP must expeditiously address requests for access and service proposals. We agree that UP must expeditiously address requests for access and service proposals.

(4) *The Transwood Facility at Ogden, UT.* For some years prior to the UP/SP merger and for several years thereafter, Transwood, Inc. (Transwood) operated a transload facility at Ogden, UT (a 2-to-1 point), on property that Transwood leased from UP. UP now intends to terminate Transwood's lease, and BNSF contends that action may not only jeopardize BNSF's right to access the facility — a right, BNSF claims, that is encompassed by the conditions we imposed in *Merger Dec. No. 44* — but also could eliminate the Transwood facility as a source of competition to UP's direct service to soda ash producers in Southwestern Wyoming and to other exclusively-served UP points in Utah and Southern Idaho.

UCRC, on the other hand, maintains that Transwood's planned relocation to a larger UCRC site will benefit all concerned, because planned upgrades of plant and equipment at the new site will allow Transwood to handle a greater volume and a wider variety of commodities for a larger number of customers, all of whom will have the option of routing via either BNSF or UP. UCRC observes that it began discussing with Transwood its relocation to the UCRC site in early 1999, well before UP indicated any intent to cancel Transwood's lease, and that the parties reached a tentative agreement to relocate the facility prior to UP's notice that it intended to terminate the Transwood lease.¹⁷ As a result, UCRC claims that BNSF is simply attempting to play UP, UCRC, and Transwood against one another in the hope of obtaining an advantage either in commercial negotiations with UCRC and Transwood or here in our general oversight proceeding, and UCRC asks us to make clear that BNSF's tactics will not be permitted to provide the carrier with any advantage.

We see no reason to take any action with respect to the operation and/or relocation of the Transwood facility. Transwood has not requested relief; no shipper that uses the Transwood facility has requested relief; and BNSF, although expressing its displeasure with the relocation, has not requested relief either. And, because it is apparent that BNSF's tactics have not provided BNSF

¹⁶ UP asserts that it has cooperated in arranging BNSF service to McClellan Park.

¹⁷ UP indicates that it is working with Transwood to ensure a smooth transition to a new and improved UCRC site, and agrees with UCRC that the relocation will benefit Transwood and area shippers, as well as UCRC, BNSF, and UP.

any kind of advantage in this proceeding, no Board action is necessary in this matter.

(5) *Reciprocal Switching In Southern California.* With traffic moving to and from 2-to-1 shipper facilities in the Los Angeles Basin, BNSF attributes some decline in the volume of loaded units that BNSF has originated and terminated within the Southern California Corridor (between Riverside and Ontario, CA, at Southgate, CA, Patata, CA, and on the La Habra Branch) to poor and inconsistent reciprocal switching service by UP. BNSF therefore asks us to affirm UP's obligation to impartially provide reciprocal switching services along the trackage rights lines and to indefinitely provide performance reports to BNSF (no less than quarterly) from which service can be benchmarked and switching for BNSF movements can be compared with switching for UP's own account.¹⁸

As we have indicated before, our intervention in switching disputes should only be a last resort,¹⁹ and any intervention would be premature here. We agree with BNSF that, where UP is to provide reciprocal switching services under the auspices of the BNSF Agreement, such services must be provided on an impartial basis. We do not believe that it is necessary, however, to require UP to provide quarterly reciprocal switching performance reports to BNSF. BNSF's recently implemented automated measurement tool to measure the adequacy of UP switching services should satisfy that objective, and if an inadequate level of service (measured against acceptable benchmarks) can be demonstrated, BNSF could seek relief at that time.

(6) *The Ajax-San Antonio "Paired Track."* Between Ajax and San Antonio, UP recently reconstructed a former Missouri-Kansas-Texas Railroad (MKT)

¹⁸ BNSF states that it recently implemented an automated measurement tool to objectively quantify UP's service performance at points where UP provides reciprocal switching services to BNSF, both on and off the trackage rights lines. BNSF states that this tool should allow it to more closely monitor UP's performance in Southern California and elsewhere on the trackage rights lines, and to hold UP accountable for service failures impacting BNSF's customers.

¹⁹ *Cf. Union Pacific/Southern Pacific Merger*, 3 S.T.B. 1030, 1060 (1998), where, in declining relief in similar circumstances in the Houston/Gulf Coast oversight proceeding, we observed that:

switching differences are inevitable for carriers that work together. Railroads regularly work out arrangements with each other without requiring government intervention, and we see no reason why BNSF and UP should not be able to work out the matter here as well. If for some reason BNSF continues to have complaints (or, for that matter, if UP has its own complaints about BNSF's activities in this regard) and either party wants us to intervene, it should submit detailed pleadings in support of its position.

mainline that had been dismantled prior to the UP/SP merger. The reconstruction of the MKT track allowed UP to institute “directional running” on the Ajax-San Antonio segment. BNSF contends, however, that its train performance on the Eagle Pass Corridor (between Temple and Eagle Pass, TX) has been adversely impacted by UP’s refusal to allow BNSF trains operating in the Ajax-San Antonio segment of this corridor to join UP’s directional flow, and requests that we direct UP to allow BNSF to join the directional flow whenever and wherever UP implements directional operations involving BNSF’s trackage rights lines if necessary for BNSF to provide competitive service.²⁰

The directional flow situation on the Ajax-San Antonio segment, however, is unlike any other directional flow situation that has arisen in the UP/SP merger context. On the Ajax-San Antonio segment, directional flow has been made possible by pairing a line over which BNSF has trackage rights (the old Missouri Pacific line between Ajax and San Antonio) with a line over which BNSF does not have trackage rights (the old MKT line). Further, the line over which BNSF does not have trackage rights is a line that, for all practical purposes, did not exist at the time of the UP/SP merger.

Rather than granting or denying BNSF’s request for relief, we offer the following guidance that BNSF and UP may use to resolve their dispute concerning access by BNSF to the Ajax-San Antonio segment. UP cannot unilaterally take action that impairs BNSF’s ability to provide service on a trackage rights line. However, we are not persuaded that the institution of directional running on paired lines, when one line is and one line is not a trackage rights line, necessarily interferes with BNSF’s ability to provide service on the line that is a trackage rights line. What BNSF claims is that the institution of directional running on the paired lines between Ajax and San Antonio interferes with BNSF’s ability to provide *competitive* service. But that may simply mean that UP’s investment in the reconstruction of the MKT line has made UP more competitive.

BNSF and UP should reevaluate BNSF’s request for access to the Ajax-San Antonio MKT line in light of this analysis. If BNSF and UP are unable to resolve the matter on their own, BNSF may invoke our continuing authority to enforce the conditions we imposed on the merger. But, in that event, BNSF should demonstrate how the institution of directional running on the paired lines

²⁰ BNSF also suggests that we authorize our Office of Compliance and Enforcement, or other appropriate office, to direct such operations on short notice to address any service issues that arise, pending a review by the Board.

between Ajax and San Antonio has interfered with BNSF's ability to provide service on the Missouri Pacific trackage rights line.

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

It is ordered:

1. The formal oversight process of the UP/SP merger that we established when we approved that merger is concluded.

2. The restated and amended version of the BNSF Agreement is approved, insofar as its terms are consistent with the conditions imposed in *Merger Dec. No. 44*, as such conditions have been interpreted, clarified, and/or supplemented in subsequent decisions.

3. UP and BNSF shall submit, no later than March 1, 2002, a final restated and amended version of the BNSF Agreement.

4. All requests for relief made in the fifth annual round of the UP/SP general oversight proceeding (other than those requests that were addressed either in *General Oversight Dec. No. 19* or in *General Oversight Dec. No. 20*) are disposed of as indicated in this decision. Any requests for relief that were made in the fifth annual round of the UP/SP general oversight proceeding but have not been specifically granted are denied.

5. This decision is effective on December 20, 2001.

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