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SERVICE DATE – DECEMBER 20, 2001

SURFACE TRANSPORTATION BOARD

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. 20

Decided: December 19, 2001

We address in this decision certain issues—involving the definition of "2-to-1" points, the definition of transload facilities, the Stockton-Elvas trackage rights line, and team tracks—that have been raised in the fifth annual round of the UP/SP "general oversight" proceeding.

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] Among the conditions attached to that authorization, we required UP to abide by the terms of the BNSF and CMA Agreements[2] under which UP provided BNSF approximately 4,000 miles of trackage

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

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rights over the merged UP/SP system to preserve, among other things, competitive rail service for "2-to-1" shippers—those shippers that, prior to the merger, were served by both UP and SP, but by no other railroad. Merger Dec. No. 44, 1 S.T.B. at 252.

We also expanded upon those agreements by imposing several other broad-based conditions that afforded BNSF trackage rights to serve shippers that, as a result of the merger, would have been deprived of a "build-in/build-out" option, and to serve new facilities (including transload facilities) on both UP and former SP lines over which BNSF received trackage rights under the BNSF Agreement. Merger Dec. No. 44, 1 S.T.B. at 419-20. These conditions were designed to replicate other, more indirect competitive opportunities that would otherwise have been lost upon SP's absorption into UP, and to aid BNSF in obtaining sufficient traffic to compete effectively with the merged carriers. Id. at 372-73.

In this fifth round of general oversight, UP and BNSF have jointly submitted for our review and approval a "restated and amended" version of the BNSF Agreement. See UP/SP-386, BNSF-92 (Joint Submission). The carriers indicate that this updated version incorporates the conditions in the BNSF Agreement that we 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 have reached relating to those conditions and other matters. But, in addition to the matters on which UP and BNSF have reached agreement, the restated and amended agreement includes conflicting proposals with respect to certain issues on which the carriers do not agree, including: (1) the definition of "2-to-1" points; (2) the definition of "Existing Transload Facilities" and "New Transload Facilities"; (3) BNSF's access to "new facilities" on the Stockton-Elvas trackage rights line; and (4) BNSF's right to purchase or lease "team tracks" at 2-to-1 points.[3] We address these issues in turn.[4]

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[2](...continued)
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] We previously addressed the carriers' conflicting proposals regarding the scope of BNSF's trackage rights in the Houston-Memphis-St. Louis corridor. See Union Pacific Corp.—Control & Merger—Southern Pacific Corp., Finance Docket 32760 (Sub No. 21), Decision No. 19 (STB served Nov. 8, 2001). Remaining issues in this round of oversight not resolved in that decision or in our decision here will be addressed in a third decision.

[4] Comments addressing the issues are found in: UP/SP-385, UP's report on BNSF Agreement issues; BNSF-PR-20, BNSF's progress report; UP/SP-386, BNSF-92, the carriers' joint submission of restated and amended BNSF Agreement; UP/SP-387, UP's opposition to substantive changes to the BNSF Agreement; BNSF-93, BNSF's comments on unresolved issues
(continued...)

DISCUSSION AND CONCLUSION

Definition Of 2-to-1 Points. UP would retain in the restated BNSF Agreement the definition of 2-to-1 points used in this merger proceeding and similar to that used in others—geographic locations at which at least one shipper/receiver had available to it, either directly or from reciprocal switching, service from both UP and SP but no other railroad. BNSF proposes to define 2-to-1 points as locations commonly served by both UP and SP, without regard to "whether any shippers or receivers at those locations were open to or served by both UP and SP." Under BNSF's definition, locations would qualify as 2-to-1 points if there was at least one shipper/receiver open to UP and at least one shipper/receiver open to SP, even if no shipper/receiver was open to both merger applicants (or any other railroad).[5] Joint Submission, at 3-4. BNSF's broader definition of 2-to-1 points would thus allow the carrier to access through the trackage rights additional facilities that we have traditionally considered to be "1-to-1" points (those served only by UP or SP).

BNSF also seeks to serve new shipper facilities and existing transload facilities located on lines over which BNSF was not granted trackage rights under the BNSF Agreement. BNSF asserts that this result is called for by Section 8(i) of the Agreement—the so-called "omnibus clause"—which states the applicants' intent to preserve two-carrier competition for "all '2-to-1' shipper facilities" and "all other shippers who had direct competition or competition by means of siting, transload, or build-in/build-out from only UP and SP pre-merger" including at "Existing

[4](...continued)
relating to the restated and amended BNSF Agreement; the ACC-1 comments filed by the American Chemistry Council (ACC) (formerly CMA); the NITL-27 comments filed by The National Industrial Transportation League (NITL); the DOT-6 and DOT-7 comments filed by the United States Department of Transportation (DOT); UP/SP-389, UP's reply; BNSF-94, BNSF's reply (initial reply statement, filed September 19, 2001, as corrected on September 21, 2001); an undesignated UP letter filed September 24, 2001; and BNSF-96, BNSF's reply.

[5] UP and BNSF would each define 2-to-1 points as of September 25, 1995, the date the BNSF Agreement was initially executed. Joint Submission, at 3-4. BNSF would define geographic locations using six-digit Standard Point Location Codes (SPLCs) and, as provided in Section 9(g) of the agreement, those locations would be deemed to include all areas within the switching limits of the locations. Id. at 3. Six-digit SPLCs identify a geographic area with the first number, the State with the second, the county with the third and fourth numbers, and the station in the city or town with the last two numbers. See Merger Dec. No. 44, 1 S.T.B. at 372 n.102.

Transload Facilities and New Shipper Facilities at . . . '2-to-1' Points not along a Trackage Rights Line."[6]

Section 8(i), however, must be read in concert with the BNSF Agreement as a whole, and when that is done, it is clear that this provision of the agreement was not meant to be read as expansively as BNSF now suggests. This is so because the basic structure of the BNSF Agreement provides BNSF only "overhead" trackage rights (also known as "bridge" trackage rights)—trackage rights that do not allow BNSF to access intermediate points on the trackage rights lines—except insofar as access to such points is expressly provided. See Sections 1(b), 3(c), 4(b), 5(b), and 6(d) of the restated BNSF Agreement, which provide, in identical language, that "[t]he trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, *except for the local access specified herein*." Joint Submission, at 8, 14, 18, 23, and 27 (emphasis added). As consistently reflected in each of the many iterations of the

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[6] Section 8(i) provides:

> It is the intent of the parties that this Agreement result in the preservation of competition by two rail carriers for (a) all "2-to-1" Shipper Facilities at points listed on Exhibit A to this Agreement and (b) all other shippers who had direct competition or competition by means of siting, transload or build-in/build-out from only UP and SP pre-merger.
>
> The parties recognize that some "2-to-1" Shipper Facilities, Existing Transload Facilities, and New Shipper Facilities at "2-to-1" Points will not be able to avail themselves of BNSF service by virtue of the trackage rights and line sales contemplated by this Agreement. For example, "2-to-1" Shipper Facilities, Existing Transload Facilities, and New Shipper Facilities located at points between Niles Junction and the end of the joint track near Midway (including Livermore, CA, Pleasanton, CA, Radum, CA, and Trevarno, CA), Lyoth, CA, Lathrop, CA, Turlock, CA, South Gate, CA, Tyler, TX, Defense, TX, College Station, TX, Great Southwest, TX, Victoria, TX, Sugar Land, TX, points on the former Galveston, Houston & Henderson Railroad served only by UP and SP, Opelousas, LA, and Herington, KS, are not accessible under the trackage rights and line sales covered by this Agreement. Accordingly, UP/SP and BNSF agree to enter into arrangements under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service to "2-to-1" Shipper Facilities, Existing Transload Facilities, and New Shipper Facilities at the foregoing points and at other "2-to-1" Points not along a Trackage Rights Line.

See Joint Submission, at 33.

BNSF Agreement, the most prominent local access-exception specified in the agreement was BNSF's access to traditionally defined 2-to-1 shipper facilities (those served by both UP and SP but no other carrier) at the points specifically "listed on Exhibit A to the Agreement."[7] Id.

Against this framework, Section 8(i) simply recognizes that certain 2-to-1 facilities will be unable to access the trackage rights lines accorded to BNSF under the agreement, lists those points, and provides for UP and BNSF to enter into other kinds of arrangements (such as other trackage rights, haulage rights, rate relief, or other mutually acceptable means) that would allow BNSF to afford competitive service at those facilities. Nowhere does Section 8(i) indicate that it was meant to embrace a trove of points that otherwise would not have been available to BNSF and that would upset the basic "overhead rights/except-where-specified" structure of the BNSF Agreement. As we have previously determined, the omnibus clause was included in the BNSF Agreement only to protect "the relatively few 2-to-1 points that were not explicitly covered by the trackage rights and line sales provided for in that agreement."[8] Union Pacific Corp.—Control & Merger—Southern Pacific Corp., Finance Docket No. 32760, Decision No. 89, slip op. at 2 (STB served June 1, 2000) (Merger Dec. No. 89), citing Merger Dec. No. 44, 1 S.T.B. at 252.

Further, BNSF's proposed definition of 2-to-1 points would improperly expand our already broad, but well-defined, conditions preserving the indirect competition that would otherwise have been lost because of the merger. These conditions address the major weakness of the original version of the BNSF Agreement (September 25, 1995): that it generally provided only for BNSF access to traditionally defined 2-to-1 shippers, doing little to protect shippers who would, in some instances at what would otherwise be 1-to-1 points, lose as a result of the merger the competitive constraints indirectly provided by transloads, build-in/build-outs, or siting competition. See Merger Dec. No. 44, 1 S.T.B. at 372 (under original BNSF Agreement, UP/SP merger "would reduce competition" at points subject to indirect constraints).

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[7] Exhibit A to the revised agreement lists the 2-to-1 points referred to in Sections 1(b), 3(a), 4(b), 5(b), and 6(d) of the agreement.

[8] In fact, the UP/SP applicants indicated early in the merger proceeding that, to the best of their knowledge, only one unlisted 2-to-1 point—Labadie, MO—stood to be covered by Section 8(i). As the merger proceeding progressed, certain other unlisted 2-to-1 points were discovered and added (by name) to the list that appears in Section 8(i), but it remained clear that the applicants did not expect to uncover many more such points. See UP/SP-22 (filed Nov. 30, 1995) at 297 & n.1; see also UP/SP-23 (also filed Nov. 30, 1995) at 166-67 (Section 8(i) was meant for only a "handful of small '2-to-1' points" not covered by the BNSF Agreement which applicants "may not have located."). Neither BNSF nor any other party during the merger proceeding indicated any different intention for Section 8(i).

However, in the CMA Agreement (April 18, 1996) and the second supplemental agreement to the BNSF Agreement (June 27, 1996), the applicants themselves expanded BNSF's access to such shippers by granting BNSF the right to serve any new facilities located post-merger on any SP-owned line over which BNSF was accorded trackage rights, as well as the facilities of CMA members who could establish that the merger would otherwise deprive them of build-in/build-out options. We, in turn, then imposed conditions that expanded these agreed-to additions to BNSF's access by requiring the applicants to permit BNSF to serve: (1) new facilities (including transload facilities) on SP-owned and UP-owned track over which BNSF received trackage rights; and (2) any shipper that, as a result of the merger, would otherwise have suffered the loss of a build-in/build/out option. See Merger Dec. No. 44, 1 S.T.B. at 372-73, 419-20. After having discussed at length and expressly defined the scope of our conditions preserving indirect competition, there is no basis for anyone to expect—nor did we intend—that, without any explanation, these conditions would then be further expanded to permit BNSF access not just to new shipper facilities and existing transload facilities on all of the trackage rights lines, but also to such facilities not along the trackage rights lines.

Finally, we have previously rejected the expanded definition of 2-to-1 points of the kind that BNSF proposes here, determining that:

> [r]ather than defining 2-to-1 points as those within some arbitrary proximity to two rail carriers (a BEA[9] or 4-digit SPLC), and thus treating direct and indirect rail competition as equivalent, . . . we have devised specific conditions directly addressing both the competitive problems that have been raised with the BNSF agreement and the CMA agreement and concerns about whether BNSF will have sufficient traffic to compete effectively.

Merger Dec. No. 44, 1 S.T.B. at 372-73 (footnote omitted). It was thus clear that, during the merger proceeding and upon the merger's authorization, our conditions preserving indirect competition were designed to reach a set of points separate from, and in addition to, what all concerned parties at the time understood to be 2-to-1 points—locations where a shipper facility had been open to both UP and SP, and to no other railroad.[10] See Merger Dec. No. 44, 1 S.T.B.

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[9] A BEA refers to a Business Economic Area. Usually, BEAs are "collections of counties" that can, in some instances, comprise as much as "two-thirds or more of the area of some western states." Merger Dec. No. 44, 1 S.T.B. at 372 n.102.

[10] Listed in Exhibit A to the BNSF Agreement are locations (including Reno, NV, and Halsted, Mont Belvieu, and Eldon, TX) that actually did not have any shippers with access to both UP and SP (and no other railroad). Listing these points, however, did not reflect an understanding that a 2-to-1 point was something different than what it was understood to be

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at 393 (where, after discussing our new facilities, transload, and build-in/build-out conditions, we concluded that, with the conditions we were imposing, "BNSF will be an effective replacement for SP at . . . 2-to-1 points *and* affected 1-to-1 points.") (emphasis added).

In sum, we see no basis to grant the relief sought by BNSF here. The reality is that our conditions preserving direct and indirect competition have together provided enormous competitive opportunities for shippers and, in turn, BNSF on the approximately 4,000 miles of trackage rights that BNSF received. BNSF now seeks to expand these opportunities even further. In our judgment, however, that is an overreach that has no competitive justification in the context of the UP/SP merger, nor support in the BNSF Agreement itself. We therefore reject BNSF's proposed definition of 2-to-1 points and direct that, in the restated and amended BNSF Agreement, UP and BNSF apply UP's definition.

Definition Of Transload Facilities. As we have observed, our "new facilities" condition requires that BNSF be granted the right to serve new facilities (including transload facilities that include those owned or operated by BNSF) on the trackage rights lines. See Merger Dec. No. 44, 1 S.T.B. at 419-20. Initially, UP and BNSF commonly defined "new transload facilities" as shipper facilities (other than automotive or intermodal facilities or team tracks) that provide transload services, including (though not limited to) commonly recognized transload service providers, at which freight is transferred from one railcar to another or from one mode to another, the construction of improvements to provide such services is required, and operating costs above and beyond the cost of providing direct rail service are incurred.[11] Joint Submission, at 6-7. The only significant distinction between the definitions subsequently proposed by UP and BNSF is that, under UP's definition, the transload facility must be a public facility (i.e., a facility that offers services to the shipping public) in which the operator of the new transload facility could not have an ownership interest in the product being transloaded, while BNSF would allow for such an interest.[12]

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[10](...continued)
during the merger proceeding. Rather, these exceptions simply reflected nothing more than agreement on the part of the applicants to provide certain additional relief for those points to address a perceived special competitive impact potentially resulting from the merger.

[11] UP and BNSF each indicate, by way of an example, that BNSF would not be able to construct a new truck transload facility adjacent to an exclusively served coal mine and then truck the coal a short distance (e.g., 100 feet) from the mine to the facility. Joint Submission, at 6-7.

[12] BNSF defines "existing transload facilities" as those in existence on September 25, 1995, with the same qualifications as for new transload facilities, plus the requirement that the
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After reviewing the comments, however, UP asserts that, for the purpose of defining the scope of the conditions we have imposed in this proceeding, we should not adopt either BNSF's or UP's definition of transload facilities, but, instead, resolve any disputes on a case-by-case basis. UP asserts that most transloads create no conflict between carriers, and those that do arise out of special circumstances. As a result, UP claims that attempts to define transload facilities in the abstract may simply produce additional disputes.[13] UP/SP-389, at 35. DOT concurs. DOT-7, at 8-9.

After considering the comments, we agree with UP and DOT that we should not require in the restated and amended BNSF Agreement a comprehensive definition of the transload facilities to which BNSF will have access. The fact that we have not previously defined qualifying transload facilities with any great precision[14] does not appear to have been overly burdensome on the parties. Accordingly, we believe that we should simply remain available to resolve, on a case-by-case basis, any disputes concerning such qualification.

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[12](...continued)
existing facilities had been leased, owned, or continuously operated by the same transload operator for at least 12 months. Joint Submission, at 5-6. UP contends that a definition of existing transload facilities is not necessary, id. at 5, but submits that, if we elect to define it, we should apply UP's definition for new transload facilities. UP/SP-387, at 21 n.10.

[13] On reply, UP now concedes that, by precluding any ownership interest in the product transloaded, its definition of new transload facilities could be too narrow and might discourage some legitimate transload activity. UP/SP-389, at 37. BNSF has consistently argued that we should reject any effort to restrict "transload facilities" to only public facilities where the operator has no ownership of the product being transloaded; the competition offered by transloading, BNSF maintains, is not dependent on the identity of the party doing the transloading. See, e.g., BNSF-94, at 12-16.

[14] In Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp. Finance Docket No. 32760, Decision No. 61 (STB served Nov. 20, 1996) (Merger Dec. No. 61), we explained that a transload facility must be "legitimate" (i.e., entail both the construction of a rail transload facility as that term is used in the industry and operating costs above and beyond the costs that would be incurred in providing direct rail service), but discussed only the example of a facility that would clearly not be "acceptable" (a truck transload facility within 100 feet of an exclusively served coal mine). Merger Dec. No. 61, slip op. at 12. In addressing this question again in Union Pacific/Southern Pacific Merger, 2 S.T.B. 697 (1997) (Merger Dec. No. 75), we added that a facility cannot be generally regarded as a transload facility for the purposes of our transload condition if the facility is really "a contrivance to obtain a competitive option that was not available to the shipper prior to the merger." Merger Dec. No. 75, 2 S.T.B. at 701.

What we have said with respect to the "new facilities" condition is equally true with respect to that condition's transload component:

> We do not believe that it is necessary or appropriate for us to determine, in advance, the exact parameters of the new facilities condition. As we have noted, the underlying purpose of the condition is to replace competition that would have been lost pursuant to the merger. A determination of whether a new facility such as a transload facility addresses the loss of competition that this condition was intended to remedy, or whether it instead amounts to an overreach, however, is fact-specific; it cannot be made in a vacuum, nor can it be broadly defined. Rather, each determination will no doubt be unique, given the expected differences in each shipper's circumstances. Thus, in each case, we must examine the particular circumstances to determine whether the condition has been met.

Union Pacific/Southern Pacific Merger, 2 S.T.B. 703, 716 (1997) (General Oversight Dec. No. 10).

Nonetheless, a few matters regarding the transload condition, and the parties' arguments regarding that condition, merit special attention that should provide some guidance on this issue. First, we reemphasize that the crucial issue in identifying a qualifying transload facility is not whether it is public or private, or whether the operator of the transload facility has an ownership interest in the product being transloaded, but, as we outlined in Merger Dec. No. 61, supra note 14, slip op. at 12, whether the facility is "legitimate." Furthermore, BNSF cannot achieve access to a transload facility merely by showing that such access would satisfy the "traffic density" purpose of the transload condition. While BNSF could cite traffic density with respect to any facility located on the trackage rights lines, traffic density is not relevant to the question of whether a facility is a legitimate transload facility. See Merger Dec. No. 75, supra note 14, 2 S.T.B. at 702 n.10. Lastly, we reject UP's argument that, under the transload condition, a shipper whose facility was served by UP prior to the merger must build its transload facility on a line owned by SP prior to the merger, and vice versa. UP argues that, without this restriction, single-shipper transloads would violate Merger Dec. No. 75 by "giving BNSF direct rail access to shippers that only received direct and exclusive rail service from either UP or SP prior to the merger." Merger Dec. No. 75, 2 S.T.B. at 699. That argument, however, has already been rejected, and UP cannot relitigate it now.[15]

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[15] In Merger Dec. No. 61, UP asked us to clarify "that BNSF's right to serve new transload facilities on UP lines is only for the purpose of handling traffic transloaded to or from points on SP lines," and "that BNSF's right to serve new transload facilities on SP lines is only for the purpose of handling traffic transloaded to or from points on UP lines." Merger Dec. No. 61, slip op. at 3. UP argued that its proposed clarification was necessary "because the (continued...)

We therefore direct BNSF and UP to revise the restated and amended version of the BNSF Agreement so that, if a general definition of the term "transload facility" is included, that definition is consistent with our decision here.

The Stockton-Elvas Trackage Rights. Section 1(a) of the current version of the BNSF Agreement lists the "Western Trackage Rights" that UP provided to BNSF, including those over the former SP line between Stockton, CA, and Elvas, CA.[16] UP/SP-266, Exhibit A at 2; see also UP/SP-387, Map #2. Section 1(b) provides that the trackage rights granted in Section 1(a) shall be bridge rights for the movement of overhead traffic only, except for the local access that is specified. As pertinent here, Section 1(b) provides that BNSF shall receive access on the SP-owned lines listed in Section 1(a) to any new shipper facility located subsequent to UP's acquisition of control of SP at points other than those listed on Exhibit A to the agreement "(except the line between Elvas (Elvas Interlocking) and Stockton.)" UP/SP-266, Exhibit A at 2. Thus, under Section 1(b) of the current agreement, BNSF's trackage rights on the Stockton-Elvas line are for overhead traffic only, precluding BNSF service to or from new shipper facilities located subsequent to the UP/SP merger at points on the Stockton-Elvas line.

BNSF proposes to revise Sections 1(a) and 1(b) of the restated and amended BNSF Agreement to provide that, although BNSF's trackage rights on the Stockton-Elvas line are overhead rights, BNSF would receive access to any new shipper facility located "subsequent to UP's acquisition of control of SP" on the Stockton-Elvas line. Joint Submission, at 8-9. UP would likewise revise Sections 1(a) and 1(b) to reaffirm that BNSF's trackage rights on the Stockton-Elvas line are overhead rights, but it would further revise Section 1(b) to provide that BNSF could serve Willamette Industries at Elk Grove, CA, and Southdown Cement at Polk, CA. Id. at 9-10.

We agree with BNSF's proposed revisions to Sections 1(a) and 1(b) and direct BNSF and UP to include, in the final restated and amended version of the BNSF Agreement, BNSF's

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[15](...continued)
transload condition, read literally, allows BNSF to serve, via new transload facilities on the lines where it will receive overhead trackage rights, not only traffic trucked to or from a point on the other merging railroad, but also traffic trucked to or from a point on the very line where the transload facility is located (or on a nearby branch line of that merging railroad)." Id. We rejected UP's request for clarification, and concluded that the transload condition should be read literally: "BNSF may serve any new transload facility, including those owned or operated by BNSF itself, located post-merger on any UP/SP line over which BNSF has received trackage rights in the BNSF agreement; and BNSF's right to serve a new transload facility includes the right to handle all traffic transloaded at that facility." Id., slip op. at 7.

[16] Elvas is also referred to as "Elvas Interlocking" and "Elvas Tower."

revisions regarding this matter. As we have repeatedly indicated, in authorizing the UP/SP merger we provided that the new facilities provision of the CMA Agreement, which granted BNSF "the right to serve any new facilities located post-merger on any SP-owned line over which BNSF receives trackage rights in the BNSF agreement," be expanded to require "that BNSF be granted the right to serve new facilities on both SP-owned and UP-owned track over which BNSF will receive trackage rights." Merger Dec. No. 44, 1 S.T.B. at 419-20; see also Merger Dec. No. 44, 1 S.T.B. at 373; Merger Dec. No. 61, slip op. at 2; General Oversight Dec. No. 10, 2 S.T.B. at 714.

UP argues, however, that, in characterizing the CMA Agreement as providing BNSF access to "any" new facility on SP trackage rights lines, we overlooked the fact that Section 1(b) of the current BNSF Agreement specifically excepts the Elvas-Stockton SP trackage rights line from such access, and we gave no indication in Merger Dec. No. 44 that this provision of the BNSF Agreement would be nullified by our "new facilities" condition. UP argues, in essence, that, because we overlooked the Stockton-Elvas restriction in 1996, we have no choice but to accept it now.

Because the text of the "new facilities" condition requires "that BNSF be granted the right to serve new facilities on both SP-owned and UP-owned track over which BNSF will receive trackage rights," Merger Dec. No. 44, 1 S.T.B. at 419-20, and because that text makes no exception for the Stockton-Elvas line, BNSF must be granted the right to serve new facilities on the Stockton-Elvas line. In the case of a conflict between the conditions we imposed in Merger Dec. No. 44 and the restrictions BNSF and UP agreed upon in the 1996 version of the BNSF Agreement, the conditions we imposed trump any restrictions that BNSF and UP may have previously agreed upon. Moreover, as we indicated in Merger Dec. No. 61, slip op. at 7:

> The new facilities condition should be read literally: BNSF may serve any new facility (except as otherwise indicated) located post-merger on any UP/SP line over which BNSF has received trackage rights in the BNSF agreement.[17]

UP insists, however, that the Stockton-Elvas situation is not like any of the "new facilities" scenarios we considered in Merger Dec. No. 61 because the Stockton-Elvas line was an SP line, not a UP line; because BNSF agreed (in the 1996 version of the BNSF Agreement) to a restriction on its "new facilities" rights on the Stockton-Elvas line; because BNSF was given access to the Stockton-Elvas line as an alternative route, for operating convenience only; and because, in view of BNSF's access to the Stockton-Haggin Junction line, siting competition in the Stockton-Sacramento corridor can be preserved without affording BNSF

[17] The "except as otherwise indicated" exception refers to the limitation in our condition that "the term 'new facilities' does not include expansions of or additions to existing facilities or load-outs . . . ." Merger Dec. No. 44, 1 S.T.B. at 420.

access to new facilities on the Stockton-Elvas line. Further, UP adds, access by BNSF to new facilities on the Stockton-Elvas line is not necessary to ensure that BNSF has sufficient traffic density on its trackage rights lines.

When we said in Merger Dec. No. 61 that the "new facilities" condition should be read literally, we did not mean that it applied only to situations identical to the situations we addressed in that decision. We meant that the "new facilities" condition should always be read literally, and a literal reading of that condition establishes BNSF's right to access new facilities on the Stockton-Elvas line.

Team Tracks. BNSF proposes to add to the restated and amended BNSF Agreement a new Section 8(p) which would provide that, "[i]f UP no longer uses a team track at a '2-to-1' Point, it agrees to sell or lease the track to BNSF at normal and customary costs and charges." See Joint Submission, at 35-36.[18] UP objects to that revision. Id.

We agree with UP that it should not be required to sell or lease to BNSF team tracks no longer used as such (or no longer used at all) by UP. A basic premise of the BNSF Agreement was that, aside from the trackage rights lines themselves, BNSF must construct its own facilities unless UP has specifically agreed to provide them. This premise is clearly applicable in the "team tracks" context; Section 9(h) of the restated and amended BNSF Agreement provides that BNSF has a right "to construct, or have constructed for it, for its sole use exclusively owned or leased facilities, including, without limitation, . . . team tracks." See Joint Submission, at 41-42. Given this background, and given that it could be difficult (particularly years after the fact) to identify which tracks were actually used as team tracks, we see no justification for the new provision proposed by BNSF.

BNSF contends that it must have team tracks if it is to fully replicate the intramodal competition that existed at 2-to-1 points prior to the merger, and that, as a practical matter, it would need to secure UP's cooperation in the construction of BNSF team tracks. We agree that, if BNSF is to compete effectively, it must have team tracks in appropriate circumstances. However, we believe that the difficulties cited by BNSF are overstated. As UP notes, team tracks are not difficult to construct; they require only a switch, a small area of land, and a short segment of track.

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[18] A "team track" is "a rail-owned track on which the railroad parks a car for a shipper to load or unload." UP/SP-387, V.S. Rebensdorf at 9. See also UP/SP-387, at 6 n.3 (citation omitted): "'Team tracks' are any tracks on which cars are placed for the public's use in loading or unloading freight using trucks. Decades ago shippers used wagons pulled by 'teams' of horses" and that is how the term evolved.

As requested by ACC and DOT, however, we clarify that we expect UP to work cooperatively with BNSF to enable BNSF to construct team tracks and ancillary facilities, including loading facilities and necessary connections with UP/SP tracks, when BNSF notifies UP of its desire to construct team tracks and/or ancillary facilities along a UP/SP line. In this respect, as in so many others, railroads like BNSF and UP must cooperate with each other at the same time they compete with each other. Such cooperation, we think, works best when the details are arrived at privately, rather than in an administrative proceeding.

Other Arguments. Finally, UP argues that we should not even consider BNSF's proposals respecting 2-to-1 points, transload facilities, the Stockton-Elvas trackage rights, and team tracks. UP contends that, because a merged railroad must be able to rely on its settlement agreement partners to honor their agreements in the form imposed by the Board, BNSF's proposals contravene our policy favoring private settlement agreements; because BNSF previously agreed "not to seek any conditions in the control case, not to support any requests for conditions filed by others, and not to assist others in pursuing their requests," UP/SP-22 at 338, BNSF's proposals violate the terms of the BNSF Agreement itself; and because BNSF's proposals would expand the conditions on the UP/SP merger 5 years after UP and SP consummated the merger, we lack the power to grant BNSF's proposals. We disagree.

BNSF, however, should be regarded as the guardian of the rights we entrusted to it in Merger Dec. No. 44. BNSF, as the grantee under most of the conditions we imposed when we authorized the UP/SP merger, has a strong incentive to see to it that those conditions are enforced to the fullest, and, as that grantee, is the party best situated to enforce them against UP. BNSF's proposed revisions here reflect its effort to ensure that our conditions are working in the manner intended. This does not mean, of course, that any dispute between BNSF and UP regarding the conditions we imposed in Merger Dec. No. 44 should be resolved in BNSF's favor. But it does mean that a dispute should not be resolved in UP's favor on the ground that BNSF has no right to dispute anything.

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

It is ordered:

1. BNSF and UP shall include, in the final restated and amended version of the BNSF Agreement, the "2-to-1 point" definition advocated by UP.

2. BNSF and UP shall include, in the final restated and amended version of the BNSF Agreement, either: (a) a general "transload facilities" definition upon which BNSF and UP can agree consistent with this decision; or (b) no "transload facilities" definition.

3. BNSF and UP shall include, in the final restated and amended version of the BNSF Agreement, the wording of Sections 1(a) and 1(b) advocated by BNSF regarding access to new shipper facilities on the Stockton-Elvas trackage rights line.

4. BNSF and UP shall not include, in the final restated and amended version of the BNSF Agreement, the Section 8(p) provision advocated by BNSF.

5. The due date for the submission of the final restated and amended version of the BNSF Agreement will be announced in a subsequent decision.

6. This decision is effective on the date of service.

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

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SERVICE DATE – DECEMBER 20, 2001

SURFACE TRANSPORTATION BOARD

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

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 of the BNSF Agreement as supplemented by the CMA Agreement[2] and as further expanded by the Board.

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[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 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

(continued...)

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]

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[2](...continued)
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 Corp.—Control & Merger—Southern Pacific Corp., STB Finance Docket 32760 (Sub-No. 21), Decision No. 20 (STB served Dec. 20, 2001).

[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 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
(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

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[6](...continued)
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 Corp.—Control & Merger—Southern Pacific Corp., STB Finance Docket 32760 (Sub-No. 21), Decision No. 16 (STB served Dec. 15, 2000) (General Oversight Dec. No. 16), slip op. at 6.

[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, 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 (continued...)

of key commodities affected by the merger,[9] 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 facilities accessed by virtue of conditions in the CMA Agreement, nearly 150 shipper facilities

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[8](...continued)
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.

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 Corp.—Control & Merger—Southern Pacific Rail Corp., STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 1 (STB served May 7, 1997) (General Oversight Dec. No. 1), slip op. at 3 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 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.").

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[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.

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 Corp.—Control & Merger—Southern Pacific Rail Corp., STB Finance Docket No. 32760, Decision No. 72 (STB served May 23, 1997) (Merger Dec. No. 72), slip op. at 8 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, 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

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[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.

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

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[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 Corp.—Control & Merger—Southern Pacific Corp., STB Finance Docket 32760 (Sub-No. 21), Decision No. 13 (STB served Dec. 21, 1998), slip op. at 10 n.34.

competition 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 Park[16] 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,

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

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 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

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[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.

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) 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

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[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.

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 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.

<u>It is ordered</u>:

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

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[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.

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 the date of service.

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

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STB FD-32760 (SUB 21) 11-8-01 C-19 32252

32252 SERVICE DATE - LATE RELEASE NOVEMBER 8, 2001
EB

SURFACE TRANSPORTATION BOARD

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. 19

Decided: November 8, 2001

We address, in this decision, the Houston-Memphis-St. Louis corridor trackage rights issues raised in the fifth annual round of this "general oversight" proceeding.[1] As explained below, we clarify that the "entry/exit" and "Texas/Louisiana" restrictions placed on the trackage rights accorded to The Burlington Northern and Santa Fe Railway Company (BNSF) in the corridor—pursuant to the BNSF and CMA Agreements,[2] whose terms we imposed as conditions to our authorization of the UP/SP merger—do not apply to shippers' traffic moving via BNSF pursuant to the merger's "build-in/build/out" and "new facilities" conditions that we also imposed. Moreover, they also do not apply to traffic moving to and from the intermediate "2-to-1" points expressly listed in the agreements. In all other respects, the restrictions continue to apply. We direct the carriers to revise their proposed "restated and amended" agreement accordingly.

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[1] Other issues raised in this round of the oversight proceeding will be addressed in a subsequent decision.

[2] The BNSF Agreement refers to the agreement entered into by the UP/SP applicants and BNSF, dated 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. Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 247 n.15 (1996) (Merger Dec. No. 44). 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). Id. at 243, 254-55.

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.[3] Among the conditions attached to that authorization, we required UP to abide by the terms of the BNSF Agreement, as supplemented by the CMA Agreement, under which UP provided BNSF approximately 4,000 miles of trackage rights over the merged UP/SP system to preserve, among other things, competitive rail service for "2-to-1" shippers—those shippers that, prior to the merger, were served by UP and SP, but by no other railroad. Merger Dec. No. 44, 1 S.T.B. at 252.

We also expanded upon those agreements by imposing several other broad-based conditions that afforded BNSF trackage rights to serve shippers that, as a result of the merger, would have been deprived of a "build-in/build-out" option, and to serve new facilities (including transload facilities) on both UP and former SP lines over which BNSF received trackage rights under the BNSF Agreement. Merger Dec. No. 44, 1 S.T.B. at 419-20. These conditions were designed to replicate other competitive opportunities that would otherwise have been lost upon SP's absorption into UP, and to aid BNSF in obtaining enough traffic to compete effectively with the merged UP/SP.[4] Id. at 372-73.

As part of the BNSF Agreement, BNSF was afforded trackage rights in the Houston-Memphis-St. Louis corridor over various UP and SP lines.[5] Section 6(c) of the BNSF

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[3] UP's acquisition of common control was consummated on September 11, 1996, and the merger was completed on February 1, 1998.

[4] To further the objective of a sufficient BNSF traffic base for BNSF to provide an effective competitive alternative, we also required UP to make available to BNSF for bidding at least 50% of the traffic (by volume) that was under UP and SP contracts at 2-to-1 points on all of the BNSF trackage rights corridors. Merger Dec. No. 44, 1 S.T.B. at 373, 419-20.

[5] These lines are: (1) UP's line between Houston, TX, and Valley Junction, IL (located just east of St. Louis, MO), via Palestine, TX, Little Rock, Bald Knob, and Hoxie, AR; (2) SP's former line between Houston and Illmo, MO (located near Rockview, MO, at about the mid-point of BNSF's own Memphis-St. Louis line), via Cleveland, TX, Pine Bluff, Brinkley, Fair Oaks, and Jonesboro, AR, and Dexter Junction, MO; (3) UP's line between Bald Knob and Bridge Junction, AR (located just west of Memphis, TN); (4) SP's former line between Brinkley and Briark, AR (located just west of Memphis, TN); and (5) UP's line between Pine Bluff and North Little Rock, AR. See Section 6(a) of BNSF Agreement; UP/SP-22 at 326-27; UP/SP-266, (continued...)

Agreement provided that the trackage rights in this corridor would be bridge rights for the movement of overhead traffic only, except where specified, and further provided that the trackage rights would be subject to two restrictions, as follows:

> Except as provided by Section 9(l) of this Agreement, BNSF shall not have the right to enter or exit at intermediate points on UP's and SP's lines between Memphis and Valley Junction, IL. Traffic to be handled over the UP and SP lines between Memphis and Valley Junction, IL is limited to traffic that moves through, originates in, or terminates in Texas or Louisiana except that traffic originating or terminating at points listed on Exhibit A under the caption "Points Referred to in Section 6c" may also be handled over these lines.[6]

Section 9(l) of the Agreement provides, in pertinent part,[7] that:

> BNSF shall have the right to connect, for movement in all directions, with its present lines (including existing trackage rights) at points where its present lines (including existing trackage rights) intersect with lines it will purchase or be granted trackage rights over pursuant to this Agreement.

UP and BNSF have jointly submitted for our review and approval here a "restated and amended" version of the BNSF Agreement. See UP/SP-386, BNSF-92 (Joint Submission). The carriers indicate that this updated version incorporates the conditions in the BNSF Agreement that we 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 have reached relating to those conditions and other matters. But, in addition to the matters on which UP and BNSF have reached agreement, the restated and amended agreement includes conflicting proposals with respect to certain issues on which the carriers do not agree, including, as pertinent here, the scope of BNSF's Houston-Memphis-St. Louis trackage rights.

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[5](...continued)
Exhibit A at 11. See also UP/SP-387, Map #1.

[6] Those points are Camden, AR, Pine Bluff, AR, Fair Oaks, AR, Baldwin, AR, Little Rock, AR, North Little Rock, AR, East Little Rock, AR, Forrest City, AR, Paragould, AR, and Dexter, MO. See UP/SP-22 at 358-59; UP/SP-266, Exhibit A at 11-12; Joint Submission (UP/SP-386, BNSF-92), Exhibit A, at 2.

[7] See UP/SP-22 at 354.

Specifically, BNSF would remove the "entry/exit" and "Texas/Louisiana" restrictions now contained in Section 6(c) by deleting the above-noted language entirely. See Joint Submission, Proposed Restated and Amended BNSF Settlement Agreement, at 26. UP, on the other hand, would retain the entry/exit restriction, but remove the "Except as provided in Section 9(l) of this Agreement" language of Section 6(c) to make clear that this restriction on BNSF's trackage rights supersedes the general "intersecting points" provision of Section 9(l). UP would also specifically clarify that the entry/exit restriction applies at intermediate points on UP's and SP's lines between Bald Knob and Fair Oaks, AR (points at roughly the same latitude as Memphis), and Valley Junction, IL, and it would retain the Texas/Louisiana restriction essentially in its current form. Id. Accordingly, UP's proposal would have new Section 6(d) restate Section 6(c) in pertinent part as follows:

> BNSF shall not have the right to enter or exit at intermediate points north of Bald Knob and Fair Oaks, AR on UP's and SP's lines between Memphis and Valley Junction, IL. Traffic to be handled over the UP and SP lines between Memphis and Valley Junction, IL is limited to traffic that moves through, originates in, or terminates in Texas or Louisiana, except that traffic originating or terminating at points listed on Exhibit A under the caption 'Points Referred to in Section 6(d)' may also be handled over these lines.

UP and BNSF each filed comments on the other's proposals (UP/SP-387, BNSF-93), and further comments were filed by Entergy Services, Inc., and Entergy Arkansas, Inc. (collectively Entergy) (ESI-33, ESI-34); The National Industrial Transportation League (NITL) (NITL-27); the American Chemistry Council (ACC) (formerly CMA) (ACC-1); and the United States Department of Transportation (DOT) (DOT-6, DOT-7). UP and BNSF replied (UP/SP-389, BNSF-94, BNSF-96).[8]

DISCUSSION AND CONCLUSIONS

Build-In/Build-Out Lines, New Facilities, and Named 2-to-1 Points. We have imposed competitive conditions upon our approval of a rail consolidation in order to replicate, insofar as possible, competition that would otherwise have been lost as a result of the transaction. See, e.g., Merger Dec. No. 44, 1 S.T.B. at 419. Here, we imposed as conditions the terms of the BNSF Agreement, as supplemented by the CMA Agreement, so that, among other things, BNSF could offer a competitive alternative for 2-to-1 shippers, and over 2-to-1 corridors. But, as we have observed, we also expanded upon those agreements to impose conditions that would preserve other pre-merger competitive options. There is no basis to conclude, nor did we intend,

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[8] UP also filed a letter (undesignated) on September 24, 2001. All of the pleadings are summarized in the Appendix to this decision. See also UP/SP-385 and BNSF-PR-20.

that the restrictions contained in Section 6(c) of the BNSF Agreement would work to narrow the scope of the remedial conditions that we imposed to prevent those competitive options from being lost.[9]

The "new facilities" condition, for example, was imposed to preserve indirect "siting competition"— the ability of a shipper "to play UP and SP against each other in deciding where to locate new facilities"—and "to enable BNSF to achieve sufficient traffic density on the trackage rights lines." Merger Dec. No. 61,[10] at 9, 10; see also Merger Dec. No. 44, 1 S.T.B. at 372-73. Application of the restrictions in Section 6(c)—to deny BNSF similar routings to those that would have been available to UP or SP for traffic moving to and from any new facilities on either a UP or former SP line over which BNSF had received trackage rights in the corridor—would undermine those purposes.

Likewise, we imposed a general condition to preserve the pre-merger opportunity of a railroad to "build-in" to a shipper, or a shipper to "build-out" to a railroad.[11] Prior to the merger, any traffic that UP or SP might have obtained from shippers in the corridor via build-in/build-out lines could have moved via any routes then open to UP or SP. Thus, application of the entry/exit and Texas/Louisiana restrictions as to build-in/build-out traffic would prevent BNSF from replicating the competitive role that UP or SP provided in these circumstances and would improperly undercut this condition as well.

Nor, finally, is there any basis to apply the "entry/exit" restriction to deprive shippers at the named intermediate points in Section 6(c) (see note 6) of the full measure of the competitive protections afforded to 2-to-1 points under the BNSF Agreement. BNSF's trackage rights in the Houston-Memphis-St. Louis corridor largely addressed 2-to-1 shippers in Texas and Louisiana that, prior to the merger, moved traffic over the entire corridor to and from the St. Louis Gateway

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[9] UP has in fact acknowledged that the Texas/Louisiana restriction does not apply to traffic moving via BNSF from new facilities or build-outs along the trackage rights lines in the corridor. See, e.g., UP letter, September 24, 2001 (supra note 8), at 1-2.

[10] Union Pacific Corp.—Control & Merger—Southern Pacific Corp., STB Finance Docket No. 32760, Decision No. 61 (STB served Nov. 20, 1996) (Merger Dec. No. 61).

[11] This condition was based upon a provision in the CMA Agreement under which, for a limited period of time after the merger, a CMA member that showed that the merger had deprived it of a build-in/build-out option from/to a second rail carrier could obtain that access through substituted BNSF service, thus replicating the competitive options that had been available from UP and SP. We expanded upon this approach by preserving pre-merger build-in/build-out options for all shippers, removing the time limit, and clarifying that the test of feasibility would be whether the line was constructed. Merger Dec. No. 44, 1 S.T.B. at 373, 420.

via either UP or SP (St. Louis Gateway traffic).[12] BNSF agreed that it would use the UP and SP lines between Memphis and Valley Junction only for traffic to or from Texas and Louisiana, and that it would not enter or exit the UP and SP Memphis-Valley Junction trackage rights lines at intermediate points between Memphis (i.e., Bald Knob and Fair Oaks, AR) and Valley Junction. Even though this traffic generally moved over the entire corridor, UP insisted on these restrictions to ensure that BNSF would use UP and SP track for the St. Louis Gateway traffic that the trackage rights were primarily designed to address, and that BNSF would use its own lines for other, non-merger related traffic.[13] UP/SP-387, at 14-17, V.S. Rebensdorf, at 3-4.

Neither the character of the St. Louis Gateway traffic nor UP's underlying concerns are relevant, however, to shippers at the named intermediate 2-to-1 points within the corridor. Like shippers with previous build-in/build-out options, shippers at the interior 2-to-1 points prior to the merger could have—and, at these points, likely did—move over any routes open to UP or SP that could connect with BNSF or other rail lines north of Memphis. Thus, we find that the entry/exit restriction of Section 6(c) may not be invoked to prevent BNSF from replicating that competitive option for traffic from these particular points.

Entergy. These principles are best illustrated by the circumstances involving Entergy. Entergy owns and operates a coal-fired electric generating plant at White Bluff Station, located just north of Pine Bluff, AR, that is served solely by UP over that carrier's Pine Bluff-Little Rock line. As a result, UP has always delivered to White Bluff the Powder River Basin (PRB) coal that the plant uses. SP, however, also operated a nearby line though Pine Bluff, giving the utility a pre-merger competitive build-out option that we expressly preserved, via substituted BNSF

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[12] Under the initial BNSF Agreement, BNSF would have gained trackage rights over the former SP line only between Houston and Memphis and then used its own line from Memphis to St. Louis to serve the St. Louis Gateway. See UP/SP-387, Map #1. However, addressing concerns by chemical shippers (whose movements comprised much of the St. Louis Gateway traffic) that BNSF would not be able to compete effectively with a merged UP/SP in that way, UP/SP applicants entered into the CMA Agreement, which afforded BNSF access to UP and SP lines along the entire corridor from Houston to the St. Louis Gateway and allowed BNSF to perform "directional running" for its traffic moving over the parallel UP and SP lines comprising the corridor. UP/SP-387, at 14, V.S. Rebensdorf, at 2-3; see also Map #1.

[13] Thus, for example, BNSF must continue to use its own Memphis-St. Louis line—not the UP/SP trackage rights—for its St. Louis Gateway traffic to and from the Southeast that moved via Memphis over other BNSF lines serving southeastern points such as Birmingham, AL, and Pensacola, FL. UP/SP-387, V.S. Rebensdorf, at 3-4.

service, if and when such a line were constructed.[14] Merger Dec. No. 44, 1 S.T.B. at 429, 469; see also ESI-34, at 5-6.

Entergy and BNSF point out, and UP acknowledges, that a pre-merger BNSF-SP routing of PRB coal trains to and from White Bluff could have moved via Jonesboro, AR, and the utility argues that applying the entry/exit restriction for BNSF trackage rights trains at points north of Bald Knob and Fair Oaks (such as Jonesboro) would improperly preclude Entergy from replicating that option and force longer and less efficient trackage rights movements to White Bluff via Memphis. ESI-34, at 8, BNSF-94, at 21 n.19. UP concedes that, absent the entry/exit restriction, BNSF would have "a slightly more efficient route," but contends that BNSF would be an effective competitive replacement for SP for Entergy's White Bluff coal traffic even with the restriction, and that there is therefore no basis to override the restriction for Entergy's traffic. UP/SP-389, at 22.

UP's argument, however, is inconsistent with the build-out condition itself, which was imposed to allow "BNSF to replicate the competitive options now provided by the independent operations of UP and SP." Merger Dec. No. 44, 1 S.T.B. at 420. Because Entergy's pre-merger build-out option via SP would have included a connection with BNSF at Jonesboro, a post-merger BNSF option must necessarily include a connection with the BNSF line at Jonesboro.[15] Otherwise, Entergy would be left with less than what it had previously, thereby defeating the purpose of the build-out condition. There is no basis to conclude from Merger Dec.

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[14] In Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp., STB Finance Docket No. 32760, Decision No. 88 (STB served Mar. 21, 2000) (Merger Dec. No. 88), we clarified that Entergy also had a pre-merger build-out option to link its White Bluff generating plant with a closer point on SP's line (8.6 miles away) than the point (21 miles away) that we had identified in Merger Dec. No. 44, and we preserved its ability to replicate that option and receive substituted BNSF service should the line be constructed.

[15] Consistent with both the build-out condition and UP's post-merger implementation of directional running, BNSF should also be permitted to exit the trackage rights lines at Hoxie, AR. Prior to the merger, the SP line through Jonesboro would have handled Entergy's build-out traffic to and from White Bluff in both directions. Under UP's directional running, however, the SP line now generally handles southbound traffic only, and northbound traffic is handled on the parallel UP line that runs through Hoxie. BNSF, of course, has trackage rights over both lines; indeed, the trackage rights over the northbound UP line were granted to allow BNSF to "run with the flow" of UP traffic. It is in no one's interests to force BNSF to run empty, dedicated unit-trains from White Bluff northbound on the SP southbound line. Thus, consistent with directional running, BNSF must be entitled to "enter" the trackage rights lines at Jonesboro and "exit" back to its own line at Hoxie. See UP/SP-387, Map #1.

No. 44, nor did we intend, that the entry/exit restriction could thwart our broad-based build-out condition in this way.[16]

Finally, the fact that BNSF has now been afforded the right to serve White Bluff directly via UP's Pine Bluff-Little Rock line,[17] thereby obviating the need for Entergy to construct a build-out, does not change the principle that the entry/exit restriction does not apply here. We had already conditionally authorized Entergy's construction of the 8.6-mile build-out that we had preserved in Merger Dec. No. 88 (supra note 14) before BNSF obtained the additional trackage rights, and have subsequently granted final approval for that construction.[18] Because the additional trackage rights substitute for that construction, they do not alter Entergy's right to receive service without restrictions that would not have been in place for SP-BNSF service before the merger.

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[16] Moreover, as BNSF points out, the additional mileage (if the entry/exit restriction were applied) for routing PRB unit-coal trains on its lines past Jonesboro to Memphis and then onto SP's former line back to White Bluff would, contrary to UP's arguments, likely affect BNSF's competitiveness for Entergy's traffic in various ways, including increased transit and cycle times (plus a likely increased cost to Entergy of equipment and the potential need for (and costs of) additional crews) that, as a result, would diminish BNSF's ability to guarantee needed service levels. BNSF also points out that its cost of service would further increase due to the costs of constructing and/or rehabilitating necessary connections and lines in Memphis to handle this traffic. BNSF-94, at 21 n.19.

[17] BNSF's direct access to Entergy was part of a settlement of Entergy's private lawsuit against UP for events occurring during the UP/SP service crisis in the aftermath of the merger. (We recognize that references to these trackage rights that BNSF obtained as a result of the settlement were submitted as confidential, ESI-34, at 3, but we must be able to refer to and address the evidence in a meaningful way. See, e.g., CF Indus. v. Koch Pipeline Co., L.P., STB Docket No. 41685 (STB served May 9, 2000), at 2 n.3.

[18] See Entergy Ark. & Entergy Rail–Construct. & Oper. Exempt.–White Bluff, AR, STB Finance Docket No. 33782 (STB served May 4, 2000, and Sept. 28, 2001).

In sum, UP's application of the entry/exit restriction or the Texas/Louisiana restriction to traffic moving subject to the build-in/build-out conditions (such as Entergy's traffic) and the new facilities conditions, and traffic moving from or to the named intermediate 2-to-1 points within the corridor would undermine the conditions we imposed in Merger Dec. No. 44. See DOT-7, at 5. Accordingly, the restated and amended version of the BNSF Agreement should be amended to make clear that neither of the restrictions applies to traffic moving from or to build-in/build-out lines, new facilities, or the named 2-to-1 points,[19] and we direct UP and BNSF to do so.

St. Louis Gateway Traffic. On the other hand, there is no basis to remove the entry/exit and Texas/Louisiana restrictions entirely, as BNSF urges. The restrictions were designed to ensure UP that BNSF would use the trackage rights lines only as intended—to preserve the SP competition for St. Louis Gateway traffic that otherwise would have been lost through the merger—and not for BNSF's other, non-merger related operations.

BNSF's arguments[20] for removing these restrictions on its trackage rights are unconvincing. BNSF argues that the phrase in current Section 6(c) of the BNSF Agreement—"Except as provided in Section 9(l) of this Agreement"—overrides the entry/exit restriction and establishes a right for BNSF to intersect with its own lines north of Bald Knob and Fair Oaks. BNSF-93, at 16 n.12, BNSF-94, at 19 & n.17. But that interpretation is illogical. It would make no sense to have a provision barring BNSF from entering or exiting the trackage rights lines at intermediate, intersecting points north of Memphis, except as provided in another provision allowing BNSF to enter and exit the trackage rights lines at those points. Looking at the phrase in Section 6(c) in the context of the entire agreement, we agree with UP that the reference to Section 9(l) simply confirms BNSF's general right under the agreement to establish connections between its own lines and the trackage rights lines with respect to all of the trackage rights granted in Section 6 except for St. Louis Gateway traffic carried by BNSF over the UP/SP lines between Memphis and Valley Junction.[21] UP/SP-389, at 15-16.

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[19] While UP has acknowledged that the Texas/Louisiana restriction does not apply to traffic moving pursuant to these conditions (supra note 9), this should be clearly reflected in the text of the restated and amended BNSF Agreement.

[20] BNSF's arguments have been joined in, to a greater or lesser extent, by Entergy, NITL, ACC, and DOT.

[21] Alternatively, BNSF argues that the entry/exit restriction was intended to bar its entry or exit to or from the UP/SP trackage rights lines only at intermediate points where it would

(continued...)

Contrary to BNSF's arguments, BNSF-PR-20, at 115-16, BNSF-93, at 16-17, BNSF-94, at 20-21, we did not reject in Merger Dec. No. 61 the entry/exit and Texas/Louisiana restrictions contained in Section 6(c). That decision addressed UP's effort to impose a new restriction on the BNSF trackage rights, pursuant to the new facilities condition. We rejected UP's attempt to further restrict BNSF's use of the trackage rights, because it would be inconsistent with one of the purposes of the new facilities condition—ensuring that BNSF could gain adequate traffic density to be an effective competitor. See Merger Dec. No. 61, at 11. In doing so, however, we did not disturb the entry/exit and Texas/Louisiana restrictions as they apply to St. Louis Gateway traffic. If "traffic density" concerns were elevated above all others, as BNSF implicitly suggests, they would sweep aside every restriction contained in the BNSF Agreement, including the most fundamental restriction—that the trackage rights acquired by BNSF are overhead rights unless otherwise provided. It was never our intention to nullify each and every restriction that might conceivably interfere with BNSF's efforts to add to its traffic density. Such a result would be an unwarranted distortion of UP and SP's settlement with BNSF, the kind of private-sector resolution that we encourage and favor.

Finally, BNSF argues that, while "it is not BNSF's intent to routinely route" its non-merger-related traffic over the UP/SP trackage rights lines in the corridor, we should nevertheless remove the entry/exit and Texas/Louisiana restrictions so that the carrier can "have the routing flexibility it needs to achieve the network system efficiencies" for it to "effectively replace SP." BNSF-94, at 22-23. But this argument works to persuade us to retain the restrictions, rather than remove them, because it confirms why UP sought the restrictions in the first place—the concern that BNSF would use the trackage rights lines for movements unrelated to the merger. BNSF accepted these restrictions originally and has advanced no compelling reason why we should now override them and enable BNSF to use UP's system to benefit BNSF's broader operations.

Because the entry/exit and Texas/Louisiana restrictions continue to fulfill their purpose of ensuring that BNSF's trackage rights only prevent the loss of competition in the corridor for St. Louis Gateway traffic, and go no further, we see no basis to disturb them. We therefore direct UP and BNSF, in addition to the other revisions ordered in this decision, to adopt the language proposed by UP in Section 6(d) of the restated and amended agreement that clarifies that the entry/exit restriction supersedes the "intersecting points" authorization of Section 9(l)—as

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[21](...continued)
connect with the lines of other railroads—not BNSF lines—or at intermediate points where the trackage rights lines connect with the lines of other railroads over which BNSF had acquired the right to operate. BNSF-94, at 19-20. But this explanation likewise makes little sense because, as UP has explained, BNSF does not have a right to use its trackage rights over UP or SP lines to connect with the lines of other railroads except where those lines are specifically identified in the agreement. UP/SP-389, at 16-17; Joint Submission, Proposed Restated and Amended BNSF Settlement Agreement, Section 6(d), at 28.

restated in Section 9(m)—as to points on the UP and SP trackage rights lines north of Bald Knob and Fair Oaks.[22]

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

<u>It is ordered</u>:

1. BNSF and UP must amend the restated and amended version of the BNSF Agreement to make clear that neither the entry/exit restriction nor the Texas/Louisiana restriction applies to traffic moving from or to build-in/build-out lines, new facilities, or the 2-to-1 points identified in Section 6(c) of the BNSF Agreement.

2. Pursuant to our general build-out condition, BNSF unit coal trains moving to and from Entergy's White Bluff facility pursuant to trackage rights that UP afforded to BNSF in settlement of a private lawsuit, which substitute for the need to construct a build-out line, must be allowed to enter and exit the trackage rights lines at Jonesboro and Hoxie, AR, respectively.

3. In all other respects, BNSF and UP must include, in the restated and amended version of the BNSF Agreement, the language proposed by UP with respect to the entry/exit restriction and the Texas/Louisiana restriction.

4. This decision is effective December 8, 2001.

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

Vernon A. Williams

Vernon A. Williams
Secretary

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[22] After we complete our review of all of the issues raised in the fifth annual round of the UP/SP general oversight proceeding, we will establish the due date for the submission of another "restated and amended" version of the BNSF Agreement, as clarified and as directed to be amended in this decision.

APPENDIX: ARGUMENTS OF THE PARTIES

BNSF's Arguments. (1) BNSF contends that the entry/exit and Texas/Louisiana restrictions stem from a version of the BNSF Agreement that pre-dated our expansion of BNSF's rights, an expansion (BNSF further contends) that we believed was required to ensure full replacement competition and long-term traffic density. BNSF adds that, to the extent UP (and perhaps even BNSF) originally intended BNSF's use of the Houston-Memphis-St. Louis corridor trackage rights lines to be restricted, that intent has clearly been overridden by our decisions. BNSF explains: that, in Merger Dec. No. 44, we authorized BNSF to serve "new facilities" on UP-owned lines; that UP thereafter attempted to impose a restriction on BNSF's right to serve "new facilities" on two particular UP lines (the Houston-Valley Junction and Bald Knob-Fair Oaks lines); and that, in Merger Dec. No. 61, we rejected UP's attempt to impose this restriction because (we said) this restriction would be inconsistent with one of the principal purposes of the "new facilities" condition, i.e., ensuring that BNSF could achieve sufficient traffic density not only in the short term but also over the long term.

(2) BNSF contends that UP's current proposal to restrict BNSF's ability to enter and exit the Houston-Memphis-St. Louis corridor trackage rights lines and to place geographic limitations on the traffic BNSF can carry over those lines would have the same effect as the "new facilities" proposal that we rejected in Merger Dec. No. 61. BNSF explains: that restricting BNSF's ability to connect with the trackage rights lines at points north of Bald Knob and Fair Oaks would adversely affect BNSF's ability to compete in the Houston-Memphis-St. Louis corridor; that, by way of example, unit coal trains from the PRB that BNSF could move, in competition with UP, to electric utilities and generating stations located in the corridor (such as Entergy's White Bluff Station, located north of Pine Bluff, AR, on UP's Little Rock-Pine Bluff line) would most efficiently move over BNSF's lines from the PRB to the point of connection with the SP trackage rights line at Jonesboro (for inbound trains) and from White Bluff to the point of connection with the UP trackage rights line at Hoxie (for outbound trains); and that, although BNSF may have other routes over which it could move such trains into and out of the Houston-Memphis-St. Louis corridor, those routes are more circuitous and would therefore not enable BNSF to compete as effectively against UP. BNSF adds that Merger Dec. No. 88, wherein we granted Entergy the ability to replicate its pre-merger build-out option at White Bluff (by building out to an SP line and receiving service from BNSF via the build-out line), would be seriously undercut if UP could prevent BNSF from connecting with the SP line at Jonesboro.

(3) BNSF contends that the argument that the BNSF Agreement did not give BNSF the right to connect with its own lines north of Memphis because BNSF has its own network of lines in northeastern Arkansas and southeast Missouri was rejected in Merger Dec. No. 61 as a basis

for limiting BNSF's trackage rights.[23] BNSF further contends that the argument that BNSF's trackage rights were granted on the UP/SP lines north of Bald Knob and Fair Oaks solely for purposes of operating convenience in order to allow BNSF to avoid problems that might occur from running "against the flow" in the Houston-Memphis-St. Louis corridor was similarly rejected in Merger Dec. No. 61 as a basis for limiting BNSF's trackage rights.[24]

(4) As respects the entry/exit restriction, BNSF contends that UP has not simply asked that Section 6(c) of the BNSF Agreement be retained, but, rather, has asked that a key phrase of that language ("Except as provided in Section 9l of this Agreement") be deleted. BNSF explains: that this phrase provides, in essence, that the restriction on BNSF's right to connect with the UP and SP lines at issue is subject to BNSF's right to connect with its own lines under the provision now proposed to be codified as Section 9(m); that, therefore, the "plain meaning" of the language of the 1996 version of the BNSF Agreement (language, BNSF claims, that was drafted largely, if not entirely, by UP) gives BNSF the right to connect with its own lines pursuant to the provision now proposed to be codified as Section 9(m); and that, although BNSF is not resting its argument that the existing restrictions should be discontinued solely on the presence of the "Except as provided in Section 9l of this Agreement" phrase in the entry/exit restriction, the fact remains that the parties clearly intended that BNSF's right to connect with its own lines — pursuant to the provision now proposed to be codified as Section 9(m) — would apply notwithstanding the entry/exit restriction. And, BNSF adds, because there were at least 2 shortlines (the Missouri & Northern Arkansas Railroad at Diaz, AR, and the Jackson & Southern Railroad at Delta, MO) operating at the time of the UP/SP merger to which the entry/exit restriction would have been applicable under BNSF's interpretation, this interpretation does not read the entry/exit restriction out of the BNSF Agreement.

(5) BNSF contends that, although UP claims that the entry/exit restriction was crafted in accordance with the terms of the CMA Agreement, the fact of the matter is that the CMA Agreement itself contains no restriction on BNSF's right to enter or exit the Memphis-

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[23] BNSF cites Merger Dec. No. 61, slip op. at 11, in support of its statement that we rejected, in Merger Dec. No. 61, the argument that, because BNSF has its own network of lines in northeastern Arkansas and southeast Missouri, the 1996 version of the BNSF Agreement did not give BNSF the right to connect with its own lines north of Memphis. Merger Dec. No. 61, however, does not address any such argument.

[24] BNSF cites Merger Dec. No. 61, slip op. at 11, in support of its statement that we rejected, in Merger Dec. No. 61, the argument that, because BNSF's trackage rights on the UP/SP lines north of Bald Knob and Fair Oaks were granted for purposes of operating convenience, BNSF should not have the right to serve "new facilities" on the UP line north of Bald Knob. This is indeed an accurate assessment of this aspect of that decision. See Merger Dec. No. 61, slip op. at 11 (the 4th and 5th paragraphs).

Valley Junction trackage rights lines. BNSF further contends that, even assuming that *the parties* to the CMA Agreement were concerned primarily (or even exclusively) about BNSF's ability to compete effectively for St. Louis traffic when they granted BNSF trackage rights north of Bald Knob and Fair Oaks, *the Board* had broader concerns in mind when it enhanced BNSF's right to provide service in the Houston-Memphis-St. Louis corridor. The Board was also concerned, BNSF adds, about BNSF's ability to acquire and maintain sufficient traffic density in that corridor.

(6) BNSF contends that, whereas the expansion (in Merger Dec. No. 44) of the new facilities and general build-out conditions substantially enhanced BNSF's rights to serve shippers in the Houston-Memphis-St. Louis corridor, the adoption of UP's position respecting the entry/exit restriction would significantly affect BNSF's ability to provide competitive service in that corridor by increasing BNSF's cost of service and shippers' cost of equipment. BNSF further contends that the restriction on entry and exit would prevent BNSF from providing a competitive replacement service for SP's pre-merger service and would also eliminate specific pre-merger joint-line routings that BNSF could have offered by interchanging with SP at Jonesboro and with UP at Hoxie. With particular respect to the Entergy situation, BNSF contends that the entry/exit restriction could adversely affect BNSF's competitiveness to provide service to Entergy's White Bluff facility. BNSF explains that the additional mileage (approximately 166 miles, by BNSF's calculations) that the entry/exit restriction would add to BNSF's route between the PRB and White Bluff would, at least to some degree, make BNSF less competitive, not only because of the additional mileage itself but also because Entergy's cost of equipment could increase, BNSF could potentially be required to utilize additional crews, and BNSF's transit and cycle times and its ability to guarantee competitive levels of service could be adversely affected. And, BNSF adds, it would also be forced to incur significant expenses to construct and/or rehabilitate the necessary connections and lines in Memphis, thereby further increasing its cost of service.

(7) BNSF contends that the Texas/Louisiana restriction, if read literally, conflicts with the "new facilities" condition that we imposed in Merger Dec. No. 44. BNSF explains that, if its use of the Memphis-Valley Junction trackage rights lines is to be limited to traffic that moves from, to, or via Texas or Louisiana, it will not be able to serve new facilities located in Arkansas or Missouri (unless, of course, the new facilities happen to be located at the 10 Arkansas and Missouri points accorded special treatment in the Texas/Louisiana restriction). BNSF further contends that, even if the Texas/Louisiana restriction is read to allow BNSF to handle "merger-related" traffic that neither moves from/to the 10 specified Arkansas and Missouri points nor moves from/to/via Texas or Louisiana, the Texas/Louisiana restriction would still conflict with the "new facilities" condition because (BNSF apparently contends) traffic moving from/to new facilities in Arkansas or Missouri cannot be regarded as "merger-related."

(8) BNSF contends that, although it does not intend to routinely route its traffic unrelated to the merger to and from the Southeast over the Memphis-Valley Junction trackage rights lines,

we should order that the Texas/Louisiana restriction be deleted from the BNSF Agreement in order to allow BNSF to have the routing flexibility it needs to implement and achieve network system efficiencies and to maintain sufficient traffic densities to effectively replace SP. BNSF further contends that, at a minimum, we should hold that BNSF can use the trackage rights lines north of Bald Knob and Fair Oaks not only to provide competitive service to all shippers located in the corridor to which BNSF obtained access (such as Entergy at White Bluff) but also to all merger-related traffic moving both within and beyond the corridor itself.

(9) BNSF argues that, UP's claims to the contrary notwithstanding, BNSF is not seeking new rights or conditions but, rather, is merely seeking authoritative clarifications of its existing rights under the BNSF Agreement.

Entergy's Arguments. (1) Entergy contends: that we should confirm that BNSF has the right, under the present version of the BNSF Agreement, to enter and exit UP trackage at Jonesboro and Hoxie; and that we should reject UP's proposal to delete the provisions of Section 6(c) that give BNSF that right.

(2) Entergy indicates that, although White Bluff has heretofore been rail-served exclusively by UP, Entergy — acting in reliance upon Merger Dec. No. 88 and in further reliance upon certain commitments UP made in settling a dispute with Entergy — has negotiated with BNSF the terms of a rail transportation contract covering deliveries by BNSF of PRB coal to White Bluff. Entergy further indicates, however, that BNSF has advised that UP's proposed modification of the entry/exit restriction would seriously degrade the efficiency of BNSF's proposed service to White Bluff. Entergy explains: that BNSF's most efficient routing for unit coal trains to White Bluff would be to move via its own lines to Jonesboro (the point at which BNSF would enter the trackage rights lines), then move south with the directional flow of UP traffic over the former SP line through Fair Oaks to Pine Bluff, and then move north over UP's Little Rock-Pine Bluff line to the White Bluff turnout; that BNSF's most efficient return routing for empty trains would be to move back onto the Little Rock-Pine Bluff line, then move north to Little Rock, and then move north with the directional flow of UP traffic over the former UP line through Bald Knob to Hoxie (the point at which BNSF would exit the trackage rights lines); that UP, however, has insisted that BNSF may not enter or exit the trackage rights lines at either Jonesboro or Hoxie, but, rather, must enter and exit the trackage rights lines at Memphis; and that BNSF has advised that the Memphis routing insisted upon by UP would be significantly more circuitous and expensive than the routing preferred by BNSF.

(3) Entergy contends that, even though Section 6(c) of the 1996 version of the BNSF Agreement provides that "BNSF shall not have the right to enter or exit [the Memphis-Valley Junction trackage rights lines] at intermediate points" between Memphis and Valley Junction, UP's position (that BNSF cannot enter or exit the trackage rights lines at Jonesboro and Hoxie) has no basis in, and indeed runs directly counter to the express language of, the 1996 version of the BNSF Agreement. Section 6(c), Entergy explains, provides that the

restriction that bars BNSF's entry to and exit from the trackage rights lines at intermediate points between Memphis and Valley Junction applies "[e]xcept as provided in" Section 9(l). And Section 9(l), Entergy further explains, provides that "BNSF shall have the right to connect, for movement in all directions, with its present lines (including existing trackage rights) at points where its present lines (including existing trackage rights) intersect with lines it will purchase or be granted trackage rights over pursuant to this Agreement." The unambiguous language of the 1996 version of the BNSF Agreement, Entergy therefore concludes, authorizes BNSF to enter and exit the trackage rights lines at any and all points (including "intermediate points" such as Jonesboro and Hoxie) where they intersect with BNSF's own "present lines (including existing trackage rights)." And UP, Entergy argues, has offered no evidence that the parties to the CMA Agreement (UP/SP, BNSF, and CMA) intended Section 6(c) to deny BNSF the right to enter or exit *its own lines* at intermediate points on the Memphis-Valley Junction trackage rights lines, a right (Entergy notes) that is the norm everywhere else on the trackage rights provided for in the BNSF Agreement.

(4) Entergy contends that UP's proposed change to Section 6(c) — i.e., the proposed removal of the "Except as provided in Section 9l of this Agreement" cross-reference — is plainly designed to ratify, after the fact, the anticompetitive position UP is taking, and thereby to enhance UP's inherent advantage, as track owner and operator, in the nascent competition for Entergy's coal traffic. Entergy further contends that UP's proposed elimination of BNSF's entry/exit rights at Jonesboro and Hoxie would undermine BNSF's ability to compete for Entergy's coal traffic at White Bluff, and would thereby: (i) run counter to the principle that post-merger UP vs. BNSF competition should be as complete and as effective as pre-merger UP vs. SP competition could have been; and (ii) undermine UP's commitments to Entergy. Entergy explains: that, in order for BNSF to be able to compete with the same level of efficiency as a through BNSF-SP route could have competed but for the merger, BNSF must be allowed to replicate, insofar as possible, the pre-merger BNSF-SP routing's route and operational conditions; that, but for UP's post-merger imposition of directional flows, this would simply have required routing BNSF trains to White Bluff in both directions over the Jonesboro connection; but that, given UP's directional flow arrangements, BNSF must be allowed to substitute the paired northbound route and connection, i.e., UP's line to the connection at Hoxie. Entergy also explains that, by preventing BNSF from routing its trains returning from White Bluff in that manner, UP's proposed amendment of Section 6(c) would give itself a cost advantage against BNSF that it would not have enjoyed against a BNSF-SP through movement. Entergy further explains that, whereas BNSF's preferred routing would run 157 miles from Jonesboro to the White Bluff turnout and 144 miles from the White Bluff turnout to Hoxie (for a total of 301 miles), the Memphis routing insisted upon by UP would run 214 miles from Jonesboro to the turnout and 253 miles from the turnout to Hoxie (for a total of 467 miles). The circuity involved in the Memphis routing, Entergy notes, would be considerable (the Memphis routing, Entergy advises, is 55% longer than BNSF's preferred routing). And, Entergy adds, the Memphis routing — by increasing the distance BNSF's trains must travel to reach White Bluff — could significantly lengthen BNSF's cycle times on Entergy's traffic, and thereby increase

both BNSF's cost of service and Entergy's cost of equipment in comparison to those experienced with the competing UP service to White Bluff.

(5) Entergy contends, in essence, that its interpretation of Sections 6(c) and 9(l) of the 1996 version of the BNSF Agreement does not render meaningless the portion of Section 6(c) that provides that "BNSF shall not have the right to enter or exit at intermediate points on UP's and SP's lines between Memphis and Valley Junction, IL." This entry/exit restriction, Entergy explains, precludes BNSF from connecting with the lines of *other carriers* (including shortlines) between Memphis and Valley Junction, even if BNSF subsequently acquires ownership of or operating rights over the lines of such other carriers. Examples of such prohibited entry/exit points, Entergy adds, would be UP's connection with the Missouri & Northern Arkansas Railroad at Diaz, AR, and its connection with the Jackson & Southern Railroad at Delta, MO.

NITL's Arguments. NITL supports BNSF's positions respecting the entry/exit and Texas/Louisiana restrictions. NITL contends, in general: that the technical language of the BNSF Agreement must be read in the light of our decisions, which (NITL argues) converted that agreement from a private settlement to an integral part of the mechanism by which we implemented our statutory responsibility to protect the public interest; and that, because the rail industry can no longer afford to tolerate inefficiencies, we should read the technical language of the BNSF Agreement in such a way as to avoid, where possible, the imposition of unnecessary operational restrictions on BNSF's trackage rights. NITL also contends: that UP's position that BNSF trains in the Houston-Memphis-St. Louis corridor should not be able to enter or exit the trackage rights lines at intermediate points north of Bald Knob and Fair Oaks is an operational restriction that we should not permit; that, under the restriction advocated by UP, BNSF's southbound traffic would have to continue past those points to Memphis, and then come back to the trackage rights lines at Bald Knob or Fair Oaks (or Brinkley), depending upon the destination; that, however, prior to the merger BNSF could have interchanged traffic moving on its own Memphis-Kansas City line either with UP at Hoxie or with SP at Jonesboro; and that, therefore, the restriction advocated by UP is inconsistent with the intent of the trackage rights condition that we imposed (which intent, NITL argues, was to replace the competitive rail service that had existed prior to the merger). NITL further contends that the technical language of the entry/exit restriction itself (i.e., the "Except as provided in Section 9l of this Agreement" language) gives BNSF the right to connect with its own lines north of Bald Knob and Fair Oaks.

ACC's Arguments. ACC contends that, to enable BNSF to rectify the loss of competition on the Memphis-Valley Junction and Bald Knob-Fair Oaks trackage rights lines and to enable BNSF to achieve sufficient traffic densities on these lines, we should clarify that BNSF's use of these lines is not restricted to overhead traffic originating or terminating in Texas or Louisiana. ACC further contends that, in Merger Dec. No. 61, we have already rejected the argument that these trackage rights are limited to overhead traffic. ACC explains that, when we clarified that the "new facilities" condition applies to these lines, we clarified (in essence) that BNSF has access to traffic originating and terminating on these lines, and is not limited to using the lines for the movement of overhead traffic originating and terminating in Texas and Louisiana.

UP's Arguments, In General. (1) UP contends: that the original version of the BNSF Agreement contemplated that BNSF would acquire only Houston-Memphis (not Houston-Memphis-St. Louis) trackage rights, that such rights would allow BNSF to operate only on *SP's* Houston-Memphis line (and not on *UP's* parallel Houston-Memphis line), and that BNSF would compete in the Houston-Memphis-St. Louis corridor by combining its Houston-Memphis SP line trackage rights with BNSF's own Memphis-St. Louis line; that, however, CMA and several other parties argued, during the course of the UP/SP merger proceeding, that BNSF would not be able to compete effectively against UP/SP in the Houston-Memphis-St. Louis corridor (i.e., that BNSF would not be able to replicate the competition provided by SP in that corridor) unless it obtained trackage rights on UP/SP all the way to the St. Louis Gateway (and, such parties further argued, UP's plans to institute "directional operations" required that BNSF receive trackage rights over both UP *and* SP); that, therefore, in order to gain CMA's support for the merger, it was agreed (in the CMA Agreement that was entered into by CMA, BNSF, and UP/SP) that BNSF would acquire Memphis-St. Louis trackage rights on both the UP line and the SP line, and would also acquire Houston-Memphis trackage rights on the UP line; that, however, it was also agreed (by BNSF, CMA, and UP/SP) that BNSF would use its Memphis-St. Louis trackage rights only to serve St. Louis Gateway traffic, and would continue to use its own Memphis-St. Louis line to carry traffic that already used that line; and that, in order to ensure that BNSF would use its Memphis-St. Louis trackage rights only to handle St. Louis Gateway traffic, and would continue to use its own Memphis-St. Louis line to carry traffic that already used that line, the parties agreed that the St. Louis Gateway trackage rights would be subject to 2 restrictions (the entry/exit restriction, which provides that BNSF's trains cannot enter or leave the trackage rights lines at intermediate points north of Bald Knob and Fair Oaks;[25] and the Texas/Louisiana restriction, which provides that BNSF can carry, over the UP/SP lines between Memphis and Valley Junction, only traffic that moves from, to, or via Texas or Louisiana, except that BNSF can also carry, over such lines, traffic originating or terminating at 10 specified points in Arkansas and Missouri).

(2) UP contends that, in Merger Dec. No. 44, when we imposed the BNSF Agreement and the CMA Agreement, we imposed these agreements with the challenged restrictions intact. UP further contends that these restrictions made sense in 1996 and that they continue to make sense today. UP explains: that CMA's competitive concern was limited to St. Louis Gateway

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[25] For reasons that are not entirely clear, UP sometimes refers to the entry/exit restriction as if the crucial point on the SP line were not Fair Oaks but, rather, Brinkley (which is located several miles south of Fair Oaks). For present purposes, however, this discrepancy appears to have no obvious consequences, because there appear to be no "intermediate points" between Fair Oaks and Brinkley.

traffic; that the new, restricted trackage rights between Memphis and St. Louis solved this concern without giving BNSF additional rights not necessary to replicate pre-merger UP vs. SP competition; that the entry/exit restriction reflected the fact that the only justification for the Memphis-St. Louis trackage rights was to give BNSF a more direct route to St. Louis for traffic affected by the UP/SP merger; that the Texas/Louisiana restriction reflected the fact that it was in Texas and Louisiana that BNSF gained access to industries as a result of the UP/SP merger; and that the restrictions also ensured that BNSF would use its own network of tracks rather than relying unnecessarily on UP/SP's tracks.

(3) UP concedes, in essence, that the removal of the entry/exit restriction would indeed allow BNSF to be a more effective competitor; the removal of this restriction, UP explains, would modestly shorten BNSF's routes for certain traffic and would save it some operating expenses. UP contends, however: that neither BNSF nor any other party argued in 1996 or has argued in the years since that BNSF needs to use the routes that would be made available by the removal of the entry/exit restriction; that, in fact, BNSF wants to be a more effective competitor for traffic that has nothing to do with the St. Louis Gateway (traffic, UP adds, for which BNSF can compete using its own lines); and that neither the UP/SP merger itself, nor the restrictions to which BNSF agreed in the 1996 version of the BNSF Agreement, created a competitive failure that must now be corrected (mileage differences between competing routes, UP notes, are universal in the railroad industry, and cannot be regarded as competitive failures). UP further contends that the challenged restrictions do not prevent BNSF from replacing the competition formerly provided by SP. And, UP adds, Entergy itself has argued (though not in the pleadings filed in the fifth annual round of the UP/SP general oversight proceeding) that the White Bluff build-out that we preserved in Merger Dec. No. 88 will result in "competitive rail transportation service" at "competitive rates."

(4) UP further concedes, in essence, that the removal of the Texas/Louisiana restriction might also allow BNSF to be a more effective competitor for traffic now barred from UP/SP's Memphis-Valley Junction lines by that restriction. UP contends, however: that BNSF has offered no explanation for striking this restriction; that, in fact, there is no plausible theory under which removing this restriction would remedy a competitive failure caused by the merger; and that the traffic subject to this restriction moves exactly as it did before the merger (i.e., it moves on BNSF's own Memphis-St. Louis line, which runs along the Mississippi River and which, UP advises, is used by BNSF to handle traffic to and from Birmingham, AL, and points throughout the Southeast). UP further contends: that it may be that BNSF would prefer to abandon parts of its Mississippi River line in favor of using UP's tracks; that, although this would confer a financial windfall on BNSF, this would work to the detriment of the few shippers located on the line segments that BNSF would abandon; and that this would also work to the detriment of UP, because (UP explains), although it invested millions of dollars after the merger to expand capacity near Dexter, MO, to handle post-merger traffic, its own tracks are still congested in places. BNSF, UP maintains, should be required to do what it agreed to do in the 1996 version

of the BNSF Agreement (i.e., to use UP/SP lines only for merger-related traffic and to use its own lines for other traffic).

(5) The Texas/Louisiana restriction, read literally, provides that BNSF can use the Memphis-Valley Junction trackage rights lines to handle: (i) traffic moving "over" the Memphis-Valley Junction trackage rights lines from, to, or via points in Texas or Louisiana; and (ii) traffic moving "over" the Memphis-Valley Junction trackage rights lines from or to 10 specified points in Arkansas and Missouri. The word "over" is important, because — according to UP — it is by virtue of the word "over" that "the geographic restriction [UP refers to the Texas/Louisiana restriction as the geographic restriction] expressly applies only to overhead traffic. It does not apply to traffic from new facilities, transloads, or build-outs along the trackage rights lines." See the undesignated UP letter filed September 24, 2001, at 1-2 (the carryover paragraph). BNSF's claim that the Texas/Louisiana restriction conflicts with the "new facilities" condition, UP therefore argues, is simply wrong (UP is arguing, in essence, that, because traffic moving from/to a new facility located in Arkansas or Missouri would not be "overhead" traffic, such traffic would not be subject to the Texas/Louisiana restriction).

(6) The Texas/Louisiana restriction, read literally, provides that BNSF can use the Memphis-Valley Junction trackage rights lines to handle: (i) traffic moving from, to, or via points in Texas or Louisiana; and (ii) traffic moving from or to 10 specified points in Arkansas and Missouri. The tenor of UP's comments suggests (although this is not entirely clear) that UP may be arguing that the Texas/Louisiana restriction allows BNSF to handle a third category of traffic as well: (iii) traffic moving from or to all points in Arkansas and Missouri, provided only that such traffic is merger-related. See, e.g., UP/SP-389 at 22 n.19 (in this footnote, which appears in the part of the UP/SP-389 pleading that discusses Entergy's interests, UP argues that the Texas/Louisiana restriction does not preclude BNSF's use of the Memphis-Valley Junction trackage rights lines for coal trains moving to/from White Bluff): "Neither BNSF nor its supporters claim that the geographic restriction [UP, as previously noted, refers to the Texas/Louisiana restriction as the geographic restriction] prevents BNSF from serving as a competitive replacement for SP [as respects Entergy's White Bluff facility], which is not surprising, because it [the Texas/Louisiana restriction] only affects traffic that would have moved on BNSF's own line along the Mississippi River between Memphis and St. Louis prior to the merger."

(7) UP disputes the proposition that Merger Dec. No. 44 gave BNSF unrestricted use of every trackage rights line. UP argues: that BNSF has cited no language in Merger Dec. No. 44 that would support this proposition; that, to the contrary, when we imposed the BNSF and CMA Agreements in Merger Dec. No. 44, we did not strike the now-challenged restrictions, even though (UP notes) we specified the respects in which we wanted to modify those agreements; and that, under these circumstances, our silence respecting these restrictions should be construed as an endorsement, not an implied repeal.

(8) UP disputes the proposition that Merger Dec. No. 61 rejected all limits on BNSF's trackage rights. UP explains that, although that decision says that BNSF can access "new facilities" on UP's Houston-Valley Junction and Bald Knob-Fair Oaks lines, that decision says nothing about removing either the entry/exit restriction on entry to and exit from the St. Louis Gateway trackage rights or the Texas/Louisiana restriction on the traffic that can be handled over the UP/SP lines between Memphis and Valley Junction.

(9) UP disputes the proposition that the entry/exit restriction, as it appears in the 1996 version of the BNSF Agreement, is effectively nullified by its opening phrase, which provides, in essence, that the entry/exit restriction applies "[e]xcept as provided" in Section 9(l), the "intersecting points" authorization. UP contends: that the entry/exit restriction must be read in the context of the entire BNSF Agreement; that, because a literal reading of the entry/exit restriction would render that provision meaningless, a literal reading cannot be appropriate; and that, therefore, the reference to Section 9(l) in the entry/exit restriction should be read to confirm BNSF's right to establish connections between its own lines and the trackage rights lines with respect to all of the trackage rights granted in Section 6 *except* for the trackage rights over the UP/SP lines between Memphis and Valley Junction. UP also disputes the notion that the entry/exit restriction, as it appears in the 1996 version of the BNSF Agreement, should be read to allow BNSF to connect with *its own lines* between Memphis and Valley Junction but not with the lines of *other railroads* between those points; the flaw in this reading, UP argues, is that it would merely prevent BNSF from doing what it has no right to do in the first place, because (UP continues) the BNSF Agreement gives BNSF no right to connect with the lines of other railroads unless such lines are specifically identified. UP similarly disputes the somewhat related notion that the entry/exit restriction, as it appears in the 1996 version of the BNSF Agreement, should be read to preclude BNSF from connecting with the lines of other railroads between Memphis and Valley Junction even if it later acquires ownership of or operating rights over those lines; the flaw in this reading, UP argues, is that BNSF has, under the BNSF Agreement, no right to connect with newly acquired routes even in the absence of the entry/exit restriction's restrictive language, because (UP explains) Section 9(l) allows BNSF to connect only with its "present" lines. See UP/SP-22 at 354.[26]

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[26] UP, which concedes that the language of the entry/exit restriction (as it appears in the 1996 version of the BNSF Agreement) could be improved, has suggested (as previously noted) that it be improved by striking the reference to Section 9(l). UP adds that, if BNSF or others are concerned that eliminating the reference to Section 9(l) would have some additional significance, UP would agree to replace the "Except as provided in Section 9l" language with "Notwithstanding the provision in Section 9(l)" or some other similar language that would clearly indicate that BNSF retains the right to connect between its present lines and the trackage rights granted in Section 6 at all locations except points north of Bald Knob and Fair Oaks.

(10) UP contends: that, because BNSF's proposals would expand the conditions on the UP/SP merger 5 years after UP and SP consummated that merger, we lack the power to grant BNSF's proposals; that our power now is limited to the modification or replacement of conditions that have failed to preserve competition; and that, because the conditions previously imposed on the UP/SP merger have been entirely effective in preserving the UP vs. SP competition that existed prior to the merger, the rule against retroactive regulation would be violated by any attempt to impose, in 2001, new burdens or conditions on the UP/SP merger. UP also contends that BNSF's proposals contravene our policy favoring private settlement agreements; a merged railroad, UP explains, must be able to rely on its settlement agreement partners to honor their agreements in the form imposed by the Board, and should not be forced to fight a rear-guard action throughout the oversight period against attempts by its settlement partners to obtain additional competitive concessions. UP further contends that BNSF's proposals violate BNSF's promises in the BNSF Agreement, in which it agreed "not to seek any conditions in the control case, not to support any requests for conditions filed by others, and not to assist others in pursuing their requests," UP/SP-22 at 338.

UP's Arguments, As Respects Entergy. (1) UP concedes, in essence, that the removal of the entry/exit restriction would give BNSF "a slightly more efficient route" to/from Entergy's White Bluff facility (via connections with the trackage rights lines at Jonesboro and Hoxie), and that, therefore, the removal of the entry/exit restriction would make BNSF a slightly more effective competitor for Entergy's White Bluff coal traffic. UP argues, however, that, because BNSF is — as respects Entergy's White Bluff coal traffic — an effective competitive replacement for SP even with the entry/exit restriction left intact, this restriction does not have to be eliminated to preserve competition for Entergy's traffic.[27]

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[27] UP's comments respecting Entergy appear to be premised, at least in part, on the view that, even if there were no entry/exit restriction, the Texas/Louisiana restriction would preclude BNSF's use of the Memphis-Valley Junction trackage rights lines for coal trains moving to/from White Bluff. See, e.g., UP/SP-389 at 21-27 (UP, which refers to the entry/exit and Texas/Louisiana restrictions as "the St. Louis Gateway restrictions," argues that, even if "the St. Louis Gateway restrictions" are left intact, BNSF, utilizing a routing via Memphis, will be able to provide competitive service at White Bluff). As previously noted, however, UP has explicitly represented that the Texas/Louisiana restriction "does not apply to traffic from . . . build-outs along the trackage rights lines," and UP has also explicitly represented that the Texas/Louisiana restriction "only affects traffic that would have moved [whereas Entergy's White Bluff traffic almost certainly would not have moved] on BNSF's own line along the Mississippi River between Memphis and St. Louis prior to the merger." We will therefore assume, for present purposes, that UP has conceded that the Texas/Louisiana restriction does not preclude BNSF's use of the Memphis-Valley Junction trackage rights lines for coal trains moving to/from White Bluff.

(2) UP contends that, even with the entry/exit restriction in place, there is very little circuity in the post-merger BNSF single-line route as compared to a pre-merger BNSF-SP joint-line route, and that, therefore, the Entergy situation: is like a prior situation in which we declined to impose a condition to correct an alleged circuitous routing problem;[28] and is not like a prior situation in which we did impose a condition to correct a circuitous routing problem.[29] UP explains: that the post-merger BNSF single-line route for loaded trains from the PRB to the White Bluff turnout, with the entry/exit restriction in place (via BNSF's Memphis-Kansas City line, with a connection to the trackage rights lines at Memphis), is 1,447 miles, whereas a pre-merger BNSF-SP joint-line route for loaded trains from the PRB to the White Bluff turnout (via a BNSF-SP connection at Jonesboro) would have been 1,406 miles; that, therefore, the post-merger BNSF single-line route from the PRB to White Bluff, with the entry/exit restriction in place, is merely 41 miles, or 2.9%, longer than the pre-merger BNSF-SP joint-line route; that the post-merger BNSF single-line round-trip route between the PRB and the White Bluff turnout, with the entry/exit restriction in place (the return route for empty trains would run via the trackage rights lines from White Bluff to Little Rock to Bald Knob to Fair Oaks and on to a point just west of Bridge Junction, and then via BNSF's Memphis-Kansas City line), is 2,911 miles, whereas the pre-merger BNSF-SP joint-line round-trip route between the PRB and the White Bluff turnout (via a BNSF-SP connection at Jonesboro) would have been 2,812 miles; and that, therefore, the post-merger BNSF single-line round-trip route between the PRB and White Bluff, with the entry/exit restriction in place, is merely 99 miles, or 3.5%, longer than the pre-merger BNSF-SP joint-line round-trip route. These differences, UP argues, have no competitive significance.[30]

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[28] 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 [General Oversight], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 13 (STB served Dec. 21, 1998) (General Oversight Dec. No. 13), slip op. at 14-17, 42-51 (in denying the relief sought by the Arkansas, Louisiana and Mississippi Railroad Company, we noted, among other things, that certain joint-line routings "do not appear to be unduly circuitous" vis-à-vis the corresponding single-line routings, slip op. at 15 n.44).

[29] See Merger Dec. No. 44, 1 S.T.B. at 307-08, 471 (in granting the relief sought by Texas Utilities Electric Company, we noted that, post-merger, its "only real competitive options will be the 1,510-mile UP single-line routing and the substantially more expensive 1,749-mile BNSF single-line routing," 1 S.T.B. at 308, and we concluded that relief was called for because the 1,749-mile BNSF single-line routing would be "excessively circuitous," 1 S.T.B. at 471).

[30] UP contends that Entergy's calculations exaggerate the circuity of the post-merger

(continued...)

(3) UP contends that, even with the entry/exit restriction in place, the post-merger BNSF single-line routing to/from White Bluff will be more efficient, and therefore more competitive, than the pre-merger BNSF-SP joint-line routing would have been. UP explains: that, for one thing, because SP might not have accepted the "short haul" that would have been its lot with a BNSF-SP routing via Jonesboro, the pre-merger BNSF-SP joint-line routing may be an entirely theoretical construct; that, for another thing, even if a joint-line routing could have been implemented, it is doubtful that the pre-merger BNSF-SP joint-line rate would have been as favorable to Entergy as the post-merger BNSF single-line rate; that, in addition, whereas a pre-merger BNSF-SP joint-line routing would have required operation via SP's single-track line between Jonesboro and White Bluff, the post-merger BNSF single-line routing will benefit from the directional operations that UP has established between Houston and Memphis; and that, furthermore, the post-merger BNSF will be able to offer single-line service without negotiating interchange arrangements or revenue demands with a second carrier.

(4) UP contends that the reality of the situation is that BNSF has already demonstrated that it can compete effectively for Entergy's White Bluff traffic. UP explains: that BNSF and Entergy have already negotiated the terms of a rail transportation contract covering BNSF deliveries of PRB coal to White Bluff; that neither BNSF nor Entergy has presented any evidence that the benefits of the current contract or the benefits of future competition will be lost if the entry/exit restriction remains in place; that BNSF has not claimed that it entered into the contract without being aware of the entry/exit restriction, nor has BNSF alleged that it will seek to void the contract if the entry/exit restriction remains in place; and that Entergy has not claimed that it would not have entered into the contract if it were aware of the entry/exit restriction, or that it will seek to void the contract if that restriction remains in place, or that it will not in the future seek to enter into contracts with BNSF.

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[30](...continued)
BNSF single-line route in 2 respects. (i) UP contends that Entergy's calculations ignore the mileage from the PRB to BNSF's crossing of the trackage rights lines and thus exaggerate a small overall difference in route length. An accurate comparison, UP argues, must begin with the traffic's point of origin in the PRB, because (UP notes) BNSF competes not on the basis of its route between Jonesboro and White Bluff but rather on the basis of its route between the PRB and White Bluff. (ii) UP contends that Entergy's calculations wrongly compare BNSF's theoretical route without the entry/exit restriction to BNSF's route with the restriction in place. That comparison, UP argues, is irrelevant because it does not relate to the impact of the UP/SP merger. The correct comparison, UP maintains, is between a pre-merger BNSF-SP joint-line route and a post-merger BNSF single-line route with the entry/exit restriction in place. The flaw in Entergy's calculations, UP adds, is that the pre-merger BNSF-SP joint-line route could not have taken advantage of UP's line between White Bluff and a connection with BNSF at Hoxie, which (UP points out) is shorter than the combination of SP's White Bluff-Jonesboro line and BNSF's Jonesboro-Hoxie line.

(5) UP contends that its position with respect to the entry/exit restriction does not undermine commitments UP made in settling a dispute with Entergy. UP explains: that UP stands by its commitments, which involved BNSF's use of the Little Rock-Pine Bluff line; that the entry/exit restriction has nothing to do with BNSF's ability to use the Little Rock-Pine Bluff line; that UP never promised Entergy that BNSF would be able to use the Hoxie and Jonesboro connections in providing service to Entergy; and that UP has thus done nothing to interfere with the benefits that Entergy bargained for (i.e., the commitments that UP made in settling its dispute with Entergy).[31]

DOT's Arguments. DOT contends that, in resolving the disputes concerning the entry/exit and Texas/Louisiana restrictions, we should adhere to the central purposes of the conditions we imposed on the UP/SP merger (which purposes, DOT adds, were to allow BNSF to replicate the competition provided by SP, and to ensure that BNSF would have access to a sufficient traffic base). DOT also contends, with reference to the entry/exit restriction, that the preservation of pre-merger competition calls for a routing that will allow BNSF to provide service at least as efficiently as the pre-merger SP (which, DOT notes, would have routed Entergy's White Bluff traffic via Jonesboro). DOT further contends, with reference to the entry/exit restriction's "Except as provided in Section 9l of this Agreement" language, that, regardless of the proper interpretation of this language as a matter of contract law, we should remember that, in this proceeding, private agreements must give way to overriding public interest considerations.

[31] We do not think that UP, by asserting (and asking us to adopt) its views with respect to the entry/exit restriction, has violated the obligation of good faith implicit in its contract with Entergy.

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STB FD-32760 (SUB 21) 9-13-01 C 32164

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SEC

SERVICE DATE - SEPTEMBER 13, 2001

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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. 18

Decided: September 12, 2001

In Decision No. 16 (served December 15, 2000), the Board ordered that replies in the fifth annual round of the UP/SP General Oversight proceeding would be due on September 4, 2001. See Decision No. 16, slip op. at 14, ordering paragraph 4. This due date was later extended to September 14, 2001. See Decision No. 17 (served August 30, 2001).

By letter dated September 12, 2001, Union Pacific Railroad Company (UP) and The Burlington Northern and Santa Fe Railway Company (BNSF) have asked that the date for filing replies be further extended to September 19, 2001. UP and BNSF indicate that the requested additional 5-day extension will allow them to ensure that their filings are complete and accurate.

The extension request is reasonable and will, therefore, be granted.

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

It is ordered:

1. The date for filing replies in the fifth annual round of the UP/SP General Oversight proceeding is extended to September 19, 2001.

2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams

Vernon A. Williams
Secretary

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STB FD-32760 (SUB 21) 8-30-01 C 32122

32122 SERVICE DATE - LATE RELEASE AUGUST 30, 2001
SEC

SURFACE TRANSPORTATION BOARD

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. 17

Decided: August 29, 2001

In Decision No. 16 (served December 15, 2000), the Board ordered that replies in the fifth annual round of the UP/SP General Oversight proceeding would be due on September 4, 2001. See Decision No. 16, slip op. at 14, ordering paragraph 4.

By letter dated August 28, 2001, Union Pacific Railroad Company (UP) and The Burlington Northern and Santa Fe Railway Company (BNSF) have asked that the date for filing replies be extended to September 14, 2001. UP and BNSF indicate that the requested 10-day extension may assist them in reaching a successful resolution of one or more of the still unresolved issues relating to the BNSF Settlement Agreement.

The extension request is reasonable and will, therefore, be granted.

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

It is ordered:

1. The date for filing replies in the fifth annual round of the UP/SP General Oversight proceeding, heretofore set as September 4, 2001, is extended to September 14, 2001.

2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams

Vernon A. Williams
Secretary

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Records: 218

STB FD-32760 (SUB 21) 12-15-00 C ID-31455

SERVICE DATE - DECEMBER 15, 2000

SURFACE TRANSPORTATION BOARD

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. 16

Decided: December 13, 2000

This decision addresses the issues raised in the fourth annual round of the UP/SP general oversight proceeding. Upon reviewing the record, we find that there have been no demonstrable competitive problems resulting from the merger. We will continue to monitor the situation.

BACKGROUND

UP/SP Merger Proceeding. In our August 12, 1996,[1] decision, we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation and the rail carriers controlled by Southern Pacific Rail Corporation, subject to various conditions, including 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]

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

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

[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, which is now called the American Chemistry Council.

imposed, had not caused any substantial competitive problems, and that there was no need for adjustments in the general conditions imposed.[3]

In view of UP's increasing service problems in the Houston area, however, we undertook a range of actions, including holding public hearings to address proposals for solving UP's service problems and instituting 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.[4] Although we did impose a series of service orders to ease the service crisis and directed other actions to improve the operations in the Houston area, we ultimately found no competitive problems in that region stemming from the merger.

Second Annual Round Of General Oversight Proceeding. By 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 it had not been implemented 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.[5]

Third Annual Round Of General Oversight Proceeding. By decision served November 30, 1999, we considered the issues raised in the third annual round of the general

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[3] 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. 10 (STB served Oct. 27, 1997) (General Oversight Dec. No. 10).

[4] 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 Decision No. 10 (STB served Dec. 21, 1998) (Houston/Gulf Coast Oversight).

[5] 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], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 13 (STB served Dec. 21, 1998) (General Oversight Dec. No. 13).

oversight proceeding and concluded that the record continued to show no competitive problems resulting from the merger. We also found that the UP/SP service crisis was over.[6]

This Decision. We discuss the issues raised in the following pleadings: the UP/SP-378 "Applicants' Fourth Annual Report on Merger and Condition Implementation" filed July 3, 2000, by UP; the BNSF-PR-16 "Quarterly Progress Report," filed July 3, 2000, by BNSF; the comments filed August 18, 2000, by Edison Electric Institute (EEI), the California Public Utilities Commission (CPUC), and The Kansas City Southern Railway Company (in KCS-16); the comments filed August 21, 2000, by Arkansas Electric Cooperative Corporation (in AECC-1); the LYON-1\MONT-15 reply filed September 5, 2000, by Lyondell Chemical Company and Montell USA, Inc., to the comments of KCS; the UP/SP-380 reply and highly confidential appendix filed September 5, 2000; the BNSF-9 reply filed September 5, 2000; the DOT-5 reply comments filed September 5, 2000, by the United States Department of Transportation (DOT); the letter filed September 5, 2000, by The National Industrial Transportation League (NITL); the letter filed September 13, 2000, by UP; and the letter filed September 19, 2000, by EEI. The UP/SP-378 and BNSF-PR-16 progress reports are summarized in the appendix to this decision.

COMMENTS AND REPLIES

Arkansas Electric Cooperative Corporation (AECC) owns a 35% interest in the White Bluff, AR generating plant operated by Entergy Arkansas, Inc. (Entergy), and similar minority shares of other plants controlled by Entergy and other companies in Arkansas. AECC contends that BNSF's trackage rights fee of 2.5 mills per ton-mile that we approved in the merger under the BNSF settlement agreement is too high to permit BNSF to compete effectively with UP. AECC anticipates that BNSF's upcoming rate proposals, which must include fees for trackage rights over 145 miles of UP lines to serve Entergy's proposed build-out of a rail line from the White Bluff plant, will be too high. AECC asks us to reevaluate the trackage rights fee and to reduce it to preserve pre-merger competition.

In reply, UP contends that the BNSF trackage rights fee is at the low end of the range of comparable fees, that BNSF already competes strongly against UP hauling coal under the BNSF settlement agreement over comparable distances on UP track. Conversely, UP notes that it has competed successfully moving unit-train coal using trackage rights over BNSF subject to higher trackage rights fees. UP also points out that the reasonableness of the fee has been previously

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[6] 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], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 15 (STB served Nov. 30, 1999) (General Oversight Dec. No. 15).

litigated and resolved in the UP/SP merger case. In its reply, BNSF outlines the service initiatives it has undertaken to compete with UP, and states that AECC's argument that BNSF cannot compete effectively for coal movements over trackage rights lines is further undercut by the fact that BNSF has used its trackage rights to move coal to the Lower Colorado River Authority (LCRA) facility at Halsted, TX, the Texas Utilities Electric Company (TUE) facility at Martin Lake, TX, and the City Public Service Board of San Antonio (CPSB) facility at Elmendorf, TX.

The Kansas City Southern Railway Company (KSC) contends that UP's fourth annual report fails to show that BNSF provides strong competition in the Central Corridor or in the Houston market. It claims that either the trackage rights fee is too high to permit BNSF to compete there or that BNSF is only making a token effort to operate in the Central Corridor so that we do not give these trackage rights to one of its competitors. KCS asks the Board to: initiate a special rate study to evaluate BNSF's impact in Houston; order UP to sell its 150-mile Victoria to Rosenberg, TX, line to Tex Mex; reconsider BNSF's access to Lake Charles, LA shippers that are also served by UP and KCS; and require UP and BNSF to disclose the details of their Houston-New Orleans line swap agreement.

In reply, Lyondell Chemical Company and Montell USA Inc., two West Lake Charles, LA shippers, maintain that KCS has produced no new evidence or grounds to support its latest attempt to reverse our Lake Charles access condition. In reply, UP contends that KCS raises its own parochial interests and that KCS wants to revisit issues that have been long settled in the proceeding.

California Public Utilities Commission (CPUC) notes that it is pleased to see that the merger has resulted in new services being provided in California by both UP and BNSF. CPUC states that "BNSF and UP have made substantial improvements to their rail infrastructure which should improve existing service levels and intensify competition." It also notes that the severe implementation problems that followed the merger have disappeared. Nevertheless, CPUC argues that the progress reports submitted by UP and BNSF fail to provide a basis to compare the carriers' post-merger competition in the I-5 Corridor, on the Central Corridor, or at 2-to-1 points[7] with the competition that SP provided before the merger. CPUC asks the Board to require the carriers, in their upcoming fifth and final oversight reports, to provide corresponding "benchmarks" with respect to market share, cost savings, service capacity, and capital improvements or service downgrades in each of the above markets. CPUC asks the Board to consider, in light of its proposed merger guidelines, expanding BNSF's access to California shippers through new trackage rights over UP or via rate quotations to UP shippers. While

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[7] Plants that, prior to the merger of UP and SP, had access, either directly or through reciprocal switching, to both UP and SP and no other carrier, were designated as 2-to-1 points. BNSF was granted access to these plants via trackage rights as a replacement carrier for SP.

indicating that no shippers have filed complaints with it suggesting anticompetitive behavior by UP or BNSF, CPUC recommends that the Board undertake a survey of 2-to-1 shippers to assess their views on the level of competition between the two carriers.

UP replies that CPUC's Central Corridor concerns are the same ones CPUC raised last year that were rejected by us. UP contends that CPUC's new informational request would be too burdensome and costly without producing useful data. According to UP, CPUC produces no evidence to support its request for expanded BNSF access in California and that its request for a new condition promoting competition is outside the scope of this oversight proceeding.

Edison Electric Institute (EEI) claims that the annual reports fail to show that BNSF competes with UP for Utah and Colorado coal in the Central Corridor. Because of this lack of information, EEI asks us to require UP and BNSF to submit specific evidence of rate reductions, competitive bidding, and traffic levels for Utah and Colorado coal traffic.

UP replies that BNSF is a strong competitor for Central Corridor coal traffic and that, as a result, Colorado and Utah coal originations, as measured by the revenue per ton-mile UP receives for this traffic, declined fractionally last year, and that these rates have not changed appreciably since the merger, despite railroad cost increases. BNSF outlines its service improvements in the Central Corridor in competition with UP. BNSF also states that EEI and AECC have mischaracterized the purpose of the Board's conditions as they relate to transportation of coal from Utah and Colorado mines in the Central Corridor, and seriously overstated the role the Board anticipated BNSF would fulfill post-merger. The majority of the Utah/Colorado coal mines (including all of the former SP Central Corridor Colorado mines) were exclusively served by SP, and the Board determined that competition for the transportation of coal from those mines would be unaffected by the merger. BNSF states that the competition the Board sought to preserve through imposition of the Utah Railway Company (URC) Agreement was limited to the existing level of competition for those few western coal shippers who were dependent on Utah/Colorado coal and who had access to URC. BNSF further states that it has adequately fulfilled its responsibilities to serve as a joint-line partner with URC to provide a competitive alternative to such facilities as the North Valmy, NV power plant owned jointly by Sierra Pacific Power and Idaho Power Company.

United States Department of Transportation (DOT), in reply, doubts that a study of UP and BNSF market share at 2-to-1 points would yield meaningful insight about the level of competition at those points. In view, however, of the competitive concerns of other commenters, DOT recommends that BNSF should be required to report the number of post-merger carloads it originates and terminates by major commodity in the Central Corridor and that this information should then be compared to the total number of pre-merger carloads SP handled at 2-to-1 locations in the corridor. DOT states that BNSF should provide data showing the number of carloads of Utah and Colorado coal it handles. DOT also asks UP to address its Southern Corridor capacity constraints in more detail in the next annual report.

The National Industrial Transportation League (NITL) argues that the comments raise serious concerns over BNSF's ability to compete with UP in the Central Corridor. NITL asks us to conduct a comprehensive review of the competitive situation in the corridor and, if warranted, remove any obstacles to more effective rail-to-rail competition there.

DISCUSSION AND CONCLUSIONS

OVERVIEW. The pleadings submitted here reaffirm our conclusions in last year's oversight decision that UP's service crisis is over and that the UP/SP merger has not produced any demonstrable competitive problems.[8] In fact, the record indicates vigorous competition and improved service in the West. Our conclusion that competition has not been undermined by this and other recent mergers in the West is also confirmed by a comprehensive rate study recently released by STB staff. This study shows that rail rates in the West continued to decline rather sharply during the period from 1996 to 1999 when this merger was being implemented. In this 3-year period, western rail rates fell 9.0%, or 3.1% per year on an inflation-adjusted basis. Rail rates on coal movements in the West declined even faster, falling 14.2% in inflation-adjusted dollars, or 5.0% per year.[9] Rate decreases of this magnitude could not have been realized if the UP/SP and BNSF mergers had substantially decreased rail competition in the region.

Based on all of the evidence submitted here, it appears that BNSF has become a strong competitor to UP where it provides service under trackage rights as a result of the merger. Moreover, claims by various parties that the trackage rights compensation BNSF pays could be an impediment to its ability to compete are unsupported.

Central Corridor Traffic. Although the comments include arguments by CPUC, NITL, KCS, and EEI about the level of post-merger competition in the Central Corridor, no shipper has complained about UP's rates or services. Rather, the arguments raised here concern either the

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[8] DOT, in its comments, states that "the record shows that the Board's conditions have proven effective as a general matter," that the "substantial problems in these areas [of safety of railroad operations and adequacy of service levels] . . . have now been essentially resolved" and that "[n]o party challenges the reality of vigorous competition between UP and BNSF generally." DOT-5 at 2-4. See also CPUC's comments, at 5, stating that it "has not received any complaints from shippers suggestive of anti-competitive behavior by UP or BNSF to date." EEI presents no basis whatsoever for its surmise that shippers may not have participated here because of "fears of retaliation" from UP.

[9] In fact, of the 30 commodities tracked by the Board's Office of Economics, Environmental Analysis, and Administration, the declines in western coal rates exceeded those of every commodity group except for western movements of transportation equipment, which fell nearly 22% over the 3-year period.

volume of BNSF's traffic using its trackage rights or BNSF's market share as compared to UP's (post-merger) or SP's (pre-merger) market share. As we explained in General Oversight Decision No. 10, slip op. at 5, BNSF has access only to those shippers that were served by both UP and SP prior to the merger, and most of SP's shippers were served only by SP. Thus, market share cannot be the decisive criterion by which to judge the degree to which BNSF replicates the competition that would have otherwise been lost through the merger. We have also explained that BNSF must have sufficient traffic to sustain service levels that will allow its Central Corridor route to be a realistic choice for those relatively few shippers that it may serve under the trackage rights granted in this proceeding.

And it appears that BNSF has in fact been able to meet its pre-merger projections for traffic using its Central Corridor trackage rights, and that the projections made by KCS witness Crowley during the UP/SP merger proceeding have proven to be overly pessimistic. As we noted in UP/SP, BNSF projected that it would handle 2-5 trains a day through the Central Corridor, while Crowley predicted only 1.08 trains a day. BNSF operated 103 through trains in May 2000 over the Central Corridor, which equates to about 3.3 trains per day.[10]

EEI and DOT argue that we need to obtain more evidence about BNSF service and competitive rate offerings for coal shippers in Utah and Colorado. As a threshold matter, we note that BNSF did not obtain authority in the merger proceeding to provide service to any coal shippers in Colorado. Indeed, we rejected requests that we should give BNSF trackage rights to serve the coal mines that were solely served by SP in Colorado as a way of preserving source competition between those mines and Powder River Basin (PRB) mines.[11] Accordingly, the only coal shippers that BNSF may serve using the Central Corridor trackage rights are those few mines and load-outs located on URC, in the northwestern part of Utah.

We continue to believe 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

[10] BNSF also reports that its overall traffic on all its new trackage rights lines meets or exceeds its expectations to "grow the traffic associated with its rights from zero to the size and scale of a new Class I railroad."

[11] The court specifically affirmed our determination in UP/SP Merger, 1 S.T.B. at 396-98, that "there is little meaningful competition today between those mines and PRB mines." WCTL, 169 F.3d at 780-81. AECC's witness Nelson now argues that this argument is rebutted by the fact that many plants that once used relatively high-sulphur Utah and Colorado coal "have been converted in part or entirely to PRB coal." We have always acknowledged, as did the court that "an increasing number of utilities are making capital investments allowing them to burn PRB coal." WCTL, 169 F.3d at 780. Having made this investment, however, these companies will not return to Utah and Colorado coal.

by UP at points where it formerly competed with SP. In last year's decision, we found that BNSF's presence in the Central Corridor required UP to compete vigorously for BNSF-accessible traffic. See General Oversight Decision No. 15, slip op. at 8. Because UP had submitted positive and unrebutted rate results covering several years of experience since the merger, we took no action on CPUC's contention that pre-merger competition in the Central Corridor had not been effectively replicated by post-merger competition between UP and BNSF. Although UP has submitted no comprehensive rate evidence of its own during this the fourth year of oversight, our staff's recently released rate study shows that western rail rates continued their significant overall decline through year-end 1999, and while we have made UP's confidential 100% traffic tapes available for this purpose, no shipper or other party has submitted any indication that the positive trends we have noted in our last three oversight decisions have not continued.[12]

BNSF argues, and UP confirms, that BNSF has aggressively competed with UP in the Central Corridor, and that it provides daily merchandise service in this corridor. Given that level of presence, it should not be difficult for BNSF to provide single-car, multi-car, or unit-train[13] service to coal or other shippers as needed. BNSF also notes that, over the past few years, it has made twenty bids for coal sourced in Utah, and it has been successful on a number of occasions, including service to the North Valmy, NV utility plant.

In its most recent comments, DOT indicates that it continues to believe that BNSF is an important competitive constraint on UP in the Central Corridor. DOT states that BNSF has maintained or even increased the operating frequency of its merchandise train service in the Central Corridor and that no shippers in California have complained of a lack of rail-to-rail competition. We agree with DOT's assessment of these issues.

Moreover, we continue to believe that a study of UP and BNSF market shares at 2-to-1 points in the corridor, or elsewhere that BNSF has trackage rights, would not provide any useful

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[12] NITL asserts in its three page letter comment that "UP has been able to establish higher rate levels, lower service levels and more onerous contract terms and conditions for Central Corridor coal shippers and receivers," but it presents no specificity concerning the movements it is talking about, and no evidence to support any of these allegations. As NITL knows, this kind of vague evidence is of very little assistance to us in our oversight proceedings.

[13] Most coal is moved in unit-trains of 100 cars or more that are shuttled between coal mines and generating plants. No other traffic is moved with these coal shipments.

insight about the level of competition between the two carriers.[14] As we explained in our initial annual oversight decision in this proceeding:

> We . . . agree with the assessment of the Department of Transportation (DOT) in its submission that "BNSF market share . . . should not be the decisive criterion by which the level of competition is judged. BNSF must have sufficient traffic to sustain service levels that allow it to be a realistic choice for shippers, but the traffic level could be far less than that of an independent SP." DOT notes in its comments that: "the most important indicator of the impact of the trackage rights conditions is the effect BNSF's presence in the market has on the rates offered by UPSP."

General Oversight Decision No. 10, slip op. at 5.

We also think that UP has persuasively rebutted claims by AECC that, since the merger, it has deemphasized Utah and Colorado coal. UP notes that it has rebuilt its 565-mile line between Denver, CO, and Topeka, KS, to serve this traffic. In the merger application, it predicted that it would spend $86 million for this purpose, but it has already invested more than $230 million, a greater sum than SP invested on its whole system in a typical year prior to the merger. UP has also obtained a large number of new locomotives and railcars to provide this service. UP notes that its coal volumes from this market have continued to grow over the last 3 years despite a substantial decline in the demand for export coal.

Trackage Rights Fees. AECC and KCS have argued that the level of the trackage rights fee that BNSF must pay to provide service over UP's lines prevents BNSF from competing effectively for either PRB coal or for Colorado/Utah coal. Arguments about both the level and the structure of the payments, raised by KCS and others in the merger proceeding, were carefully examined by us and rejected in UP/SP Merger, 1 S.T.B. at 413-16. Our decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit against challenges to the trackage rights fees and other issues in WCTL, 169 F.3d at 781.

The commenters have now presented some theoretical arguments that the trackage rights fee should be analyzed differently, but no real evidence that the trackage rights fee has hindered BNSF from competing. As a threshold matter, we would stress that this is the fourth year of

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[14] DOT points out that, due to the nature and length of contracts, one carrier could manage to obtain the entirety of a shipper's business for a number of years and that a yearly market share analysis would show no participation in these moves from the unsuccessful but still competing carrier.

oversight in this case, and that the time for presenting theoretical arguments has long passed. If some party believes that competition in the Central Corridor or elsewhere has been impaired by the merger, that party should be able to present concrete evidence that UP has been able to charge shippers sharply increased rates without losing the traffic. No shipper, indeed, no party, has come forward to allege that kind of evidence. To the contrary, UP's representation that its average coal rate for Colorado and Utah coal origins in dollars per ton-mile have not changed appreciably since the merger despite railroad cost increases is unrebutted. As UP points out, no party has found it necessary to obtain and study UP's confidential 100% traffic tapes that are available in this proceeding.

Moreover, the theoretical arguments that have been presented here concerning the level of the trackage rights fee are simply not persuasive. KCS does no more than again point to the statement of its witness Crowley that was submitted in the merger proceeding, and which the Board, affirmed by the D.C. Circuit, found to be deeply flawed. WCTL, 169 F.3d at 781.

AECC argues that the trackage rights fee that BNSF pays will not permit BNSF to compete at the White Bluff plant in which it owns a minority interest.[15] It also claims that the trackage rights fee in general is too high, and it presents a statement by an analyst, Michael Nelson, who argues that we need to set trackage rights fees in merger proceedings based on what he describes as "marketplace economics." These arguments are without merit. As a preliminary matter, recent developments[16] involving rail service to White Bluff demonstrate that BNSF can compete effectively there using the fee that we approved. The actual shipper at White Bluff, Entergy, apparently has no problem with either BNSF's service or the trackage rights fee, and it has not participated in this oversight proceeding. AECC, the minority owner, does not pay the freight or negotiate rates, and it professes no first-hand knowledge of the specifics of coal transport to this plant. It does not even indicate in its pleading what coal the White Bluff plant uses.

AECC's main argument regarding BNSF's inability to compete for coal traffic moving to the White Bluff plant is that "competitive" coal movements out of the PRB are priced as low as 8 mills per net ton-mile, and that, because BNSF has to pay a trackage rights fee of 2.5 mills per net ton-mile, it will be unable to compete with UP using these trackage rights. There are significant problems with this analysis. AECC does not even attempt to explain why a trackage rights fee of 2.5 mills for a 145-mile segment of a much longer route would necessarily preclude BNSF from matching competitive rate offers for PRB coal movements. AECC has submitted no analysis or work papers to support this contention. With regard to movements of Utah coal, the 8

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[15] Entergy Corporation is the majority owner of this plant.

[16] Because of a protective order in another proceeding, UP provided details of those developments in a highly confidential appendix filed under seal.

mill rates are simply not a valid measure of comparison. As UP notes, those low rates apply only to very long, downhill movements out of the PRB. In sharp contrast, movements east from Utah have to move up and down steep slopes with significant curvatures, and, between Utah and Denver, move in shorter trains with twice the locomotive power. There is no evidence that the cost characteristics of these movements are at all similar, much less that either UP or SP was able to offer unit-train coal rates out of Utah at this extremely low level before the merger.

AECC witness Nelson also attacks our longstanding, court-approved requirement that a trackage rights tenant should be required to pay its pro rata share of a cost of capital rental of the facilities it uses. St. Louis S.W. Ry. Compensation — Trackage Rights, 4 I.C.C.2d 668 (1988); 5 I.C.C.2d 525 (1989); 8 I.C.C.2d 80 (1991); 8 I.C.C.2d 213 (1991) (SSW Compensation), aff'd, Union Pacific Corp. et al. v. ICC, No. 88-1186 (D.C. Cir. Oct. 30, 1992) (unpublished), cert. denied, 113 U.S. 2442 (1993). Put simply, his argument is that a host carrier should be permitted only a very marginal return above its out-of-pocket costs on these assets, not its cost of capital, to permit the tenant to replicate the "low" returns that he argues that rail carriers receive for moving coal in unit trains where they compete head-to-head. The Board and the ICC have long held that the tenant needs to pay its fair, usage-based portion of the cost of capital in order to "put the tenant on an equal footing with the landlord." WCTL, 169 F.3d at 781. Otherwise, the landlord would end up subsidizing the tenant, it would not receive an adequate return, and there would be no economic incentive for it to maintain or replace the line as necessary to continue efficient service. See SSW, 8 I.C.C.2d at 86; Missouri Pac. R. Co. v. ICC, 23 F.3d 531, 534 (D.C. Cir. 1994).

Moreover, AECC's theories are directly contradicted by substantial evidence presented by UP and BNSF of successful competitive trackage rights movements of unit-train coal using these same fees or higher ones. For example, BNSF states that it has successfully used its trackage rights to move coal to such shippers as LCRA at Halsted, TX, TUE's Martin Lake, TX facility, and CPSB's Elmendorf, TX plant.

KCS Arguments. We are also denying various specific requests of KCS. It has presented no support from shippers or others to justify requiring UP to initiate a special rate study for Houston. KCS has presented no new evidence to undermine our specific finding in Houston/Gulf Coast Oversight Proceeding, Decision No. 10, at 16, that UP has competed vigorously with BNSF to serve Houston shippers and that it has provided them with rate reductions and other competitive benefits. We agree with UP's characterization that this would be little more than a fishing expedition funded by UP. If KCS or Houston shippers truly believed that Houston rates were a problem, we would expect them to present more than bald allegations or speculation. As UP notes, no shipper has complained here of UP rates. Again, the 100% traffic tapes are available to KCS, and its counsel is free to use them (subject to the usual confidentiality agreement) to develop its presentation in these oversight proceedings.

KCS also asks that we require divestiture of UP's Victoria to Rosenberg line to KCS' 49%-owned affiliate, Tex Mex.[17] But, as UP notes, UP has already agreed to sell that line to Tex Mex, making KCS' request moot. Indeed, we recently granted Tex Mex's request for an exemption for its purchase of this line from UP. Texas Mexican Railway Company – Purchase Exemption – Union Pacific Railroad Company, STB Finance Docket No. 33914 (STB served Dec. 11, 2000).

KCS also asks that we reconsider our merger condition granting BNSF's access to Lake Charles, LA. KCS presents no new evidence or changed circumstances, but merely argues that we erred in granting that condition. This request really has nothing to do with oversight; it is an extremely tardy claim that we committed material error by granting these rights in our 1996 decision, and one that is vigorously opposed by shippers at Lake Charles, who benefit from the access granted to BNSF. We continue to believe that our ruling on this issue in UP/SP was correct, and we see no need to consider this issue further here.

Finally, KCS asks that we force UP and BNSF to disclose the details of their line swap agreement concerning the former line between Houston and New Orleans. UP and BNSF filed a petition for exemption for joint ownership of this line and, despite Federal Register notice, KCS did not participate in this proceeding. We granted this exemption in September 1998. This matter has already been resolved and KCS has presented no valid reason for revisiting issues pertaining to that administratively final decision here. Moreover, KCS has failed to show that this request is within the scope of this oversight proceeding.

CPUC Issues. CPUC makes a number of suggestions, and raises a list of issues that it believes should be studied in next year's oversight proceeding. It calls for a study of competition on the I-5 corridor over which the merger has enabled both UP and BNSF to operate. As we explained in our previous oversight decision, this is all new competition that did not exist before the merger, and CPUC has not shown that there could be any merger-related harm in this corridor.

CPUC has suggested that we should impose additional conditions to improve competition in California in light of our notice of proposed rulemaking in STB Ex Parte No. 582 (Sub-No. 1). But, as we have noted on several occasions, we have retained oversight jurisdiction only to impose additional conditions where those that we have already imposed have proven inadequate to remedy competitive harms caused by the merger. Thus, CPUC's suggestion to apply retroactively our newly proposed merger guidelines to mergers that have already received our approval is clearly inappropriate.

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[17] KCS has frequently asserted that it does not control Tex Mex. Tex Mex has not joined in KCS' request.

CPUC requests that we study whether UP realized all projected merger benefits and whether these have been passed on to shippers. Given that the annual oversight proceedings have provided shippers and shipper organizations with ample opportunities to comment if UP has failed to pass on projected merger benefits to the shippers, we find it unnecessarily burdensome to undertake such a study. Moreover, we have verified, through our staff study discussed above, that the western railroads have achieved significant efficiency gains over the past several years, and that they have indeed passed along many of those gains to their shippers in terms of reduced rates.

CPUC also asks that we hold UP to its commitments to upgrade the Donner Pass and to increase capacity on the Sunset Route between El Paso and Los Angeles. We note that there is no requirement that a merger applicant actually make investments in the exact places or at the precise dollar amount that it predicts it will spend in its application. That being said, we note that, in its merger application, UP predicted that it would undertake a massive capital infusion to rehabilitate the lines of SP, whose deteriorating infrastructure was but one sign of the serious financial difficulties faced by that carrier. This projected investment by UP was a major factor in our decision finding that the transaction would be in the public interest and should be approved. UP/SP, 1 S.T.B. at 381-84. We noted specifically UP's plans to spend approximately $1.3 billion over the next 4 years to upgrade SP facilities, assemble more direct routes, build new terminals and yards, and improve service. Id. at 381. In its Fourth Annual Report, UP notes that it will have spent $1.25 billion by the end of this year, indicating that it is on target in making the investments it projected. As CPUC itself notes, these investments are clearly benefitting California shippers.

CPUC's request that we study positive train separation will be denied because it has nothing to do with this merger or with oversight.

Issues for the Next Round of Oversight. We imposed, as a condition to our approval of this merger, oversight for 5 years to examine whether the conditions we imposed have effectively addressed the competitive issues they were intended to remedy. We retained jurisdiction to impose additional remedial conditions if, and to the extent, we determined that the conditions already imposed were not effectively addressing competitive harms caused by the merger.

Next year's oversight is scheduled to be the final round of this formal oversight process. To that end, we expect UP to submit sufficient information for us to make a determination that oversight should end as scheduled. The UP July 2001 submission should contain rate and other relevant information for the fifth oversight year, as well as a summation of rate and other relevant information pertaining to the entire 5-year oversight period. The BNSF July 2001 submission should also contain both information for the fifth oversight year and a summation pertaining to the entire 5-year oversight process.

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 conditions or measures beyond the relief granted in this decision are denied.

2. UP and BNSF, respectively, must file their fifth annual progress reports by July 2, 2001, and must make their 100% traffic waybill tapes available to interested persons by July 16, 2001.

3. Comments of interested parties concerning oversight will be due on August 17, 2001.

4. Replies will be due on September 4, 2001.

5. This decision is effective on the date of service.

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

Vernon A. Williams

Vernon A. Williams
Secretary

APPENDIX

THE UP/SP-378 REPORT. Service Recovery. UP maintains that, except for a temporary setback in June 2000, it provided better service during the past year than at any previous time. According to UP, its improvement in the movement of western coal has been especially noteworthy. UP states that its systemwide average train speed, which fell as low as 12 m.p.h. during the service crisis, stood at 18.7 m.p.h. when it filed its annual oversight report last July and that its average train speed reached 20.0 m.p.h., its fastest average speed since September 1996.

UP indicates that its locomotive productivity, measured in gross ton-miles per horsepower-day, increased from 93.7 to 127.7 last year. In March 2000, UP's locomotive productivity reached a record level of 133.5. In addition, UP compares its freight car dwell time -- the amount of time freight cars spend in a defined geographic terminal area -- of 26.2 hours in April, a record low for UP, to its dwell time of 43.9 hours during the service crisis. UP states that, in early 1998, it used a second crew on 20% to 25% of its trains and that, last year, it reported that its "recrew rate" had fallen to about 10%. This year, UP states that its recrew rate has dropped below 5%. UP also indicates that its origin train departing performance reached a record 82% in May, that locomotive terminal dwell time dropped to 13.5 hours, and that there are no car shortages on UP, due in part to weak demand for grain transportation.

UP states that, through May, it successfully moved an average of ten to eleven coal trains per day from Colorado and Utah mines within service parameters. UP states that this volume should increase significantly as the West Elk mine in Colorado resumes production. UP also indicates that shippers such as Toyota, General Electric, Air Products, Daimler Chrysler, and ExxonMobil recognized it for outstanding performance last year.

UP concedes that its service deteriorated in June 2000. Among the reasons given by UP are that floods closed UP's St. Louis-Kansas City mainline for a week in May. UP also states that it had several disruptive derailments, including an incident at Eunice, LA, that blocked UP's mainline to Livonia Yard for a week. In addition, UP indicates that it was engaged in extensive projects to upgrade its tracks during the summer. According to UP, all of these recent events adversely affected its performance and caused locomotive imbalances across the system. During May, UP states that it experienced 13 major service interruptions on mainlines serving Texas and Louisiana, including the Eunice derailment. As a result, UP found itself short of locomotives for aggregates service in Texas.

UP states that service to aggregates shippers improved during the latter part of June. It indicates that it recently leased 47 more locomotives, now arriving, all of which will go to Texas for rock and chemical service. UP also states that it will receive 90 high-horsepower locomotives over the next month and that this influx of 4,000- to 6,000-horsepower units will satisfy UP's demands for locomotives across its system.

Additional Service Improvements. According to UP, it is cooperating with CSX and four Northern California shortline railroads in offering a new joint service from California to Chicago, New York City, and Boston that is diverting perishable shipments from trucks to the railroads. UP explains that it gathers farm produce, wine, and other commodities along its line from Bakersfield to Roseville while California shortlines originate additional shipments from the Central Valley and the San Francisco Bay area. UP's Express Lane train then operates from Fresno via Roseville to North Platte on a combination of SP and UP routes in 51 hours. At North Platte, shipments make a positive connection to a train assembled for CSX to run through to Selkirk Yard near Albany, NY. Shipments are then moved to the New York and Boston markets. UP adds Oregon and Idaho potatoes to the CSX-bound train at North Platte. Other shipments make connection there to Chicago and St. Louis. UP states that the cooperating railroads offer service to New York City in 8 days and to Boston in 9 days and that customers may obtain guaranteed service for a slightly higher rate. According to UP, most customers do not take the guaranteed option because the service has often been faster than advertised. As a result, UP states that it is now handling shipments that have not moved by rail for many years.

UP states that it is now providing significantly faster intermodal service between Chicago and Northern California and between Memphis and Southern California. Before the service crisis, UP explains that it implemented expedited intermodal service over combined UP/SP routes, but then slowed or canceled the trains to conserve capacity and locomotives. UP states that it not only has reinstated the fast schedules for the original trains but also added additional premium intermodal trains on even faster schedules. For the Memphis-Southern California movement, all four trains operate over the parallel UP and SP routes in Arkansas and northeastern Texas with the flow of directional running, over UP's former Texas & Pacific line from Dallas to El Paso, and over the SP Sunset Route between El Paso and Los Angeles.

UP indicates that it has completed the process of improving SP's interline service for manifest traffic. Before the UP/SP merger, SP delivered unblocked trains to interchange partners at most gateways, requiring the connecting carrier to switch the train and causing delays. Now shipments from former SP points move in pre-blocked run-through trains that bypass interchange points and intermediate switching. UP states that it has implemented numerous additional improvements in interline service that benefit shippers at former SP locations through merger synergies.

Cooperative arrangements among UP, Tex Mex, TFM, and the U.S. and Mexican governments are allowing traffic through the Laredo Gateway to grow. UP indicates that its northbound traffic is running approximately 30% above volumes during the comparable period of 1999. Southbound volumes have increased by approximately 15% to 20%. UP states that it is working with U.S. Customs to develop improved pre-clearance procedures for export traffic and that the first test will take place on the Canadian border at Eastport, ID. Once these processes are tested, UP plans to use them at gateways to Mexico to reduce staging of shipments for customs clearance.

Merger Implementation. According to UP, it continues to achieve significant improvements in safety, continuing a consistent trend since the merger. UP states that its rate of reportable injuries in 2000 improved by 24.9% from the same period in 1999. The rate of injuries involving lost work days declined by 25.6% compared to 1999. The number of grade crossing accidents declined by approximately 8%. UP indicates that it is working with the Federal Railroad Administration on derailment prevention.

With only three exceptions, UP reports that it has completed merger implementing agreements covering all labor union crafts and territories. UP states that the United Transportation Union and the Brotherhood of Locomotive Engineers are still negotiating with it concerning the second phase of the Portland consolidation, that the Brotherhood of Maintenance of Way Employes and Sheet Metal Workers International Association are still negotiating consolidation of work and territories, and the International Brotherhood of Electrical Workers is still negotiating the consolidation of seniority in the engineering services department.

Based on current projections, UP estimates that it will have spent approximately $1.25 billion to implement the UP/SP merger by the end of this year. This investment by UP includes over $400 million in capacity expansion, almost $500 million in rail line upgrades, over $100 million in information technology, and almost $45 million to upgrade SP locomotives. According to UP, it has spent $143.5 million on merger projects this year (through May 31) and expects to spend a total of over $260 million by December 31. In its report, UP outlines its recent infrastructure upgrades in the Kansas City-Denver Corridor, the Golden State and Sunset Routes, and specific terminals throughout its system.

UP states that it continues to improve and expand its facilities in Texas and Louisiana where the carrier's service crisis arose in 1997. During 2000, UP expects to invest $192.7 million to upgrade rail lines and $72.9 million to expand capacity in this region. For the 3-year period between 1998 and 2000, UP reports that it expects to have spent a total of $607.8 million, and additional projects are planned for 2001 and beyond.

Competition. According to UP, the merger and the competitive conditions imposed by the Board are promoting rail competition in the West. UP states that its system provides shippers with single-line and shorter routings that were not available prior to the merger, as well as improved equipment supply and reduced switching fees. UP maintains that the competitive conditions, particularly the extensive trackage and haulage rights granted to BNSF, have been effective and that shippers are benefitting from BNSF's strong competition, as reflected in both the large volumes of traffic they are awarding to BNSF and the rate and service initiatives that UP has taken to meet BNSF's competition.

Competitive Benefits of the Merger. UP indicates that the synergies of the combined UP and SP system have produced expanded single-line service and shorter routes in many important corridors and that these improvements have attracted new business to the merged system.

Among the shippers named by UP that are taking advantage of the single-line opportunities are: UP grain producers moving shipments to SP destinations such as the Imperial Valley and Nogales gateway; SP Pacific Northwest and California lumber producers reaching new markets at UP points and via UP junctions; UP-served South Central lumber producers reaching SP destinations; UP-served and SP-served Gulf Coast chemical manufacturers shipping their products to destinations and junctions on the other merging railroad; and SP aggregate producers reaching new destinations served by UP in the Houston area. UP specifies other shippers enjoying new shorter routes: UP-served shippers using SP's Sunset Route across the Southern Corridor; SP-served Utah coal producers that cut 300 miles off their routes to export facilities and industrial coal users in Southern California; SP-served rock shippers in Texas; SP-served Louisiana shippers moving goods to Memphis and beyond; and intermodal shippers moving traffic between Memphis and Los Angeles that cut 200 miles off their route.

UP presents examples of shippers benefitting from combining UP and SP fleets as a single source of car supply. Some of UP's examples are: the use of UP's mechanical reefer fleet by SP shippers in California; the acquisition of centerbeam flatcars for Pacific Northwest and California lumber shippers; and the repositioning of intermodal equipment between UP and SP facilities on the West Coast and elsewhere.

UP maintains that the elimination and reduction of switch fees has also enhanced competition. When the merger was consummated, switch fees between UP and SP were eliminated. UP claims that these fees, frequently $495 per car, were a major obstacle to the use of the most efficient routes and to competition for shorter-haul movements against truck and alternate product sources. It indicates that switch fees between UP and SP amounted to more than $16 million, for over 50,000 cars, in the year prior to the merger. In the first full year following the merger, UP states that the reductions in the BNSF-SP switch fees amounted to more than $11 million on over 65,000 cars. UP estimates that the elimination and reduction of reciprocal switching charges as a result of the merger and settlement agreements will exceed $100 million during the first 4 years following the merger. In addition, in February 1998, UP reports that it entered into a new systemwide reciprocal switch fee agreement with BNSF that produced further overall reductions in switch fees and simplified switch fee administration on both railroads.

Effectiveness of Competition-Preserving Conditions. As conditions to its approval of the merger, the Board imposed the settlement agreements entered into between the primary applicants and BNSF and CMA and augmented them in a number of ways. The Board also granted in part Tex Mex's trackage rights application and imposed as a condition the applicants' settlement agreement with URC. UP states that it continues to devote substantial resources in complying with all merger conditions and that all of the conditions have been effective during the past year.

UP maintains that it has fully complied with the BNSF and CMA agreements. During the past year, the Board has resolved three disputes between BNSF and UP regarding the scope of merger conditions. In Decision No. 86, served July 12, 1999, the Board addressed a request by BNSF for a determination whether it was entitled to access Four Star Sugar in El Paso, TX, by providing additional clarification regarding the scope of its new facilities condition but leaving the parties to arbitrate their specific dispute. UP subsequently reached an agreement with BNSF regarding access to Four Star Sugar. In Decision No. 88, served March 21, 2000, the Board found that Entergy is entitled to pursue a proposed build-out, ruling that Entergy had demonstrated that it could have pursued identical plans for a build-out to SP prior to the merger. In Decision No. 89, served June 1, 2000, the Board found that AmerenUE's Labadie, Missouri power plant is a "2-to-1" shipper entitled to BNSF service under the BNSF agreement's omnibus clause, but that the contract modification condition does not apply to AmerenUE's contract with UP.[18] UP has offered BNSF interim haulage between St. Louis and Labadie and also agreed to allow shortline Missouri Central Railroad to carry coal to Labadie. UP and BNSF are negotiating a permanent trackage rights agreement between Pacific, MO, and the Labadie plant.

UP reports that, in 1998, Tex Mex and its affiliate KCS proposed to acquire and rehabilitate UP's line between Rosenberg and Victoria, TX, in order to shorten Tex Mex's route between Laredo and Houston. UP states that the parties have now reached agreement for Tex Mex to acquire the portion of this line between mileposts 2.5 and 87.8, and to receive overhead trackage rights over the remaining segments of the line (near Rosenberg and Victoria) permitting Tex Mex to connect to the UP lines over which Tex Mex already has trackage rights. Consummation of the sale and trackage rights grant is contingent on the Board's authorization or exemption. UP expects Tex Mex to submit a petition seeking such an exemption in the near future. UP states that Tex Mex will be able to use its new trackage rights both for traffic having a prior or subsequent movement on Tex Mex's original Laredo-Robstown-Corpus Christi line as well as traffic originating or terminating at shipper facilities located on the portion of the Rosenberg Line that Tex Mex will acquire. In this regard, UP has agreed, upon completion of the sale of the Rosenberg Line, to modify the terms of Tex Mex's existing trackage rights to permit Tex Mex to handle traffic to/from Rosenberg Line shipper facilities. When Tex Mex begins freight operations over the Rosenberg Line, it will relinquish its existing trackage rights over UP's other lines between these points.[19]

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[18] In Decision No. 90, served October 30, 2000, we denied AmerenUE's petition seeking reconsideration of this portion of the decision.

[19] As previously noted, by decision served December 11, 2000, in STB Finance Docket No. 33914, the Board granted Tex Mex's exemption request to purchase the Rosenberg to Victoria line from UP.

UP maintains that BNSF continues to provide vigorous and effective competition using the rights it received as a condition to the merger. According to UP, BNSF rapidly made the transition from interim haulage, which had gone into effect immediately following the merger, to full trackage rights operations in all major corridors, and BNSF is operating trackage rights trains over virtually all the lines where it has the right to do so. The sole exception, UP explains, is that BNSF has not used its rights to St. Louis, except for occasional movements, because it has preferred to work with IC to move traffic between Memphis and connections with eastern carriers.

UP indicates that it continues to handle BNSF traffic in haulage service between Houston and Brownsville, as provided for in the settlement agreement, as well as at several other locations. UP also continues to provide haulage for traffic moved by BNSF to and from "omnibus" points -- i.e., "2-to-1" points not located on BNSF trackage rights corridors -- pursuant to UP's June 1997 offer to provide service to and from all such points via haulage pending any request by BNSF for an alternative form of access. UP states that significant BNSF haulage movements were handled to or from the following "omnibus" points during the past year: Livermore CA (haulage to/from Warm Springs, CA); Trevarno, CA (haulage to/from Warm Springs, CA); Dickinson, TX (on the former Galveston, Houston and Henderson Railroad) (haulage to/from Houston, TX); and Great Southwest, TX (haulage to/from Ft. Worth, TX).

______UP indicates that the volume of traffic handled by BNSF pursuant to its trackage rights continued to increase this year: Through May 2000, BNSF operated a total of 26,943 through freight trains over the trackage rights lines since the commencement of operations in October 1996. See UP/SP-378, Exhibits 1, 2 and 3, depicting, by month, the numbers of BNSF through trackage rights freight trains and the number of cars and tons on those trains.

According to UP, the exhibits show that: (1) the monthly number of BNSF trackage rights trains had grown to 875 in May 2000--greater than the 751 trackage rights trains that BNSF operated a year earlier, in May 1999, and greater than the 703 trackage rights trains that BNSF operated in May 1998; (2) BNSF tonnages have increased, reaching 4.8 million gross tons in May 2000, compared with 3.8 million gross tons in May 1999, and 3.3 million gross tons in May 1998; (3) cars moving in through trackage rights trains increased, reaching 59,777 (30,330 loads and 29,447 empties) in May 2000, compared with 47,176 (25,401 loads and 21,775 empties) in May 1999, and 40,802 (21,889 loads and 18,913 empties) in May 1998; and (4) the tonnage and number of cars per train increased to 5,539 gross tons per train in May 2000, from 5,000 in May 1999, and 4,630 in May 1998, while cars per train were 68 in May 2000, compared with 63 in May 1999, and 58 in May 1998.

According to UP, these figures do not include BNSF's local trackage rights trains that connect directly with BNSF's through trains at BNSF's own terminals, rather than connecting with trackage rights trains--and thus represents still further traffic secured by BNSF because of the merger conditions. UP adds that BNSF continues to move appreciable volumes via haulage, though more and more of BNSF's operations have shifted to trackage rights over time. In May 2000, loaded and empty haulage cars totaled nearly 3,100. Almost half of these moved to and from Brownsville, with the remainder spread among such other locations as Lake Charles, LA; Orange, TX; the Northern California area; and the "Paired Track" in Nevada.

UP claims that BNSF's through train frequencies in major corridors, generally two or even three trains per day in each direction, demonstrate BNSF's competitiveness. In the Central Corridor, BNSF operated 103 through trains in May 2000, carrying 440,836 gross tons. The totals in May 1999 were 153 through trains and 500,234 gross tons. The totals in May 1998 were 168 through trains and 497,557 gross tons. According to UP, the decline between May 1999 and May 2000 resulted from a change in the methodology and data source that UP uses to count Central Corridor trackage rights trains, not any actual change in BNSF operations or volumes. UP notes that, if the old methodology were applied to the recent data, BNSF volumes would have remained approximately the same. BNSF's service in the Central Corridor consists of approximately two trains per day westbound from Denver to Stockton via Salt Lake City, one train per day eastbound from Stockton to Denver via Salt Lake City, and one train per day eastbound from Salt Lake City to Denver.

Also, in the Central Corridor, UP reports that BNSF's average monthly trains have grown from 62 in the first period, to 138 in the second, declined slightly to 122 in the third, and then declined to 93 in the most recent period; and average monthly tons have grown from 92,656 in the first period, to 412,999 in the second, declined slightly to 373,370 in the third, and then declined slightly to 362,394 in the most recent period.

In the Houston-Memphis Corridor, UP indicates that BNSF operated 185 through trains in May 2000, carrying 916,131 gross tons, compared to May 1999 when BNSF operated 115 through trains and 692,946 gross tons. The totals in May 1998 were 116 through trains and 609,058 gross tons. BNSF is running at least two trains per day in each direction in this corridor.

In the Houston-New Orleans Corridor, UP reports that BNSF operated 239 through trains in May 2000 carrying 1,372,779 gross tons. The totals in May 1999 were 166 through trains carrying 781,727 gross tons. The totals in May 1998 were 164 through trains carrying 812,718 gross tons. A portion of the increase from May 1999 to May 2000 is attributable to traffic moving in manifest trains that had previously moved in local trains. BNSF service in this corridor remains at a level of approximately three trains per day, one of them an intermodal train, in each direction. According to UP, these data show BNSF's continued strength in all three major corridors.

UP states that BNSF now offers a competing single-line alternative from Western Canadian gateways and jointly served points in Washington and Oregon to jointly served points in California and Arizona and western Mexican gateways and that BNSF has increased its lumber shipments in the I-5 Corridor by moving traffic from the Pacific Northwest to California points on its new single-line routes, by greatly expanding the volumes at its reload facilities in the Los Angeles Basin, and by developing new reload facilities in Arizona. According to UP, BNSF is operating approximately six trains per day in each direction in the I-5 Corridor.

UP states that its Utah and Colorado coal shippers continue to benefit from UP's investment in a new export terminal in Los Angeles, which has led to significant reductions in cycle time, and from UP's investment in the Kansas Pacific line to improve the handling of eastbound Utah and Colorado coal movements. UP states that it continues to market Utah and Colorado coal aggressively, as shown by its new contracts for Colorado coal movements to Arizona Electric Power, Empire District Authority, Alliant Energy, Nebraska Public Power District, and Dairyland.

The BNSF-PR-16 Report. BNSF maintains that it aggressively continues to compete with UP on the UP/SP lines and continues to be effective in marketing its services over those lines. Throughout the past year, BNSF states that it has continued its efforts to provide reliable, dependable and consistent service over its trackage rights lines and that, as a result of these efforts, many customers are benefitting from BNSF's new access. BNSF states that it will continue to work to ensure that UP and BNSF live up to the competitive terms and conditions imposed by the Board on UP/SP merger.

BNSF summarizes its changes in operations along the UP/SP lines during the past year. In April 2000, BNSF implemented several changes to its Transportation Service Plan (TSP) for the Gulf Coast region designed to reduce terminal dwell times and improve connections for merchandise business moving through terminals at New Orleans, Lafayette, Silsbee, Houston, Temple and Fort Worth. As part of this plan, BNSF introduced two new trains to handle merchandise business between Houston, TX, and Lafayette, LA.

BNSF reports: that on April 20, 2000, it began to offer intermodal service between points in the United States and Monterrey, Queretaro, and Mexico City, Mexico in conjunction with the Texas Mexican Railway Company (Tex Mex) and Transportacion Ferroviaria Mexicana (TFM); that it commenced a new six day per week southbound train service to handle this new intermodal business to Mexico, as well as merchandise traffic that was previously handled on BNSF's Fort Worth to Corpus Christi merchandise train; that in the northbound direction, BNSF added a new daily train to handle intermodal business, as well as merchandise business that previously moved on BNSF's Corpus Christi to Somerville, TX merchandise train; and that both new trains utilize BNSF's trackage rights over UP between Angleton, TX, and Robstown, TX, where a connection is made with Tex Mex.

BNSF states that it continues to operate regularly scheduled, daily merchandise train service eastbound and westbound on the Central Corridor between Denver, CO, and Stockton, CA. During June 2000, BNSF increased the operating frequency of its eastbound merchandise train service from Riverbank, CA, to Denver, CO, from 4 days per week to daily operation.

BNSF maintains that it continues to offer vigorous and effective competition to shippers located on its Central Corridor trackage rights between Denver, CO, and Stockton, CA.

In the I-5 Corridor, BNSF states that it increased the operating frequency of its northbound Riverbank, CA, to Vancouver, WA, merchandise service to daily service. With this change, BNSF now operates four regularly scheduled merchandise trains over the I-5 Corridor. According to BNSF, its I-5 team, comprised of representatives from BNSF's marketing, operations, service design and performance, customer service, and equipment management groups, has continued its efforts to improve transit time and service consistency for merchandise business moving over the I-5 Corridor. BNSF states that, during the second quarter of 2000, it created a new position – Director of I-5 Business Development – to lead BNSF's growth initiatives involving the I-5 Corridor.

BNSF indicates that, in December 1999, it established a new crew change point at Kremmling, CO, between Grand Junction and Denver, CO, on BNSF's Central Corridor trackage rights line. Due to mountainous terrain and difficult operating conditions on the 275-mile Denver-Grand Junction route, BNSF states that a high percentage of its crews had been unable to complete their trips within the Federal hours-of-service law. With assistance from its unions, BNSF implemented the new crew change at Kremmling in an effort to improve quality of life for its crews, to reduce operating costs, and to improve train performance and service consistency on the Central Corridor. Under the new arrangement, the former Grand Junction to Denver pool is divided into two segments: a Denver-to-Kremmling pool (103 miles) and a Grand Junction-to-Kremmling pool (172 miles). BNSF reports that the new crew change at Kremmling has increased operational efficiency.

Effective in September 1999, BNSF implemented improved blocking of traffic originating in the Pacific Northwest destined to locations on the Central Corridor, primarily in Nevada. The Nevada block is built at the Pasco classification yard in Eastern Washington for southbound movement on the Pasco-Stockton merchandise train. According to BNSF, this service design improvement has resulted in reduced numbers of car handlings, improved transit time, and service consistency.

BNSF states that, in August 1999, it continued to upgrade its I-5 Corridor services when the frequency of its southbound merchandise train from Vancouver, WA, to Barstow, CA, was increased from 6 days per week to daily operation. Its merchandise train now departs Vancouver, WA, and arrives at Barstow, CA, 62 hours later, allowing time for this business to be processed for connection to outbound trains on the same day. This service, in conjunction with the existing merchandise train service connecting with trains in the corridor, is designed to handle existing carload growth in the I-5 Corridor and to encourage further growth by improving transit time, speed and consistency.

BNSF states that it continued a cooperative, joint project with UP to measure and monitor the service performance of BNSF trains operating over UP routes and of UP trains operating over BNSF routes. The two carriers developed and agreed upon measurement procedures and performance standards for over 90 combinations of route, direction and train type, including 46 performance standards applicable to the UP/SP lines. The performance measurements allow side-by-side, month-to-month comparisons of BNSF and UP transit times for similar train types operating in the same direction on a given route. By comparing BNSF and UP train performance and measuring performance against the agreed-upon standards, the carriers' management can identify potential areas of concern and develop corrective actions. BNSF reports that development of the measurement procedures and performance standards is an ongoing process and that the carriers have agreed to continue working to resolve data integrity issues and develop standards for line segments that do not yet have such standards.

During the past year, BNSF states that it continued its intensive marketing activities with respect to "2-to-1" customers and new facilities on UP/SP trackage rights lines. These efforts include field surveys, face-to-face customer contacts, and follow through designed to acquaint customers with BNSF's services and capabilities, as well as to acquaint BNSF with the customers' transportation needs. BNSF continues to issue service updates to its customers that are faxed directly to customer locations and posted on the BNSF Internet site.

BNSF maintains that its traffic volumes over the lines to which it received access as a result of the merger have continued to grow. See BNSF-PR-16, Attachment 2. According to BNSF, the charts attached to its report (Attachments 3 to 12) reflect the volumes of traffic for each of the major traffic lanes to which BNSF received access. BNSF's Attachment 13 shows the breakdown by general commodity groups of this traffic.

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Records: 217

STB FD 32760(SUB21) 11-30-99 C 30523

SERVICE DATE - LATE RELEASE NOVEMBER 30, 1999

SURFACE TRANSPORTATION BOARD

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.

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, a 5-year oversight condition and the terms of the BNSF agreement as supplemented by the CMA agreement and further

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[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).

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

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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 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. 10 (STB served Oct. 27, 1997) (General Oversight Dec. No. 10).

[5] Rail Service In The Western United States, STB Ex Parte No. 573 (STB served Oct. 2, 1997) (published in the Federal Register on October 7, 1997, at 62 FR 52373) (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 Oct. 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).

UP and BNSF to take specific steps to facilitate the operations 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

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[6] Joint Petition For Service Order, STB Service Order No. 1518 (STB served Oct. 31, 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, Supplemental Order No. 1 to STB Service Order No. 1518 (STB served Dec. 4, 1997).

[8] Joint Petition For Service Order, STB Service Order No. 1518 (STB served Feb. 25, 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 Mar. 31, 1998; published in the Federal Register on April 3, 1998, at 63 FR 16628) (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; published in the Federal Register on May 22, 1998, at 63 FR 28444) (Houston/Gulf Coast Oversight Dec. No. 1).

[10] Joint Petition For A Further Service Order, STB Service Order No. 1518 (Sub-No. 1) (STB served July 31, 1998).

movement of railcars through Houston, and provided for joint dispatching of trains in and around the Houston area.[11]

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

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[11] 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. 10 (STB served Dec. 21, 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." UP/SP-366 at 47.

[12] 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], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 13 (STB served Dec. 21, 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, slip op. at 18.

(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 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

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[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."

[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.

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.

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]

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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 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, Finance Docket No. 32760, Decision No. 86 (STB served July 12, 1999) (Merger Dec. No. 86), slip op. at 3, 4 and 6. 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:

(continued...)

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.

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

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[20](...continued)
(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, slip op. at 10 n.34.

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

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 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, slip op. at 5. 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 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.

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[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.

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

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.

<u>It is ordered</u>:

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 the date of service.

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

Vernon A. Williams
Secretary

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

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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).

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.

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

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[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).

[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

(continued...)

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-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.

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[34](...continued)
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.

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

[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.

training and education programs to combat problems stemming from fatigue, and the adoption of 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

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

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 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

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[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, slip op. at 23 n.70 and 25 n.75. 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.

[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).

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 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

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[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.

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.

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[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 & 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.

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

[GENERAL OVERSIGHT]

Decision No. 14

December 31, 1998

NOTICE TO THE PARTIES:

Decision No. 13 served Late Release December 21, 1998, contained certain typographical errors, as reflected on the attached Errata sheet. Please make corrections to your copies.

Vernon A. Williams

Vernon A. Williams
Secretary

ERRATA SHEET

1. Page 5, line 7, insert "(CIC)" after "Corporation".

2. Page 8, line 4 of the second full paragraph, delete "from" after "notwithstanding"; line 2 of footnote 31, change "2-1" to "2-to-1".

3. Page 27, line 4 of footnote 87, change "Dec. 18" to "Dec. 11".

4. Page 31, line 2 of the first full paragraph, insert a comma after "(near New Braunfels, TX)".

5. Page 45, line 9, change "itself" to "themselves".

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STB FD 32760 (Sub 21) 12-21-98 C 29765

29765 SERVICE DATE - LATE RELEASE DECEMBER 21, 1998
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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. 13)

Decided: December 18, 1998

We discuss, in this decision, the conclusions we have reached in the second annual round of the UP/SP general oversight proceeding.[1] We also discuss, in this decision, the conclusions we have reached with respect to certain related matters.

BACKGROUND

UP/SP Merger Proceeding. In Merger Dec. No. 44 (served August 12, 1996),[2] 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, a 5-year oversight

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[1] We will refer to the STB Finance Docket No. 32760 (Sub-No. 21) proceeding as the "general oversight" proceeding to distinguish it from the STB Finance Docket No. 32760 (Sub-No. 26) "Houston/Gulf Coast oversight" proceeding.

[2] 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, Finance Docket No. 32760, Decision No. 44 (STB served Aug. 12, 1996) (Merger Dec. No. 44).

condition[3] and the terms of the BNSF agreement.[4] The common control authorized in Merger Dec. No. 44 was consummated on September 11, 1996, and the mergers authorized in Merger Dec. No. 44 were completed on February 1, 1998.

First Annual Round Of General Oversight Proceeding. In General Oversight Dec. No. 10 (served October 27, 1997),[5] 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, at that time, for any major adjustments in the imposed conditions. See General Oversight Dec. No. 10, slip op. at 2-3.

Ex Parte No. 573 and Service Order No. 1518 Proceedings. Although we concluded that the UP/SP merger had not produced, as of mid-1997, any substantial competitive problems, it had become, by that time, evident that the UP rail system was experiencing serious service problems. In response to these problems, we took, in the STB Ex Parte No. 573 and STB Service Order No. 1518 proceedings, 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;[6] (2) we issued, on October 31, 1997, a 30-day emergency service order (which went into effect on November 5, 1997), that, among

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[3] "[W]e are establishing oversight for 5 years to examine whether the various conditions we have imposed have effectively addressed the competitive issues they were intended to address, and we are retaining 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, slip op. at 13.

[4] BNSF refers to The Burlington Northern and Santa Fe Railway Company and its predecessor corporations.

[5] 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. 10 (STB served Oct. 27, 1997) (General Oversight Dec. No. 10).

[6] Rail Service In The Western United States, STB Ex Parte No. 573 (STB served Oct. 2, 1997) (published in the Federal Register on October 7, 1997, at 62 FR 52373) (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 Oct. 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).

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 of other carriers in that area;[7] (3) we issued, on December 4, 1997, a decision extending the emergency service order to March 15, 1998, and modifying that order to address four additional matters (service involving Texas, California, western coal, and midwest agricultural shippers);[8] (4) we issued, on February 25, 1998, a decision extending the emergency service order, as previously modified, to August 2, 1998 (the maximum time permissible under 49 U.S.C. 11123);[9] and (5) we issued, on July 31, 1998, a decision that, by denying a request that the emergency service order be continued or that a new one be issued, 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]

Houston/Gulf Coast Oversight Proceeding. By decision served March 31, 1998, we instituted a proceeding to consider long-term proposals for additional remedial conditions pertaining to rail service in the Houston/Gulf Coast region.[11] In that proceeding and related proceedings:

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[7] Joint Petition For Service Order, STB Service Order No. 1518 (STB served Oct. 31, 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.

[8] Joint Petition For Service Order, Supplemental Order No. 1 to STB Service Order No. 1518 (STB served Dec. 4, 1997).

[9] Joint Petition For Service Order, STB Service Order No. 1518 (STB served Feb. 25, 1998). We also required UP to augment its weekly reports.

[10] Joint Petition For A Further Service Order, STB Service Order No. 1518 (Sub-No. 1) (STB served July 31, 1998) (we also directed UP and, to a lesser extent, BNSF to continue to file, in the STB Ex Parte No. 573 docket, the periodic reports that had been required under the emergency service order).

[11] 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 Mar. 31, 1998; published in the Federal Register on April 3, 1998, at 63 FR 16628) (General Oversight Dec. No. 12). Subsequently, however, the Houston/Gulf Coast oversight proceeding was 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

(continued...)

requests for new remedial conditions were filed on or about July 8, 1998; we accepted these requests by decision served August 4, 1998;[12] comments with respect to these requests were filed on or about September 18, 1998; rebuttal evidence in support of these requests was filed on or about October 16, 1998; and oral argument was held on December 15, 1998.

This Decision: Comments Filed In The Second Annual Round Of The General Oversight Proceeding. We have considered, in this decision, the issues raised in the following pleadings that were filed in, or that should have been filed in, the second annual round of the general oversight proceeding:[13] the UP/SP-344 "second annual report on merger and condition implementation" and the UP/SP-345 confidential appendices, both filed July 1, 1998, by UP; the BNSF-PR-8 quarterly progress report, filed July 1, 1998, by BNSF; the undesignated letter in the nature of comments, filed August 12, 1998, by the County Sanitation Districts of Los Angeles County (LACSD);[14] the

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[11](...continued)
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; published in the Federal Register on May 22, 1998, at 63 FR 28444) (Houston/Gulf Coast Oversight Dec. No. 1).

[12] 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. 6 (STB served Aug. 4, 1998; published in the Federal Register on August 7, 1998, at 63 FR 42482) (Houston/Gulf Coast Oversight Dec. No. 6).

[13] In our decision addressing the issues that had been raised in the first 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, 1998; that comments of interested parties concerning oversight would be due on August 14, 1998; and that any replies to such comments would be due on September 1, 1998. See General Oversight Dec. No. 10, slip op. at 19. We later extended the reply date to September 30, 1998. 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) (STB served Aug. 27, 1998).

[14] This letter, which was addressed to the Board's Secretary, was not actually filed in the STB Finance Docket No. 32760 (Sub-No. 21) proceeding, but will be addressed in this decision.

BNSF-7 comments filed August 14, 1998, by BNSF;[15] the AFPA-2 comments filed August 14, 1998, by the American Forest & Paper Association (AF&PA); the PSC-9 comments filed August 14, 1998, by Public Service Company of Colorado (PSCo); the undesignated comments filed August 14, 1998, by the Colorado, Kansas & Pacific Railway Company (CK&PR); the undesignated comments filed August 14, 1998, by Cemex USA Management, Inc. (Cemex);[16] the DOT-3 reply filed September 1, 1998, by the United States Department of Transportation (DOT); the CIC-2 comments filed September 17, 1998, by Champion International Corporation on behalf of itself and its Moscow, Camden & San Augustine Railroad (MC&SA) subsidiary; the A&NR-2 comments filed September 21, 1998, by Angelina & Neches River Railroad Company (A&NR);[17] and the UP/SP-361 reply filed September 30, 1998, by UP. The matters discussed in these pleadings are summarized in Appendix A.

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[15] In an undesignated letter filed August 19, 1998, in STB Finance Docket No. 32760 (Sub-No. 21) and in STB Ex Parte No. 573, UP advised: that it would address, in its submissions in the Houston/Gulf Coast oversight proceeding, those portions of the comments filed by BNSF in the general oversight proceeding that covered the same ground as BNSF's condition request in the Houston/Gulf Coast oversight proceeding; and that it would address, in its submissions in the general oversight proceeding, all other points in the comments filed by BNSF in the general oversight proceeding. By decision served August 27, 1998, we indicated that "[w]e do not object to UP's proposed approach in this regard." 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) (STB served Aug. 27, 1998) (slip op. at 2 n.1).

[16] In an undesignated letter filed August 19, 1998, in STB Finance Docket No. 32760 (Sub-No. 21) and in STB Ex Parte No. 573, UP advised that it intended to address, in its submissions in the Houston/Gulf Coast oversight proceeding, the comments filed by Cemex in the general oversight proceeding. By decision served August 27, 1998, we indicated that we preferred to consider, in the general oversight proceeding, the issues raised by Cemex in its comments filed in that proceeding. 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) (STB served Aug. 27, 1998) (slip op. at 2; second full paragraph).

[17] The CIC-2 comments and the A&NR-2 comments were filed in STB Finance Docket No. 32760 (Sub-No. 26). We are considering these comments here insofar as these comments concern matters properly considered in the second annual round of the general oversight proceeding.

<u>This Decision: Related Matters</u>. We have also considered, in this decision, issues respecting three related matters that were raised in the following pleadings: (1) the ESI-28 petition for modification of Merger Dec. No. 44 or, in the alternative, for an additional condition, filed October 23, 1997, by Entergy Services, Inc., and Entergy Arkansas, Inc. (referred to collectively as Entergy);[18] and the UP/SP-328 reply to the ESI-28 petition, filed November 12, 1997, by UP;[19] (2) the undesignated petition (hereinafter referred to as the AL&M Petition) for an additional remedial condition, filed May 12, 1998, by the Arkansas, Louisiana and Mississippi Railroad Company (AL&M);[20] the BNSF-6 reply to the AL&M Petition, filed June 1, 1998, by BNSF; the undesignated reply to the AL&M Petition, filed June 1, 1998, by KCS; the two undesignated replies to the AL&M Petition, filed June 1, 1998, by Georgia-Pacific Corporation (G-P);[21] the IP-21 reply to the AL&M Petition, filed June 1, 1998, by International Paper Company (IP);[22] the UP/SP-343 reply to the AL&M Petition, filed June 2, 1998, by UP;[23] the undesignated supplement to the AL&M Petition (hereinafter referred to as the AL&M Supplement), filed June 26, 1998, by AL&M; the UP/SP-347 reply to the AL&M Supplement, filed July 16, 1998, by UP;[24] the undesignated motion to strike the AL&M Supplement, filed July 16, 1998, by KCS; and the undesignated reply to

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[18] Entergy submitted two versions of this petition: a confidential version (designated ESI-28); and a public, redacted version (designated ESI-29).

[19] The ESI-28 petition was filed in STB Finance Docket No. 32760 and in STB Finance Docket No. 32760 (Sub-No. 21). The UP/SP-328 reply was filed in STB Finance Docket No. 32760 (Sub-No. 21). We have previously indicated our intention to address, in this decision, the ESI-28 petition. <u>See</u> <u>Joint Petition For A Further Service Order</u>, STB Service Order No. 1518 (Sub-No. 1) (STB served July 31, 1998), slip op. at 7 n.13.

[20] The AL&M Petition and all related pleadings were filed in STB Finance Docket No. 32760 (Sub-No. 21).

[21] One reply was submitted by Norman Langberg, the Director of Logistics, Paper for G-P. The other reply was submitted by Robert T. Pugh, the Director, Logistics Services for G-P's Building Products Group.

[22] We have noted, but have not otherwise considered, the letters expressing support for the AL&M Petition that were filed in June 1998 by Century Ready-Mix Corporation and Abell Corporation. These letters, which are in the nature of correspondence, do not appear to have been served on interested parties.

[23] UP also filed, on June 2, 1998, an undesignated motion for leave to file its UP/SP-343 reply a day late. We will grant the motion.

[24] UP, noting that the AL&M Supplement is an impermissible reply to a reply, <u>see</u> 49 CFR 1104.13(c), asks that we acce the UP/SP-347 reply if we accept the AL&M Supplement.

the motion to strike, filed July 20, 1998, by AL&M;[25] and (3) the undesignated petition for reconsideration filed August 20, 1998, by Cemex in STB Ex Parte No. 573 and in STB Service Order No. 1518;[26] and the undesignated reply to the Cemex petition, filed September 11, 1998, by UP in STB Service Order No. 1518.[27] The matters discussed in these pleadings are also summarized in Appendix A.

This Decision: Matters Not Considered. We have already addressed, and therefore we will not consider in this decision, the issues raised in: the undesignated comments urging revisions to the STB Ex Parte No. 573 reporting requirements, filed in STB Finance Docket No. 32760 (Sub-No. 21) on August 14, 1998, by The National Industrial Transportation League (NITL); the undesignated letter in the nature of a reply to such comments, filed August 19, 1998, by UP in STB Finance Docket No. 32760 (Sub-No. 21) and in STB Ex Parte No. 573; and the undesignated supplemental comments, accompanied by an undesignated petition to file said supplemental comments, filed September 3, 1998, by NITL in STB Finance Docket No. 32760 (Sub-No. 21).[28]

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[25] The AL&M Supplement is a reply to a reply, which is prohibited by 49 CFR 1104.13(c) and which is not permitted by any procedural order applicable to the STB Finance Docket No. 32760 (Sub-No. 21) proceeding. We will not strike it, however, because, by making explicit that AL&M's principal grievance is KCS's lack of single-line access to most AL&M destinations, the AL&M Supplement has served to better frame the issues raised in the AL&M Petition. And, given our resolution of those issues, there is no need to grant KCS's alternative request that it be allowed more time to file a response to the AL&M Supplement.

[26] Cemex seeks reconsideration of our denial of its request for emergency service relief. See Rail Service In The Western United States, STB Ex Parte No. 573 (STB served July 31, 1998).

[27] Cemex also filed, on September 24, 1998, an undesignated motion to strike portions of the UP reply; and UP filed, on September 28, 1998, an undesignated letter in the nature of a reply to the motion to strike. The motion to strike assails three categories of material: (1) references to information upon which we did not rely in Rail Service In The Western United States, STB Ex Parte No. 573 (STB served July 31, 1998); (2) a statement that has assertedly been misrepresented and taken out of context; and (3) a reference to the comments filed August 14, 1998, by Cemex in STB Finance Docket No. 32760 (Sub-No. 21). The motion to strike will be denied. Cemex's objections to the material in the first and third categories would require us to take a static look at UP's service problems, and to grant or deny emergency service relief today based on a state of affairs that existed many months ago; but we think it is preferable that our decisions with respect to UP's service problems be based on present realities. And Cemex's objections to the material in the second category go not to admissibility but to weight.

[28] See Rail Service In The Western United States, STB Ex Parte No. 573 (STB served Sept. 22,
(continued...)

Nor will we consider in this decision the undesignated request for a new remedial condition, filed July 8, 1998, by the Western Coal Traffic League (WCTL) in STB Finance Docket No. 32760 (Sub-No. 26), which we transferred to STB Finance Docket No. 32760 (Sub-No. 21)[29] but which WCTL has since withdrawn.[30]

DISCUSSION AND CONCLUSIONS

The merger, while it has not proceeded as smoothly as we had hoped it would, has produced and will continue to produce benefits for the shipping public.[31] Nevertheless, we knew when we approved the merger that it would have potential competitive impacts, and so we imposed remedial conditions and a 5-year oversight requirement so that we could ensure that our conditions in fact ameliorated potential competitive harm. We will now address whether our conditions have achieved their purpose, and will then turn to various other issues that were raised during this phase of the oversight proceeding.

COMPETITIVE IMPACTS. We recognize that the service problems in the West have competitively injured a variety of shippers and carriers, including UP. However, the reports, comments, and replies that were filed in the second annual round of the general oversight proceeding establish that, notwithstanding from the effects of the service crisis, the UP/SP merger has not thus far caused any substantial competitive harm. The UP vs. SP competition that existed prior to the merger no longer exists; but, in its place, there now exists UP vs. BNSF competition, which appears to be at least as effective as the pre-merger UP vs. SP competition. The reports submitted July 1, 1998, by UP and BNSF demonstrate that BNSF is providing fully competitive train service in every

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[28](...continued)
1998) (addressing the issues raised in the pleadings noted in the text).

[29] See Houston/Gulf Coast Oversight Dec. No. 6, slip op. at 6 n.11.

[30] See WCTL's undesignated "notice of withdrawal without prejudice," filed September 9, 1998, in STB Finance Docket No. 32760 (Sub-No. 21).

[31] In addition to the expansion of the number of single-line services and shorter routings, better equipment supply, reduced access fees, and broadened service coverage and competitive benefits for 2-1 shippers now being served by BNSF, UP estimates that the eliminations and reductions of switch charges that were produced by the UP/SP merger and by the BNSF agreement, as augmented by the CMA (Chemical Manufacturers Association) agreement, will amount to some $56 million during the first 2 post-merger years. UP also notes that, in February 1998, UP and BNSF entered into a new systemwide reciprocal switch fee agreement that superseded seven earlier agreements involving former constituent railroads of UP and BNSF, that produced further overall reductions in switch fees, and that greatly simplified switch fee administration on UP and BNSF. See UP/SP-344 at 53.

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 confidential appendices submitted with the UP report contain numerous examples of BNSF's success in gaining 2-to-1 traffic using its rights, and numerous examples too of the rate and service improvements UP has had to provide to shippers to retain a share of the 2-to-1 traffic.[32] The confidential appendices also document post-merger reductions in UP's rates for 2-to-1 traffic, 3-to-2 traffic, Eastern Mexico gateway traffic, coal traffic, chemical traffic, plastics traffic, and grain traffic. The service problems that have occurred during implementation of the merger are well known, but they do not change the fact that there have been no discernible purely competitive problems caused by the merger.[33]

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[32] BNSF claims that most of the growth in its trackage rights traffic has come either from overhead business, from business moving to and from 2-to-1 shortlines, or from business where BNSF has had to commence its own switching operations for 2-to-1 customers. At the Houston/Gulf Coast oral argument, however, BNSF, although it indicated that it wanted to intensify its competitive presence, stated: "We think we have established a major presence at the 2-to-1 points. . . . We believe competition is working." Transcript at 66-67. In any event, the 2-to-1 shippers to which BNSF has access are shippers that, prior to the merger, had access both to UP and to SP (and to no other railroad); but such access did not necessarily mean that any such shipper actually enjoyed, day in and day out, simultaneous two-carrier service before the merger. One bar to simultaneous post-merger, two-carrier service cited by BNSF (the inability of many shippers to accommodate physical switches by two carriers in a 24-hour period) would also have barred pre-merger, two-carrier service. And the other bar cited by BNSF (duplication of scarce resources, i.e., power, crews, and infrastructure) would appear to be transitional in nature; if there is sufficient traffic to support simultaneous two-carrier service, BNSF should have an incentive to develop and make available the necessary resources.

[33] BNSF suggests that the rights it received have been rendered less effective than initially expected by unanticipated service and related problems, which, it states, have had a disproportionate effect on it. We agree that the service problems that the post-merger UP has experienced have indeed had a negative impact on the operations conducted by BNSF under the rights it secured in the BNSF agreement. The evidence we have seen, however, does not indicate that the impact on BNSF has been disproportionately greater than the impact on UP, and in any case, we anticipate that UP's service problems will prove to have been transitional, and that the negative impacts on BNSF's operations will likewise prove to have been transitional.

BNSF, of course, would like to be even more of a competitive force,[34] but we conclude, based upon the reports, comments, and replies filed in the second annual round of the general oversight proceeding, that, at this time, no adjustment in the general conditions imposed in connection with the UP/SP merger is necessary.[35]

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[34] BNSF's complaints concerning cooperation, discrimination, neglect, and manipulation appear to be linked to BNSF proposals to alter existing arrangements in ways that BNSF argues would improve its ability to offer a more competitive service. See, e.g., BNSF-PR-8 at 21 (proposal for coordinated dispatching control of the lines between Denver and Pueblo, CO), at 27-28 (proposal for a joint dispatching facility for the Tehachapi line), and at 63 (proposal for the establishment of service standards for areas where UP provides reciprocal switch and haulage service for BNSF). However, BNSF does not show that it is unable to compete, or that its existing rights do not restore competitive options that existed before the merger and that would have continued but for the merger; rather, its point appears to be that, notwithstanding its arms length settlement reached with UP, it now could compete even better if certain adjustments to its arrangements were made. BNSF's complaints have not been substantiated and its proposals have not been developed at any length, and we therefore see no justification, at this time, for taking additional steps of the sort that BNSF suggests. Moreover, as UP notes, it has had and continues to have its own problems with some BNSF switching and dispatching practices; switching and dispatching differences are inevitable for carriers that work together; but railroads regularly work out arrangements with each other concerning dispatching and switching without requiring government intervention. We share BNSF's sense (with which UP does not disagree) that it and UP ought to have joint dispatching facilities in addition to the one they currently maintain at Spring, TX, and indeed the testimony at the Houston/Gulf Coast oral argument confirmed that the two carriers are considering expanding their joint dispatching capabilities. However, we see no reason why BNSF and UP should not be able to work out these sorts of issues privately. 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. Pursuit of this approach, of course, could open the door to efforts by UP to have us address comparable complaints about BNSF.

[35] We have made some adjustments to our conditions for the Houston/Gulf Coast area in our decision in 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. 10 (STB served Dec. 21, 1998) (Houston/Gulf Coast Oversight Final Decision).

SERVICE PROBLEMS. The UP service situation, although still not perfect, has improved considerably and all indications are that it will continue to improve. There is every reason to believe that the service problems will prove to have been a transitional phenomenon. Based on the record, we therefore see no reason to impose additional conditions on the merger, outside of the Houston/Gulf Coast area, that arise from the service problems. Of course, we will continue to retain jurisdiction over the merger, and to ensure through our periodic reporting requirements that our conditions are effective.

In another decision served simultaneously with this one, we have adopted rules to address service inadequacies by establishing expedited procedures for shippers to obtain alternative rail service from another carrier when the incumbent carrier cannot properly serve shippers. See Expedited Relief for Service Inadequacies, STB Ex Parte No. 628 (STB served Dec. 21, 1998). Specific conditions that would fundamentally change the structure of the merger, however, are neither necessary nor appropriate.

SAFETY PROBLEMS. Although UP and DOT have interacted in a variety of ways concerning safety, DOT states that there are, at this time, no safety problems requiring action on our part in the context of the general oversight proceeding. See DOT-3 at 2-5.

PAPER BARRIERS. The paper barrier issues[36] raised by AF&PA are among the issues addressed in the broad "Railroad Industry Agreement" (the RIA) that was recently entered into by the Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA). See Association of American Railroads and American Short Line and Regional Railroad Association--Agreement--Application Under 49 U.S.C. 10706, STB Docket No. S5R 100 (STB served Sept. 22, 1998 and published in the Federal Register on Sept. 25, 1998, at 63 FR 51398; STB served Dec. 18, 1998). Although the comprehensive agreement on the issue of paper barriers reached in the RIA did not eliminate all limitations on the scope of the services that can be provided by small railroads, it did provide new opportunities for smaller railroads to address some of the concerns that have been expressed over the past year by shippers. In any event, the "paper barrier" issues raised by AF&PA have no connection to the UP/SP merger, which neither rendered any shortline captive to UP[37] nor created or extended any paper barrier.

ENTERGY/CEMEX. Entergy and Cemex are 1-to-1 shippers, each of which was rail-served prior to the merger by a single railroad (the pre-merger UP) and each of which is

[36] A "paper barrier" is a contractual provision constraining the ability of a small railroad to interchange traffic with carriers other than the carrier from which its lines were originally purchased.

[37] The BNSF agreement protects 2-to-1 shortlines.

rail-served today by a single railroad (the post-merger UP). The merger, therefore, had no adverse impact on the rail service options available to Entergy and Cemex.[38]

Entergy and Cemex insist, however, that, as a practical matter, the merger has had an adverse impact on their rail service options. Prior to the merger, they claim, UP rail service was adequate; subsequent to the merger, they argue, UP rail service has been inadequate. Entergy and Cemex, invoking both our UP/SP oversight jurisdiction and our 49 U.S.C. 11123 "directed service" authority, have asked that we remedy their problems by granting BNSF access to their facilities.

We will deny their requests. The service problems so many shippers have experienced have proven to be, for the most part, transitional problems that occurred in connection with merger implementation and that reflected, to a large degree, the inadequate state of the pre-merger SP infrastructure. These are problems that do not call for permanent solutions of the sort suggested here. We would not hesitate to grant relief to Entergy and Cemex, and to other similarly situated shippers, if, and to the extent that, we believed that UP's service problems were structural, i.e., had been created by the merger and were likely to endure as long as the merger endured. But all the evidence we have seen leads us to believe that UP's rapidly diminishing service problems are transitional and therefore temporary, not structural and therefore not permanent. Indeed, UP's recent, substantial infrastructure improvements to its lines in the New Braunfels, TX, area, and in the "Central Corridor" — lines over which Cemex and Entergy traffic moves — have spurred service improvements throughout the UP system.

We do not mean to suggest that UP's service has yet reached its optimal levels. Merger implementation is a process, not an event; rehabilitation of inadequate infrastructure is similarly a process, not an event; and, in the nature of things, each such process is likely to take time. The problems that have arisen, and that have been and are continuing to be mitigated, might have been delayed if there had been no UP/SP merger. That alternative, however, would almost certainly have resulted, sooner or later, in the destruction of SP. See Merger Dec. No. 44, slip op. at 114-16. The evidence indicated that SP's competitive, financial, and physical condition had been eroding for several years, and would continue to erode, because of SP's chronic inability to generate sufficient capital from its railroad operations.

We do not mean to trivialize the transitional problems that Entergy and Cemex faced during the admittedly serious but now-over service emergency. Those problems have been serious, but no more serious than the problems faced by many other shippers. Yet, as we reviewed the service emergency, we concluded that we could not grant all allegedly adversely impacted 1-to-1 shippers access to another carrier, because to do so would surely have interfered with UP's own service

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[38] The merger, had it not been properly conditioned, might have had an adverse impact on Entergy's pre-merger build-out option. There has been no such impact, however, because we imposed a condition that preserved the pre-merger build-out status quo.

recovery efforts, could have stressed the system of the carrier recruited to provide alternative service, and would ultimately have aggravated rather than ameliorated the service problems. Given the transitional nature of the service problems, which are abating, we see no basis on which to grant such access as a merger condition.[39]

We are today issuing regulations that provide expedited procedures for obtaining access to another carrier to remedy service failures by the incumbent carrier. Regardless of how the new procedures, had they been in effect during the service emergency, might have applied to the situations of Entergy or Cemex, or how they might apply to the situations of Entergy or Cemex in the future, it is clear that relief under either the service order or as a merger condition would have been inappropriate.

CIC/A&NR. The directional running patterns instituted by UP have increased the carrying capacity of UP's (formerly SP's) Houston-Fair Oaks line. CIC and A&NR do not suggest otherwise, but they insist that this directional running pattern (both UP and BNSF operate southbound trains on the Houston-Fair Oaks line), and the increased traffic thereby made possible, have impaired local service provided by UP to shippers like CIC and shortlines like A&NR. UP concedes that local service has not been entirely satisfactory, but contends that it has taken a number of steps to improve such service.

We have previously said that "there is no reason to believe that new post-merger traffic flows will cause service problems [on the Houston-Fair Oaks line]." See Merger Dec. No. 44, slip op. at 193. We cannot now say for certain whether we were right or wrong. There has been no way to separate the local effects of UP's systemwide service problems from the local effects of directional running patterns. And, making matters more complicated, there appears to be no way to distinguish impacts of directional running from those that can be remedied without interfering with directional running.

On the other hand, the service crisis has ended, and UP has indicated its intention to address local service issues. However, if it turns out that directional running does impair local service, it may be the kind of problem for which there is no easy solution. The first remedy suggested by CIC and A&NR (open interchange) would seem to be far too broad. See Merger Dec. No. 44, slip op. at 193 ("Direct access to BNSF, as sought by CIC, would vastly improve, not merely preserve, the competitive status quo."). The second remedy suggested by CIC and A&NR (requirements that affected shortlines receive daily local service and that local crews receive priority when on or crossing mainlines) is more narrowly tailored, but no less objectionable. A daily local service

[39] We note that Cemex has filed a petition disputing many of our factual findings in our decision denying it emergency service relief. We find no merit to its allegations of factual error, and, in any case, we find that, even if Cemex's factual arguments were correct, they would not be material to the result.

requirement might well require UP to engage in inefficient operations; and a local crew priority requirement would involve our micromanagement of operating decisions best left to the railroads.

The best solution, for now, is to give UP's directional running arrangements time to develop and to permit UP, now that its systemwide service appears sustainably improved, to turn its full attention to correcting such local service problems. We are, however, prepared to entertain, in the third and subsequent annual rounds of the general oversight proceeding, renewed claims that the local service provided by UP to shippers such as CIC and shortlines such as A&NR remains adversely affected by the directional running patterns established by UP (and BNSF) in connection with the merger.

NEW FACILITIES CONDITION. We do not agree with A&NR's claim that the new facilities condition[40] has created, for shortlines like A&NR, a disadvantage that we have an obligation to correct. The disadvantage cited by A&NR existed prior to the merger because, at that time, shippers could elect to locate new facilities at points served by both UP and SP, while an exclusively served shortline like A&NR (i.e., a shortline with only a single Class I connection) might not be able to offer a site open to rail competition. And, in any event, even if the merger did create the harm cited by A&NR, that harm is not the kind of harm that our conditioning power was meant to rectify. A&NR, after all, is not claiming that it has been made less competitive but that its Class I competitors have been made more competitive. Cf. Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 38, slip op. at 99 (ICC served Aug. 23, 1995) (the Bunge precedent).

AL&M. AL&M is a 3-to-2 shortline that claims, in essence, that it should be regarded as a "2½-to-1½" shortline. UP, SP, and KCS were AL&M's pre-merger Class I connections; UP and KCS are AL&M's post-merger Class I connections. AL&M insists, however, that, with respect to traffic that is originated on AL&M's Fordyce-Monroe line,[41] KCS is not, and cannot be, a fully competitive Class I connection. AL&M contends, in particular, that KCS has single-line access to a limited number of AL&M destinations, and that KCS's joint-line routings to all other AL&M destinations are not competitive with the single-line routings of the post-merger UP.

In Merger Dec. No. 44, we granted relief only in limited circumstances where a shipper had pre-merger access to three railroads. See Merger Dec. No. 44, slip op. at 152-53 (respecting the Lake Charles area). Similarly, we have accorded relief in limited circumstances where a merger

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[40] See Merger Dec. No. 44, slip op. at 145-46.

[41] AL&M's arguments are equally applicable with respect to the small portion of its traffic that is terminated on AL&M's Fordyce-Monroe line. For convenience, however, we will refer to AL&M's traffic as if all of it moved outbound from points on the Fordyce-Monroe line.

reduces the number of Class I connections for a shortline railroad, and hence the shippers it serves, from three to two. See Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 38, slip op. at 94-95 (ICC served Aug. 23, 1995).

AL&M did not previously participate in the UP/SP merger proceeding or request that we impose a special condition for its benefit. Nor has it persuaded us that there is any reason for us to reopen the proceeding now for the purpose of imposing such a condition. It has been over 2 years since we approved the merger, and AL&M has failed to present any convincing, concrete evidence that the merger has resulted in competitive harm to shippers located on its line.[42] It merely presents speculative evidence that it will be disadvantaged because KCS, one of its two remaining connections, will not be an effective competitor. This is not an appropriate basis for imposing additional relief in conjunction with this oversight process.

Moreover, AL&M's arguments are without merit. KCS appears to be a fully effective Class I connection for traffic originated on AL&M's line. AL&M concedes the competitiveness of KCS's single-line routings to the AL&M destinations that are located on KCS's system and that are conveniently accessible in KCS single-line service, and the evidence of record demonstrates the competitiveness of KCS's joint-line routings (KCS-BNSF, KCS-IC, KCS-CSX, and KCS-NS)[43] to the AL&M destinations that are located beyond KCS's system or that, though located on KCS's system, are not conveniently accessible in KCS single-line service. The KCS-BNSF, KCS-IC, KCS-CSX, and KCS-NS joint-line routings provide, for traffic originated by AL&M and interchanged with KCS at Monroe, non-circuitous access to destinations located throughout the United States, and the evidence we have seen indicates that these joint-line routings are indeed competitive with the single-line routings of the post-merger UP.[44]

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[42] AL&M and G-P, a shipper on AL&M's line, have presented evidence indicating that UP is charging higher rates to serve G-P's facilities. UP notes, however, that the rates in question are pursuant to a confidential contract recently negotiated between UP and G-P. UP points out that, under this contract, the rates for some G-P movements have been reduced, while rates for other movements have been increased, but that, overall, rates to G-P are not higher.

[43] Illinois Central Railroad Company is referred to as IC. CSX Transportation, Inc., is referred to as CSX. Norfolk Southern Railway Company is referred to as NS.

[44] By and large, traffic that UP (but not KCS) can efficiently handle in single-line service to a destination not exclusively served by UP would be routed, by KCS, either KCS-BNSF or KCS-IC. KCS-BNSF and KCS-IC joint-line routings do not appear to be unduly circuitous vis-à-vis UP single-line routings. Some KCS-BNSF joint-line routings, in fact, appear to be even shorter than the

(continued...)

AL&M's principal grievance respecting KCS's joint-line routings, and respecting in particular KCS-BNSF joint-line routings, is neither undue circuity (KCS-BNSF routings, as we have said, are not unduly circuitous) nor a UP bottleneck (UP is not a participant in any KCS-BNSF routings).[45] AL&M's principal grievance, rather, is that the KCS-BNSF routings are joint-line routings, and, therefore, in AL&M's view, are, by their very nature, not fully competitive with UP single-line routings. "It is the limited single system reach of the KCS that is the principal reason the Board should extend the Lake Charles condition to permit BNSF access to the AL&M at Fordyce." AL&M Supplement at 12. AL&M is arguing, in essence, that, at least with respect to traffic moving to certain points in the Far West, it has been adversely affected by the merger because, whereas it previously had two single-line options (UP and SP), it now has only one (UP). This argument, though of somewhat more force than a similar argument previously made by SPP/IDPC,[46] is not sufficiently compelling. The KCS-BNSF joint-line routing should be,[47] and indeed the traffic statistics cited by KCS and UP demonstrate that the KCS-BNSF joint-line routing is, quite competitive with the UP single-line routing.

We realize that UP's service problems have adversely affected AL&M, not only with respect to traffic routed AL&M-UP but also, because of UP's delays in returning AL&M's cars, with respect to traffic routed AL&M-KCS. We expect, however, that UP's service problems will prove to have been a transitional phenomenon, and we think that, in these circumstances, and given the strength of the KCS competitive option now available to AL&M, the establishment of a permanent AL&M-BNSF interchange at Fordyce would not be an appropriate response.[48]

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[44](...continued)
comparable UP single-line routings.

[45] Compare Merger Dec. No. 44, slip op. at 152 (we noted, in our discussion of the Lake Charles situation, that "any KCS routing to and from St. Louis or Chicago must still include a connection with applicants at Shreveport or Texarkana, giving applicants control of a 'bottleneck' for these movements.").

[46] The argument now made by AL&M might be more compelling than the argument previously made by Sierra Pacific Power and Idaho Power Company (referred to collectively as SPP/IDPC) because "the difference between single-line service and joint-line service is less important in the coal unit train context." See Merger Dec. No. 44, slip op. at 187.

[47] Because BNSF cannot now interline traffic with AL&M, BNSF has every incentive to participate in an AL&M-KCS-BNSF routing.

[48] The AL&M argument that, if the existing KCS competitive option were really effective, AL&M would not have been adversely impacted by UP's service problems, is not well taken. Because American railroads interchange cars, UP's service problems were not, and could not have been, confined
(continued...)

Finally, we recognize AL&M's argument, which G-P supports, that UP has raised certain rates from the levels charged by SP. Neither AL&M nor G-P, however, has shown that the rate structure that G-P negotiated with UP reflects any abuse of market power. Moreover, we should point out that SP's rate structure, which had to be at least one of the factors associated with the carrier's downward spiral, was not necessarily a model to which UP was forever bound. Indeed, in the underlying merger proceeding, there was substantial evidence that SP cut rates to attract new business, but that the strategy was unsuccessful because many shippers were unwilling to ship with a carrier in a weakened condition at unremunerative rates.[49]

PSCo/CK&PR. The conditions requested by PSCo and CK&PR have largely been mooted by UP's decision to preserve the Tennessee Pass line and its continuity as a through route. Abandonment of this line has ceased to be a UP objective, and, if abandonment should ever again become a UP objective, UP will have to seek, outside the merger context, either approval or exemption for that abandonment.[50] Particularly given the need for infrastructure in the railroad industry, which UP recognizes, we strongly encourage UP, if it ultimately determines that it does not intend to use this line, to make efforts to sell it to an entity that will use it in the transportation system. We will be vigilant as to this issue.

LACSD. The service problems complained of by LACSD appear to have been resolved, and, for this reason, further action on our part appears unnecessary.

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[48](...continued)
to the UP system itself.

[49] In Merger Dec. No. 44, at 272, we described "lower rate levels offered by SP in certain examples as indicative of the lower quality product it has been constrained to offer." We noted that "SP cannot continue to maintain its existing competitive presence in the long run because the revenues generated from its current pricing structure are not sufficient for it to maintain or replace its capital." Finally, we noted that, where SP did provide the low bid and receive a contract, "often . . . it runs out of equipment for a move, and other carriers are relied on for the balance of the business."

[50] (1) PSCo's request that we revisit, in the next annual round of the general oversight proceeding, the issue of UP service on the Moffat Tunnel route is at odds with the structure of the general oversight proceeding. This issue will be revisited only if the reports, comments, and/or replies filed in 1999 indicate that this issue remains a matter of concern. (2) We see no need to intervene in any aspect of the CK&PR/UP dispute respecting CK&PR's efforts to acquire UP lines in Colorado; these disputes, including but not limited to UP's actions vis-à-vis the $100,000 deposit, appear to be beyond our jurisdiction. We note, however, that there is no discernible logic in CK&PR's argument that UP is willing to suffer the degradation of service over its remaining Central Corridor routes if necessary to eradicate the competitive option once offered by the former DRGW/MPRR route.

GENERAL OVERSIGHT CONTINUED. The third annual round of the general oversight proceeding will be conducted in mid-1999, in accordance with the schedule indicated in the ordering paragraphs below. We anticipate that, following a review of the reports, comments, and replies filed in 1999, we will issue another decision concerning oversight issues. We reserve the right, however, to alter the filing schedule and/or to modify the reporting requirements, if and to the extent circumstances warrant.

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

It is ordered:

1. Except as otherwise indicated,[51] all requests for relief discussed in this decision, including but not limited to the requests contained in Entergy's ESI-28 petition filed October 23, 1997, AL&M's undesignated petition filed May 12, 1998, and Cemex's undesignated petition filed August 20, 1998, are denied.

2. As respects certain procedural matters discussed in this decision: (a) UP's undesignated motion filed June 2, 1998, for leave to file its UP/SP-343 reply a day late is granted, and the UP/SP-343 reply is accepted for filing and made part of the record; (b) KCS's undesignated motion filed July 16, 1998, to strike the AL&M Supplement is denied; and (c) Cemex's undesignated motion filed September 24, 1998, to strike portions of UP's reply to the Cemex petition is denied.

3. UP and BNSF shall continue to report quarterly, with comprehensive summary presentations included in their progress reports due on July 1, 1999. UP and BNSF shall make their 100% traffic tapes available by July 15, 1999.

4. Comments of interested parties concerning oversight will be due on August 16, 1999.

5. Replies will be due on September 3, 1999.

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[51] We have, as a practical matter, granted the PSCo request, and the similar (though differently worded) CK&PR request, that we continue in effect the "condition," see Merger Dec. No. 44, slip op. at 155-56, that permitted UP to discontinue service on, but not to abandon, the Tennessee Pass line. We have also, as a practical matter, granted the request, made by various parties, that we continue to maintain oversight of the UP/SP merger.

6. This decision is effective immediately.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Vernon A. Williams
Secretary

APPENDIX A: SUMMARY OF PLEADINGS

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THE UP/SP-344 REPORT. The evidence, UP argues, demonstrates that, notwithstanding the congestion problems that have afflicted UP in the past year, both the UP/SP merger and the competitive conditions we imposed in Merger Dec. No. 44 have strengthened, and are continuing to strengthen, transport competition in the West. UP contends, in particular: that the merged UP/SP system is continuing to enhance its competitiveness by providing new single-line service and shorter routings,[52] better equipment supply,[53] and reduced switch charges; and that 2-to-1 shippers are continuing to benefit both from access to the comprehensive and expanded BNSF system[54] and from the rate and service initiatives UP has had to undertake to meet BNSF competition.[55] UP further contends that, as it has always predicted, the merger has not had adverse competitive effects on 3-to-2 traffic or on Utah and Colorado coal, Gulf Coast chemicals, or grain.[56]

THE BNSF-PR-8 REPORT AND THE BNSF-7 COMMENTS. BNSF contends that, although it is working aggressively to compete and to increase its volumes to the point where it can maintain viable long-term operations, its ability to provide effective and competitive service over the UP lines to which it gained access in connection with the merger is being thwarted both by certain "structural deficiencies" in the rights it received[57] and by the "disproportionate impact, whether

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[52] UP has submitted numerous examples to demonstrate that, within the past year, new single-line service and shorter routings made possible by the merger have brought shippers lower rates and better service. See UP/SP-345, Confidential Appendix A.

[53] 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.

[54] UP has submitted numerous examples of traffic handled by BNSF pursuant to the conditions imposed in Merger Dec. No. 44. See UP/SP-345, Confidential Appendix B.

[55] UP has submitted numerous examples of rate and service initiatives it has had to undertake to retain 2-to-1 traffic. See UP/SP-345, Confidential Appendix C.

[56] The UP/SP-344 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 hiring additional employees; in pursuing merger-related capital investments; in consolidating and improving terminals and shops; in implementing directional running; and in enhancing the safety of the merged system's operations.

[57] BNSF uses the term "structural deficiencies" to express the thought that the rights it received, though sound when originally conceived, have degraded substantially as a result of unanticipated service and related problems and other post-merger events and circumstances.

intentional or not,"[58] of UP's congestion and service problems.[59] BNSF further contends: that, on numerous occasions, UP operating practices have led to UP's trains being favored over BNSF's trains; that, on far too many occasions, UP has created blockages adverse to BNSF by dispatching a UP train over a trackage rights line when the crew for that train did not have sufficient time to allow it to complete the movement; that, in a number of lanes, BNSF trains have been handled more slowly than their UP counterparts; and that, in general, UP, by lack of cooperation,[60] by discrimination,[61] by neglect,[62] and by manipulation of existing agreements,[63] has forced BNSF into an inferior competitive position that fails to provide 2-to-1 shippers the competitive options they had prior to the merger. BNSF concedes that its traffic moved via the trackage rights lines has continued to grow,[64] but insists that most of the growth has come either from overhead business, from business moving to and from 2-to-1 shortlines, or from business where BNSF has had to commence its own switching operations for 2-to-1 customers.[65]

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[58] BNSF-PR-8 at 65.

[59] BNSF suggests that, "[w]hile UP has taken the position in its discussions with BNSF that the service problems BNSF is facing are no worse than the service problems UP itself has to deal with, that is not a sufficient answer because, even if true, shippers are still not receiving the effective competitive service envisioned by the Board when it approved the UP/SP merger." BNSF-PR-8 at 3.

[60] BNSF claims that it has experienced significant difficulties in obtaining UP's commitment to resolve problems concerning BNSF shipments on the trackage rights lines.

[61] BNSF claims that, whenever there has been a shortage of crews, it has been UP's practice to crew its own trains first.

[62] BNSF claims that, in certain instances, UP has failed to notify BNSF of impending crew shortages until after they commenced, thus giving BNSF no opportunity to plan for the shortages or to work with UP to try to minimize their impact.

[63] BNSF claims that continued manipulative efforts by UP have precluded BNSF from serving customers clearly within the scope of the Board's merger conditions.

[64] See BNSF-PR-8 at 60. See also BNSF-PR-8, Attachments 7, 9, 10, 11, 12, 13, and 14.

[65] BNSF contends that, although UP's service for BNSF has proven erratic and unworkable, BNSF cannot always commence its own switching operations, both because of the duplication of scarce resources (power, crews, and infrastructure) that direct BNSF service would require, and also because many customers cannot accommodate two carriers physically switching their facilities in a 24-hour period.

As respects the Central Corridor, BNSF contends that, given the congestion along UP lines in this corridor, BNSF has been unable to be competitive with UP on a consistent basis. BNSF claims: that its service to and from shippers in Salt Lake City, using Utah Railway as its agent, has been adversely impacted by UP's practice of parking trains and blocking switching leads that are used by Utah Railway to service customers' facilities; that, as long as the Central Corridor remains congested, UP trains will continue to be backed up, consuming track facilities such as the Salt Lake lines intended for use by BNSF; that BNSF trains are also being delayed by a lack of UP crews; and that, in addition, there has been a systemic mishandling by UP of BNSF shipments in haulage service.

As respects the I-5 corridor and California, BNSF claims that there have been, and will continue to be, severe service problems in the Stockton area,[66] in the Sacramento area,[67] in the Los Angeles area,[68] and on the Tehachapi line.[69]

BNSF indicates that, although it will continue to work with UP to resolve the problems it (BNSF) faces in providing competitive service,[70] we may find it necessary to take additional steps to ensure competitive service if UP is unwilling or unable to correct its shortcomings. BNSF suggests, in this respect, that we might: require neutral switching supervision in certain geographic areas; require UP to allocate crews on a basis that would allow both UP and BNSF to provide equally competitive service; require the dispatching protocol to be formally modified to provide that, before a train is dispatched over a line, either the crew has sufficient hours of service to operate over the line or a replacement crew is in place to relieve the original crew; and require the establishment of a joint dispatching facility to dispatch certain lines (e.g., the Tehachapi line).

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[66] BNSF contends that, although BNSF and UP recently completed major track realignment and construction projects to improve the movement of trains between Stockton and Sacramento, serious problems remain, largely due to the time consuming permit process and lack of coordination between the two UP route dispatchers controlling Stockton.

[67] BNSF mentions, in particular, its long-running service problems using UP reciprocal switch and haulage services to provide competitive service to Farmers Rice at West Sacramento.

[68] BNSF contends that there is significant congestion in Southern California and in the Los Angeles Basin.

[69] BNSF claims that, on account of UP's crew shortages and UP's inconsistent, unreliable, and often discriminatory dispatching practices, the service that BNSF has received over the Tehachapi Line between Kern Junction (Bakersfield) and Mojave has deteriorated significantly.

[70] BNSF further indicates that, in an effort to resolve these problems, it is implementing certain operational changes of its own, and is also implementing a plan to provide its own crews for certain of its trains.

UP/SP-361 Reply. UP acknowledges that congestion on its lines during its service crisis has adversely affected BNSF service over UP facilities. UP contends, however: that UP service suffered even more; and that BNSF's allegations of a "lack of cooperation and neglect" and "outright discrimination and manipulation of existing agreements" are outrageous falsehoods. The truth, UP insists, is that UP has bent over backwards to provide BNSF one unilateral concession after another, far beyond anything required by the BNSF agreement or the conditions imposed by the Board, to ensure that BNSF would be quickly and fully competitive using the rights it received in connection with the merger. UP contends, among other things: that, even though all of the BNSF trackage rights agreements became effective immediately upon UP's consummation of control on September 11, 1996, UP agreed to allow BNSF to serve shippers for an initial 6-month period pursuant to a blanket interim haulage agreement (which allowed BNSF to establish competitive service far more rapidly and at a much lower cost than it could have under the terms of the BNSF agreement); that, even though the interim haulage agreement contemplated that BNSF would commence trackage rights operations after the initial 6-month haulage period expired, UP, at BNSF's request, entered into still further agreements with BNSF, granting haulage rights in numerous locations for periods of up to 5 years (which have given BNSF a cost advantage in serving 2-to-1 shippers above what the BNSF agreement contemplated); that the haulage arrangements have allowed BNSF to employ trackage rights at the precise time when it was optimal to do so from an economic standpoint (which has enabled BNSF to choose on a case-by-case basis whether and when it was more efficient for it to use UP trains, crews, and facilities, or to mount its own trackage rights operations); that UP has also demonstrated extraordinary flexibility in allowing BNSF to switch between trackage rights and haulage rights without providing the notice expressly required under the parties' agreements; that, when UP instituted directional running over its lines between Houston and Beaumont, it granted BNSF the additional trackage rights that were necessary to allow BNSF too to operate directionally over those lines; and that UP has also gone out of its way to provide BNSF with lower-cost access to New Orleans than it was required to provide under the BNSF agreement.

As respects the Central Corridor, UP concedes that it has indeed experienced congestion in this corridor, but contends: that this congestion was temporary, and resulted from steps that will improve service both for UP and for BNSF;[71] that, in any event, this congestion did not place BNSF at any competitive disadvantage; and that operations are now much more fluid throughout the Central Corridor.[72] UP further contends: that BNSF's own data show that its Central Corridor traffic has been increasing dramatically; that UP has not discriminated against BNSF in dispatching the Central Corridor; and that there is no reason to believe that joint or coordinated dispatching control of the

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[71] UP claims that vital maintenance on Central Corridor lines, the TCS cutover in the Far West, and the rebuilding of the Roseville yard were contributing factors in Central Corridor congestion.

[72] UP concedes, however, that, between Denver and Bond, CO, capacity constraints continue to affect both UP and BNSF operations.

Central Corridor would improve BNSF's ability to compete.[73] And, with regard to BNSF's complaints respecting UP crews, UP: insists that, aside from a single occasion in early June,[74] it has consistently provided BNSF with crews in accordance with standard priorities (i.e., high-priority intermodal trains have been crewed ahead of manifest trains); and suggests that, in any event, the matter will soon be moot, in view of BNSF's intention to use its own crews for its Central Corridor operations effective January 1, 1999.[75]

As respects the I-5 corridor and California, UP insists that it has implemented, and will continue to implement, effective methods to resolve problems in the Stockton area,[76] in the Sacramento area,[77] in the Los Angeles area,[78] and on the Tehachapi line.[79]

And, UP adds, if it were inclined to bombard the Board with complaints about BNSF actions that have adversely affected UP service, it could. UP notes, in general, that every railroad using a joint

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[73] UP adds that it would be willing to discuss joint or coordinated dispatching arrangements with BNSF, but would expect BNSF to be equally receptive to coordinated dispatching of BNSF lines used by UP, such as Portland-Tacoma, Chicago-Kansas City, Daggett-Riverside CA, and the Powder River Basin Joint Line.

[74] See UP/SP-361 at 22 n.7.

[75] See UP/SP-361, Exhibit 1.

[76] UP concedes that there have been problems in the Stockton area, but insists that the track realignment project referenced by BNSF has not yet been completed.

[77] UP concedes that there have been haulage problems in Sacramento, which is served via an interchange in Stockton. UP claims, however, that new interchange arrangements agreed to by UP and BNSF appear to be working.

[78] UP concedes that there has been congestion in the Los Angeles area, but insists that this congestion, which was caused by transitory problems principally related to UP's TCS cutover, has been substantially resolved.

[79] UP concedes that the Tehachapi line has been congested, but claims that this congestion was related to essential maintenance and important improvements that have taken place on the line. And, UP adds, a joint dispatching facility will not solve the Tehachapi line's remaining problems. UP insists that the problems that BNSF is facing as UP's tenant on the Tehachapi line are just like those UP is facing as BNSF's tenant on Cajon Pass -- the volume of traffic moving over both lines is too great for the railroads to expect to move their trains without occasional delays. Both railroads, UP suggests, need to look at capacity issues, and, if they decide that improvements are necessary, each railroad must pay its fair share.

facility regularly has issues to raise with its joint-facility partners, and UP notes, in particular, that, in its capacity as a tenant on various BNSF lines, it has its own ongoing menu of grievances with BNSF actions that have affected UP's ability to compete. See UP/SP-361 at 62-76 (itemization of some, though not all, such grievances). UP stresses, however, that it is not asking the Board to address such grievances,[80] and, in particular, that it is not asking the Board to reopen the BN/SF merger proceeding,[81] even though (so UP claims) many of UP's grievances have more nexus to the BN/SF merger than the complaints BNSF has raised have to the UP/SP merger.

THE AFPA-2 COMMENTS. AF&PA, the national trade association of the forest products and paper industry, asserts that the UP/SP merger has adversely impacted rail competition and rail service to shippers. AF&PA suggests that, within the context of this proceeding, we should seek to maximize routing options by increasing the opportunities for shortline rail carriers to participate in UP's rail traffic. AF&PA claims that shortlines: can provide reliable and efficient service on lower density rail lines that have been "spun off" by the larger Class I carriers; and, by connecting smaller and often more rural communities to the interstate network of the Class I carriers, can provide a vital service. AF&PA further claims, however, that "paper barriers" instituted in line sales agreements and in the pricing policies of the Class I carriers can severely restrict a shortline's ability to provide competitive, efficient, and profitable service. Paper barriers, AF&PA argues, can limit, either directly or indirectly,[82] a shortline's ability to interchange traffic with other rail carriers, even where such routings and connections may be efficient.

AF&PA therefore contends: that we should evaluate the degree to which "paper barriers" restrict the competitive service opportunities of the shortlines that connect to the UP system; and that, if such restrictions are found to be substantial, we should undertake to eliminate such restrictions, in whole or in part, in order to improve the quality of rail service provided to shippers and to enhance the competitive alternatives available to shippers. AF&PA argues that such action would serve the public interest by providing increased competitive options to shippers, by alleviating some of the burdens on the UP system, and by making available improved economic opportunities to the shortlines.

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[80] UP indicates that it believes that the concerns of railroads using joint facilities should be addressed, and almost always can be addressed, through negotiation and private dispute-resolution mechanisms, not through governmental intervention.

[81] See Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 38 (ICC served Aug. 23, 1995).

[82] The indirect limits referenced by AF&PA include the imposition of substantial financial penalties.

DOT-3 Reply. DOT agrees that elimination of "paper barriers" would improve service and competition for shippers served by shortlines now subject to such barriers. DOT notes, however, that, because problems connected with "paper barriers" are not the result of the UP/SP merger, the relationship of the AF&PA proposal to the instant proceeding is unclear. DOT therefore suggests that it would be better to consider in the Ex Parte No. 575 proceeding the "competitive access" concerns raised by AF&PA in this proceeding.[83]

UP/SP-361 Reply. UP contends that the merger has generated a particularly wide array of benefits for forest products and paper shippers, which (UP claims): have benefitted from access to the merged system's greatly expanded fleets of centerbeam flatcars,[84] bulkhead flatcars,[85] and boxcars;[86] have benefitted from the merged system's ability to use the combined UP/SP fleet more efficiently; have benefitted from the merged system's complete redesign and simplification of SP's lumber tariffs; have benefitted from reductions in the rates applicable to forest products; and have benefitted from the shorter routes and single-line routing options made possible by the merger. UP further contends, with respect to the shortline issues raised by AF&PA: that these issues have no connection to the UP/SP merger, which neither rendered any shortline "captive" nor created any "paper barrier"; that, in any event, these issues have been addressed in a recent AAR/ASLRRA agreement;[87] and that, furthermore, UP is in the process of instituting new, competitive through rates that will allow exclusively served shortlines to ship products to BNSF local points.[88]

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[83] See Review of Rail Access and Competition Issues, STB Ex Parte No. 575 (STB served Apr. 17, 1998).

[84] UP indicates that its centerbeam fleet will grow from 3,221 cars pre-merger to 4,396 cars in the first quarter of 1999.

[85] UP indicates that, since the merger, it has acquired 800 additional bulkhead flatcars for lumber traffic, and has plans to acquire another 125 such cars, which will bring its fleet of bulkheads to almost 4,000.

[86] UP indicates that, since the merger, it has purchased or repaired 763 50-foot boxcars and 308 60-foot boxcars, which has brought UP's fleet of boxcars used in the lumber and paper business to almost 19,000 cars.

[87] See Association of American Railroads and American Short Line and Regional Railroad Association--Agreement--Application Under 49 U.S.C. 10706, STB Docket No. S5R 100 (STB served Sept. 22, 1998 and published in the Federal Register on Sept. 25, 1998, at 63 FR 51398; STB served Dec. 18, 1998) (decisions approving the rate-related provisions of the AAR/ASLRRA agreement).

[88] UP indicates that it has already put such rates in place for one Pacific Northwest shortline and is in the process of negotiating similar through rates with respect to three other Pacific Northwest

(continued...)

THE PSC-9 COMMENTS. PSCo[89] contends that UP's service in transporting PSCo and SPS coal trains over the Moffat Tunnel line has deteriorated markedly during the period of approximately 1 year since UP discontinued operations on the Tennessee Pass line and shifted to the Moffat Tunnel line the traffic (especially the eastbound coal traffic) that formerly used the Tennessee Pass line. PSCo contends that, following the discontinuance of operations on the Tennessee Pass line, the Moffat Tunnel line has experienced increased traffic,[90] congestion, and delays, and associated service problems as well (round-trip cycle times, PSCo claims, have increased substantially over the past year and a half). And, PSCo fears, UP, although it has not been authorized to abandon the Tennessee Pass line, may be taking actions that will effectively disrupt the continuity both of the Tennessee Pass line[91] and of the former UP line extending east from Pueblo, CO, that was used by SP to transport Colorado coal to Midwestern destinations.[92]

PSCo, which is concerned that the congestion problems UP is already experiencing on the Moffat Tunnel line may become worse in the future,[93] asks that we: (1) preserve the Tennessee Pass line

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[88](...continued)
shortlines.

[89] PSCo's comments were filed on its own behalf, and also on behalf of a PSCo affiliate, Southwestern Public Service Company (SPS).

[90] The increased traffic consists of UP trains routed off of the Tennessee Pass line (this portion of the increase is attributable to the Tennessee Pass discontinuance) and BNSF trains operating over the Moffat Tunnel line pursuant to BNSF's Central Corridor trackage rights (this portion of the increase is not attributable to the Tennessee Pass discontinuance).

[91] PSCo has in mind the acquisition by Royal Gorge Express, LLC, of an 11.75-mile segment of the Tennessee Pass line (between Parkdale and Cañon City), which will be leased to and operated by Rock & Rail, Inc., subject to a permanent, irrevocable overhead trackage rights easement retained by UP. See Royal Gorge Express, LLC--Acquisition and Operation Exemption--Union Pacific Railroad Company, STB Finance Docket No. 33622 (STB served July 15, 1998); Rock & Rail, Inc.--Lease and Operation Exemption--Royal Gorge Express, LLC, STB Finance Docket No. 33608 (STB served July 15, 1998).

[92] PSCo claims that efforts by a shortline operator (the reference is apparently to CK&PR) to purchase the abandoned segment of this line between NA Junction, CO, and Towner, CO, have been unsuccessful, although (PSCo adds) the State of Colorado remains interested in acquiring this segment so that rail operations thereon can be resumed.

[93] PSCo contends, in essence, that the very existence of the Moffat Tunnel imposes a capacity limitation on the Moffat Tunnel line. PSCo indicates, in this regard, that it has been advised that, due to (continued...)

as a potential alternative through route for traffic moving between points west of Dotsero, CO, on the one hand, and, on the other hand, Pueblo, CO, by continuing in effect the condition permitting UP to discontinue service on, but not to abandon, the Tennessee Pass line;[94] (2) order UP to continue to preserve the integrity and continuity of the Tennessee Pass line as a potential through route;[95] and (3) revisit, in the next annual round of the general oversight proceeding, the level of service UP is providing on the Moffat Tunnel line.

UP/SP-361 Reply. UP indicates that, because traffic growth is indeed pressing capacity on the Moffat Tunnel route,[96] it has reconsidered its plans to abandon the Tennessee Pass route, and has determined that service on the Tennessee Pass route will be resumed if necessary to alleviate congestion on the Moffat Tunnel route.[97] UP adds that the conditions requested by PSCo are not needed, given UP's own decision to preserve the Tennessee Pass route and its continuity as a through route.

THE CK&PR COMMENTS. CK&PR was established for the purpose of acquiring and operating the Tennessee Pass line and the NA Junction-Towner line,[98] but, to date, it has neither acquired nor operated either line. CK&PR contends: that it made a good faith effort to acquire the NA Junction-Towner line; that UP, however, did not make any particular effort to help CK&PR acquire that line; that, in fact, UP, after giving CK&PR little time to assemble certain complicated financing arrangements, kept CK&PR's good faith nonrefundable $100,000 deposit; but that CK&PR has not yet

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[93](...continued)
the need to vent locomotive exhaust fumes, at least 20 minutes must elapse after one train exits the tunnel before another train is allowed to enter the tunnel.

[94] See Merger Dec. No. 44, slip op. at 155-56.

[95] PSCo insists that UP should not be permitted to sell portions of the Tennessee Pass line in a manner that would impair UP's ability to resume through train operations between Dotsero and Pueblo via the Tennessee Pass.

[96] UP indicates that traffic has grown on the Moffat Tunnel route: because UP has successfully promoted expansion of Utah and Colorado coal traffic; and because BNSF has greatly expanded its own Central Corridor trackage rights operations. UP adds that, to reduce traffic on the Moffat Tunnel route, it has rerouted some coal trains to its Wyoming mainline.

[97] UP notes that, on August 21, 1998, it advised the Board that it was removing the Tennessee Pass line from Category 1 on UP's system diagram map.

[98] CK&PR apparently would like to acquire the UP lines between Dotsero, CO, and Towner, CO (i.e., the Tennessee Pass line and the NA Junction-Towner line, plus the Dotsero-Sage segment that lies west of the Tennessee Pass line and the Cañon City-NA Junction segment that lies between the Tennessee Pass line and the NA Junction-Towner line).

given up on its efforts to acquire the NA Junction-Towner line. CK&PR adds: that, in July 1998, the State of Colorado exercised its state-law right of first refusal to purchase the NA Junction-Towner line;[99] that the State has indicated that it will request shortline operator bids once it takes possession of the line; and that, despite opposition from UP, CK&PR intends to submit a bid in response to that request.[100] CK&PR further contends that, with respect to the Tennessee Pass line, UP has exercised a "divide and conquer" strategy by selling an 11.75-mile segment of the line to a newly established passenger excursion operator (Royal Gorge Express) and its shortline freight affiliate (Rock & Rail, Inc).

CK&PR argues, in essence, that our focus on the narrow issue of the amount of local traffic moving over the NA Junction-Towner line led us to overlook the vital role this line has played as respects Central Corridor competitive options. CK&PR claims, in fact, that eradication of the former DRGW/MPRR Central Corridor routes and the competitive options they once offered is a top UP corporate priority that UP is determined to pursue even if it results in continued degradation of service over UP's other Central Corridor routes.

CK&PR therefore asks that we scrutinize carefully UP's assertions regarding the Tennessee Pass line and competition in the Central Corridor. CK&PR asks, in particular: that we continue the condition barring UP from abandoning the Tennessee Pass line; and that we order UP to preserve the integrity and continuity of the Tennessee Pass line as a through route between Dotsero and Pueblo, until such time as it might sell the line in one piece to another rail carrier for continued service. CK&PR also urges that we ask UP whether it required Royal Gorge Express to pay fair value for the Parkdale-Cañon City segment or whether it sold that segment for a nominal consideration.[101]

UP/SP-361 Reply. UP claims: that CK&PR is a gathering of rail aficionados with dreams of operating excursion passenger trains throughout Colorado; that the State of Colorado, not UP, rejected as

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[99] CK&PR's comments suggest that, under Colorado law, before a railroad may physically dismantle an abandoned line, the railroad must give the State a right of first refusal to purchase the line. See also UP/SP-316, V.S. Opal at 11 (UP indicates that a new Colorado law requires a railroad to delay salvage of an abandoned line to give an opportunity for government entities to acquire the line in whole or in part; UP further indicates that it has "voluntarily" complied with this law, although UP believes that this law is preempted by federal law).

[100] CK&PR claims that UP has told the State: that it does not want the State to select CK&PR or any CK&PR affiliate as an operator; and that it wants to forbid the State from reselling the line to CK&PR or any CK&PR affiliate. CK&PR further claims that UP has also attempted to persuade one of CK&PR's shipper backers to refrain from supporting CK&PR in any future purchase or operating bids for the line.

[101] CK&PR claims that UP insisted that CK&PR pay fair value for the NA Junction-Towner line.

not viable CK&PR's bid to purchase the Tennessee Pass and NA Junction-Towner lines; that, following that rejection, UP, acting at the request of Colorado officials, attempted to work separately with CK&PR on a purchase of the NA Junction-Towner line; that this attempt failed, however, when it became clear that CK&PR had no financing to buy this line, and had misrepresented its financial resources both to UP and to Governor Romer;[102] that, in July 1998, UP sold the NA Junction-Towner line to the State of Colorado; and that, in any event, the conditions requested by CK&PR are not needed, given UP's own decision to preserve the Tennessee Pass route and its continuity as a through route. UP adds that the price of the Parkdale-Cañon City segment paid by Royal Gorge Express was based on net liquidation value, the same method of valuation used in connection with the NA Junction-Towner line.[103]

THE CEMEX COMMENTS AND PETITION. Cemex, a cement and aggregates shipper with facilities in Dittlinger, TX (near New Braunfels, TX) is served by UP's Austin Subdivision, a heavily used mainline that carries most of UP's traffic to and from Mexico. Cemex insists, and UP has conceded, that Cemex has been adversely impacted by UP's service problems.

Prior Decision. In our decision served July 31, 1998,[104] we acknowledged Cemex's problems but nevertheless denied Cemex's request that we use our emergency authority to grant BNSF, which had overhead trackage rights over the Austin Subdivision that it was not then using, the right to provide local services in order to interchange with the Cemex-owned Western Rail Road (WRR, which operates inside Cemex's Dittlinger facility). We noted: that we were not inclined to impose, under 49 U.S.C. 11123, remedies that might significantly impede UP's own service recovery plan, or create service problems for shippers elsewhere, or favor one shipper over another; that we were not convinced that BNSF could provide additional service to make up any current UP service shortfall without jeopardizing other operations over the line;[105] that, furthermore, although it was possible that BNSF had sufficient excess

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[102] UP disputes most of CK&PR's factual allegations regarding the CK&PR-UP relationship. See UP/SP-361, V.S. Opal.

[103] See UP/SP-361, V.S. Opal at 4 n 2 (UP indicates that the actual price paid by Royal Gorge Express for the Parkdale-Cañon City segment is confidential).

[104] Rail Service In The Western United States, STB Ex Parte No. 573 (STB served July 31, 1998).

[105] We noted that, beyond originating cement and aggregates shipments and transporting local traffic, the Austin Subdivision is also used to carry most of UP's through traffic to and from Mexico, and must be cleared several times each week to accommodate Amtrak passenger trains. We also noted: that, at the relevant points, the Austin Subdivision's single mainline track is used for a large portion of each day to switch traffic for adjacent shippers; that Cemex itself must be reached by a time-consuming and operation-delaying manual switch; and that Cemex apparently lacked enough track space to store the number of empty cars needed to sustain even its then present level of service.

capacity to serve Cemex, there was no indication that BNSF had sufficient capacity to serve the other nearby UP-served facilities that compete with Cemex; and that, in any event, although Cemex was still not receiving fully adequate service, UP's service for Cemex had already improved markedly and was likely to improve even further in the future.[106]

Cemex's Comments. In its comments filed in STB Finance Docket No. 32760 (Sub-No. 21), Cemex, which claims that the UP service improvements that have occurred have proven to be inadequate and unsustainable, asks that we impose a condition granting BNSF local service rights to all cement, stone, and sand bulk facilities in Texas[107] located along the UP lines over which BNSF received, in connection with the UP/SP merger, overhead trackage rights. Cemex contends that the requested condition: is necessary to address UP's continuing systemic inadequacies in providing reliable service to cement, stone, and sand producers in Texas;[108] is essential for the continuation of competition in bulk shipments in Texas; will ensure that BNSF can achieve sufficient traffic density to sustain the use of its trackage rights; and will result in minimal, if any, harm to UP, because UP is currently unable to provide adequate service to these shippers. Cemex further contends that the requested condition: is intended to mitigate the adverse impacts of the UP/SP merger;[109] is designed to enable shippers to receive adequate

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[106] We noted, in this respect: that UP was rehabilitating a parallel 16.7-mile line segment near New Braunfels that had previously been abandoned; and that the reactivation of this segment, which UP anticipated would occur in October, would eliminate the Austin Subdivision's only single-track segment between San Antonio and San Marcos. See also Union Pacific Railroad Company--Petition For Declaratory Order--Former Missouri-Kansas-Texas Railroad Line Between Jude and Ogden Junction, TX, STB Finance Docket No. 33611 (STB served June 5, 1998; published that day in the Federal Register at 63 FR 30810) (requesting comments on UP's petition for an order declaring that the Board lacks authority under 49 U.S.C. 10901 over the rehabilitation and reactivation, by UP, of the 16.7-mile segment).

[107] Cemex states that the problems it is experiencing are also being experienced by other similarly situated shippers.

[108] Cemex claims that UP cycle times remain excessively high and highly variable, resulting in extreme "bunching" of empties, insufficient train starts, and substantial departure delays, all of which cause congestion and severely tax Cemex's resources and facilities. Cemex concedes that, as respects Cemex's traffic, UP cycle times have improved as compared to early 1998, but Cemex insists that much of this improvement has come from actions taken by Cemex to restrict its shipments to unit trains to destinations capable of receiving from 40 to 90 rail cars at a time. And these actions, Cemex adds, have forced Cemex to stop serving many of its customers.

[109] Cemex insists that the service problems it is experiencing are predominantly the result of the UP/SP merger. The satisfactory service that UP provided pre-merger, Cemex claims, began deteriorating almost immediately after the merger was approved by the Board.

service;[110] would not create unreasonable operating or other problems for UP;[111] and would not frustrate UP's ability to obtain the anticipated public benefits of the UP/SP merger.[112]

Cemex's Petition. In its petition filed in STB Ex Parte No. 573 and STB Service Order No. 1518, Cemex contends that we erred in denying, in our decision served July 31, 1998, Cemex's request for an emergency service order. Cemex contends, in particular: that we erred in stating that Cemex had acknowledged that UP was adequately transporting all of the cement loads that Cemex was offering;[113] that we erred in stating that, in May 1998, UP transported more than 80% of its originally stated goal of 1,656 carloads per month;[114] that we were not entirely accurate in our assessment that the cycle time for returning empty cars for reloading has substantially improved;[115] that we erred in relying on UP's attempt to provide additional rail capacity by rehabilitating the previously abandoned 16.7-mile line segment near New Braunfels;[116] that we erred in emphasizing that Cemex must be reached by a

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[110] Cemex insists that granting BNSF local service rights to all cement, stone, and sand bulk facilities in Texas located along the trackage rights lines will create a level playing field for all shippers by allowing all shippers to meet current market demands. The sought relief is especially appropriate, Cemex claims: because UP gives, and will continue to give, a low priority to stone and cement trains; because UP does not now have, and will not in the future have, the ability to service the needs of cement and stone shippers; and because certain competitors that are now served either by BNSF alone or by both BNSF and UP have experienced a significantly less adverse impact than shippers like Cemex that are served exclusively by UP.

[111] Cemex notes that BNSF already has overhead trackage rights over the relevant lines.

[112] Cemex argues that the sought relief would enable BNSF to take rail volume off of UP's lines, which would effectively reduce UP's congestion problems.

[113] Cemex claims that UP's performance in transporting Cemex's cement has been unpredictable and unsustainable.

[114] Cemex claims that, in May 1998, UP achieved only 74% of its commitment.

[115] Cemex claims that, although cycle times have improved, there has not been a commensurate increase in train starts per month. Cemex further claims: that cycle times remain excessively high and highly variable; and that, in any event, much of the improvement in cycle times has come from actions taken by Cemex to restrict its shipments to unit trains to destinations capable of receiving from 40 to 90 rail cars at a time.

[116] Cemex claims that UP has advised shippers that reactivation of that segment will be delayed to some unknown future date, possibly in mid-October. The line, in fact, has been opened.

"time-consuming and operation-delaying" manual switch;[117] that we erred in stating that Cemex appears to lack enough track space to store the number of empty cars needed to sustain its present level of service, let alone that necessary for the additional carloadings it seeks;[118] that we erred in concluding that "there is too small a margin for error -- and too great a risk of harm -- to require" the emergency service relief sought by Cemex;[119] and that we erred in stating that BNSF access for Cemex would likely produce for Cemex an immediate competitive advantage over similarly situated shippers nearby.[120] Cemex asks that we grant its petition for reconsideration, that we grant emergency service relief, and that we authorize BNSF to provide local service rights to Cemex's Dittlinger facility.

UP's Reply To Cemex's Petition. In its reply to Cemex's petition, UP contends: that there is no longer an emergency situation in the Houston/Gulf Coast area;[121] that, therefore, there is no basis for the emergency service relief sought by Cemex; that UP is working at addressing Cemex's operational concerns; that UP's service to Cemex continues to improve; and that, in any event, the particular relief sought by Cemex could not possibly accomplish Cemex's goal of increasing the total volume of rock transported over the Austin Subdivision.[122] UP further contends: that the information submitted by UP, upon which we relied in our decision denying Cemex's request for an emergency service order, was accurate; and that our decision adequately explained our reasons for denying Cemex's request.

UP/SP-361 Reply. In its reply to Cemex's comments, UP insists that Cemex has presented neither a plausible allegation of any defect in competition on the Austin Subdivision nor any other basis for what would amount to a permanent "open access" condition on that Subdivision. UP contends: that Cemex was exclusively-served both before and after the UP/SP merger; that Cemex's complaints derive from UP's inability to carry all the rock that Cemex wanted to ship in a "sizzling" construction market;

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[117] Cemex claims that the manual switch at its interchange tracks is precisely the same type of manual switch that is used at all other cement and aggregate shippers on the Austin Subdivision.

[118] Cemex claims that this statement is simply untrue.

[119] Cemex insists that BNSF local service operations at Dittlinger would not pose unreasonable operating or other problems.

[120] Cemex insists that it seeks only a level playing field, and contends that it has been unable to compete with other aggregate producers that are not limited by UP's lack of reliable service. And, Cemex adds, it is not requesting that UP favor Cemex by taking cars away from other shippers; rather, it is requesting only that BNSF be granted local service rights in order to augment UP service.

[121] <u>See</u> <u>Joint Petition For A Further Service Order</u>, STB Service Order No. 1518 (Sub-No. 1) (STB served July 31, 1998).

[122] UP insists that it is utilizing the Austin Subdivision as effectively as possible, and is operating as many trains over that line as its capacity allows.

that this was a problem of rail capacity, not a problem of inadequate competition; that UP is attempting to expand capacity by rehabilitating the previously abandoned segment near New Braunfels;[123] that, over the past several months, the service UP has provided to Cemex has gotten progressively better, thanks (at least in part) to UP-initiated productivity enhancements, such as using longer trains to transport Cemex's products and working with receivers to unload cars more quickly;[124] and that UP could transport even more shipments for Cemex if Cemex would build additional trackage at its facility, which would allow Cemex's WRR subsidiary to tender 90-car trains to UP without forcing UP to build trains on the Austin Subdivision mainline from Cemex's short tracks. UP further contends: that, even if BNSF were authorized to serve Cemex, track capacity in the relevant area is such that BNSF and UP combined could not move more trains than UP can move alone; and that, as a practical matter, the addition of BNSF would result in UP-BNSF coordination problems that would actually reduce the effective transportation capacity of the local track network.

THE LACSD COMMENTS. The County Sanitation Districts of Los Angeles County claim that UP has been unable to consistently supply their wastewater treatment facilities with chlorine, a key component in disinfecting wastewater. The County Sanitation Districts, noting that the lack of a dependable chlorine supply could threaten their ability to provide adequate wastewater treatment for their customers, urge us to take all appropriate actions to restore normal rail service in order to protect the public health of citizens in the Los Angeles area.

UP/SP-361 Reply. UP concedes that chlorine shipments in July and August suffered delays, and that one car in particular was badly mishandled, on account of congestion-spawned shortages of locomotives and crews throughout Southern California.[125] UP contends, however, that its congestion problems in the Southern California area have been resolved, and that UP service in this area is now much more reliable.

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[123] See Union Pacific Railroad Company -- Petition For Declaratory Order -- Rehabilitation Of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, STB Finance Docket No. 33611 (STB served Aug. 21, 1998) (holding that the Board does not have 49 U.S.C. 10901 jurisdiction over the rehabilitation and reactivation, by UP, of the previously abandoned segment).

[124] UP contends, in particular: that, in August 1998, UP transported 1,773 cars of rock for Cemex (this, UP notes, is the largest number of rock cars it has moved for Cemex during the 3½ years for which UP has records); that UP's cycle times for rock cars have been plummeting; that, due to a recent weather-related slowdown in Houston construction, Cemex is no longer able to fill the rock trains UP is prepared to operate; and that UP is also carrying all the cement Cemex can tender.

[125] UP indicates that the LACSD chlorine shipments, which move from a supplier in Henderson, NV (southeast of Las Vegas), to points in Southern California, are routed via UP to Barstow, CA, and via BNSF beyond Barstow to destination.

THE DOT-3 REPLY. DOT has addressed both safety issues and competitive issues.

Safety Issues. DOT advises that UP safety issues have been studied intensively by the Federal Railroad Administration (FRA). DOT indicates: that FRA completed a comprehensive safety review of UP's operations, through a Safety Assurance and Compliance Program (SACP); that FRA's Final Safety Assurance and Compliance Report on UP, which was issued in February 1998, concluded that UP was making progress in remedying its safety deficiencies, but that continued effort and commitment would be needed to remedy UP's underlying problems; that, to address these problems, FRA conducted, in February 1998, a Senior Management Meeting, with representatives from UP management, UP labor, and FRA; that UP management has developed, in coordination with UP labor and FRA, a Safety Action Plan that details both long-term and interim measures to address UP's safety problems; that FRA has been working closely with UP to implement the Safety Action Plan; that, to assure continued progress, FRA has developed a detailed monitoring program; and that, as a result of all these efforts, significant results have already been achieved.[126] DOT adds: that continued effort is needed to ensure that safety continues to receive the highest priority; and that, in pursuit of this goal, FRA will continue regular inspection activities, and will work with UP management and UP labor to develop additional initiatives to address any new safety concerns.

Competitive Issues. DOT indicates that it continues to have reservations about BNSF's ability to provide competition via trackage rights for 2-to-1 shippers. See Merger Dec. No. 44, slip op. at 90 (DOT argued that the trackage rights provided for in the BNSF agreement would not allow BNSF to conduct independent operations on an equal footing). DOT insists, in this regard: that BNSF's trackage rights service has been adversely affected by UP's service problems; that the effect on BNSF of any UP service problems would have been much less significant if BNSF had operated on its own tracks rather than as a "tenant" on UP's tracks; and that shippers likely would not have suffered to the same degree if they had had access to alternative "landlord" carriers.[127] DOT adds, however, that UP's service problems have made a fair assessment of the competitive impacts of the merger impossible; a period of "normal" operations is necessary, DOT suggests, to determine the true impact of the merger. DOT therefore contends: that continued oversight will be necessary until such time as a more accurate assessment of the effectiveness of UP vs. BNSF competition is possible; and that, until that time, the reporting requirements currently in effect will have to be continued. We note that reporting requirements are, in fact, being continued.

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[126] DOT indicates that, since August 1997, there has been: a 19% reduction in reportable employee injuries; a 21% reduction in lost work days by employees; a 20% reduction in grade crossing accidents; and a 9% reduction in grade crossing injuries.

[127] DOT indicates, however, that it has not concluded that UP has consistently discriminated against BNSF trains.

UP/SP-361 Reply. UP insists that its service problems have not made a fair assessment of the competitive impacts of the merger impossible. The fact of the matter, UP claims, is that the evidence demonstrates: that the conditions imposed in Merger Dec. No. 44 have been highly effective;[128] that the UP/SP merger has not caused any reduction in competition; and that, all things considered, the UP/SP merger has been entirely procompetitive.[129]

THE CIC-2 AND A&NR-2 COMMENTS. CIC, which produces paper, plywood, lumber, and forest products, has or formerly had four East Texas plants (at Corrigan, Sheldon, Camden, and Lufkin) that rely, either directly or via a shortline connection, on UP's (formerly SP's) Lufkin Subdivision (between Houston, TX, and Shreveport, LA). See Merger Dec. No. 44, slip op. at 76 and 193.[130] CIC claims that the UP/SP merger and the conditions we imposed in connection therewith have had a negative impact on CIC, its MC&SA subsidiary, and its A&NR affiliate. CIC contends: that both UP and BNSF are funneling southbound trains to Houston over the Houston-Fair Oaks line; that this directional running has impacted the local operation which serves CIC, MC&SA, and A&NR; that, on account of this directional running, there has been a severe reduction in the frequency of car pickups and set outs by UP and there have been increased transit times for movements via UP; and that CIC has incurred substantially increased costs related to shipping products by truck or other modes in order to meet the delivery schedules of its customers.

A&NR, a shortline which interchanges with UP at Lufkin, handles an average of 5,000 rail cars a year for the several customers located on its lines. A&NR indicates that it has been negatively impacted by UP's service problems: it has experienced severe reductions in the frequency and reliability

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[128] UP insists that BNSF's trackage rights traffic volumes (and Tex Mex's trackage rights traffic volumes as well) have reached a level that supports fully competitive train services.

[129] UP cites the following procompetitive impacts: sharply lower reciprocal switch fees throughout the West; the creation of two entirely new single-line routes in the I-5 Corridor; the creation of a cornucopia of equipment utilization benefits; and the injection of new competition for "1-to-2" shippers in Louisiana (see UP/SP-344 at 94).

[130] The Corrigan plant is served directly by UP. The Sheldon plant, which is no longer owned by CIC, is served directly by UP, and (CIC indicates) may also be served in the future by BNSF, as a result of a UP-BNSF agreement, announced in February 1998, respecting ownership of certain Houston-New Orleans lines. See UP/SP-344 at 60-61; see also The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company--Acquisition Exemption--Lines Between Dawes, TX, and Avondale, LA, STB Finance Docket No. 33630 (STB served Sept. 29, 1998). The Camden plant is served by CIC's MC&SA subsidiary, which has only one customer (the Camden plant) and which interchanges with UP at Moscow. The Lufkin (Herty) plant, which is no longer owned by CIC, is served by A&NR, a 50%-owned CIC affiliate which has several customers and which interchanges with UP at Lufkin.

of local service; it has experienced a complete breakdown in communication with UP operating managers; it has experienced increased transit times for movements via UP; and it has experienced a 40% decline in rail traffic through the third quarter of 1998 as compared to the same period in 1997. A&NR claims: that directional running has added traffic and congestion over the mainline at the expense of local service to shortlines and their customers; and that the BNSF trackage rights have contributed to the additional congestion.

CIC and A&NR have offered several suggestions with respect to the problems they have identified. (1) CIC and A&NR support what they call "open interchange," i.e., the removal of service restrictions to shortlines by carriers granted overhead trackage rights. CIC and A&NR, which indicate that they support AF&PA's proposals respecting shortline routing options and paper barriers, suggest that the issue of "open interchange" should be addressed in a proceeding applicable to all railroads. (2) CIC and A&NR suggest that we should provide for specific daily local service to shortlines that interchange traffic with UP and/or BNSF on mainlines running into and out of Houston. Local crews, CIC contends, should get priority to travel over or across mainlines to switch local industries and to collect or deliver shipments and/or equipment to shortlines. (3) CIC and A&NR urge us to maintain continued and vigilant oversight of the UP/SP merger.

A&NR has also suggested that the new facilities condition we imposed in Merger Dec. No. 44[131] has created an unintentional disadvantage for shortlines. Shortlines have little prospect of developing a larger shipper base on their existing lines, A&NR contends, when a shipper will enjoy access both to UP and to BNSF by locating a new facility on the UP mainline. A&NR, which suggests that shortlines should receive the same treatment as shippers in that BNSF (or any other railroad given trackage rights) should have access to shortlines that interchange with UP, urges us to seek comments from other shortlines concerning their ability to attract new customers since the imposition of the new facilities condition.

UP/SP-361 Reply. UP concedes that local service on the Lufkin Subdivision has not been entirely satisfactory.[132] UP contends, however, that it has taken a number of steps to improve local service on this line: it has doubled the frequency of local service between Shreveport and Lufkin provided by trains LEF60 and LEF61; it has relocated dispatching of the Lufkin Subdivision from Omaha, NE, to the Spring Dispatching Center in Spring, TX; it plans to assign locomotives to locals LEF52 and LEF53 between Houston and Lufkin so that they will not have to compete for power with other operations; and it has taken action to ensure that the trains are ready to go at Englewood Yard

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[131] See Merger Dec. No. 44, slip op. at 145-46.

[132] UP adds that, because much of the outbound traffic generated by CIC, MC&SA, and A&NR is destined to California, CIC, MC&SA, and A&NR were also impacted by the congestion, in July and August, in UP's California operations.

when the local crew comes on duty, thus eliminating situations where the crew consumes part of its service time waiting for its train to be prepared.

With respect to the second suggestion advanced by CIC and A&NR (the suggestion that we should provide for specific daily local service to shortlines that interchange with UP and/or BNSF on mainlines running into and out of Houston, and that local crews should get priority to travel over or across mainlines to switch local industries and to collect or deliver shipments and/or equipment to shortlines), UP contends that CIC and A&NR have submitted no evidence: that such daily local service was guaranteed before the merger; that local crews had any such priority before the merger; or that any competitive impact of the merger, as opposed to specific local-train service issues on one line, has caused any reduction in UP's service to shortlines. And, UP further contends: a condition requiring daily local train service to every shortline in east Texas, or anywhere else, might require UP to provide uneconomic service; and a condition requiring priority for local crews would involve a government override of sensible day-to-day operating decisions in order to favor a particular group over others.

With respect to A&NR's suggestion concerning the new facilities condition, UP contends: that, even if A&NR's contention as to relative disadvantage were true, this would be a circumstance that existed prior to the merger (because, at that time, shippers could elect to locate new facilities at points served by both UP and SP, while an exclusively-served shortline could not offer a site open to rail competition); but that, as a practical matter, there is every reason to conclude that A&NR's contention as to relative disadvantage is not true (because recent history has demonstrated that solely-served shortlines clearly can compete for new industries). And, UP adds, BNSF is already handling ample traffic volumes, and does not need more industry access to ensure its competitiveness.

THE ESI-28 PETITION. Entergy's interests are focused on its White Bluff Steam Electric Station (White Bluff), which is located near Redfield, AR, and which uses coal originated at Powder River Basin (PRB) mines served by both UP and BNSF. Prior to the UP/SP merger, White Bluff, which lies on UP's line between North Little Rock and Pine Bluff, was rail-served exclusively by UP, which transported coal to White Bluff via a single-line routing from the PRB. Entergy insisted, however, that, in the context of the UP/SP merger, White Bluff had to be regarded as a 2-to-1 point, because a build-out to an SP line, located about 21 miles away at Pine Bluff, would enable White Bluff to enjoy a BNSF-SP joint-line routing from the PRB. Entergy therefore argued that the pre-merger status quo at White Bluff could be preserved only by granting trackage rights to BNSF (or another independent carrier) over SP's line between Pine Bluff (the point of connection with a White Bluff build-out) and West Memphis, AR (the point of connection with BNSF's own line), limited to the transportation of coal trains to/from White Bluff via the White Bluff-Pine Bluff build-out line. See Merger Dec. No. 44, slip op. at 54-55.

We granted the build-out preservation condition sought by Entergy vis-à-vis White Bluff, and thereby preserved the White Bluff build-out status quo, by requiring that the BNSF agreement be amended to allow BNSF to transport coal trains to and from White Bluff via the White Bluff-Pine Bluff build-out line, if and when that line is ever constructed by any entity other than UP/SP. We noted that, with this build-out relief, Entergy would continue to have the option of building out to an independent carrier and would continue to be able to use this option in its negotiations with the post-merger UP. See Merger Dec. No. 44, slip op. at 154 and 185.

Now, in its ESI-28 petition (filed October 23, 1997), Entergy contends that, on account of UP's service problems, UP has been unable to deliver all the coal White Bluff needs to meet its generation requirements, and, in consequence, the generation of electricity at White Bluff has had to be curtailed and Entergy has had to rely on more expensive power (by purchasing power from the grid and by generating power at its gas-fired plants). The situation, Entergy warns, is approaching near-critical proportions; UP, Entergy claims, is simply unable to provide Entergy with adequate rail transportation service for coal consumed at White Bluff. Entergy adds that the build-out preservation condition imposed for its benefit in Merger Dec. No. 44 is inadequate to protect it from competitive harm during the UP service crisis.

Entergy, which expresses concern that UP will not be able to return to anything approaching normal service levels in the foreseeable future, asks that BNSF be allowed immediate interim access to White Bluff for the duration of the UP service crisis, and be permitted to serve White Bluff directly for a period of 3 years (the estimated time required to design, construct, and place in service a build-out line to Pine Bluff).[133] Entergy suggests that we can award it the relief it seeks either by modifying the build-out preservation condition pursuant to the oversight jurisdiction we retained in the UP/SP merger proceeding[134] or by issuing a directed service order pursuant to the "directed service" provisions of 49 U.S.C. 11123. Entergy adds: that it has filed a breach of contract action in federal district court in Louisiana; that it seeks, in that action, the right to terminate its UP contracts; but that, unless we allow BNSF immediate interim access to White Bluff, Entergy may be unable to obtain, in the district court action, an effective remedy.

UP/SP-328 Reply. UP, by reply filed November 12, 1997, urges denial of the ESI-28 petition. (1) UP argues that, in essence, the Entergy vs. UP dispute is a private contractual dispute; Entergy, UP claims, is seeking what amounts to a remedy for UP's supposed breach of the service commitments set forth in Entergy's UP contracts. The Board, UP insists, should not intervene in the resolution of private contractual disputes. And, UP adds, this point applies with particular force where, as here, Entergy is already pursuing, in a federal district court, its contract claim against UP. (2) UP argues that we impose conditions upon a merger only to rectify harms that the merger causes to competition or to another railroad's ability to provide essential services. Entergy, UP claims, has not seriously suggested that the condition it now seeks satisfies those standards. UP contends, in particular: that the service problems

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[133] The condition sought by Entergy would provide that direct BNSF service to White Bluff will terminate after 3 years if Entergy has not completed the White Bluff build-out by then.

[134] Entergy insists that its present predicament at White Bluff is largely a consequence of UP's failure to implement the UP/SP merger in an orderly manner.

claimed by Entergy are not as severe as Entergy has suggested,[135] and, in any event, were not caused by the UP/SP merger;[136] and that the requested condition would expand rather than preserve Entergy's competitive options. (3) UP argues that, if Entergy's coal supplies are indeed threatened by UP's performance, Entergy has an efficacious remedy: it can readily move coal by rail to the Mississippi River, and then by barge to White Bluff.[137]

Decision Served July 31, 1998. By decision served July 31, 1998, we ruled that, although service at White Bluff might not be at the levels that Entergy would prefer, Entergy had not demonstrated an entitlement to emergency relief vis-à-vis White Bluff (i.e., access by BNSF to White Bluff for a period of 6 months). We noted: "UP states that it has delivered more trains to Entergy's power plants during the first five months of 1998 than it did during the comparable months of 1997 when there were no service problems on the UP system. Moreover, unlike other utilities, Entergy has apparently refused to support operational changes to minimize congestion or pursue other UP-suggested transport alternatives that would have increased its coal deliveries. Finally, as UP notes, the imminent completion of its $400 million track improvements and capacity expansion in the Central Corridor over routes used for Entergy shipments will reduce cycle times and provide the increased capacity that Entergy seeks."[138]

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[135] UP insists that the service problems cited by Entergy represent only a short-term service issue involving only 3 of the past 4 months of deliveries to White Bluff. And, UP adds, even the recent few months of higher cycle times are not significantly different from limited periods in the past when cycle times for White Bluff deliveries have risen.

[136] UP claims: that its service problems arose in an area where the merger had not yet been implemented, and were caused by the fragility of, and certain extraordinary stresses that had been imposed upon, SP; that, with or without the merger, SP would have experienced a congestion crisis; that shippers responded to service problems on SP lines by rerouting traffic via UP lines, which spread congestion beyond the limits of the SP lines; and that, because the congestion around White Bluff flowing from SP's problems in Texas would have occurred even without the merger, that congestion cannot be causally attributed to the merger.

[137] See UP/SP-328 at 6 n.4. UP, however, has not addressed Entergy's claim that, under the terms of Entergy's UP contracts, "Entergy is not free to seek alternative transportation of coal" for White Bluff. See ESI-28, Exhibit CWJ-3, page 8, ¶21.

[138] Joint Petition For A Further Service Order, STB Service Order No. 1518 (Sub-No. 1) (STB served July 31, 1998), slip op. at 2 (describing Entergy's most recent request for emergency relief) and 7-8 (denying Entergy's requests for emergency relief). See also Rail Service In The Western United States, STB Ex Parte No. 573 (STB served July 1, 1998), slip op. at 2 (describing Entergy's earlier requests for emergency relief).

THE AL&M PETITION. AL&M, a class III shortline that is wholly owned by Georgia-Pacific Corporation (G-P), operates over 109 miles of track extending in a generally north-south direction between its northern terminus at Fordyce, AR, and its southern terminus at Monroe, LA.[139] AL&M's principal customers are: G-P, which produces pulp, paper, paperboard, lumber, plywood, other wood products, and chemical resins at plants at Fordyce and Crossett; International Paper Company (IP), which produces paper at its plant at Bastrop, LA;[140] Geo Chemical Company; the Ouachita Fertilizer Company; the Shops Warehouse; Century Redi-Mix;[141] and the Coating & Laminating Company. AL&M indicates that, by means of its Class I connections, the products of these shippers move outbound in various types of cars to destinations throughout the United States. Prior to the UP/SP merger, AL&M had three Class I connections: UP (at Monroe and Bastrop); SP (at Fordyce); and KCS (at Monroe). At present, however, AL&M has only two Class I connections: the post-merger UP (at Monroe, Bastrop, and Fordyce); and KCS (at Monroe).

AL&M claims, in essence, that, although it appears to be a 3-to-2 shortline, its situation is more akin to that of a 2-to-1 shortline. AL&M contends: that the pre-merger UP and the pre-merger SP were able to provide, and the post-merger UP is able to provide, direct access to/from a wide range of destinations/origins; but that KCS was able to provide, and remains able to provide, direct access to/from a few points only. AL&M insists: that KCS directly reaches only a handful of the hundreds of destinations to which AL&M traffic was shipped in 1997;[142] and that, although KCS is able to interline traffic to reach other destinations, these routings add circuity and cost, so that rates for KCS movements are typically higher than comparable UP rates.[143] And, AL&M states: KCS routings tend to be circuitous, given that, at Monroe, traffic must move either west to Shreveport or east to Jackson before reaching a north-south line; and, because the AL&M-KCS connection is at the southern end of the

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[139] The Fordyce, AR-Crossett, AR segment of the Fordyce, AR-Monroe, LA line is owned by the Fordyce & Princeton Railroad (F&P), an AL&M affiliate that, like AL&M, is wholly owned by G-P.

[140] Bastrop is located near the southern end of the Fordyce-Monroe line.

[141] Century Redi-Mix produces cement.

[142] AL&M indicates that the KCS-served destinations to which AL&M-originated traffic was shipped in 1997 were: New Orleans, Lake Charles, DeRidder, Springhill, and West Monroe, LA; Hatfield, AR; Brandon and Louisville, MS; Korf and Garland, TX; and some points in the Kansas City, MO, area.

[143] AL&M notes, in particular, that KCS must interline traffic to provide efficient routings to Houston and the St. Louis area gateways. And, as respects the St. Louis area gateways, AL&M adds that, although the connections provided to KCS by the Gateway Western and Gateway Eastern railroads (which KCS recently acquired) might in theory allow KCS to reach East St. Louis, the routing would be highly circuitous.

Fordyce-Monroe line, traffic from/to the northern end of the line (e.g., traffic from/to G-P's Fordyce plant) requires a 109-mile haul on AL&M in addition to the already circuitous haul on KCS.

AL&M asserts that it and its shippers have been seriously and adversely affected by the UP/SP merger, which (AL&M argues) eliminated the vigorous competition that had previously existed between UP and SP. Post-merger UP service, AL&M insists, has been poor, and, although there have been, from time to time, improvements, these improvements have been sporadic and episodic. UP rate increases, AL&M adds, have already occurred, and further UP rate increases are anticipated.[144] And, AL&M alleges, UP has also imposed "hidden" rate increases by transferring operating costs from itself to AL&M and AL&M's customers. These impacts, AL&M states, are not simply by-products of UP's well-known service problems, but reflect, instead, the fact that UP lacks competitively-driven incentives to offer good service and reasonable rates. AL&M argues, in particular, that the KCS competitive option has not constrained UP from providing poor service and implementing substantial rate increases.[145]

AL&M therefore asks that we impose a condition allowing for the creation, at Fordyce, of a BNSF-AL&M interchange[146] with respect to all traffic except traffic that can be handled by KCS direct to destination or direct from origin.[147] This condition, AL&M contends, would remedy the competitive harm caused by the UP/SP merger and would restore to AL&M and its shippers the vigorous and effective competition that existed prior to the merger by ensuring that AL&M and its customers have access to two Class I connections (UP and BNSF) able to compete for AL&M traffic which KCS cannot directly serve.[148]

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[144] AL&M claims that UP has indicated that the rates charged by SP were "too low."

[145] AL&M also notes that other competitive options (i.e., truck or intermodal) are prohibitively expensive except in emergency situations.

[146] BNSF already has overhead trackage rights on the UP (formerly SP) line that runs through Fordyce.

[147] AL&M indicates that, under its requested condition, BNSF would not be given access at Fordyce "to AL&M traffic moving to or from points directly served by the KCS, including KCS-served points in New Orleans, Shreveport, Lake Charles, and Kansas City." AL&M Petition at 10-11. AL&M further indicates that it "is willing to exclude from BNSF access traffic that travels from the AL&M direct to a destination on the KCS (or vice versa). This exclusion should not encompass traffic that can reach its destination only after being interchanged by the KCS to another carrier, nor, conversely, traffic originating off the KCS and routed over the KCS to AL&M destinations." AL&M Supplement at 12 n.26.

[148] AL&M claims that the requested condition is operationally feasible, and it insists that it has

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AL&M concedes that it did not request, in the UP/SP merger proceeding, the condition it has requested now; there then appeared to be, AL&M indicates, no precedent for remedial access by a third carrier where a merger would result in a 3-to-2 reduction in the number of available carriers. AL&M notes, however, that such a precedent exists now, because we created it in our decision approving the UP/SP merger. See Merger Dec. No. 44, slip op. at 152-54 (certain shippers in the Lake Charles area had, prior to the merger, access to UP, SP, and KCS; we noted, however, that KCS had to interline with UP or SP to provide "efficient routings" to the key gateways at Houston, New Orleans, St. Louis, and Chicago; and we therefore required that BNSF be given greater access to these shippers than the access that the UP/SP applicants had proposed).[149] See also Merger Dec. No. 63, slip op. at 7-8 (rejecting KCS's argument that we erred in granting BNSF access to shippers in the Lake Charles area).[150]

BNSF-6 Reply. BNSF, which supports the relief sought by AL&M, contends that, even if two carriers have access to a shipper's facilities, that shipper should be deemed a "2-to-1" shipper if route circuity or other service impediments effectively limit its commercially realistic, efficient, and competitively priced rail carrier options to one carrier.[151] BNSF further contends that the same principle should be equally applicable to similarly situated shortlines such as AL&M. And, BNSF adds, it would be able to provide service to AL&M through a Fordyce interchange with minimal or no impact on UP operations.

KCS Reply. KCS, which opposes the relief sought by AL&M, contends: that KCS, which handled over 8,600 cars in 1997 and over 2,600 cars during the first quarter of 1998 that were

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[148](...continued)
adequate tracks, sidings, and crews to position cars for two pick-ups and set-offs per day at Fordyce, one by UP and one by BNSF.

[149] AL&M claims that the limitations on KCS routings from Lake Charles are present in almost identical form in the case of KCS routings from Monroe. The principal difference, AL&M adds, is that, whereas the Lake Charles-New Orleans KCS routing is 109.9% longer than the comparable UP routing, the Monroe-New Orleans KCS routing is only 40.3% longer than the comparable UP routing.

[150] 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, Finance Docket No. 32760, Decision No. 63 (STB served Dec. 4, 1996) (Merger Dec. No. 63).

[151] BNSF cites Merger Dec. No. 44, slip op. at 152-53 (respecting the Lake Charles area) and 186 (respecting Texas Utilities Electric Company).

interchanged with AL&M, provides a significant competitive restraint vis-à-vis UP;[152] that, during 1997, KCS handled traffic originated by AL&M and destined to dozens, if not hundreds, of destinations beyond the KCS system (from Vermont to Florida, and from California to Washington); and that KCS routings are preferable to many UP routings and to many prospective BNSF routings as well.[153] KCS also contends that the lack of shipper support for the AL&M petition[154] may indicate that the "rate" increases alleged by AL&M are not increases in the rates charged to shippers but, rather, increases in UP's division of such rates; the AL&M-UP dispute, KCS suggests, may really be a "divisions" dispute; but variations in the division of the revenues generated by the rates charged to shippers, KCS argues, should not, in and of itself, have an effect upon the rates that shippers are charged.[155]

KCS further contends: that the insufficiency of UP service complained of by AL&M is no different than that suffered by many, including KCS, as a result of UP's service problems; that, as respects AL&M, the effect of UP's service problems was exacerbated by UP's inability to maintain manageable levels of traffic in its Pine Bluff Yard; but that, because the problem at Pine Bluff Yard appears to have been cured, UP's service levels for AL&M traffic can be expected to improve. And, KCS adds, AL&M's analogy to the Lake Charles situation fails because that situation was entirely different: KCS's pre-merger routings at Lake Charles were largely KCS-UP joint line routings that competed against SP single-line routings; and an unconditioned merger would therefore have made the post-merger UP a participant in almost all post-merger KCS routings. KCS also claims that, even if BNSF were given access to AL&M at Fordyce, BNSF could not offer more effective competition to UP than KCS currently does: BNSF (KCS notes) would have to use UP lines to interchange with AL&M (and would therefore be subject to UP interference and UP's service problems), whereas KCS has its own independent lines; and, in any event, BNSF, just like KCS, would have to interline AL&M's traffic.

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[152] KCS claims that, during the first quarter of 1998, the AL&M-KCS routing handled almost as many outbound cars as the AL&M-UP routing (1,294 for AL&M-KCS; 1,382 for AL&M-UP).

[153] KCS claims that all prospective BNSF routings would involve movement of freight via Longview, TX, and would therefore often be more circuitous than the comparable KCS routings. See also BNSF-6 at 3-4 (BNSF indicates that, initially, its service at the Fordyce interchange would involve the movement of all outbound freight via Longview; BNSF adds that, if volumes increased, it might operate a local "turn" operation between Camden, AR, and Pine Bluff, AR).

[154] KCS claims that AL&M has submitted no evidence that shippers located on its line have suffered a reduction in competition for their traffic.

[155] KCS argues that, in the merger context, conditions are imposed to protect shippers, not to protect railroads. And, KCS adds, AL&M has not demonstrated that a realignment of the AL&M-UP divisions will impair AL&M's ability to provide essential services to shippers located on the AL&M line.

G-P Replies. Georgia-Pacific indicates that the products it produces at its Fordyce and Crossett plants[156] generally must move outbound by rail; truck and intermodal, G-P claims, are prohibitively expensive except in emergency situations. G-P contends: that, prior to the UP/SP merger, it had, through AL&M, a choice of service and rates from two major systems (UP and SP) and one regional system (KCS); that, since the merger, its choices have been limited to one major system (the post-merger UP) and one regional system (KCS); but that KCS, given its geographic limitations, cannot be fully competitive with the post-merger UP.[157] G-P further contends that, because the KCS competitive option has not had a constraining effect on UP, G-P has experienced: excessive delays in obtaining, from UP, empty equipment for loading; substantially increased UP line-haul transit times for almost all movements;[158] and increases in the rates charged by UP.[159] And, G-P adds: it has had to ship products by truck or intermodal, at substantially increased cost, in order to meet delivery schedules; and it has experienced, as a result of this shift to non-rail modes, a reduction of business due to non-competitive costs.

The inability of KCS to provide a fully effective competitive option vis-à-vis UP, G-P claims, is demonstrated by the fact that the KCS competitive option has not induced UP to offer better service, to provide adequate equipment, and to refrain from rate increases. Only BNSF, G-P contends, has the system reach to compete effectively with, and to provide an effective competitive constraint on the rates and service provided by, the post-merger UP. BNSF, G-P argues, can provide a fully competitive alternative to UP; KCS, G-P insists, cannot.[160] G-P therefore supports the relief requested by AL&M.

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[156] G-P operates a plywood plant at Fordyce and plywood, lumber, and chemical plants at Crossett. G-P indicates that, in 1997, the rail volume from these four plants was approximately 5,000 carloads. The distribution of traffic, on a regional basis, was as follows: 49% to the Midwest, 34% to the West, 12% to the Northeast, and 5% to the South.

[157] G-P claims: that KCS does not directly serve more than a handful of G-P destinations (i.e., only a few G-P destinations are located on KCS lines); that, in all other cases (e.g., traffic moving to the Houston and St. Louis area gateways), KCS must interline traffic to reach G-P destinations; and that, although KCS can offer service over joint routes, the rates for these joint routes have typically been higher than the UP rates to the same points (presumably on account of the inherent additional costs involved in interlining traffic).

[158] G-P indicates that it has not realized a significant, sustained improvement in UP service levels over the last 6 months (i.e., the 6 months preceding June 1, 1998).

[159] G-P indicates that, given the recent rate increases received on a negotiated G-P plywood contract, it expects UP to increase its rates by amounts in the 15% to 20% range, over the course of the next year, if AL&M's efforts to create an AL&M-BNSF routing are thwarted.

[160] G-P claims that UP representatives have stated that UP intends to increase rates on the basis

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IP-21 Reply. In Merger Dec. No. 44, we considered International Paper's concerns that the UP/SP merger would adversely affect UP vs. SP (i.e., UP vs. AL&M-SP) competition at its Bastrop plant. IP argued: that the pre-merger SP, which had no incentive to discriminate against AL&M and in favor of the pre-merger UP, provided a friendly connection at Fordyce for traffic originated by AL&M; that the post-merger UP/SP, however, would have an incentive to treat AL&M less favorably than itself, and therefore would not provide a friendly connection at Fordyce for traffic originated by AL&M; and that, therefore, the UP vs. SP-AL&M competition that existed pre-merger would not exist post-merger. IP suggested that, in order to preserve UP vs. SP competition at its Bastrop plant and at certain other IP plants (with respect to traffic moving from those plants to SP-served points), we should require that UP/SP keep open all routes, at competitive rates with service no less favorable than would be accorded UP/SP traffic, via pre-merger KCS-SP junctions at Beaumont, Houston, Dallas, and Shreveport, on traffic to/from competitively served points (including AL&M originations and terminations at Bastrop). See Merger Dec. No. 44, slip op. at 71-73. We denied IP's suggestion (this was IP's condition #2), stating: "Conditions intended to keep open existing junctions are overly intrusive and could delay, in certain respects, implementation of the increased efficiencies expected from the merger, and would deny UP/SP the freedom to adapt to new developments." See Merger Dec. No. 44, slip op. at 191.

IP now contends: that, prior to the UP/SP merger, IP had three competitive options at Bastrop (an AL&M-SP routing via Fordyce, an AL&M-KCS routing via Monroe, and a UP routing), and, as a result, rail service was reliable and efficient, and rates were maintained at competitive levels;[161] that, post-merger, IP has only two competitive options at Bastrop (an AL&M-KCS routing via Monroe, and a UP routing);[162] but that, since July 1997, UP service at Bastrop has been grossly inferior, and IP has been forced to divert traffic to truck to meet its commitments and keep the plant open. IP further contends: that IP's efforts to shift traffic to the AL&M-KCS routing (for traffic headed to destinations in the

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[160](...continued)
that rates charged by SP were "too low." These statements, G-P argues, prove that the loss of SP has had, and will continue to have, a direct adverse effect on the competitive choices available to G-P and its customers. And, G-P adds, UP's ability to unilaterally increase rates that are "too low" shows conclusively that the limited rail competition offered by KCS is inadequate to constrain UP pricing.

[161] IP claims that, prior to the merger, SP was a far more responsive, competitive carrier than UP, and provided a substantially superior level of service and more favorable rates.

[162] IP claims that, once certain existing SP contracts expire, the AL&M-UP routing via Fordyce will disappear.

Southwest, Midwest, and Far West) have been thwarted by a lack of cars on AL&M[163] and KCS;[164] that UP, facing no competitive constraint capable of tempering its conduct, has simultaneously reduced service and increased rates; and that UP, unless some such competitive constraint is brought to bear against it, is likely to allow service to deteriorate further and to raise rates even higher. IP, which supports the relief requested by AL&M, maintains that BNSF could replace the AL&M-SP Fordyce routing that was lost with the merger and could restore a competitive option that was available to IP prior to the merger; BNSF, IP claims, is willing to handle traffic routed AL&M-BNSF via Fordyce and to provide IP with the badly needed boxcars that would permit AL&M to receive its proper share of IP's business.[165]

UP/SP-343 Reply. UP, which opposes the relief sought by AL&M, concedes that, as respects traffic moving via an AL&M-UP routing, UP had serious service problems in the fall of 1997, and again in February and March of 1998 (as UP implemented, and then adjusted to, directional running on the line through Fordyce). UP claims, however, that its service has improved considerably in recent months, and that, to solidify those improvements, it has restructured its local operation in various respects. UP has also made three additional arguments in opposition to the "open access" relief sought by AL&M.

(1) UP insists that it has not imposed substantial rate increases on G-P (AL&M's largest shipper). UP claims: that, since the merger, UP and G-P, to simplify G-P's rate spectrum, to bring G-P's rates into line with market conditions, and to expand G-P's marketing opportunities, have negotiated dozens of rate changes applicable throughout the West; that G-P's overall freight costs (i.e., its freight costs for all traffic handled by UP from all G-P origins) have remained flat, and, in fact, G-P has received, in many instances, substantial rate reductions; that UP has indeed made some upward rate adjustments (these apparently include the rate increases complained of by AL&M), but these adjustments have merely reflected market conditions; and that the assertion that UP has embarked on a campaign to raise SP rates that are "too low" is flatly untrue.[166]

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[163] AL&M maintains a fleet of 3,342 cars. AL&M Supplement at 6 n.10. IP indicates that AL&M's car shortages are attributable to UP, which has failed to return AL&M's cars to AL&M.

[164] IP indicates that KCS "has stepped up to the plate at many other locations in excess of their commitments, and has been of great assistance to IP at other locations; but there is a limit to that company's resources." IP-21, V.S. McHugh at 6.

[165] IP suggests that the apparent 3-to-2 impact of the merger at Bastrop is more akin to a 3-to-1½ impact, in that AL&M is not able, by itself, to substitute for the service that had been provided by SP.

[166] UP notes that the rates it applies to G-P's freight are constrained by intense competition in the lumber and panel products marketplace.

(2) UP insists that the AL&M-KCS routing provides effective competition to the AL&M-UP routing. UP contends: that, if KCS did not provide effective competition, UP might have been expected to raise rates on traffic moving to, or via, the destinations and gateways KCS serves; that, however, AL&M has not complained of any UP rate increases to KCS gateways such as New Orleans, Dallas, Kansas City, Shreveport, Jackson, Meridian, or Beaumont; that, in fact, KCS is indeed effective to these gateways, and it provides effective competition to points beyond by using its connections (BNSF, Tex Mex, IC, CSX, and NS) at those gateways;[167] and that the AL&M-KCS-BNSF routing, in particular, has been highly effective in taking business from UP. The Lake Charles precedent, UP adds, is not relevant here, because KCS single-line routes from/to Monroe are highly competitive, and because KCS joint-line routes from/to Monroe are also highly competitive (KCS, UP claims, has efficient direct routes to connections at key Eastern gateways, and has direct joint-line routes to important Western markets that are of comparable length to, or even slightly shorter than, UP routes).

(3) UP insists that "duplicate" BNSF operations at Fordyce would reduce service quality for other shippers on the UP line that runs through Fordyce. UP contends: that, with the implementation of directional operations, the former SP line through Fordyce has become the southbound route for both UP and BNSF trains; that an AL&M-BNSF interchange at Fordyce would likely entail either stopping a BNSF southbound train at Fordyce or running a BNSF local on the UP line between Pine Bluff and Fordyce; that, with either scenario, delays would occur on account of the doubling of the amount of time the UP mainline at Fordyce is blocked (because, UP claims, there is no room to get off the mainline while switching); and that, with the BNSF local scenario (which would involve running a BNSF local train northbound against the flow of southbound traffic), even more delays would be likely.[168]

AL&M Supplement. The AL&M Supplement addresses arguments raised by KCS and UP in their replies to the AL&M Petition.

(1) AL&M concedes that UP's G-P rate changes were negotiated by UP and G-P, but insists that the fact that such changes were negotiated does not mean that UP has not exercised the increased market power resulting from the UP/SP merger. The substantial rate increases applicable to AL&M traffic, AL&M contends, reflect the additional market power gained by UP as a result of the merger. AL&M also concedes that UP decreased its rates for other products moving from other G-P origins, but insists that these decreases are irrelevant to the matter at hand. The market at issue here, AL&M contends, is

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[167] KCS can interchange: with BNSF at Beaumont, TX, and Dallas, TX (for traffic moving from/to the Far West); with Tex Mex at Beaumont, TX (for traffic moving from/to Mexico); with IC at Jackson, MS (for traffic moving from/to/via Memphis, East St. Louis, and Chicago); with NS at Meridian, MS, and Birmingham, AL; and with CSX at Birmingham, AL.

[168] UP, which claims that AL&M has been unwilling to interchange more traffic with UP at Fordyce due to lack of track space, also questions how AL&M would be able to interchange cars with two carriers at that location.

comprised of traffic moving to/from points on the AL&M line; movements of forest products to/from all points in the West, AL&M adds, constitute a different market.

(2) AL&M concedes that the substantial rate increases UP imposed on G-P (as respects traffic originating at AL&M points) were partly offset by corresponding decreases in AL&M's revenues. AL&M maintains that it and G-P accepted the new contract despite the substantial UP revenue increases because they believed this was the best they could do. The fact that AL&M was forced to offset much of UP's revenue increase by decreasing its own revenue, AL&M adds, is further evidence of UP's increased post-merger market power.

(3) AL&M insists that UP can be expected to continue to raise rates as other contracts expire.

(4) AL&M insists that the injury of which it complains was not caused by the creation of a more efficient routing that bypassed its system or that made its service less valuable. The injury of which it complains, AL&M argues, was caused by the reduction in the head-to-head competition that formerly existed between UP and SP, which created increased UP market power by which UP can extract more monopoly rents at the expense of AL&M and its shippers.

(5) AL&M, though it concedes that KCS has rendered valuable service to shippers seeking an alternative to UP during its service crisis, contends that, notwithstanding the competition supposedly offered by KCS, UP has been able to increase its rates above those that UP and SP charged G-P prior to the merger. The limitations of KCS's system and KCS's resources, AL&M maintains, are evident: KCS's routes most often are longer than UP's, and generally require KCS to interchange traffic; the points served by KCS are simply too few; KCS can reach most points only indirectly and through interchange with other carriers;[169] and KCS cannot furnish a sufficient number of cars.

(6) AL&M, which doubts that the restructuring announced by UP will fix UP's ever-changing service difficulties, insists that, contrary to UP's assertions, UP's service problems continued during June 1998. And, AL&M suggests, it is concerned that, unless we allow the creation of an AL&M-BNSF interchange at Fordyce, UP will have no incentive to continue to provide adequate service.

(7) AL&M claims: that track capacity at Fordyce is adequate to support interchanges with both UP and BNSF; that AL&M is willing to perform the switching that would be required for an AL&M-BNSF interchange; and that the objection that an AL&M-BNSF interchange would delay through traffic on the mainline is vague and speculative, and echoes the objections UP has typically made whenever another railroad has sought to provide service over UP's lines.

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[169] "It is the limited single system reach of the KCS that is the principal reason the Board should extend the Lake Charles condition to permit BNSF access to the AL&M at Fordyce." AL&M Supplement at 12.

UP/SP-347 Reply. (1) UP claims that the results of recent UP/G-P contract negotiations demonstrate that UP did not gain market power as a result of the UP/SP merger. UP further claims: that G-P has in fact benefitted from UP efforts, aided by merger synergies, to make G-P lumber and G-P panel products more competitive throughout the Western marketplace; that, despite isolated instances involving high percentage rates of increase on small-volume flows, the overall impact of UP's rate changes has been only a minimal increase; and that, in the few instances in which G-P's rates were increased, the increases reflected the fact that existing rates had been in place for several years and were below market levels. (2) UP contends: that the relevant issue in determining whether KCS is an effective competitor is not UP's rate level but KCS's rates and how much traffic KCS has moved; that, despite AL&M's claim that KCS is not competitive because it must interchange its traffic with other railroads, almost all of the AL&M traffic that KCS moved in the first quarter of 1998 was destined to points that KCS does not serve directly; and that the evidence supports UP's assertion that KCS provides effective competition from AL&M points with efficient routes to both Eastern gateways and Western destinations. (3) UP insists that its service with respect to AL&M has improved substantially. And, UP adds, AL&M has offered no real response to UP's evidence that adding an AL&M-BNSF interchange at Fordyce would cause added congestion and train delays on UP's line. The reality, UP claims, is that, even if AL&M might benefit from an AL&M-BNSF interchange at Fordyce, other shippers using the UP line that runs through Fordyce would suffer.

KCS Motion To Strike. KCS argues that the AL&M Supplement is a reply to a reply, and, as such, is prohibited by 49 CFR 1104.13(c) and is not permitted by any other directive of the Board. KCS therefore contends that we should strike the AL&M Supplement. KCS further contends that, if we deny its motion, we should allow KCS 20 days to respond to the AL&M Supplement.

AL&M Reply To KCS Motion. AL&M concedes that the AL&M Supplement addresses points raised by UP and KCS in their replies to the AL&M Petition. AL&M argues, however, that the AL&M Supplement has not burdened the record but rather has served to better frame the issues before the Board. AL&M therefore opposes the KCS motion, and, in order to allow KCS to have the "last word" (much as UP has had the "last word" with its UP/SP-347 reply), AL&M invites KCS to submit evidence and argument in opposition to the points made in the AL&M Supplement.

UP/SP-361 Reply. UP claims that, in the several months ending September 30, 1998, its service has improved markedly and cycle times are returning to normal. "The average cycle time for moves that UP interchanges with AL&M and that terminate at UP-served destinations has dropped from a February 1998 high of 26 days to 17 days in August, a level that is approaching normal. For movements to non-UP-served destinations, cycle times dropped from a February peak of 14 days to 7 days in August, at or close to normal." See UP/SP-361 at 2 n.2.

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Records: 224

STB FD 32760 (Sub 21) 8-27-98 C 29559

29559
SEC

SERVICE DATE - AUGUST 27, 1998

SURFACE TRANSPORTATION BOARD

DECISION

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 [OVERSIGHT]

STB FINANCE DOCKET NO. 32760 (SUB-NO. 26)

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]

Decided: August 27, 1998

In a decision in STB Finance Docket No. 32760 (Sub-No. 21) (the Sub-No. 21 proceeding) served on October 27, 1997, the Board established a procedural schedule providing that comments relating to general merger oversight would be due on August 14, 1998, with replies due on September 1, 1998. Subsequently, the Board initiated the proceeding in STB Finance Docket No. 32760 (Sub-No. 26) (the Sub-No. 26 proceeding or the Houston/Gulf Coast Oversight proceeding), and in a decision issued in the Sub-No. 26 proceeding on August 4, 1998, accepting requests for additional merger conditions, the Board provided that responses to proposed remedial conditions for the Houston/Gulf Coast area would be due on September 18, 1998, with rebuttal due on October 16, 1998. Finally, in the August 4 decision issued in the Houston/Gulf Coast Oversight proceeding, the Board indicated that a condition sought by the Western Coal Traffic League (WCTL), which was not specifically Houston/Gulf Coast-related, would be considered in the Sub-No. 21 proceeding.

Since those orders were issued, we have received a petition from WCTL, and letters from counsel for Union Pacific Railroad Company (UP). In its petition filed August 19, 1998, WCTL expresses concern that, by deciding to handle its request in the general oversight proceeding (in which rebuttal is not being permitted) rather than the Houston/Gulf Coast Oversight proceeding (in which rebuttal is being permitted), the Board deprived WCTL of the opportunity to make a complete case. WCTL states that, because it filed its request in the Sub-No. 26 proceeding, it "had no reason to augment its filing with anticipatory rebuttal of arguments that UP might, or might not, advance." Petition at 3. Arguing that it ought to be permitted to open and close in order to meet its burden of proof, WCTL requests an opportunity to file rebuttal 30 days after UP's reply.

In its letter dated August 19, 1998, UP expresses its view that one of the requests for conditions that is being handled in the Sub-No. 21 proceeding — that of Cemex USA Management (Cemex) — should be handled in the Houston/Gulf Coast proceeding, and it states that it intends to address Cemex's request in Sub. No. 26 unless the Board indicates otherwise.[1] In its letter dated August 20, 1998, UP opposes WCTL's request for rebuttal, noting that parties seeking remedial conditions in merger proceedings typically are not entitled to rebuttal unless the conditions involve what is essentially a responsive application.

We understand UP's position that the Cemex request should be heard as part of the <u>Houston/Gulf Coast Oversight</u> proceeding. However, although Cemex's facilities are located in Texas (not particularly close to the Houston area on which most of the <u>Houston/Gulf Coast Oversight</u> proposals focus), the types of issues that Cemex's request raises are similar to those raised by other parties that are already being considered in the Sub-No. 21 proceeding. Therefore, Cemex's request will be considered in the context of general oversight, rather than the <u>Houston/Gulf Coast Oversight</u> proceeding.

We agree with UP that WCTL should not be entitled to rebuttal. Although it filed its request in the <u>Houston/Gulf Coast Oversight</u> proceeding, the accounting issues that WCTL raised clearly are general oversight rather than Houston/Gulf Coast oversight issues. It is well established that parties seeking these types of conditions are not entitled to rebuttal.

Nevertheless, we understand WCTL's position that it would have filed a more complete case had it known that its request would be considered in the Sub-No. 21 rather than the Sub-No. 26 proceeding. In the interest of developing as complete a record as possible, we are therefore establishing a revised procedural schedule in the Sub-No. 21 proceeding, under which WCTL will have until September 9, 1998, to supplement its initial filing with its "anticipatory rebuttal." In order to avoid conflict with the filings in the <u>Houston/Gulf Coast Oversight</u> proceeding, all of UP's responses in the Sub-No. 21 proceeding will now be due on September 30, 1998.

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[1] In this letter, UP also states that it intends to address on September 18, 1998, those portions of Burlington Northern Santa Fe Railway Company's (BNSF) August 14 filing that cover the same ground as BNSF's condition application in the <u>Houston/Gulf Coast Oversight</u> proceeding, and to reply to all other points in BNSF's August 14 filing in its response in the Sub-No. 21 proceeding. We do not object to UP's proposed approach in this regard.

It is ordered:

1. WCTL may supplement its filing in the Sub-No. 21 proceeding by September 9, 1998.

2. UP's response to comments filed in the Sub-No. 21 proceeding is now due on September 30, 1998.

3. This decision is effective on August 26, 1998.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams

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