As a threshold matter, Crowley[164] argues that a trackage rights tenant should not have to pay any return element on the rail property used, but should be charged no more than the landlord's "below the wheel" variable costs. He calculates this level to be 1.48 mills per gross ton-mile. We will adhere to the ICC's consistent position in SSW Compensation, which has been affirmed by the D.C. Circuit Court of Appeals, that trackage rights fees will allow landlord and tenant to compete on an equal basis only where the tenant is allocated an appropriate share, based on usage, of the total costs. See, e.g., BN/Santa Fe, slip op. at 90-91.

Recognizing that our well-established standards require inclusion of a return element based on market value, Crowley also develops a fee of 1.8 mills per gross ton-mile based on the fair market value of SP's roadway assets. Although Crowley's method is similar to our capitalized earnings method, there are several significant errors in his approach that make his calculation totally unreliable.[165] Because there is no recent purchase price to establish UP's market value, he has used the purchase price of SP alone to calculate a value for both UP's and SP's lines. But this significantly understates the value of the investment base because a substantial portion of the trackage rights at issue run over UP's lines,[166] which tend to be in much better-maintained condition, and of higher value, than SP's lines. Next, Crowley computes the present value of the track investment base as depreciated to zero over 32 years. This too understates the real costs because UP/SP will be required constantly to replace capital as its lines deteriorate. Finally, Crowley uses the wrong interest rate, an after-tax cost of capital, despite the fact that the ICC consistently found that the pre-tax cost of capital should be used to reflect the cost of income taxes. These errors result in a substantial understatement of the investment base, and thus of the return element.

Applicants demonstrate that, if Crowley's errors (other than his use of just SP property) were corrected, the capitalized earnings method would yield a rate of 3.84 mills per gross ton-mile. This includes a return element of 2.40 mills per gross ton-mile, which would be the correct number if all the properties were the less expensive SP properties, rather than a mix of SP and UP properties. Applicants correctly use URCS to develop UP/SP's system average operating and maintenance costs, which they calculate to be 1.44 mills per gross ton-mile.[167] This would yield total compensation of 3.84 mills (2.40 mills + 1.44

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[164] Although for convenience we will refer to Crowley's testimony on behalf of WCTL, our discussion responds to comments he has submitted on behalf of numerous parties.

[165] Crowley's computation of the operating and maintenance cost portion of the formula is also wrong because Crowley includes only the tenant's share of the variable portion of operating and maintenance costs rather than its share of those full costs.

[166] Under the original BNSF agreement, BNSF would operate over approximately 1,727 miles of trackage rights over UP lines, and 2,241 miles over SP lines.

[167] URCS costs will understate the actual maintenance expenses UP/SP will incur on the SP lines. Because URCS is derived from historical costs for 1990 through 1994, it reflects the relatively lower maintenance activity by SP.

mills) per gross ton-mile, which is substantially higher than the 1.8 mills Crowley developed, and, more importantly, much higher than the 3.0 to 3.1 mills per gross ton-mile that BNSF has agreed to pay.[168]

In addition, UP/SP has agreed to allow BNSF an option to elect to use, a formula under which BNSF would pay a share, based on usage, of UP/SP's actual total maintenance and operating expenses, taxes, and an interest rental based on depreciated book value of the segment used times the current pre-tax cost of capital.[169] That alternative approach, which is similar to SSW Compensation, though more generous to the tenant, may result in even lower fees to BNSF. The availability of this option provides additional assurance that the fees are not unreasonably high, and that they will permit BNSF to compete effectively.[170]

Structure of the Payments. DOJ again argues, as it did in BN/SF, that, because the fees are 100% variable, BNSF will be constrained in its ability to compete with UP/SP.[171] DOJ claims

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[168] WCTL and WSC attempt to show that the fees agreed to by BNSF are excessive when compared to those in other agreements between UP and SP. We agree with applicants that none of these agreements is comparable. See UP/SP 231, RVS Rebensdorf, at 14-30. For example, one of the compared agreements required a capital contribution by the tenant, which this one does not. Others pertained to switching and terminal operations and industrial spurs, operations generally unlike those at issue here.

Applicants' witness Kauders also demonstrates that total compensation per gross ton-mile would be 8.32 mills under the annuity method and 9.05 mills under the replacement cost new less depreciation method, the two alternatives to capitalized earnings under the SSW Compensation standard that are used when fair market value is not available.

[169] Applicants have also improved the method by which the charges are updated each year. Originally, the index was to be 70% of the RCAF, unadjusted for productivity. Certain protestants wanted to use the RCAF, adjusted for productivity. UP/SP has agreed to use actual maintenance related expenses, rather than using an index at all. This reflects costs more accurately.

[170] KCS argues that BNSF will have to pay reciprocal switching charges at certain origin or destination points for SP-served shippers. But the number of situations where switching is required will not increase, and may decrease. Moreover, SP's level of reciprocal switching charges will fall significantly. Amendments to the operating agreements now allow BNSF to select: (1) switching by UP at a maximum switching charge of $130 (reduced from approximately $495) at both 2-to-1 points and non-2-to-1 points; or (2) direct service by BNSF, or a third party with UP/SP's concurrence.

KCS also argues that BNSF's costs should be increased by 77% for "additional charges" it assumes will be assessed by UP/SP, but applicants have shown that there will be no additional charges to BNSF other than those specified in the BNSF agreement. We note that these charges pertain to the first of the three components of trackage rights fees discussed in SSW Compensation.

[171] DOT and MRL also raise this argument, although to a lesser extent.

that competition will force rates down to variable cost levels, and that, because UP/SP's variable costs will always be much lower than BNSF's, it will always be able to offer lower rates and obtain all of the traffic. DOJ's argument reflects a basic misunderstanding of the relative importance of trackage rights fees in BNSF's overall cost of service, and of rail pricing in general.

As the ICC explained in rejecting DOJ's approach in BN/SF, slip op. at 90-91:

> Placing the tenant in the same economic position as the landlord suggests that it might be appropriate to break up the rental charge into similar constant and variable components, or to ask the tenant to make a lump sum contribution to capital. But potential tenants may have difficulty in making such capital contributions, and a 100% variable rental charge reduces risks for the tenant railroad, which may not have experience participating in that market . . . .

As is true of any investment, no prospective trackage rights tenant would agree to make a capital contribution unless it believed it could recover that cost through the rates it charges to shippers on that line. No railroad would invest in rail properties, through trackage rights or through purchase of divested rail lines, if it anticipated revenue that only covered its variable costs.[172] Only by pricing above their variable (or marginal) costs can railroads recover all their costs and achieve adequate revenues.[173]

The only markets in which railroads tend to price their services down to their total variable costs are those where motor carriage is extremely competitive. Those markets are not of concern in the rail merger context because rail competition is relatively unimportant in such markets in comparison to the overall competitive picture. And because railroads need to return their joint and common costs to replace their road bed and track structure as these items deteriorate, they cannot long continue to provide service in such markets. The issue of how the fees are structured is ultimately a red herring because railroads generally must price significantly above their variable costs in order to return their joint and common costs and continue to compete.

Even if we were to assume that variable cost is the only relevant cost for rail ratemaking purposes, protestants still have not shown that BNSF would be at a disadvantage here. Protestants compare BNSF's trackage rights fee with the lower "below the wheel" variable costs that UP/SP will experience, and they argue this proves BNSF will have a substantial variable cost disadvantage. This comparison is extremely misleading because the costs protestants focus on are just a small portion of the total variable costs that BNSF will experience for any particular movement. Overall, BNSF's variable costs are likely to be lower

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[172] Railroading exhibits economies of scale, scope, and density that lead to declining average cost levels, so that costs attributable to any movement are below average costs.

[173] See, generally, Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 526-528 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3rd Cir. 1987).

than were SP's, and certainly low enough to allow it to compete effectively with UP/SP.[174]

Conditions Imposed.

Criteria for Imposing Conditions. The various conditions requested by parties involve the exercise of our conditioning power under section 11344(c) as part of any approval of the application.[175] Section 11344(c) gives us broad authority to impose conditions governing railroad consolidations. Because conditions generally tend to reduce the benefits of a consolidation, they will be imposed only where certain criteria are met. UP/MKT, 4 I.C.C.2d at 437.

We will adhere to the criteria for imposing conditions set out in UP/MP/WP, 366 I.C.C. at 562-65. Conditions will not be imposed unless the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate. A condition must also be operationally feasible, and produce net public benefits. We are also disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects. See, e.g., SF/SP, 2 I.C.C.2d at 827, 3 I.C.C.2d at 928; and UP/MKT, 4 I.C.C.2d at 437.

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[174] The "below the wheel" variable costs included in the trackage rights fees relate only to the expense of ownership and maintenance of running track and structures. These costs account, on average, for only about 17% of the total variable costs of western railroads. Thus, at most, a small component of BNSF's total variable costs will be higher than SP's for the trackage rights portion of a given movement. But BNSF is a very efficient carrier, and its remaining variable costs of operating its trains over the trackage rights segment should be lower than SP's comparable costs.

Moreover, BNSF will be operating over its own lines for a substantial portion of any given movement from origin to destination, and for that portion of the movement, trackage rights fees are irrelevant. For those portions of the movements, BNSF's variable costs will also tend to be lower than were SP's. We conclude that, even if we viewed this issue from the perspective of variable costs alone, BNSF would likely be in a better position to compete than was SP. See UP/SP-260 at 26-27.

DOJ asserts that applicants' focus on a comparison of BNSF's and SP's total operating costs is misplaced, claiming:

> In effect, Applicants argue that the Board may impose a tax --in the form of higher trackage rights fees than necessary to reimburse the landlord for the trackage costs-- on any replacement railroad whose current operating costs are lower than SP's current operating costs.

DOJ-14 at 31. "Imposing a tax" is an odd phrase to use to describe a compensation arrangement that has been mutually agreed to by applicants and BNSF, and which we have found to be lower than the compensation we would have set if the parties had not come to an agreement. This beneficial arrangement can hardly be called a tax on BNSF's efficiency.

[175] The responsive applications filed by CMTA, MRL, Entergy, Tex Mex, WEPCO, and MCC's rail affiliates are not independent applications.

A condition must address an effect of the transaction. We will not impose conditions "to ameliorate longstanding problems which were not created by the merger," nor will we impose conditions that "are in no way related either directly or indirectly to the involved merger." Burlington Northern, Inc.--Control & Merger--St. L., 360 I.C.C. 788, 952 (footnote omitted) (BN/Frisco); see also UP/CNW, slip op. at 97.

While showing that a condition addresses adverse effects of the transaction is necessary to gain our approval for imposition of a condition, it is by no means sufficient. The condition must also be narrowly tailored to remedy those effects. We will not ordinarily impose a condition that would put its proponent in a better position than it occupied before the consolidation. See UP/CNW, slip. op. at 97; Milwaukee--Reorganization--Acquisition by GTC, 2 I.C.C.2d 427, 455 (1985) (Soo/Milwaukee II).[176]

BNSF agreement. For many shippers throughout the West, the various rights provided for in the BNSF agreement will ameliorate the competitive harms that would be generated by an unconditioned merger. We therefore impose as a condition the terms of the BNSF agreement, by which we mean the agreement 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.[177]

CMA agreement. Although applicants have not asked that approval of the merger be made subject to the CMA agreement, because we find that the CMA agreement is largely tied to the BNSF agreement and its provisions are necessary to ameliorate competitive harm, we impose as a condition the terms of the CMA agreement. Many of the pro-competitive provisions of the CMA agreement require amendments to the BNSF agreement, and are reflected in the second supplemental agreement dated June 27th; other such provisions do not require amendments to the BNSF agreement.

Broad-based conditions. As we have previously discussed, we are imposing a number of broad-based conditions that augment the BNSF agreement to help ensure that the BNSF trackage rights will allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP.

New facilities and transloading facilities. The BNSF agreement, as amended by the CMA agreement, grants BNSF the right to serve any new facilities located post-merger on any SP-owned

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[176] If, for example, the harm to be remedied consists of the loss of a rail option, any conditions should be confined to restoring that option rather than creating new ones. See Soo/Milwaukee II, 2 I.C.C.2d at 455; UP/MP/WP, 366 I.C.C. at 564. Moreover, conditions are not warranted to offset competitors' revenue losses. BN/Frisco, 360 I.C.C. at 951.

[177] As we already have discussed, in imposing the BNSF agreement as a condition to this merger, we will require applicants to honor *all* of the amendments, clarifications, modifications, and extensions thereof described in: (1) the April 18th CMA agreement (UP/SP-219); (2) the April 29th rebuttal filings (UP/SP-230 at 12-21; UP/SP-231, Part C, Tab 18 at 5-11; see also UP/SP-260 at 8-9, summarizing the clarifications and amendments described in the April 29th rebuttal filings); (3) the June 3rd brief (UP/SP-260 at 23 n.9); and (4) the June 28th filing that accompanied the second supplemental agreement (UP/SP-266 at 3).

line over which BNSF receives trackage rights in the BNSF agreement. The BNSF agreement further provides, however, that the term "new facilities" does not include expansions of or additions to existing facilities or load-outs or transload facilities. We require as a condition that this provision be modified in two respects: first, by requiring 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; second, by requiring that the term "new facilities" shall include transload facilities, including those owned or operated by BNSF.

Build-in/build-out options. The CMA agreement provides a post-merger procedure by which a CMA member can raise a claim that the merger deprived it of a build-in/build-out option. We require as a condition that this procedure be modified in two ways: first, by making this procedure applicable to all shippers; second, by removing the time limit to which this procedure is subject. These modifications will allow BNSF to replicate the competitive options now provided by the independent operations of UP and SP. We further clarify that a shipper invoking this procedure need not demonstrate economic feasibility; the only test of feasibility is whether the line is actually constructed. Any technical disputes with respect to the implementation of this build-in/build-out remedy may be resolved either by arbitration or by the Board.

Opening contracts at 2-to-1 points. The CMA agreement provides that, immediately upon consummation of the merger, applicants must modify any contracts with shippers at 2-to-1 points in Texas and Louisiana to allow BNSF access to at least 50% of the volume. We require as a condition that this provision be modified by extending it to shippers at all 2-to-1 points incorporated within the BNSF agreement, not just 2-to-1 points in Texas and Louisiana. The extension of this provision to all 2-to-1 points will help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations.

Oversight. We impose as a condition to approval of this merger oversight for 5 years to examine whether the conditions we have imposed have effectively addressed the competitive issues they were intended to remedy. We retain 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.

We require as a condition that applicants submit on or before October 1, 1996, a progress report and implementing plan regarding their compliance with the conditions to this merger, and further progress reports on a quarterly basis.

As we have discussed earlier, we expect that BNSF will compete vigorously for the traffic opened up to it by the BNSF agreement and have imposed upon BNSF a common carrier obligation with respect to this traffic.[178] We further require that BNSF submit a progress report and an operating plan on or before

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[178] Again, we emphasize that BNSF, as soon as reasonably practicable, must begin trackage rights operations over the key corridors between Houston and New Orleans, between Houston and Memphis, and in the Central Corridor. A failure to conduct trackage rights operations in these corridors could result in termination of BNSF's trackage rights, and substitution of another carrier, or in divestiture.

October 1st of this year, and further progress reports on a quarterly basis thereafter.

We plan to initiate a proceeding at the end of the first year, on or about October 1, 1997, seeking comments from interested parties on the effects of the merger and implementation of the conditions. The competition provided by BNSF will be one of the key matters to be considered in the oversight proceeding. If circumstances warrant, a proceeding may be held prior to October 1, 1997. Subsequent proceedings will be scheduled as needed.

South Central Lines/SP East.

NAFTA/Grain: Tex Mex. We are particularly sensitive to our responsibility to ensure that this merger will foster the goal of North American economic integration embodied in NAFTA. After all, our regulatory powers are derived from the "Commerce Clause" of our nation's constitution,[179] which, in a very real sense, has resulted in the creation of a "free trade zone" within these United States, leading to our emergence in this century as an economic superpower.

NAFTA now has the potential to contribute to the economic growth and prosperity of the United States, Mexico, and Canada. Mexico, in particular, holds great promise as a market for our agricultural and other products. As USDA explained, "[u]nder NAFTA, Mexico is expected to be an important growth market, especially for grains and oil seeds produced in the midwest and plains states. Affordable rail rates and access to service are critical."[180]

The BNSF agreement should preserve shippers' competitive alternatives at the Brownsville border crossing, and should enhance them at Eagle Pass by upgrading BNSF's access from haulage to trackage rights. But Tex Mex and its supporters have raised legitimate concerns that, absent a grant of Tex Mex's responsive application, the merger could result in a reduction in competition at Laredo, the most important U.S.-Mexican rail gateway.

Specifically, Tex Mex has proposed that we grant it trackage rights that would permit it to connect with KCS at Beaumont via Houston. Tex Mex notes that, except for a small segment of UP track running from Robstown to Placedo, the routing proposed by Tex Mex would not overlap with BNSF's trackage and haulage rights from Houston to Brownsville, and thus it would not unduly interfere with BNSF's new operations. Tex Mex envisions its proposed trackage rights as an addition to those competitive safeguards contained in the BNSF agreement, and not as a replacement.

Tex Mex has offered a number of arguments in favor of its proposal. First, it suggests that all the U.S.-Mexican gateways should be viewed as a single market now served by UP, SP, and BNSF, and that the reduction from three railroads to two brought about by the merger is an unacceptable loss of competition that

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[179] Article I, Section 8, states in part:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . .

[180] Dunn, Oral Arg. TR at 240.

cannot be remedied through any condition relying on BNSF, which is one of the three.

We must reject this argument. In SF/SP, the ICC determined that there was no all-Mexican-gateway market, and that Laredo clearly occupied a position of separate and surpassing economic significance. SF/SP, 2 I.C.C.2d at 797. We reaffirm that finding here, but also acknowledge that, as BNSF has explained, this does not mean that the Mexican gateways are completely independent. BN/SF-59 at 31 n.12.

Further, Tex Mex acknowledges that, in 1994, BNSF handled only 3% of all U.S.-Mexican rail traffic at the border.[181] TM-39 at 36. Even if there were a single market for U.S.-Mexican movements by rail, BNSF's extremely limited presence prior to this merger would hardly make this a 3-to-2 situation, much less one that calls for remedial conditions.[182]

Tex Mex has raised other arguments that we find more persuasive. It is concerned that the merger will diminish its traffic base to the point where it is unable effectively to preserve a second competitive routing at Laredo, and that the merger might endanger the essential service it provides to the more than 30 shippers located on its line.

The 8.8% of current Tex Mex traffic originated at points served exclusively by SP is likely to shift to the new and efficient UP/SP single-line route into Laredo created by this merger. Another 31% of Tex Mex traffic now originates at or moves through 2-to-1 points on SP. BNSF will have access to this traffic via the BNSF agreement. Applicants' traffic study shows all this traffic moving via a BNSF/Tex Mex routing into Laredo. As we have explained elsewhere, the BNSF agreement will permit BNSF effectively to replace the competition that will be lost when SP is absorbed into UP, and thus protect shippers at 2-to-1 points from facing higher prices or deteriorated service. This does not mean that BNSF will be able to retain all the traffic now carried by SP when BNSF's competition is the newly merged and more efficient UP/SP, which may choose to offer shippers lower rates or better service than offered by either UP or SP today.

Further, for this 2-to-1 traffic, and for the 34.2% of 1994 Tex Mex traffic carried via a Tex Mex/SP/BN or SF interline

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[181] This market share will likely rise. The BNSF agreement will extend BNSF's presence for handling Mexican traffic. Its haulage rights to Eagle Pass will be converted into trackage rights, and, as noted previously, it will have new trackage and haulage rights over the UP line into Brownsville.

[182] Our finding that this is not a 3-to-2 situation is corroborated by the testimony of Tex Mex's own witness, Grimm, who argues that this would remain a 2-to-1 situation even after implementation of the BNSF agreement:

> In the market for rail transportation between the United States and Mexico, therefore, the effects of the merger will be much closer to a 2-to-1 reduction than a 3-to-2 reduction. Although BNSF will be a theoretical competitor, it will be a very minor and ineffective one.

TM-23 at 122.

movement,[183] the BNSF agreement has created a new potential single-line movement for BNSF into Mexico via Eagle Pass. As RCT explains:

> [W]ere it not for the fact that Laredo currently enjoys a competitive advantage over the other gateways to Mexico because there is a larger infrastructure of customs brokers located at Laredo than at the other gateways, there would be little or no incentive for BN/SF to route traffic via TexMex. Certainly, there is no reason to assume that BN/SF would deliberately route unit trains of grain in joint-line service with TexMex via Laredo when it will have a comparatively direct shot in single-line service at Eagle Pass. Given the admitted concentration of BN/SF's traffic from the grain belt and the Pacific Northwest and the industrial Midwest, it is only logical to assume that BN/SF would favor the less circuitous, single-line routing via Eagle Pass.

RCT-7 at 22-23.

We are persuaded that a partial grant of Tex Mex's responsive application is required to ensure the continuation of an effective competitive alternative to UP's routing into the border crossing at Laredo. Further, as noted by Volkswagen of America:

> [E]conomical access to international trade routes should not be jeopardized when the future prosperity of both countries depends so strongly on international trade.

TM-39 at 15.

Tex Mex has offered an effective rebuttal to applicants' and BNSF's claims that the BNSF agreement is sufficient to preserve competition at Laredo:

> If Applicants are right that BNSF will be better for Tex Mex than SP and that the route Tex Mex seeks will be inferior to BNSF's route, then granting Tex Mex's application would have little adverse impact on Applicants or BNSF, because little traffic would move over Tex Mex's trackage rights.

TM-39 at 5.

Finally, we note that applicants and BNSF have raised legitimate concerns over Tex Mex's request that it have unrestricted access to interline with other carriers along its trackage rights route. Tex Mex has conceded this point, explaining:

> An incidental competitive benefit of granting the rights Tex Mex seeks is that Tex Mex could carry some

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[183] Tex Mex notes that nearly all of the 1994 traffic it received in interline movements with BN or SF has disappeared because of a $300 per car surcharge imposed by BN and SF (and continued by BNSF) on all grain cars originating on BNSF destined for Laredo. TM-39 at 9. BNSF has explained that this was due to service problems and poor turnaround times for these cars by SP, which would be eliminated with the rights it receives under the BNSF agreement.

> shipments between Beaumont and Houston that had no prior or subsequent rail movement south of Houston. This, however, would be a relatively minor benefit, and it was certainly not a central purpose of the application . . . . [The Board] could limit the rights granted to exclude Tex Mex from carrying shipments between Houston and Beaumont that have no prior or subsequent movement by rail south of Houston.

TM-34 at 7. Although we have accepted Tex Mex's arguments that it may need to replace traffic it will lose via the merger in order to preserve competition at Laredo, the trackage rights we are granting here may only be used in conjunction with traffic that moves on the Tex Mex.

We are therefore granting Tex Mex the trackage rights sought in its Sub-No. 13 responsive application and in its Sub-No. 14 terminal trackage rights application, restricted in both instances to the transportation of freight having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. These trackage rights will be effective on the effective date of this decision.[184]

With respect to the precise details of the Sub-No. 13 trackage rights, we will allow Tex Mex and UP/SP an opportunity to reach an agreement, and we will require these parties to submit, within 10 days of the date of service of this decision, either agreed-upon terms respecting implementation of the Sub-No. 13 trackage rights or separate proposals respecting such implementation. We realize that 10 days is a short time frame, but it will enable us, if necessary, to choose the better of the offered alternatives, or some variation thereof, prior to the effective date of this decision. We wish, however, to emphasize that, even if certain details respecting the Sub-No. 13 trackage rights cannot be resolved prior to the effective date of this decision, these trackage rights will nevertheless become effective on that date. If the terms of compensation have not been resolved prior to the effective date, compensation will accrue from the actual date of the start of trackage rights operations, and will be payable after terms have been established. We note that, if we are required to prescribe the Sub-No. 13 compensation terms, we will look to the terms and conditions in the BNSF agreement as well as to the principles announced in the SSW Compensation cases.

With respect to the precise details of the Sub-No. 14 trackage rights, we will allow Tex Mex and HB&T an opportunity to reach an agreement, and we will require these parties to submit, within 10 days of the date of service of this decision, either agreed-upon terms respecting implementation of the Sub-No. 14 trackage rights or separate proposals respecting such implementation. The 10-day time frame, as previously noted, will enable us, if necessary, to choose the better of the offered alternatives, or some variation thereof, prior to the effective date of this decision. We wish, however, to emphasize that, even if certain details respecting the Sub-No. 14 trackage rights cannot be resolved prior to the effective date of this decision, these trackage rights will nevertheless become effective on that

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[184] The Sub-No. 14 application is unopposed, and an extended discussion with respect thereto is therefore unnecessary. We find that the use by Tex Mex of the HB&T terminal facilities at issue in the Sub-No. 14 docket is practicable and in the public interest, and will not substantially impair HB&T's ability to handle its own traffic. See 49 U.S.C. 11103(a).

date. If the terms of compensation have not been resolved prior to the effective date, compensation will accrue from the actual date of the start of trackage rights operations, and will be payable after terms have been established. We note that, if we are required to prescribe compensation terms, we will apply the principles for compensation in condemnation proceedings. 49 U.S.C. 11103(a) (third sentence); UP/MP/WP, 366 I.C.C. at 576 n.114.[185]

Plastics/Chemicals: SIT/Lake Charles/Dow/UCC. Plastic and chemical shippers located in the Gulf Coast area have raised a number of legitimate concerns over merger-related competitive harm that would not be effectively remedied by the BNSF agreement. Accordingly, we are imposing additional conditions to address these concerns. For example, we are imposing a condition that will broaden BNSF's access to SIT facilities in the area. For shippers located near Lake Charles, LA, we have crafted conditions that will permit KCS to offer an interline routing into St. Louis independent of applicants, and that will eliminate the restrictive destination conditions and "phantom" haulage charges that together would have unduly inhibited BNSF's ability to offer direct, competitive service to those shippers. Finally, we have ensured the continued availability of competitive build-out options for Dow at Freeport, TX, and UCC at Seadrift, TX, which are discussed in detail below under conditions requested by individual parties. Preserving the Dow build-out opportunity also will benefit numerous plastic and chemical shippers located along the Gulf Coast between Freeport and Texas City, TX, such as Quantum's plant at Chocolate Bayou.

Storage-in-Transit (SIT) Facilities. There is widespread agreement among the parties that SIT capacity is a critical element in service to the plastics industry. The use of railcars for storage allows plants to run at capacity and product to be readily available for prompt movement to various markets as market price and demand change.[186] It has also proven to be a cost effective alternative to investing in multiple silos as a means of storing up to 50 products while avoiding any possible problems with contamination. SPI's witness Ruple notes that "(w)hile the percentage of resins utilizing storage varies, in general between 30% and 50% require storage." Id.

Prior to the merger, SP undertook a comprehensive analysis of storage requirements for plastics shippers in the Gulf Coast. According to SP:

> Plastic storage in the Gulf Coast impacts operations more than any other normal operating condition, with the only possible exceptions being locomotive/crew availability and scheduled track maintenance.

See SPI-11, Exhibit 14. Two-thirds of the plastics hopper cars require storage, and the mean storage duration at the time of the analysis was 45 days. Id.

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[185] Our pledge to apply condemnation principles in setting compensation fulfills the alternative requirement in the fourth sentence of 49 U.S.C. 11103(a) that compensation be "adequately secured" before commencement of terminal trackage rights operations.

[186] See, e.g., SPI-11, VS Bowles, at 3-4; and SPI-11, VS Ruple, at 15-17.

UP and SP currently enjoy 84% of the plastics hopper car storage capacity in the Gulf Coast.[187] To meet customer needs, SP committed to a new 3,000-car storage yard at Dayton, TX, strategically located near plastics resins production facilities.[188] The CMA settlement has made provision for BNSF access to Dayton Yard to supply some of the needed additional storage capacity. That agreement indicates that BNSF will have equal access to that facility. It also states that applicants will work with BNSF to locate additional facilities on the trackage rights lines as necessary.

These provisions are somewhat ambiguous, and various parties have criticized them as inadequate. We think that these provisions should be clarified and strengthened. We are therefore imposing the additional condition that the BNSF agreement be modified to require that BNSF shall have access to all SP Gulf Coast SIT facilities on economic terms no less favorable than the terms of UP/SP's access, for storage in transit of traffic handled by BNSF under the terms of the BNSF agreement.

Lake Charles, LA. A number of plastic and chemical shippers, including Montell, Olin, and PPG, operate plants located at three rail stations (Lake Charles, West Lake, and West Lake Charles) in the Lake Charles area of Louisiana. These plants have access to SP and KCS, and some have access to UP as well via haulage or reciprocal switching. But KCS must interline with UP or SP to provide efficient routings to the New Orleans, Houston, and St. Louis gateways. Thus, while these shippers now benefit from direct rail competition, an unconditioned merger would place all their efficient rail routings under applicants' control.

Paragraph 8 of the CMA Agreement amended the original BNSF settlement agreement to give BNSF the right to handle traffic of Lake Charles and West Lake shippers open to all of UP, SP, and KCS for traffic moving (a) from, to, and via New Orleans and (b) to or from points in Mexico via the Texas border crossings at Eagle Pass, Laredo, or Brownsville. On brief, applicants extended this relief to incorporate West Lake Charles traffic open to SP and KCS.[189]

We believe this to be an inadequate solution for these shippers. 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. Moreover, the key role of SIT facilities for plastics shippers further complicates this situation:

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[187] SPI witness Ruple identifies the following Gulf Coast SIT sites of UP, SP, and BNSF, respectively: UP, in Spring, TX (1520 spots), in Addis, TX (550 spots), and in Avondale, LA (350 spots); SP, in Dayton, TX (3000 spots), in East Baytown, TX (1200 spots), and in Beaumont, TX (250 spots); and BNSF, in Casey, TX (720 spots), and in Teague, TX (650 spots). In addition, he identifies the following non-Gulf SIT facilities: UP, in McGehee, AR (380 spots), and in Dupo, IL (350 spots); SP, in Pine Bluff, AR (250 spots), and in East St. Louis, IL (100 spots). See SPI-11, VS Ruple and Exhibits 7-9.

[188] See SPI-11, VS Ruple, at 15, and Exhibits 8, 14, and 18.

[189] See UP/SP-260 at 23, n.9.

> As much as 70% of a plant's output may be assigned initially to storage. . . Generally, it is only after the car has been in storage that its contents are sold and a delivery destination determined.

MONT-9 at 12. Because BNSF would only be able to handle shipments routed to certain destinations, and because the destinations are not known when the product moves to the storage point, a shipper could be forced to order a rail car returned from a storage point to its facility so that it could be transported by a different carrier.

To preserve existing competitive alternatives for shippers in the Lake Charles area, we will require applicants to modify the BNSF agreement in two ways. First, BNSF must be able to use its Houston-to-Memphis trackage rights to interline with KCS at Shreveport and Texarkana. This will have the principal effect of substituting a KCS-BNSF joint-line routing via Texarkana and Shreveport for the existing KCS-UP joint-line movement via Texarkana. Second, applicants must remove the (New Orleans and Mexico) geographic restrictions on direct BNSF service to Lake Charles, West Lake, and West Lake Charles shippers and permit BNSF to serve all destinations from these points. This will permit BNSF to offer SIT facilities for a full range of destinations, without which shippers might be hesitant to use BNSF services for any shipments requiring SIT.

Furthermore, we have one additional concern with the arrangements under which BNSF service will preserve competition for Lake Charles area shippers. Section 5b of the original BNSF settlement agreement, as amended by Section 4b of the second supplemental agreement dated June 27, 1996, reads in part as follows:

> In addition to all other charges to be paid by BNSF to UP/SP herein, at West Lake and West Lake Charles, BNSF shall also be required to pay a fee to UP/SP equal to the fee that UP pays KCS as of the date of this Agreement to access the traffic at West Lake, adjusted upwards or downwards in accordance with Section 12 of this Agreement.

Protestants have referred to this as a "phantom haulage fee." It appears to us that applicants are intending to charge BNSF a fee to access traffic at West Lake Charles, even though this location is not presently open to UP under haulage or switching and is served only by KCS and SP via jointly owned track. Further, the fee that UP currently pays to KCS at West Lake is compensation for reciprocal switching or haulage service performed by KCS. Elsewhere in the BNSF agreement, the parties have made arrangements for reciprocal switching and haulage charges. If applicants perform any switching or haulage in the Lake Charles region, then these are appropriate charges that should be assessed BNSF. It appears, however, that BNSF will have direct access to West Lake shippers when it begins to operate under its trackage rights arrangement, so that UP/SP may not be performing any switching or haulage service for BNSF in this area. Under these circumstances, we find it is unreasonable for applicants to impose any charge to BNSF at West Lake over and above the compensation for trackage rights unless they are performing an additional service. It is even more unreasonable for applicants to expand the scope of this fee to include West Lake Charles, which represents 93% of the Lake Charles

area's rail traffic,[190] and where no switching or haulage is now performed and no fee is assessed. We will require applicants to modify the BNSF agreement to remove this fee.

Coal: Entergy/CPSB/TUE. We are imposing specific conditions crafted to preserve existing competitive alternatives for three coal shippers located along applicants' South Central lines. The details of each are discussed elsewhere under conditions requested by individual parties.

First, we have ensured the continued availability of a competitive build-out option for Entergy's White Bluff plant near Redfield, AR, which is now served exclusively by UP. BNSF will be permitted to substitute for SP if a connection is ever built linking the plant to a nearby SP line at Pine Bluff. (BNSF will be operating over this SP line via the trackage rights it will receive under the BNSF agreement.) Entergy will thus continue to have the option of building out to an independent carrier and will continue to be able to use this option in its negotiations with applicants.

Second, we are imposing a condition to maintain the pre-merger competitive status quo at CPSB's two plants at Elmendorf, TX. While these plants receive rail service at destination via a line owned by SP, UP is permitted to deliver coal to CPSB under trackage rights that have been granted by SP to CPSB. BNSF will be permitted to substitute for UP by using the CPSB trackage rights to deliver shipments to the plants.

Finally, we are imposing a condition to maintain the availability of two independent and efficient PRB routings to TUE's Martin Lake plant near Henderson, TX. This plant is now exclusively served by BNSF, and its most efficient PRB route is an interline movement involving both KCS and a short SP line segment. (Interline movements do not significantly detract from the efficiencies of run-through coal unit trains.) TUE has plans, however, to build a 6-mile spur to connect to UP and gain a second independent routing into the plant. We will require that the BNSF agreement be amended to permit BNSF and KCS to provide an efficient PRB joint-line movement into Martin Lake as an independent competitive alternative to the UP/SP single-line routing it will gain access to once the spur is completed.

Central Corridor.

Coal: URC agreement/Tennessee Pass. As we explain below, we are imposing two conditions to ensure that this merger does not result in competitive harm to Central Corridor coal shippers. First, we are imposing the URC agreement to preserve the existing level of rail competition for those few western coal shippers dependent on originations of Utah/Colorado coal. Second, we are granting discontinuance authority rather than full abandonment authority for applicants' Tennessee Pass Line to ensure that the merger does not result in service degradation for Central Corridor coal (and other) movements.[191]

URC agreement. Under the URC agreement, URC will receive access to additional coal sources in Utah and overhead trackage

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[190] See SPI-21 at 35.

[191] We have viewed the concerns raised over potential degradation of Central Corridor service as concerns over potential competitive harm. As noted above, merger-related competitive harm results when the merging parties gain sufficient market power profitably to raise rates and/or reduce service.

rights between Utah Railway Junction, UT, and Grand Junction, CO. BNSF, via the trackage rights it will receive under the BNSF agreement, will be able to move URC-originated coal to destination points west of Provo, UT, and east of Grand Junction. URC has explained that its agreement with applicants "will provide the market discipline to assure competitive rates for coal customers in the western region by means of its cost efficient operations and access to Utah coal acting either in conjunction with the BNSF or with UPSP."[192] As discussed elsewhere in this decision, the URC agreement is an especially important competitive safeguard for those few western coal shippers, such as the SPP/IDPC jointly owned North Valmy Station plant, that are dependent on originations of Utah/Colorado coal. We therefore impose as a condition the terms of the URC agreement.

Tennessee Pass Line. Applicants seek to abandon a portion of the Tennessee Pass Line between Malta and Cañon City, CO,[193] and to route traffic over more efficient routes post-merger. Several parties have raised concerns that the Moffat Tunnel Line between Dotsero and Denver, CO, will lack the capacity to handle overhead traffic rerouted from the Tennessee Pass Line.

Parties have requested that we consider alternative conditions designed to ensure that shippers do not suffer a degradation of the level of service now provided by SP as a result of the merger. One such condition would require UP/SP to maintain service on SP's (DRGW's) Tennessee Pass Line between Dotsero and Pueblo, Colorado. An alternative condition would permit UP/SP to discontinue service on, but not physically abandon, the Tennessee Pass Line. If the Moffat Tunnel Line cannot handle the increased traffic, we could then take steps necessary to enable UP/SP to restore the prior level of service over the Tennessee Pass Line. In addition, opponents argue that the Tennessee Pass Line is an important alternate route in the event of a derailment or congestion on the Moffat Tunnel Line.

Applicants assert that, in the 1970s, DRGW operated as many as 25 to 30 trains per day through the Moffat Tunnel, which indicates that this line should be able to handle the projected increase in traffic volume, and that additional capacity improvements on this line could be made if they prove necessary. Nevertheless, opponents point out that the traffic mix has changed considerably since the 1970s. DRGW's operations consisted mostly of short mixed-freight trains, whereas today SP operates longer trains, including heavy unit trains transporting coal. Opponents are concerned that, if SP has difficulty meeting contracted delivery schedules now, shifting more traffic to the Moffat Tunnel Line will cause additional capacity and service problems. Such a degradation in service could increase cycle times for unit trains of shipper-owned cars, and thus require shippers to purchase more cars to receive the same level of service.

Applicants assert that the Tennessee Pass Line is the least efficient link for an overhead route across the Central Corridor;

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[192] UTAH-6 at 19.

[193] Specifically, applicants seek by petitions for exemption in Docket Nos. AB-8 (Sub-No. 36X) and AB-12 (Sub-No. 189X) for SPT to abandon, and DRGW to discontinue operations over, SP's Sage-Malta-Leadville line; and by applications in Docket Nos. AB-8 (Sub-No. 39) and AB-12 (Sub-No. 188) for SPT to abandon, and DRGW to discontinue operations over, SP's Malta-Cañon City line.

and that the merger will open new, more efficient routes for the present traffic flows. Given the UP/SP and BNSF options that will become available after the merger, applicants claim that routing via Pueblo and the Tennessee Pass Line is an inferior choice.[194]

We acknowledge that applicants have taken the railroad capacity concern seriously and recognize that the inefficient Tennessee Pass Line might need to be retained just in case the Moffat Tunnel Line is overwhelmed. Applicants provided assurances that no action will be taken precipitously to abandon the line, and that overhead traffic flows will leave that line only as their new routes become fully prepared to take them efficiently.[195] Notwithstanding these reassurances, we will grant discontinuance authority rather than full abandonment authority because of the crucial nature of this through route. This will preserve the line intact until applicants demonstrate that overhead traffic over the Tennessee Pass Line has been successfully rerouted.

Related procedural aspects. Consistent with the Board's policy to promote private-sector solutions to disputes, we encourage parties to this proceeding to make their best efforts to resolve among themselves any disputes that may arise concerning the meaning or applicability of any of the terms or conditions imposed or approved before resorting to the Board for resolution. Use of arbitration to resolve disputes can result in resource and time savings for all concerned. If parties choose to use arbitration in the first instance, the Board will entertain appeals from arbitral decisions using the standards in Lace Curtain[196] set forth for review of arbitral decisions under our labor conditions, unless the parties agree otherwise.

No Divestiture Needed. A number of parties have called on us to impose certain broad-based remedies to supplement or replace the BNSF agreement. Most notably, a number of parties request that we impose some version of MRL's plan for divestiture of certain Central Corridor lines and/or some version of KCS' and Conrail's plans for divestiture of certain lines running from St. Louis to the Gulf Coast region.

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[194] Applicants note that double-stack traffic is transcontinental traffic that can easily be rerouted to shorter routes through Wyoming or New Mexico and by-pass Colorado completely. Applicants state that the Tennessee Pass Line would be the shorter post-merger route only for coal moving to West Texas, New Mexico, and Arizona. The volume of this coal, applicants assert, currently amounts to about one train per week. UP/SP-232 (Vol. 3), VS Ongerth, at 47-48.

[195] According to applicants, existing service to overhead shippers will be protected until superior options are in place, and the track itself will be left in place for a set period of time in accordance with assurances made to the Governor of Colorado. These include a commitment to maintain service on the line for at least 6 months following consummation of the merger, and to leave track in place until upgrades are completed on the new routes and at Roseville Yard in California, which could take several years. UP/SP-232 (Vol. 3), VS Ongerth, at 49.

[196] Chicago & N.W. Transp. Co.--Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd, International Bhd. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988).

As we have explained above, the merger, subject to the conditions we are imposing, including an oversight condition, will be consistent with the public interest. These conditions are narrowly tailored to ensure that they effectively remedy all significant merger-related competitive harms without unduly limiting the merger's substantial public benefits. Therefore, no other broad-based remedy is required for our approval. Further, as we explain below, while divestiture of certain of applicants' lines may have a surface appeal, it also entails its own very substantial problems in this proceeding.

South Central Lines/SP East. Various parties, including Conrail, KCS, NITL, RCT, the Arkansas Attorney General, DOT, and DOJ argue for a condition requiring divestiture of extensive UP or SP lines in the South Central region. Conrail and KCS put forth requests involving forced divestiture of specific SP line segments. While these proposals all differ somewhat in their particulars, they are all quite similar. The Conrail proposal envisions a larger divestiture of SP's assets than the KCS plan, but both these and the others would entail removing the core of what would be the UP/SP South Central network.

Divestiture in the rail industry, with its network economies, is a requirement, to be imposed only under extreme conditions, when no other less intrusive remedy would suffice. Here, divestiture would be greatly inferior to the remedy we have chosen. Divestiture would be an over-reaching solution, especially in light of the agreements that applicants have reached with various parties and the additional conditions we are imposing. Because the competitive justifications that would be the basis for compelling divestiture have been mooted, we will deny the requested conditions calling for divestiture of South Central lines.

As we already have discussed, BNSF, through the agreements applicants have arranged and the additional conditions we are imposing, will be more than sufficient as a replacement competitor in these corridors. All the parties' competitive concerns have been effectively addressed. In these circumstances, we need not resort to the significantly more intrusive divestiture remedy. As for potential purchasers, both Conrail and KCS suffer from deficiencies. Despite their attacks on the adequacy of BNSF's service plans, neither Conrail nor KCS utilized existing Board procedures to submit responsive applications in support of their sweeping proposals. They have provided no traffic studies, no operating plans, and no pro forma financial statements to reveal the full effects of their proposals.[197] As previously noted, we will not impose conditions that will restructure the competitive balance among

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[197] NITL's divestiture proposal (NITL-9 at 5-6, 56-57) is equally unsupported. It offers no justification to support its request for additional requirements that (a) SP's Houston-Flatonia-Placedo line be sold, yielding a Houston-Corpus Christi-Brownsville route distinctly inferior to the one BNSF would have under the BNSF agreement, and (b) SP's Flatonia-Eagle Pass line be sold subject to BNSF's present haulage rights, thus yielding weaker competition at Eagle Pass than would the BNSF agreement.

The proposal of the Arkansas Attorney General to turn SP lines into public highways is vague, unprecedented, and unpredictable, and thus we cannot judge its impacts. RCT suggests a specific overreaching addition to the Conrail and KCS proposals that would require the insertion of a second railroad at CP&L's Coleto Creek plant. RCT-4 at 17.

railroads with unpredictable effects, which is what divestiture to KCS or Conrail would result in here.

Divestiture would introduce a distinctly weaker competitor than BNSF at 2-to-1 points and a distinctly weaker competitor than UP/SP at exclusively served (1-to-1) points. Neither KCS nor Conrail (nor any other purchaser other than BNSF, for that matter) could offer the array of service and single-line coverage that both the merged system and BNSF will offer to their shippers. A KCS purchase would raise the most new competitive concerns, as the KCS system itself is mostly within these corridors. As such, there would be many of the same problems with parallelism as with the UP/SP merger, but without the competitive solutions we now have before us. There is evidence that Conrail is a much higher cost railroad than BNSF, and thus there are serious questions as to its ability to be a competitive force in these corridors. UP/SP-231, RVS Whitehurst, at 21.

At points that will continue to be served by multiple railroads after the merger, such as Dallas (which will be served by BNSF, UP/SP, KCS, South Orient Railroad Company as well as other shortlines) and Houston (which will be served by BNSF, UP/SP, KCS for grain, and Tex Mex for Mexican traffic over the trackage rights we are granting here, and neutral terminal roads), divestiture would add an additional railroad, reducing volume efficiencies, despite the fact that the merger as conditioned will not result in competitive harm. And divestiture will be a significant overreach because it would transfer large volumes of business at exclusively served points to the acquirer, without any competitive justification.[198]

These divestiture proposals would also take the railroad system backwards by destroying, rather than creating, single-line service.[199] Many shippers who would have received new single-line service, or who would see existing single-line service eliminated, would no longer share in the merger's benefits. It is true that the loss of new UP/SP single-line routings could be reduced somewhat by a grant back of trackage rights from the carrier chosen for divestiture to UP/SP, as variously suggested by NITL and MRL. But many shippers on the divested segments would lose single-line service because the overhead trackage rights would not permit local service. Nonetheless, single-line service over BNSF in the South Central Corridor, to and from the Pacific Northwest, to and from the Upper Midwest, and to and from

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[198] For example, applicants' witness Peterson shows that the Conrail proposal would compel the merged system to convey lines to Conrail that accounted for 265,000 carloads of exclusively served SP traffic in 1994, compared to only 90,000 carloads of 2-to-1 traffic. UP/SP-231, RVS Peterson, at 195.

Peterson details how the Conrail and KCS divestiture proposals would cause very large and unnecessary traffic losses to UP/SP (i.e., $924 million in annual gross revenues in the case of the Conrail proposal and $874 million in annual gross revenues in the case of the KCS proposal). Such losses would adversely affect the economics of the merger. Id. at 196-201.

[199] Peterson also shows that the Conrail and KCS divestiture proposals would eliminate single-line service for 357,000 units of traffic per year--even more than the volume of traffic that will gain new single-line service as a result of the merger. Offsetting this in the case of Conrail (but not KCS) would be the creation of new single-line service for a smaller volume of traffic that moves to Conrail points. Id. at 201-08.

the PRB for major coal utilities, would all be adversely affected.

Further, the quality of UP/SP service in the Chicago-St. Louis-Memphis-Texas corridor would be adversely affected by these proposals. Applicants note that a study performed for Conrail graphically demonstrates the improved transit times that will result from directional running. UP/SP-232, RVS Salzman, at 23. Even more seriously, loss of SP's Pine Bluff Yard would destroy the UP/SP blocking plan, overload UP's North Little Rock Yard, and require extra switching throughout the South Central UP/SP region. Id. at 17-20. UP/SP would lose the ability to make many blocks at Arkansas yards, requiring additional switching at other congested yards. Id. Conrail points out in detail how each additional switch increases transit time, increases damages, and increases safety risks. CR-22, VS Carey/Ratcliffe/Shepard, at 13-15. We note that these problems are inherent in Conrail's own proposal.

UP/SP would lose the ability to build run-through trains for NS via St. Louis. It would be unable to block for Conrail's Buckeye Yard. Blocking for many smaller yards in Texas and Louisiana would be eliminated. UP/SP-232, RVS Salzman, at 17-19. Almost every new block proposed in the UP/SP Operating Plan for the South Central corridor would have to be eliminated, and those that remain would displace existing blocks. Id.

In exchange, shippers would gain no discernable service benefits. Conrail witnesses acknowledge that the service plan to which Conrail is committed calls for no changes in SP's existing train schedules. UP/SP-232, RVS King, at 26-27. KCS has not disclosed its plans, but we assess that KCS could not offer significantly improved train schedules because its route network is too constrained.

Applicants' witness King asserts that the UP-Conrail "Salem Gateway" service, which provides the best service between the Northeast and the South Central region, would be degraded if Conrail were to acquire the SP lines it seeks. If Conrail is the acquirer, applicants assert it will have no incentive to help its competitor, UP/SP, maintain that gateway, or vice versa. As a result, service would decline and cars would likely be rerouted via urban St. Louis, absorbing additional delay. UP/SP-232, RVS King, at 29-30. UP/SP also asserts that there is a significant risk that current SP-NS and SP-CSX services would also be undermined because Conrail would have sharply reduced incentives to work with its competitors in the East, and vice versa. Id. at 30-31.

The economic benefits of the merger would also be undermined by these divestiture proposals. Applicants have shown that claims by some parties, especially Conrail, that the UP/SP savings are all in the West are erroneous. UP/SP-232, RVS Salzman, at 14 & Ex. DWS-1. Although many of the benefits from the merger accrue in other areas, divestiture would mean that the new system would still lose well over $100 million per year of labor, operating, and other benefits of the merger.

UP/SP would also be forced to spend huge sums for increased capacity without the use of its parallel lines for directional running. Applicants have explained that the increased burden caused by focusing more traffic on the UP lines in Arkansas and Texas would require UP to invest over $220 million to create new capacity on UP segments, and to implement capacity-enhancement plans that the merger would have avoided. UP/SP-232, RVS King, at 31. KCS, Conrail, and RCT all recognize that UP/SP probably

would have to incur the tremendous expense of double-tracking the UP Houston-Memphis route, and a number of UP lines in Texas would also be affected. KCS-33 (Vol. 2), VS Rees, at 228; CR-22, VS Carey/Ratcliffe/Sheppard, at 78-79; RCT-4 at 15, 40-41. Increased switching burdens on already-taxed UP yards would likely require UP/SP to construct a new switching yard at a cost of up to $100 million, although no location would be as well suited as the existing Pine Bluff and Little Rock facilities. UP/SP-232, RVS King, at 32.

Applicants explain that the expenditures would be vastly greater, with even greater loss of service quality and efficiency, if Conrail were to acquire SP's El Paso line. Id. at 33-34. The net effect of this further Conrail overreach would be to divert transcontinental traffic between California and New Orleans/Houston/San Antonio/Laredo from an SP line that has excess capacity to UP lines that have no extra capacity. Again, UP/SP would be forced to spend $160 million, if not more, and service quality would still decline as most traffic flows would be concentrated on a single, overburdened line and forced through the congested Ft. Worth terminal. Id. Applicants assert that these unnecessary capital outlays would make it impossible for it to make other vital investments, such as developing new intermodal terminals and services. See Comments of Riss Intermodal, Mar. 29, 1996.

A forced South Central divestiture is incompatible with the trackage rights and line sales provided for in the BNSF agreement, and could cause the entire agreement to collapse. Nothing remotely comparable in its benefits would be available. Even if some other competitive agreement or agreements could be pieced together, shippers would lose the intense, comprehensive competition offered by the BNSF agreement, and all the added competition that agreement brings. For example, instead of gaining access to two railroads in place of one and single-line service to points all across both the UP/SP and BNSF networks, shippers on SP's Southern Louisiana line would be exclusively served by the forced acquirer and would lack single-line service to any UP/SP or BNSF point.

We also believe that a divestiture requirement along the lines advocated by Conrail and KCS might dissolve the merger, leaving SP to retrench its services or possibly to dismember itself.[200] We do not believe that dismemberment of SP through forced divestiture is in the best interest of shippers and the public. Essential services would irretrievably be lost, the quality of services that are preserved would be greatly degraded, and the significant benefits of the UP/SP merger and the BNSF agreement would likely be lost.

Central Corridor. Several parties, including DOJ and MRL, argue that competition in the Central Corridor can be preserved only through divestiture. DOT states that circumstances unique to the Central Corridor militate against divestiture of that line, but it urges conditions to strengthen significantly the trackage rights proposed in the Central Corridor. MRL, acting on behalf of its owner, Dennis Washington, seeks the divestiture of all DRGW lines; extensive UP and SP lines in Nevada, California, and Oregon; UP's line to Silver Bow, MT, with trackage rights to

[200] This would be the result both because of the reduction in merger benefits, which KCS and Conrail could not replicate, and because, as can be seen from Conrail's bidding and from KCS' claim that UP overpaid for SP, the price that would be offered is likely to be inadequate. UP/SP-231, RVS Rebensdorf, at 30-32.

connect it to the Central Corridor; trackage rights on UP in Kansas to reach a variety of grain gathering points; and unilateral authority to set rates to and from all SP points in California and Oregon, with revenues pro-rated by mileage.

We have rejected already the arguments that form the basis for this extraordinary relief. We believe BNSF will be an effective competitor as a tenant over UP/SP lines,[201] as discussed more fully above. We also have rejected the argument that, given the high-quality, low-cost routes that BNSF operates between the Midwest and the West Coast, BNSF will have no incentive to operate via its trackage rights in the Central Corridor.

Even if we were to find that there was some predicate for divestiture, we would have serious reservations concerning the ability of MRL's newly formed affiliate to provide adequate, competitive service. As noted by DOT, MRL itself does not appear to possess an adequate network, particularly in California, to gather traffic that would flow over the corridor.[202] MRL may also be disadvantaged in competing against two carriers in the West that could offer single-line service to the major midwestern gateways. A probable result would be the rerouting of the overhead traffic on the Central Corridor to the other single-line carriers, jeopardizing the viability of competitive service on that corridor.

MRL's divestiture proposal would eliminate significant amounts of existing single-line service, as well as the new single-line service and improved routings created by the merger. MRL proposes to purchase approximately 350 miles of UP's lines north of Pocatello, ID, including the mainline to Silver Bow, a number of connecting branch lines, and an important connection to UP's spin-off, Eastern Idaho Railroad, at Idaho Falls, ID, which will affect over 40,000 annual carloads of UP traffic and $90 million in annual UP revenues. While a grant back of overhead trackage rights to UP/SP and BNSF, as MRL proposes, could ameliorate these losses somewhat, they would still be substantial.[203] As a result of MRL's proposal, numerous shippers located on this trackage in Idaho would no longer have access to UP's single-line routes to important UP points such as

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[201] As counsel for CPUC explained at the oral argument:

> [T]he proposed divestiture of one of the two lines in the Central Corridor is not a good idea for California. . . . We concluded that the BN/Santa Fe, through its trackage rights, will provide the kind of Central Corridor service and competition that will be best for California.

Conlon, Oral Arg. Tr. at 470.

[202] As DOT's counsel explained at the oral argument:

> [O]ther than the applicants, only the BN/Santa Fe has the gathering lines that can supply the volume of overhead traffic necessary to maintain competition throughout the Central Corridor between the West Coast and the Midwestern gateways.

Smith, Oral Arg. Tr. at 156.

[203] It is not clear whether three railroads could operate efficiently over this segment.

Chicago, St. Louis, Memphis and Dallas. These shippers would be left either with a very inefficient route over the new MRL affiliate via Salt Lake City to Kansas City, or with having to move their traffic north to the Montana Western Railway, which would hand it off to MRL, and then to BNSF.

Large volumes of agricultural commodities, such as potatoes and grain, would be adversely affected by a divestiture to MRL. This business is intensely truck competitive and diversion to the highways will occur as transit times deteriorate under the MRL proposal. Potatoes originate on this UP Northern Idaho network, destined to the population centers of the South and East; grain, primarily wheat, barley, and malt, moves mainly east and to the Portland area for export. Grain and lumber is trucked from origins on BNSF and MRL to Silver Bow for handling by UP to a variety of markets. MRL's purchase of this line could make rail service uncompetitive in these markets.

Under the BNSF agreement, intermodal and automotive customers at Salt Lake City and Reno will gain new single-line access from the numerous and substantial intermodal terminals throughout the BNSF system, especially in the East (Chicago, Twin Cities, Memphis, Kansas City, Denver, St. Louis, Omaha and Dallas) and the West (Richmond, Stockton, Modesto and Fresno). MRL would only reach Kansas City and Denver on the east and Stockton on the west. Moreover, even at these few locations, intermodal shippers would not have access to BNSF's facilities. MRL's new affiliate would only possess facilities initially at Denver that it would acquire as part of the divestiture. Most of the existing intermodal and automotive volumes to or from Salt Lake City and Reno would lose the benefit of a second competitive single-line route.

As part of the BNSF agreement, UP/SP will obtain new, shorter routes by gaining trackage rights over BNSF from Bend to Chemult, OR, and between Barstow and Mojave, CA. The MRL proposal could undermine the BNSF agreement, and with it the significant mileage savings associated with these trackage rights.

As already discussed, both UP and SP now operate over more circuitous routes than the efficient single-line routes the merger will create. The merger will reduce UP's mileage between Oakland and Chicago by 189 miles and SP's by 388 miles. From Oakland to Kansas City and St. Louis, the reductions will be 189 miles for UP and 143 miles for SP. Between Los Angeles and Memphis, the savings will be 283 miles over SP's present route and 580 miles over UP's non-competitive Central Corridor route. These mileage reductions will make the merged system more competitive with BNSF, the service leader for Bay Area-Midwest traffic.[204]

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[204] Upon merger, UP/SP will gain route and terminal flexibility in several major corridors including Los Angeles-Chicago, Bay Area-Utah, and San Antonio-Houston-Dallas-Memphis-St. Louis-Chicago. Between Los Angeles and Chicago, expedited intermodal and auto traffic will be concentrated on the Tucumcari line and slower manifest traffic on UP's Central Corridor line, adding to the total capacity of both. Between the Bay Area and Utah, expedited traffic will move via SP's Donner Pass line, and slower bulk traffic will move via UP's Feather River line. The merger will also alleviate congestion in Utah by eliminating the conflicting and inefficient movements of UP and SP traffic between Salt Lake City and Ogden which add unnecessary miles and

(continued...)

Divestiture would jeopardize the ability of the merged company to ensure long-term, high-quality rail service to shippers who are dependent presently on SP throughout the West.[205] SP's transcontinental service time will be reduced from weeks to days; service in coal, automobile, and other markets will similarly improve; reliability will be vastly increased; and cars will be available. This improvement in competition will mean that, for the first time in many years, rail transportation will be a real competitor for these shippers' business.

Divestiture would also impede applicants from using the combined facilities of UP and SP in this corridor, and thus limit the merged company's ability to resolve problems of route congestion (particularly between Ogden and Salt Lake City, and between Pueblo and Herington), circuity and altitude, which have contributed to the irregularities that make SP's services less competitive.[206] The new plan will avoid or cure tunnel clearance problems on SP's routes through the Rockies (Moffat Tunnel) and the Sierras. Yard expansion or pre-blocking of larger volumes of combined traffic to bypass yards will alleviate delays for traffic that moves through the Roseville yard and other rehandling yards in California, as well as at Kansas City. The resulting service improvements will provide consistent transit times--better by many days than what SP offers now--that can more effectively compete with the offerings of BNSF for food products, forest products and coal moving in this corridor.

In sum, we believe that the service that will be provided by BNSF over trackage rights is an appropriate replacement for the service formerly provided by SP. Divestiture to another carrier would not replace the competitive single-line and routing options that shippers will lose when SP merges with UP. No railroad other than BNSF so nearly duplicates the SP and UP networks. Likewise, no other railroad has the financial strength, operational capabilities, and marketing expertise to serve the long routes in the Western United States. The BNSF agreement grants BNSF trackage rights between Denver and Oakland, with

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[206] (...continued)
hours to every UP and SP train that crosses the Central Corridor. Most UP/SP Northern California trains will be operated straight through at Ogden, and BNSF trains will be operated straight through at Salt Lake City.

[205] SP has hundreds of carload lumber and food products shippers local to its lines in California and Oregon who have endured 2- or 3-week delivery times to the Midwest, cars lost and untraceable in terminals, inaccurate bills, and unavailable equipment. Some have limited or eliminated their carload rail shipments and are paying more to move their goods by truck or BNSF intermodal or transload service--and would return their traffic to rail if SP could provide adequate service.

[206] SP has two transcontinental routes, the Central Corridor and the Southern Corridor, both of which are largely single-track, difficult to operate, and costly to maintain. The distribution of its traffic is such that it cannot eliminate either of those routes without losing more than it would gain. Clearance problems and mountainous operating conditions across the Central Corridor route cause SP to move even more traffic over its Tucumcari route, notwithstanding congestion. SP's yards are clogged and need capital investments that SP has not been able to fit within its constrained capital budgets.

access to all 2-to-1 shippers in Utah, Nevada, and Northern California (there are no 2-to-1 points in Colorado).

We find that divestiture in the Central Corridor lacks competitive justification, and that MRL's proposed divestiture is overbroad and overreaching. Divestiture of the Central Corridor would eliminate single-line service, degrade service quality, increase transit times, restrain efficiencies, and undermine the merged system's ability to fund new capital projects as proposed by applicants. The MRL proposal would force a sale of lines accounting for approximately 350,000 carloads of exclusively served traffic in 1994, compared to only 75,000 carloads of SP's 2-to-1 traffic. Applicants predict that MRL's divestiture proposal would result in $631.3 million in annual revenue losses to UP/SP, involving five areas: carload diversions, losses resulting from MRL's proposed PRA, intermodal traffic, automotive traffic, and losses of new UP/SP marketing opportunities for carload traffic. UP/SP-231, RVS Peterson, at 210-213.

A Central Corridor divestiture is not in the best interest of shippers or the public. We believe that BNSF will be an effective competitor as a tenant over UP/SP lines. We believe that the broad-based conditions that we are imposing will sufficiently augment the BNSF trackage rights agreement to preserve competition over the Central Corridor.[207]

EMBRACED CASES AND RELATED MATTERS. We are exempting, in the Sub-No. 1 docket, the trackage rights provided for in the BNSF agreement and included in the Sub-No. 1 notice filed November 30, 1995, but we are requiring the filing of additional notices covering both the BNSF trackage rights provided for in the CMA agreement and the URC trackage rights provided for in the URC agreement. We are exempting, in the Sub-No. 2 docket, the line sales provided for in the BNSF agreement. We are exempting, in the Sub-No. 3, 4, 5, 6, and 7 dockets, the terminal railroad control transactions proposed therein. We are exempting, in the Sub-No. 8 docket, common control of UP and the two motor carriers controlled by SP, and common control of SP and the one motor carrier controlled by UP. Finally, we are granting, in the Sub-No. 9 docket, the terminal trackage rights application filed therein.

Trackage Rights. We are exempting, in the Sub-No. 1 docket, the trackage rights provided for in the BNSF agreement and included in the Sub-No. 1 notice filed November 30, 1995. These trackage rights are essential to the competitive service that BNSF will provide under the BNSF agreement, and we believe that the trackage rights class exemption codified at 49 CFR 1180.2(d)(7) (1995) can be invoked with respect to trackage rights provided for in a settlement agreement.[208]

We are directing applicants and BNSF to file, no later than 7 calendar days prior to the effective date of this decision, an additional class exemption notice covering the trackage rights added to the BNSF agreement in accordance with the amendments required by the CMA agreement. These trackage rights are also

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[207] As noted, DOT advocates augmented trackage rights as the preferred remedy in the Central Corridor. DOT-4 at 39. DOT's recommendations have been addressed elsewhere.

[208] We will not publish the Sub-No. 1 notice in the Federal Register. Sufficient notice of the Sub-No. 1 trackage rights was provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

vital to the competitive service that BNSF will provide under the BNSF agreement, but were not included in the Sub-No. 1 notice filed November 30th.[209]

We are directing applicants an URC to file, no later than 7 calendar days prior to the effective date of this decision, a class exemption notice covering the trackage rights provided for in the URC agreement. As explained elsewhere in this decision we are imposing the URC agreement as a condition to approval of the merger; and the URC trackage rights are vital to the competitive service that URC will provide under the URC agreement. Trackage rights imposed as a condition in favor of a named railroad do not ordinarily require any approval beyond the approval implicit in the imposition of the condition itself, BN/SF, slip op. at 86-7 (carryover paragraph), and therefore do not ordinarily require a filing seeking approval; but, to provide for consistent treatment for all trackage rights imposed as conditions in this proceeding, we are directing applicants and URC to invoke the trackage rights class exemption.[210]

Line Sales. We are exempting, in the Sub-No. 2 docket, the three line sales provided for in the BNSF agreement. These line sales would ordinarily require approval under 49 U.S.C. 11344; but, under 49 U.S.C. 10505, we must exempt these sales from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. We are of the opinion that regulation is not necessary to carry out the rail transportation policy; the Sub-No. 2 exemption will allow competition and the demand for services to establish reasonable rates for rail transportation, 49 U.S.C. 10101a(1), will minimize the need for regulatory control, 49 U.S.C. 10101a(2), will ensure the continuation of a sound rail transportation system with effective competition among rail carriers, 49 U.S.C. 10101a(4), and will ensure effective competition between rail carriers, 49 U.S.C. 10101a(5); and other aspects of the rail transportation policy will not be adversely affected. We are also of the opinion that regulation is not necessary to protect shippers from the abuse of market power. The very purpose of most of the arrangements provided for in the BNSF agreement, including the Sub-No. 2 line sales, is the preservation of competitive options that would otherwise be lost with the merger.[211]

Terminal Railroad Control Transactions. We are exempting, in the Sub-No. 3, 4, 5, 6, and 7 dockets, control by UP/SP of five terminal and/or switching railroads (A&S, CCT, OURD, PTRR,

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[209] The notice with respect to the additional BNSF trackage rights will be published in the Federal Register in due course. Notice of the additional BNSF trackage rights was not provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

[210] The notice with respect to the URC trackage rights will be published in the Federal Register in due course. Notice of the URC trackage rights was not provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

[211] We will not publish notice of the Sub-No. 2 exemption in the Federal Register. Sufficient notice of the Sub-No. 2 line sales was provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

and PTRC, respectively) in which UP and SP presently have non-controlling interests. Control of these railroads by UP/SP would ordinarily require approval under 49 U.S.C. 11344; but, under 49 U.S.C. 10505, we must exempt these control transactions from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. We are of the opinion that regulation is not necessary to carry out the rail transportation policy. The sought exemptions will allow competition to establish reasonable rates, promote an efficient rail transportation system, foster sound economic conditions in transportation, and encourage honest and efficient railroad management, 49 U.S.C. 10101a(1), (3), (5), and (10); and other aspects of the rail transportation policy will not be adversely affected. We are also of the opinion that the A&S, CCT, OURD, PTRR, and PTRC control transactions are of limited scope, because four of these railroads conduct local operations only and because the fifth is currently inactive. We are of the further opinion that regulation is not necessary to protect shippers from abuse of market power, because these control transactions are related to, and will facilitate, common control of UP and SP, which we have found to be consistent with the public interest.[212]

Motor Carrier Control Transactions. We are exempting, in the Sub-No. 8 docket, (i) common control of UP and the two motor carriers controlled by SP (PMT and SPMT), and (ii) common control of SP and the one motor carrier controlled by UP (Overnite).

Overnite, which provides both less-than-truckload and truckload service on a nationwide basis, is operated independently of UP, and applicants have indicated that they have no plans to eliminate that independence or otherwise incorporate Overnite into UP/SP's operations. PMT, which provides nationwide general commodity trucking service and which specializes in truckload freight movement, both over-the-highway and via TOFC, is operated independently of SP, and applicants have indicated that they have no plans to eliminate that independence or otherwise incorporate PMT into UP/SP's operations. SPMT, which formerly transported motor vehicles and also formerly specialized in the ramping and deramping of TOFC and COFC for SPT, has not conducted operations for more than 2 years, and applicants have indicated that they have no plans to resume SPMT's operations.

The Sub-No. 8 motor carrier control transactions would ordinarily require approval under 49 U.S.C. 11344; but, under 49 U.S.C. 10505, we must exempt these transactions from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. We are of the opinion that regulation is not necessary to carry out the rail transportation policy. The sought exemption will further the goals of ensuring an efficient, economical, and competitive rail transportation system, thereby meeting the needs of shippers, 49 U.S.C. 10101a(4) and (5); and other aspects of the rail transportation policy will not be adversely affected. We are

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[212] We will not publish notice of the Sub-No. 3, 4, 5, 6, and 7 exemptions in the Federal Register. Sufficient notice of the A&S, CCT, OURD, PTRR, and PTRC control transactions was provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

also of the opinion that the Sub-No. 8 control transactions are of limited scope, because they involve merely changes in formal ownership and control, rather than substantive changes that might affect the operations and service provided by the motor carriers. We are of the further opinion that regulation is not necessary to protect shippers from the abuse of market power, because the operations of Overnite and PMT will not change as a consequence of the common control for which the Sub-No. 8 exemption is sought, and because SPMT has no operations. Shippers have pre-merger, and will continue to have post-merger, numerous motor carriage services available to them at all locations served by Overnite and PMT.

IBT contends that the exemption sought in the Sub-No. 8 docket is barred by the interplay of 49 U.S.C. 11344(c) (fourth sentence) and 49 U.S.C. 10505(g)(1). The fourth sentence of 49 U.S.C. 11344(c) provides that a railroad can be authorized to acquire control of a motor carrier only if the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition; 49 U.S.C. 10505(g)(1) provides that a 49 U.S.C. 10505 exemption cannot authorize intermodal ownership that is otherwise prohibited under 49 U.S.C., Subtitle IV (wherein 49 U.S.C. 11344 is located); and IBT therefore contends that we cannot grant the Sub-No. 8 exemption because applicants, having indicated that they intend to keep Overnite and PMT independent and SPMT inactive, have made clear that they will not use these motor carriers in furtherance of UP/SP's rail operations. The fourth sentence of 49 U.S.C. 11344(c), however, is not applicable to a transaction that involves only a change of form, not of substance, in the transportation service. DRGW/SP, 4 I.C.C.2d at 949-51; UP/MKT, 4 I.C.C.2d at 485. Here, the common control (i) of UP and PMT and SPMT, and (ii) of SP and Overnite, is merely an incidental change in ownership resulting from the primary merger transaction. Each of the motor carriers is today commonly controlled with a rail company, so the Sub-No. 8 transactions will not create intermodal ownership where there was none. And, because motor carrier operations will not change as a result of the common control, the Sub-No. 8 transactions will merely serve to bring the motor carriers under a broader corporate umbrella.[213]

Terminal Trackage Rights. We are granting, in the Sub-No. 9 docket, the application filed by applicants and BNSF for an order permitting BNSF to use two small segments of KCS track in Shreveport and one small segment of KCS track in Beaumont. These rights are important to BNSF's ability to conduct operations over the segments between Houston and Memphis and between Houston and New Orleans because KCS solely owns certain rail lines through Shreveport and Beaumont, which form essential parts of those routes. KCS has longstanding trackage rights agreements over the relevant segments with SP at Shreveport, and with SP and UP at Beaumont, but KCS is unwilling to grant trackage rights to BNSF. Under applicants' and BNSF's proposal, BNSF would be able to avail itself of similar trackage rights arrangements.

Under 49 U.S.C. 11103, we may require terminal facilities owned by one railroad to be used by another if the use is practicable and in the public interest, and will not

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[213] We will not publish notice of the Sub-No. 8 exemption in the Federal Register. Sufficient notice of the Sub-No. 8 transactions was provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

substantially impair the ability of the owning carrier to handle its own traffic. We find that the three KCS segments at issue are terminal facilities, that use of such segments by BNSF is practicable and in the public interest, and that use of such segments by BNSF will not substantially impair KCS' ability to handle its own traffic.

Terminal Facilities. The three KCS segments are "terminal facilities" under 49 U.S.C. 11103 because each lies in the middle of a city, and each is used for switching and interchange movements as well as for line-haul movements through the terminal. The precise use to be made of these segments by BNSF is not crucial; 49 U.S.C. 11103 "is not necessarily limited to benefitting the rail service in the relevant terminal area." Southern Pacific Transp. Co. v. ICC, 736 F.2d 708, 723 (D.C. Cir. 1984) (SPT v. ICC) (citing with approval ICC decisions ordering "bridge the gap" terminal trackage rights under 49 U.S.C. 11103).

Owner Not Substantially Impaired. Use by BNSF of the three KCS segments will not substantially impair KCS' ability to handle its own traffic. For the most part, BNSF trains will be using track capacity freed up by UP/SP, so that KCS' track will not be subjected to greater use by other railroads than it was previously. We believe that the traffic handled by BNSF will replace traffic now handled by SP, although various parties, including KCS, have argued that BNSF will not be able to achieve even those traffic levels.

Use Is Practicable. Use by BNSF of the three KCS segments is practicable. We realize that the terminal trackage rights we are approving may make operations at Shreveport slightly more complicated than they are now because three carriers will be operating over them rather than two, but this will simply "require coordination of operations between the parties." UP/MP/WP, 366 I.C.C. at 576. Moreover, applicants' directional running plan, which will be available to BNSF for its new Houston-Memphis movement, could result in less interference with KCS' traffic at Shreveport. At Beaumont, BNSF service is merely replacing that now provided over trackage rights by SP, and thus it will clearly be practicable.

A Grant is in the Public Interest. To ameliorate certain anticompetitive consequences of the 1982 UP/MP/WP merger, the ICC imposed a condition granting DRGW trackage rights over a line between Pueblo and Kansas City, part of which was owned by a non-applicant, SF. UP/MP/WP, 366 I.C.C. at 572. The ICC used its 49 U.S.C. 11103 power to grant terminal trackage rights. Applying this provision, the ICC determined that granting access to this line to make the agency's overall merger conditions effective would be in the public interest. UP/MP/WP, 366 I.C.C. at 574-76. The Court of Appeals affirmed. SPT v. ICC, 736 F.2d at 722-24. We think that the terminal trackage rights sought here fall squarely within that precedent.

Use by BNSF of the three KCS segments is in the public interest because it is essential to the merger conditions permitting BNSF to provide a competitive alternative in the Houston-Memphis and Houston-New Orleans corridors. See UP/MP/WP, 366 I.C.C. at 576. See also SPT v. ICC, 736 F.2d at 723 (approving determination that terminal trackage rights were in public interest because they allowed ICC to create Central Corridor competitive alternative to the merged carrier).

Nevertheless, KCS contends that the terminal trackage rights here cannot be considered to be in the public interest as construed in Midtec Paper Corporation v. CNW et al., 3 I.C.C.2d

171 (1986) (Midtec). In Midtec, the ICC said that it would not grant terminal trackage rights under section 11103 unless they were necessary to remedy or prevent an anticompetitive act by the owning carrier. KCS is arguing that in Midtec the ICC replaced the flexible public interest standard of UP/MP/WP with a much narrower standard.

Whether the ICC ever applied its relatively exacting Midtec precedent in the context of a merger is a matter of some debate.[214] In any event, we believe that it is inappropriate to do so here, and, to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the broad "public interest" standard that is in section 11103(a) itself. Congress gave us broad authority in both the public interest standard in section 11103 and in the public interest standard of section 11343. Thus, we believe that it is appropriate for us to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking our ability to craft merger conditions that are clearly in the public interest as the ICC did in the past.

Conditions and Compensation. Section 11103(a) provides that the carriers are responsible for establishing the conditions and compensation applicable to terminal trackage rights awarded under 49 U.S.C. 11103, and we will therefore allow BNSF and KCS an opportunity to reach an agreement respecting such matters. Because the terminal trackage rights are crucial to the competitive role that BNSF will play in the Houston-Memphis and Houston-New Orleans corridors, we will make them effective on the effective date of this decision. To resolve as many details as possible prior to that date, we will require BNSF and KCS to submit, within 10 days of the date of service of this decision, *either* agreed-upon terms respecting implementation *or* separate proposals respecting such implementation. We realize that 10 days is a short time frame, but it will enable us promptly to set the terms. Even if certain compensations details have not yet been resolved, the Sub-No. 9 terminal trackage rights will become effective on the effective date of this decision.[215]

49 U.S.C. 11341(a). The underlying contractual agreements pursuant to which SP has trackage rights over the two Shreveport segments, and pursuant to which MPRR (UP) and SP have trackage rights over the one Beaumont segment, arguably preclude

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[214] See, e.g., Denver and Rio Grande Western RR Co. and Missouri-Kansas-Texas RR Co. v. St. Louis SW Ry. Co., Finance Docket No. 30759 (ICC served Jan. 9, 1987) (not applying Midtec); Rio Grande Industries, Inc., et al.--Pur. & Track.--CMW Ry. Co., 5 I.C.C.2d 952 (1989) (SP/CMW) (not applying Midtec); Rio Grande Industries, et al.--Purchase and Related Trackage Rights--Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL, Finance Docket No. 31505 (ICC served Nov. 15, 1989) (SP/Soo Decision No. 6) (indicating that the Midtec standard would apply if applicant were to be given terminal trackage rights).

[215] Compensation will accrue from the actual date of the start of trackage rights operations, and will be payable after the terms have been established. We realize that 49 U.S.C. 11103(a) provides that the compensation for terminal trackage rights "shall be paid or adequately secured" before a carrier may begin to use trackage rights awarded under 49 U.S.C. 11103. We therefore pledge that, if BNSF and KCS cannot reach agreement respecting compensation terms, we will set appropriate terms under condemnation principles. See UP/MP/WP, 366 I.C.C. at 576 n.114; SPT v. ICC, 736 F.2d at 723.

conveyance of such rights to other carriers without KCS' consent. The 49 U.S.C. 11341(a) immunity provision provides that a carrier, corporation, or person participating in a transaction approved under 49 U.S.C. 11344 is "exempt from the antitrust laws *and from all other law*, including state and municipal law, as necessary to let that person carry out the transaction . . ." (emphasis added). In Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117 (1991) (Dispatchers), the Supreme Court held that the immunity provision extends not only to laws but also to contracts.

Applicants have requested that we hold that, under the circumstances of this case, the immunity provision permits BNSF to use the three line segments at issue. UP/SP-26 at 123; UP/SP-232, Tab F at 12. KCS' affiliate, Tex Mex, has acknowledged that we would have the authority to override an identical anti-substitution provision in its own terminal trackage rights application over HB&T in this proceeding.[216] We think that an override of the restrictions in KCS' trackage rights agreements would be necessary to carry out the merger here if section 11103 were unavailable.[217] (Similarly, an override for Tex Mex to permit it to operate over HB&T's trackage in the Houston terminal would be necessary to carry out the merger as well.) Because we are granting the section 11103 application, however, no override of these contractual provisions is necessary.

LABOR IMPACTS. Our public interest analysis includes consideration of the interests of carrier employees affected by the proposed transaction. 49 U.S.C. 11344(b)(1)(D); Dispatchers, 499 U.S. at 120.

Union Support. The merger is supported by seven unions representing approximately 55% of the union-represented employees on the combined UP and SP systems: the United Transportation Union; the Brotherhood of Locomotive Engineers; the International Association of Machinists and Aerospace Workers; the International Brotherhood of Electrical Workers; the International Brotherhood of Boilermakers and Blacksmiths; the Sheet and Metal Workers International Association; and the International Brotherhood of Firemen and Oilers. The UP/SP merger is the first major merger since the Staggers Act that has received widespread union support, and applicants are correct in their assessment that such extensive "labor support in a major rail merger case is unheard of in recent years, and stands as a testament to the compelling benefits of this merger." UP/SP-232, Tab D at 1.

Applicants indicate that UP did not execute written agreements with the seven unions; rather, UP exchanged with each

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[216] KCS also acknowledges (KCS-60 at 43) that we have the authority under section 11341(a) to override contractual provisions prohibiting substitution of carriers in a trackage rights agreement if the criteria of section 11103 are met.

[217] We realize that there are ICC precedents indicating that the immunity provision cannot override a consent requirement in a joint facility contract. See SP/CMH, 5 I.C.C.2d at 979 (ICC held that it could not compel the assignment of trackage rights); and SP/Soo Decision No. 6, slip op. at 8 (ICC indicated that there were "substantial questions" as to its power to override a trackage rights contract). These precedents, however, did not survive the Supreme Court's 1991 Dispatchers decision, which made clear that the immunity provision may override contractual obligations.

of these unions, in writing, certain commitments that form the basis of a partnership within which the parties commit to cooperate in implementing the merger. UP, applicants indicate, has gone beyond New York Dock conditions by committing to processes, more advantageous to the employees, by which the New York Dock conditions will be administered; these processes, applicants claim, give assurances to unions and employees alike that application of the protective benefits will not be fraught with delays and adversarial proceedings, and that the protective benefits will be administered fairly and expeditiously. The unions, applicants add, have committed to reach, voluntarily, agreements implementing the operating plan accompanying the primary application.

UTU, the largest union in the rail industry, indicates, in its comments dated March 29, 1996, that it supports the merger for two reasons: first, because UP has agreed to a number of conditions that will help mitigate the impact of job loss on UTU's members; and second, because UTU believes that the merger, by allowing UP and SP to form a strong competitor to BNSF, is in the best interest of rail labor in the future. UTU adds that UP's commitments include the following: (1a) that automatic certification as adversely affected by the merger will be accorded (i) to the 1,409 train service employees, the 85 UTU-represented yardmasters, and the 17 UTU-represented hostlers projected to be adversely affected in applicants' Labor Impact Study, (ii) to all other train service employees and UTU-represented yardmasters and hostlers identified in any merger notice served after Board approval, and (iii) to any engineers adversely affected by the merger who are working on properties where engineers are represented by UTU; (1b) that UP will supply UTU with the names and test period averages of such employees as soon as possible upon implementation of the merger; (2) that, in any merger notice served after Board approval, applicants will seek only those changes in existing CBAs that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement change(s); (3) that, in the event that UTU contends that UP's application of New York Dock is inconsistent with the above-mentioned conditions, UTU and UP personnel will meet within 5 days of notice from the UTU International President or his designated representative and agree to expedited arbitration with a written agreement within 10 days after the initial meeting if the matter is not resolved, which will contain, among other things, the full description for neutral selection, timing of hearing, and time for issuance of the award(s); and (4) that, in the event UP uses a lease arrangement to complete the merger of the various SP properties into MPRR or UPRR, the New York Dock conditions will nevertheless be applicable.[218]

Protective Conditions: New York Dock. Applicants, as previously noted, project that the total labor impact of the merger will be 4,909 jobs abolished, 2,132 jobs transferred, and 1,522 jobs created. ARU and TCU, which regard these projections as a minimum, estimate that the number of UP/SP employees furloughed or transferred will be far greater than applicants have projected; and TCU warns that these job impacts will fall most heavily on certain crafts and in certain geographic locations. We believe that applicants have submitted reasonable

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[218] UTU, in its comments dated March 29, 1996, asked that we approve the merger and note the commitments that UP had made. Furthermore, while we are not imposing these commitments as an actual condition, we expect UP to abide by its commitments here.

estimates of job dislocations from common control, although actual job dislocations could end up being greater than projected by applicants. Neither the dislocations themselves, however, nor their concentration by craft or location, pose a barrier to our approval of the UP/SP merger transaction. Mergers of necessity involve employee dislocations, and the labor protective conditions that we impose are to mitigate these dislocations.

The basic framework for mitigating the labor impacts of rail mergers is embodied in the New York Dock conditions, which have been held to satisfy the statutory requirements of 49 U.S.C. 11347, New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979). See New York Dock, 360 I.C.C. at 84-90. The New York Dock conditions provide both substantive benefits for affected employees (dismissal allowances, displacement allowances, and the like) and procedures (negotiation, if possible; arbitration, if necessary) for resolving disputes regarding implementation of particular transactions. We may tailor employee protective conditions to the special circumstances of a particular case; but we will adhere to the practice which the ICC adopted in Railroad Consolidation Procedures, 363 I.C.C. at 793, and to which it consistently adhered, see, e.g., BN/SF, slip op. at 79-81; UP/CNW, slip op. at 94-96, that employees are to be provided the protections mandated by 49 U.S.C. 11347 unless it can be shown that, because of unusual circumstances, more stringent protection is necessary.

We find that the statutory protections provided in New York Dock are appropriate to protect employees affected by the merger, the lines sales, and the terminal railroad control transactions, and we further find that, subject to such protections, approval of the merger (in the lead docket), the lines sales (in the Sub-No. 2 docket), and the terminal railroad control transactions (in the Sub-No. 3, 4, 5, 6, and 7 dockets) will be consistent with the public interest insofar as carrier employees are concerned. No unusual circumstances have been shown in this case to justify additional protection.[219]

Protective Conditions: Norfolk and Western. In accordance with the "usual practice" followed by the ICC, BN/SF, slip op. at 81, we will impose the Norfolk and Western conditions in the Sub-No. 1 docket with respect to the trackage rights provided for in the BNSF agreement.[220]

We will deny the requests made by ARU and Mr. Fitzgerald that we impose the New York Dock conditions, and not the Norfolk and Western conditions, on the trackage rights provided for in the BNSF agreement. The Norfolk and Western conditions, which have traditionally provided the basic framework for mitigating the labor impacts of trackage rights transactions, have been held to satisfy the statutory requirements of 49 U.S.C. 11347 in that context. RLEA v. ICC, 675 F.2d 1248 (D.C. Cir. 1982). The benefits provided by the Norfolk and Western conditions are identical to the benefits provided by the New York Dock conditions; the two sets of conditions differ only in matters of procedure. The Norfolk and Western conditions, on the one hand,

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[219] The New York Dock protections will be available to adversely affected employees whenever they are adversely affected, and whether or not it was anticipated that their positions would be affected.

[220] We will also impose the Norfolk and Western conditions in the Sub-No. 13 docket with respect to the Tex Mex trackage rights approved therein.

allow implementation immediately upon completion of a defined negotiation period, even if management and labor have not yet achieved an agreement or gone to arbitration; the New York Dock conditions, on the other hand, require agreement or arbitration prior to implementation; and, for this reason, application of the New York Dock conditions to the BNSF trackage rights would have a severe short-term impact on BNSF's ability to provide competitive service under the trackage rights provided for in the BNSF agreement.

Protective Conditions: Oregon Short Line. We will impose the Oregon Short Line conditions on each of the authorized abandonments and discontinuances. The Oregon Short Line conditions are similar to the New York Dock conditions, but are applied in the abandonment/discontinuance context. The imposition of the Oregon Short Line conditions here is a matter of consistency but has little practical significance, because all affected employees will also be covered by the New York Dock conditions imposed on the merger. See UP/MKT, 4 I.C.C.2d at 513.

The Immunity Provision. An arbitrator acting under Article I, Section 4 of the New York Dock conditions imposed in the lead docket, the Sub-No. 2 docket, and the Sub-No. 3, 4, 5, 6, and 7 dockets will have the authority to override CBAs and RLA rights, as necessary to effect, respectively, the merger in the lead docket, the line sales in the Sub-No. 2 docket, and the terminal railroad control transactions in the Sub-No. 3, 4, 5, 6, and 7 dockets. This authority derives ultimately from 49 U.S.C. 11341(a), the "immunity" provision.

An arbitrator acting under Article I, Section 4 of the Norfolk and Western conditions imposed in the Sub-No. 1 docket will likewise have the authority to override CBAs and RLA rights, as necessary to effect the Sub-No. 1 trackage rights. This authority, like its New York Dock counterpart, also derives ultimately from 49 U.S.C. 11341(a).

The immunizing power of section 11341(a) is not limited to the financial and corporate aspects of an approved transaction but reaches, in addition to the financial and corporate aspects, all changes that logically flow from the transaction. Parties seeking approval of a transaction, whether by application or by exemption, have never been required to identify all anticipated changes that might affect CBAs or RLA rights. Such a requirement could negate many benefits from changes whose necessity only becomes apparent after consummation. Moreover, there is no legal requirement for identification because 49 U.S.C. 11341(a) is "self-executing," that is, its immunizing power is effective when necessary to permit the carrying out of a project. American Train Dispatchers Ass'n v. ICC, 26 F.3d 1157 (D.C. Cir. 1994); UP/CNW, slip op. at 101; BN/SF, slip op. at 82. Thus, it would be inappropriate and inconsistent with the statutory scheme to limit the use of the 49 U.S.C. 11341(a) immunity provision by declaring that it is available only in circumstances identified prior to approval.[22]

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[22] Although the literal terms of the 49 U.S.C. 11341(a) immunity provision indicate that it is applicable to any transaction approved or exempted "under this subchapter" (i.e., under Subchapter III of Chapter 113 of Subtitle IV of Title 49, United States Code), we believe that the immunity provision also applies in the 49 U.S.C. 10505 exemption context. See, e.g., UP/CNW, slip op. at 63-64, citing Delaware and Hudson Railway Co. -- Lease and Trackage Rights -- Springfield Terminal Ry. Company,

(continued...)

Certain Requests Denied. We will not impose several additional labor-related conditions that have been requested by parties to this proceeding.

Cherry-Picking. We will deny ARU's request that we order that any CBA "rationalization" be accomplished by allowing UP/SP's unions to "cherry-pick" from existing UP or SP agreements. This is a matter committed to the implementing agreement procedures established by the New York Dock conditions. See New York Dock, 360 I.C.C. at 85 (Article I, Section 4).

Reimbursements. We will deny ARU's request that we require UP/SP to repay SP employees their forgone lump sum payments and their deferred wage increases. SP has already "paid" its employees for their wage concessions by giving up productivity concessions achieved by the nation's other railroads. UP/SP-230 at 316-17; UP/SP-232, Tab D at 8-9.

Hiring Preference. We will deny ARU's request that we modify the hiring preference provision in the BNSF agreement. This is a matter committed to the Article I, Section 4 implementing agreement procedures both with respect to UP/SP (see New York Dock, 360 I.C.C. at 85) and also with respect to BNSF (see Norfolk and Western, 354 I.C.C. at 610-11).

Contracting Out. We will deny ARU's request that we require UP/SP and BNSF to use bargaining unit maintenance of way employees and signalmen for all merger-related track, right-of-way, and signal construction and rehabilitation work, including items mentioned in the application, the operating plan, and the BNSF agreement. This is a matter committed to the Article I, Section 4 implementing agreement procedures both with respect to UP/SP (see New York Dock, 360 I.C.C. at 85) and also with respect to BNSF (see Norfolk and Western, 354 I.C.C. at 610-11). We would also observe that "contracting out" is a matter that may be covered by provisions of existing CBAs. See UP/SP-230 at 315.

Annual Reports. We will deny ARU's request that we require UP/SP to submit annual reports demonstrating how the forecast benefits in the area of cost-savings have been used. Isolating merger benefits from other changes as they are experienced would be inordinately costly, and there is no reason to saddle UP/SP with reporting obligations that have been imposed on no prior merger.

Diversion Reports. We will deny IBT's request that we require UP/SP to file semi-annual reports indicating the volume of traffic diverted from truck carriage and the rate of return for such cargo. The merger-related diversion of traffic from motor to rail is properly regarded as a benefit that weighs in favor of approval of the merger, not a harm that must be mitigated or monitored. And IBT's suggestion that motor-to-rail diversions may reflect predatory rail pricing makes no sense at all. Indeed, as the recently enacted ICC Termination Act of 1995 (Pub. L. No. 104-88) demonstrates, Congress was obviously not persuaded by arguments of this type because it went so far as to eliminate regulatory jurisdiction over the issue of whether rail rates are too low.

Union Pacific Motor Freight Corporation. We will deny IBT's request that we impose New York Dock protection in favor of UPMF

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[221] (...continued)
Finance Docket No. 30965 (Sub-Nos. 1 and 2) (ICC served Apr. 21, 1993) (at 2 n.4).

employees. Mandatory labor protection for UPMF employees is not warranted. See Gary W. McPherson v. Union Pacific Motor Freight Company, et al., Finance Docket No. 30000 (Sub-No. 45) (ICC served Apr. 20, 1989) ("Only individuals directly employed by a rail carrier are entitled to protection under section 11347. This excludes the complainants, who were employed by non-rail subsidiaries of the rail carrier.") (slip op. at 3; footnote omitted), aff'd Rives v. ICC, 934 F.2d 1171 (10th Cir. 1991). Discretionary labor protection is not warranted either; IBT has not demonstrated that UPMF employees possess skills that are not generally marketable outside the railroad industry, and that they would therefore have difficulty finding comparable employment elsewhere.

Takings Claims. TTD's contention that a CBA override effected under the auspices of the immunity provision amounts to a "seizure" of private contract rights appears to be a variation on the familiar argument that any such CBA override amounts to a "taking" of private property in violation of the Fifth Amendment. A definitive answer to this argument cannot be provided in this proceeding or by this Board. See RLEA v. United States, 987 F.2d 806, 815-16 (D.C. Cir. 1993) (takings claims can be adjudicated only in the Federal Claims Court or, in certain limited circumstances, in a Federal District Court). We would note, however, that this statutory scheme is longstanding, and predates the relevant contracts. We think that a finding of a taking under the circumstances would be extremely unlikely.

Consolidated Proceedings. We will deny the request made by Mr. Fitzgerald that we consider the UP/SP merger on a consolidated basis with a reopened BN/SF proceeding. The evidence of record does not warrant the reopening of the BN/SF proceeding.

GWWR Agreement. We will deny the requests made by Mr. Downey. The arrangements provided for in the GWWR agreement are non-jurisdictional, which necessarily means that there is no basis for imposing labor protection with respect to GWWR employees; and the New York Dock conditions will adequately protect SPCSL employees from any merger-related adverse impacts.[222]

Alton & Southern. We think it appropriate to note, with respect to the concerns raised by Mr. Ponsler, that A&S employees adversely affected by the Sub-No. 3 control transaction will be adequately protected by the New York Dock conditions imposed in the Sub-No. 3 docket.

Division 892 Diversions. We think it appropriate to note, with respect to the concerns raised by Mr. Potoshnik, that UP employees adversely affected by the UP/SP merger will be adequately protected by the New York Dock conditions imposed in the lead docket.

FINANCIAL MATTERS. The evidence demonstrates that the entity resulting from the UPC/SPR merger will be financially sound, that UP's assumption of the payment of SP's fixed charges

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[222] When we say that the arrangements provided for in the GWWR agreement are "non-jurisdictional," we mean that such arrangements do not require our approval. Labor protection benefits are intended to protect only employees of the carriers participating in the 49 U.S.C. 11343 transaction, and are not intended to protect employees of carriers not participating in that transaction. See, e.g., UP/CNW, slip op. at 96.

and the increase in total fixed charges will be consistent with the public interest, and that the terms of the UPC/SPR merger transaction are just and reasonable.

Financial Condition. We believe that, despite acquisition expenditures of approximately $1.576 billion,[223] the financial condition of the merged entity will be favorable, because substantial earnings gains will result from increased revenues and cost savings attributable to implementation of the post-merger UP/SP operating plan.

Applicants submitted pro forma financial statements showing consolidated data of the merged UPC/SPR, based on 1994 data (for a base year) and for each of the first 5 years after consummation of the merger. These statements reflect the anticipated benefits of the merger and resulting changes in various revenue and expense accounts. Applicants also submitted financial statements for a "normal" year (a year after the fifth post-merger year) depicting the total benefits of the merger and any normalized additional debt and interest expenses that will be incurred.[224]

Applicants expect the merger to produce in a normal year, giving effect to full implementation of their operating plan, $76 million in net revenue gains from diverted traffic and $583.1 million in operating efficiencies and cost savings. Net revenue gains are expected to total $22.8 million in the first year, growing to $60.8 million in the third year, and reaching $76 million in the fifth year. Almost all of the anticipated normalized annual operating benefits of $583.1 million are expected to be realized by the end of the third year, with benefits of $235 million in the first year (40% of the normalized amount), $449.1 million during the second year (77% of the normalized amount), and $546.2 million by the third year (94% of the normalized amount). The $583.1 million annual savings are anticipated to be reached by year five. Thus, over the first 5 years, operating benefits of well over $2 billion are anticipated.

Table 1 in Appendix F shows various financial data for a post-merger UPC/SPR. These data include balance sheet and income statement figures from applicants' pro forma financial statements and selected financial ratios developed from these statements for the base year (1994 data), each of the first 5 years after the merger, and a normal year. We have reached the following conclusions based on an analysis of these data.

The consolidated pro forma income before fixed charges exceeds fixed charges (interest payments for long-term debt) by margins that gradually rise from a low of 2.6 times during the first year after the merger to 3.1 times during the fifth year.

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[223] UPC acquired, on September 15, 1995, an approximately 25% interest in SPR at a cost of approximately $976 million, and will, if the merger is consummated, acquire an additional approximately 15% interest in SPR at a cost of an additional approximately $600 million. It should be noted that, if the merger is consummated, UPC will also acquire the remaining approximately 60% interest in SPR, but that such acquisition will entail an exchange of stock, not a cash expenditure.

[224] Applicants' financial statements reflect, among other things, merger-related private benefits, including net revenues from diverted traffic and net receipts from trackage rights, which, as noted elsewhere in this decision, are properly counted as transfers but not recognized as public benefits.

The fixed charge coverage for the base year is 3.0 times and for the normal year is projected to be 3.2 times.

The pro forma cash throw-off-to-debt ratios, which measure the ability to generate sufficient cash flows from operations to repay long-term debt maturing during the year, are favorable. During the base year, cash flow from operations exceeds maturing long-term debt by 3.2 times. The pro forma ratios show a steady improvement from 3.1 times during the first year to 3.8 times by the fifth year (as well as for the normal year).

The operating ratio (the ratio of operating expenses to operating revenues) for the consolidated company is projected to improve (i.e., favorably decline) each year, moving from 82.9% during the base year to 78.9% for the fifth year and normal year. This signifies a steady improvement in operating efficiency as a result of the merger.

Consolidated net income is projected to increase significantly, from $704 million during the first year to over $967 million for the normal year. As a result of this anticipated improvement in net income, UPC/SPR's return on equity is projected to improve from 9.5% for the first year to 11.8% for years 3, 4, and 5, as well as for the normal year. Also, because of these gains in net income, along with repayment of long-term debt, the ratio of long-term debt to debt plus shareholders' equity is projected to improve from over 51% in the first year to less than 46% by the normal year.

The pro forma data indicate that a combined UPC/SPR will possess considerable financial strength and earning power. Furthermore, the merged system's income projections may be understated because they do not take into account revenue and income growth beyond what is directly anticipated from the merger, such as normal business growth, increased traffic from an improved economy, and cost savings resulting from improved technology. We conclude that a merged UPC/SPR will be financially sound. Taking into account projected revenue gains and cost savings resulting from the merger, UPC/SPR should generate sufficient cash flow to service its debt and make necessary capital outlays to maintain its plant investment.

Fixed Charges. We are required to consider the total fixed charges resulting from the merger, 49 U.S.C. 11344(b)(1)(C), as well as any assumption of payment of fixed charges and any increase of total fixed charges, 49 U.S.C. 11344(c). There will be a manageable merger-related increase in fixed charges due to the issuance of additional debt and the assumption of obligations. The evidence demonstrates, however, that this increase will not have a significant impact on the financial condition of the merged entity. The financial soundness of the merged entity supports a finding that UP's assumption of SP's fixed charges and the increase in total fixed charges will be consistent with the public interest.

Fairness Determination. Section 11344(c) directs us to approve any transaction referred to in 49 U.S.C. 11343 when we find that the transaction is consistent with the public interest, provided that the terms and conditions thereof are just and reasonable. The "just and reasonable" standard requires, among other things, that we determine, in an appropriate case, that the transaction is just and reasonable with respect to minority stockholders. See Schwabacher, 334 U.S. at 198-99; and UP/MKT, 4 I.C.C.2d at 515-16.

UPC already owns approximately 25% of the SPR common stock; these shares, which have been held in a voting trust pending the outcome of this proceeding, were acquired on September 15, 1995, for a cash price of $25.00 per share. The UPC/SPR Merger Agreement provides that, upon the satisfaction of certain conditions, including regulatory approval, a wholly owned UPC subsidiary will acquire the approximately 75% of SPR common stock not held in the voting trust (the stock not held in the voting trust is hereinafter referred to as the outstanding stock). The Merger Agreement further provides that approximately one-fifth of the outstanding stock will be acquired for cash (at a cash price of $25.00 per share) and that approximately four-fifths of the outstanding stock will be acquired in exchange for UPC common stock (at a ratio of 0.4065 shares of UPC common stock per share).

The cash price and the exchange ratio were derived by arm's-length negotiations between UPC and SPR and have been approved by the respective boards of directors and by substantial majorities of the stockholders of the two corporations. No stockholder of either company has challenged the fairness of either the cash price or the exchange ratio. All parties directly affected, having been afforded an opportunity to evaluate the Merger Agreement in light of their respective interests, are apparently satisfied with its terms, which is a strong indication that the terms are just and reasonable to the stockholders of UPC and also to the stockholders of SPR. We also find persuasive the evidence submitted by applicants' financial advisors (CS First Boston Corporation for UPC; Morgan Stanley & Co. Incorporated for SPR), who have expertise in the valuation of businesses and their securities in connection with mergers and acquisitions. See UP/SP-22 at 487-517. The evidence amply supports a finding that the terms of the Merger Agreement, including without limitation both the cash price ($25.00 per share) and the exchange ratio (0.4065 shares of UPC common stock per share), are just and reasonable both to the stockholders of UPC and to the stockholders of SPR.[225]

CONDITIONS REQUESTED. We impose conditions only when we find both that a rail merger will harm the public interest and that a proposed condition will lessen or eliminate such harm, is operationally feasible, and will produce public benefits. The fact that a requested condition pertains to or involves one of the applicants is not enough to classify it as relevant to the proposed common control transaction. There must be a nexus between the merger and the alleged harm for which the proposed condition would act as a remedy. The fact that a condition would benefit the party seeking it does not justify its imposition.

We will discuss in this part of the decision all the conditions that have been requested in this proceeding, except the following which are discussed elsewhere: the conditions

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[225] KCS claims that the terms of the transaction are not fair to the minority stockholders of SPR because SP's value would increase if it were broken up and sold in pieces. KCS-60 at 47-48. We are doubtful that KCS has standing to assert a Schwabacher interest. In any event, the fact that KCS' Schwabacher claim has not been made by any bona fide SPR stockholder is a good indication that the argument is wrong. There is no reason to believe that the sum of the values of the parts exceeds the value of the whole. Indeed, there is good reason to believe that the solution proposed by the parties is likely to be the one that will produce the greatest value to SPR's stockholders.

sought by Tex Mex; the conditions sought by labor interests; the conditions sought with respect to the proposed abandonments;[226] and the environmental conditions sought by various parties.

Broad Conditions Requested. We will discuss first the various broad conditions that have been requested by multiple parties.

South Central/SP East Divestiture Conditions. Several parties have asked that we condition the merger by requiring the divestiture of parallel lines in the South Central/SP East region. The many South Central/SP East divestiture conditions almost uniformly envision the divestiture of parallel lines in the Houston-Eagle Pass, Houston-Brownsville, Houston-New Orleans, and Houston-Memphis corridors, but differ widely with respect to various details. We are denying all South Central/SP East divestiture conditions because, as explained in greater detail above, we believe that the conditions we have imposed (primarily the BNSF and CMA agreements, and the various conditions designed to strengthen the BNSF trackage rights) will adequately preserve existing rail competition in the South Central/SP East region.[227]

Central Corridor Divestiture Conditions. Several parties have asked that we condition the merger by requiring the divestiture of parallel lines in the Central Corridor. The many Central Corridor divestiture conditions differ in various respects, but generally envision (1) the divestiture of UP and/or SP lines between the San Francisco Bay area in the West and the Salt Lake City area in the East, and/or (2)(a) the divestiture of SP lines between the Salt Lake City area in the West and Denver and Pueblo in the East, and (b) if the divested lines are acquired by a carrier other than BNSF, the divestiture of SP lines and/or trackage rights between Pueblo and Kansas City. Some parties seeking a Central Corridor divestiture seek, in the alternative, a grant of unrestricted Central Corridor trackage rights in favor of an independent railroad such as WC or MRL. We are denying all Central Corridor divestiture conditions because, as explained in greater detail above, we believe that the conditions we have imposed (primarily the BNSF and CMA agreements, and the various conditions designed to strengthen the BNSF trackage rights) will adequately preserve rail competition in the Central Corridor.[228]

Central Kansas-To-Texas Conditions. Several parties have asked that we condition the merger by inserting a third carrier into the Lower Plains States. The conditions sought by these parties differ in various details, but generally envision that a third carrier (such as KCS) would be given access to the

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[226] We are discussing in this part of the decision, however, one abandonment matter: with respect to the Barr-Girard abandonment in Docket No. AB-33 (Sub-No. 96), SPBC's procedural argument respecting lack of evidence of I&M trackage rights.

[227] South Central/SP East divestiture conditions have been sought by Conrail, KCS, NITL, SPI, CCRT, HCC, Dow, PPG, Monsanto, SCC, IPC, Weyerhaeuser, RCT, Texas State Rep. Junell, Texas State Rep. Cook, Texas State Rep. Saunders, Arkansas Attorney General Bryant, Ia/DOT, DOJ, and DOT.

[228] Central Corridor divestiture conditions have been sought by KCS, MRL, NITL, WCTL, WSC, MPCSC, JSC, CCRT, MFU, CWAC, HCC, KCOSA, WP&L, WPS, AEPCO, PSCo, ILP, Monsanto, IPC, Weyerhaeuser, IBC/IWC, and DOJ.

Central Kansas-to-Texas rights that SP obtained in a settlement agreement in connection with the BN/SF merger. We did not impose those rights as a condition to the merger. We will deny the various Central Kansas-to-Texas conditions because we believe that the conditions we have imposed will adequately preserve, and that the merger itself should enhance, rail competition in the Lower Plains States in general and for wheat traffic moving from Central Kansas to Texas in particular. BNSF and UP are currently the main competitors for this wheat flow, while SP plays a small role. A post-merger UP/SP will be a stronger competitor vis-à-vis BNSF because the merger will allow UP/SP to upgrade lines and to use combined UP and SP lines in Texas to move heavier-loading cars of wheat to the export market.[229]

Strengthen BNSF Trackage Rights Conditions. Several parties have asked, generally in the alternative, that we condition the merger by strengthening the trackage rights provided for in the BNSF agreement. We have strengthened the BNSF trackage rights in several important ways, and we believe that the conditions we have imposed will adequately preserve rail competition throughout the West. We are therefore denying any conditions that would strengthen the BNSF and URC trackage rights to any greater degree.[230]

Uinta Basin vs. PRB/Hanna Basin Conditions. Several parties, fearful that the merger will eliminate source competition between coal originated by UP (in the PRB and the Hanna Basin, and coal originated by SP (in the Uinta Basin), have asked that we impose conditions protecting this source competition. We are denying all such conditions because, as explained in greater detail above, we believe that: (1) the asserted source competition does not exist to any appreciable degree; (2) a merged UP/SP will take advantage of all reasonable opportunities to market the transportation of Uinta Basin coal; and (3) the conditions we have imposed (primarily the URC and BNSF agreements, and the various conditions designed to strengthen the BNSF trackage rights) should intensify competitive options for Uinta Basin coal shippers.[231]

Trackage Rights Compensation Conditions. Several parties, fearful that the trackage rights compensation arrangements provided for in the BNSF and URC agreements will restrict BNSF and URC in their efforts to provide competitive operations, have asked that we require either that the trackage rights fee be reduced or that the compensation arrangements be restructured. We are denying all trackage rights compensation conditions because, as explained in greater detail above, we believe that the compensation arrangements provided for in the BNSF and URC agreements are reasonable and will permit BNSF to compete effectively.[232]

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[229] Central Kansas-to-Texas conditions have been sought by KCS, JSC, CCRT, HCC, EBT, KCOSA, and Ka/DOT.

[230] Conditions designed to strengthen the BNSF trackage rights further have been sought, generally in the alternative, by SPI, WCTL, WSC, Cargill, CRA, and DOT.

[231] Uinta Basin vs. PRB/Hanna Basin conditions have been sought by WCTL, WSC, WP&L, WPS, AEPCO, WEPCO, PSCo, ILP, PSCN, AGNC, and MRL.

[232] Trackage rights compensation conditions have been sought by WCTL, WSC, Entergy, CPSB, TUE, IPC, Cargill, CRA, PSCN, Governor Leavitt, DOT, and DOJ.

UP/SP Integration Prohibition Conditions. Several parties have asked that we condition the merger with a prohibition against the integration of UP and SP Central Corridor rail operations until UP can certify that it has been in full compliance, for a period of 12 months, with its service commitments under its coal transportation contracts. We will deny these conditions because they would require, in essence, that we monitor UP's compliance with its contractual service commitments. We do not believe that it would be appropriate for us to do so. Under the statute, the exclusive remedy for an alleged breach of a coal transportation contract is an action in an appropriate state court or United States district court, unless the parties have agreed otherwise. Old 49 U.S.C. 10713(i)(2); new 49 U.S.C. 10709(c)(2). We do not think that hampering the merged carriers' ability to realize merger gains through consolidation of operations is a logical or correct way to enforce contract commitments.[233]

Conditions Requested By Individual Parties. We will now discuss any additional conditions and arguments of various individual parties not discussed elsewhere.[234]

Railroad Parties.

Consolidated Rail Corporation. We will deny Conrail's request that the Finance Docket No. 32760 (Sub-No. 1) class exemption be revoked because we believe, as did the ICC, that the trackage rights class exemption can be invoked in connection with trackage rights provided for in merger-related settlement agreements. See BN/SF, slip op. at 87 n.116. We will similarly deny Conrail's related request that the Finance Docket No. 32760 (Sub-No. 2) petition for exemption be denied; exemption by petition of the Sub-No. 2 line sales is no more inappropriate than exemption by notice of the Sub-No. 1 trackage rights.

Kansas City Southern Railway Company. We reject KCS' various challenges to our jurisdiction and to the manner in which this proceeding has been conducted. Our jurisdiction extends to rail traffic moving in foreign commerce. See old 49 U.S.C. 10501(a)(2)(G) (jurisdiction extends to transportation in the United States between a place in the United States and a place in a foreign country) and new 49 U.S.C. 10501(a)(2)(F) (same). KCS' basic arguments respecting the protective order have already been answered. See Decision No. 2 (served Sept. 1, 1995).[235] KCS had the right to challenge applicants' use of the "highly confidential" designation with respect to any particular item so designated; the challenge would have been heard first by the Administrative Law Judge (ALJ) and, on appeal, by us; and the fact that KCS made such challenges only rarely suggests that the "highly confidential" designation did not much impede KCS' ability to litigate this case.[236] KCS' constitutional

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[233] UP/SP integration prohibition conditions have been sought by WCTL, WP&L, and WPS.

[234] We will not discuss the arguments raised by those parties not requesting conditions, including. TP&W, SCRRA, NCGA, ISRI, CP&L, IPA, LCRA/Austin, IES, Geon, USDA, and DOL.

[235] See also Decision No. 5 (served Oct. 27, 1995) (upholding the "highly confidential" provision of the protective order against challenges made by other parties).

[236] Cf. Decision No. 39 (served May 31, 1996) (the ALJ, on KCS' request, ordered public release of a passage from a UPC

(continued...)

arguments, to the effect that the "highly confidential" provision of the protective order worked a violation of due process rights under the Fifth Amendment and/or the right to petition for a redress of grievances under the First Amendment, are close to frivolous. As to KCS' arguments to the effect that applicants have not provided sufficient discovery, we note that KCS has not raised these arguments in the proper fashion (these arguments should have been raised first with the ALJ and, upon an unfavorable order, should have been brought to us).

We agree with KCS that the present decision has no retroactive effect, and therefore cannot insulate any pre-merger antitrust violations; but we will decline KCS' invitation to reopen the record in the BN/SF merger proceeding because KCS has presented no evidence that such proceeding was tainted by anticompetitive behavior.

CMTA. We will deny the conditions requested by CMTA. Because Longhorn does not have, and because its predecessors never had, two-carrier competition at the McNeil interchange, the merger will have no impact on the present or future competitive options available to Longhorn or to Giddings-Llano shippers. Pre-merger, their only Class I connection is UP at McNeil; post-merger, their only Class I connection will be UP/SP at McNeil; nothing will have changed. And the passenger service conditions sought by CMTA are not necessary to mitigate merger-related impacts because the merger will have no impact at all on CMTA's future passenger operations; any disruption to CMTA's future passenger operations will be caused by the revival at Giddings (or at Elgin) of the additional Class I connection formerly provided at Giddings by SP.

We will, however, preserve the existing potential competition by providing Giddings-Llano shippers a Class I connection at Giddings. Pre-merger, Longhorn, by reactivating operations over the Smoot-Giddings segment, could achieve a second Class I connection (SP at Giddings). We will preserve this potential competition by providing that the operator of the Giddings-Llano line is to be regarded as a 2-to-1 shortline for purposes of Section 8i of the BNSF agreement (which provides, among other things, that BNSF shall have the right to interchange with any shortline which, prior to September 25, 1995, could interchange with both UP and SP and no other railroad).

Section 4b of the BNSF agreement, as amended by Section 3b of the second supplemental agreement dated June 27, 1996, provides that BNSF shall have the right to interchange at Elgin with the operator of the Giddings-Llano line, should service be reinstituted on that line to Elgin. CMTA has disparaged a connection at Elgin vis-à-vis a connection at McNeil (CMTA's brief at 19-22), but CMTA might prefer a connection at Elgin vis-à-vis a connection at Giddings. CMTA has a right to a connection with BNSF either at Giddings (because we will require such a connection) or at Elgin (because we will hold applicants to their representation that they will allow such a connection); but CMTA has no right to have two such connections because the potential competition that we seek to preserve is based upon a single connection. CMTA will therefore be required to choose between Giddings and Elgin, unless the parties agree otherwise.

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[236] (...continued)
Board of Directors' presentation that applicants had designated "highly confidential"; applicants appealed; we upheld the ALJ's order).

We will allow the interested parties (CMTA, Longhorn, UP/SP, and BNSF) an opportunity to reach a negotiated settlement respecting the precise details of the condition we are imposing. We note, however, that one such detail (the choice between Giddings and Elgin) can be decided unilaterally by CMTA. Because time is not of the essence, we will allow the parties 120 days from the date of service of this decision to submit agreed-upon terms respecting implementation of the condition we have imposed. If the parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation, and we will establish the terms.

Magma Copper Company's Rail Affiliates. We will deny the conditions sought by MCC. MCC is captive to SP; that captivity predates the merger and will not be exacerbated by it; and MCC's end-to-end foreclosure argument (to the effect that the merger will eliminate potential competition in the form of interline alternatives) has no evidentiary support.

Yolo Shortline Railroad Company. We will deny the conditions sought by Yolo. Pre-merger, Yolo has only one meaningful Class I connection (UP) and no prospect that it will ever have a second meaningful Class I connection (SP). Post-merger, Yolo will have only one meaningful Class I connection (UP/SP) and no prospect that it will ever have a second meaningful Class I connection (BNSF). The conditions sought by Yolo will not rectify any merger-related competitive harms because the merger will inflict no such harms upon Yolo. Nor will the conditions sought by Yolo rectify any operational harms attributable either to the merger or to the BNSF agreement because neither the merger nor the agreement will reduce the efficiency of operations in the West Sacramento area.

KJRY and PRC. We will not impose the conditions requested by KJRY and PRC because we think that the purposes that would be served thereby can be better served by holding applicants to their representation that UP/SP will accept the terms of the settlement agreement entered into by SP in the BN/SF merger proceeding. See UP/SP-230 at 291.

Shipper Organizations.

Corn Refiners Association. We will deny the conditions sought by CRA because we believe that the conditions we have imposed will adequately preserve the rail competition that exists today in areas served by UP and SP. We note, however, that an element of CRA's second condition is reflected in our oversight condition.

MWBC, MFU, and Governor Racicot. We will deny the various conditions sought by MWBC, MFU, and Governor Racicot, most of which seek to broaden the reach, in one fashion or another, of the competitive options created by the BNSF PRA. We realize that the BNSF PRA, by providing increased rail options for some shippers but not for all, may work to the disadvantage of those for whom increased options have not been provided. That, however, is not be the kind of harm that should be rectified under the conditioning power, which was not used by the ICC and will not be used by us to equalize rates and service among competing shippers. MWBC, MFU, and Governor Racicot are not concerned that certain shippers are losing a transportation option, but that their competitors are gaining one. Given this context, a condition requiring that a settlement agreement be changed to improve the competitive situation of particular shippers is not proper. See BN/SF, slip op. at 99 (Bunge). We also add that there is no reason to believe that the BNSF PRA will undermine use of the Silver Bow gateway for movements for

which it provides the shortest and most efficient route, that there is no merger-related justification for requiring UP/SP to guarantee its service intentions on the Pocatello-Silver Bow Line for 20 years, that there is likewise no merger-related justification for requiring that the Pocatello-Silver Bow Line be sold to MRL, and that the oversight condition we have imposed is not intended to protect "the last vestiges of intramodal competition in Montana" because neither the UP/SP merger, nor the BNSF agreement in general, nor the BNSF PRA in particular, will adversely affect UP vs. BN (or UP/SP vs. BNSF) competition in Montana.[237] Rather, they will improve it.

Save The Rock Island Committee. We will deny the condition sought by STRICT. It is true, as STRICT alleges, that the ICC, in its 1980 decision allowing SP to acquire the Rock Island line, intended that SP would rehabilitate that line; and it is true that the ICC intended that a rehabilitated Rock Island line would provide competition to MPRR's parallel Kansas City-St. Louis line. Tucumcari, 363 I.C.C. at 327. STRICT neglects to mention, however, that the ICC, in its 1982 decision granting SP trackage rights over MPRR's parallel line, intended that these trackage rights would allow SP not to rehabilitate the Rock Island line. UP/MP/WP, 366 I.C.C. at 547 and 588 (approval of the trackage rights was intended to save SP the $100 million cost of rehabilitation). The 1980 Tucumcari decision was reversed by the 1982 UP/MP/WP decision (the ICC, upon examining a new and updated record, changed its mind). The UP/SP merger will not harm competition between the MPRR line and the Rock Island line; no such competition has existed for almost two decades, and there is no reasonable prospect that such competition will ever exist again. Nor will the merger harm competition in the corridor linking Kansas City and St. Louis; BNSF, NS, and GWWR also operate in that corridor.

Hoisington Chamber of Commerce. We will deny the labor protection conditions sought by HCC. The standard labor protection conditions that we have imposed fully satisfy the statutory requirements of 49 U.S.C. 11347.

Farmers Elevator Association of Minnesota. We will deny the conditions sought by FEAM. The first condition (that UP demonstrate its ability to operate its existing system) is fulfilled; after an admittedly problematic start, UP has demonstrated its ability to operate the UP/CNW system. The second condition (that UP develop an operating plan to address service problems on the former CNW) has no connection to the UP/SP merger.

South San Antonio Chamber of Commerce. We will deny the various conditions sought by SSACC; these conditions are not directed to any problems even arguably caused by the UP/SP merger.

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[237] The conditions sought by MWBC, MFU, and Governor Racicot will not alleviate competitive harms caused by the merger because the merger will not cause competitive harms in Montana; UP, as previously noted, has only a limited presence in Montana, and SP has no presence at all. The sought conditions are designed, for the most part, to alleviate the indirect effects of the BNSF PRA, but such indirect effects (in essence, the creation of new competitive options for some but not all shippers) are not among the kinds of competitive harms that our conditioning power is used to alleviate.

Shippers: Coal.

Entergy/Arkansas P&L/Gulf States Utilities. We will grant the build-out relief sought by Entergy vis-à-vis its White Bluff plant, and thereby preserve 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. See BN/SF, slip op. at 68 (OG&E) and 98 (PPC). Because applicants have made the BNSF agreement the vehicle for resolving merger-related competitive harms, there is no reason to require the negotiation of a separate trackage rights agreement for the White Bluff build-out. We note, however, that we are not imposing the trackage rights compensation terms advocated by Entergy; we believe that the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition.

We will deny the relief sought by Entergy vis-à-vis its Nelson plant. Pre-merger (but taking the soon-to-be-completed SGR line into account), Nelson has two destination carriers (SP and KCS), neither of which can offer single-line service from the PRB. Post-merger (and also taking the soon-to-be-completed SGR line into account), Nelson will still have two destination carriers (UP/SP and KCS), but one of them will be able to offer single-line service from the PRB. Post-merger, Nelson will have two entirely practicable routings (UP/SP single-line and BNSF-KCS joint-line). While Nelson will be losing the pre-merger BNSF vs. UP competition between the PRB and Fort Worth and also between the PRB and Kansas City, Nelson will be gaining a UP/SP single-line option; and there is no reason to conclude that the loss will be appreciably greater than the gain.

City Public Service Board of San Antonio. (i) We will hold applicants to their representation that the BNSF agreement will be amended to clarify that Elmendorf is a covered point. UP/SP-230 at 257. See also Section 4a of the BNSF agreement, as amended by Section 3a of the second supplemental agreement dated June 27, 1996 (providing that BNSF can serve SP's line between MP 0 and MP 12.6 for the sole purpose of serving the CPSB plants at Elmendorf; we are unable to ascertain, however, whether BNSF has also received trackage rights over the appropriate UP line between San Antonio and Ajax).

(ii) One of the conditions we have imposed in this decision confirms that BNSF will be allowed to serve all new facilities (not including expansions of or additions to existing facilities) located along the SP (and UP) lines over which BNSF receives trackage rights.

(iii) We will impose a condition to the effect that BNSF will be allowed to serve CPSB's Elmendorf Station, at CPSB's option, via CPSB's existing trackage rights agreement with SP. Pre-merger: SP owns the Elmendorf Line and can thereby provide service; CPSB has trackage rights over the Elmendorf Line, and UP can thereby provide service; and BNSF has haulage rights. Post-merger, but without CPSB's third condition: UP/SP will own the Elmendorf Line, and will thereby be able to provide service; BNSF will have, by virtue of the BNSF agreement, trackage rights over the Elmendorf Line, and it too will be able to provide service; but CPSB will have effectively lost its own trackage rights over the line, and, for this reason, BNSF will not be able to use the CPSB trackage rights in its operations over the line. It is not entirely clear why the CPSB trackage rights are important to CPSB, but to preserve the pre-merger status quo vis-à-vis these trackage rights we will require that BNSF be allowed

to operate under such trackage rights over the 12-mile segment between SP Junction (Tower 112) and Elmendorf.

(iv) We conclude that CPSB is not a "2-to-1" shipper for purposes of the conditions imposed in this proceeding. We realize that an argument can be made that CPSB is really a 3-to-1 shipper because the BNSF agreement provides for the termination of the haulage rights by which the third carrier (BNSF) can now serve CPSB; and one could reasonably conclude that a 3-to-1 shipper ought to have access to the remedies available to a 2-to-1 shipper. But we think that CPSB is best regarded as a 3-to-2 shipper because the BNSF agreement replaces BNSF's haulage rights with trackage rights.

(v) We will not impose the compensation terms advocated by CPSB. We believe that the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition.

(vi) Because we are not certain whether anything more needs to be done with respect to condition (i) or whether time is of the essence with respect to conditions (i) and (iii), we think that the best course would be to assume, unless told otherwise, that more needs to be done and that time is of the essence. We will therefore require the interested parties (CPSB, UP/SP, and BNSF) to submit, within 10 days of the date of service of this decision, either agreed-upon terms respecting implementation of conditions (i) and (iii) or separate proposals respecting such implementation. We realize that 10 days is a short time frame, but it will enable us, if necessary, to choose the better of the offered alternatives, or some variation thereof, in time for conditions (i) and (iii) to be effective when this decision is effective (on the 30th day after the date of service).[238]

Texas Utilities Electric Company. We will require that the BNSF agreement be amended to permit KCS and BNSF to interchange TUE coal trains: (a) at Shreveport, for movement by BNSF over SP's line between Shreveport and Tenaha; and (b) at Texarkana, for movement by BNSF over UP's line between Texarkana and Longview. Without this condition, all but one of TUE's PRB routings would involve UP/SP, and the one that would not would be excessively circuitous. We add that, although TUE sought only a Shreveport interchange, we are allowing a Texarkana interchange as well, to allow BNSF's routings of TUE coal trains to connect with the additional BNSF trackage rights provided for in the CMA agreement. This also will facilitate BNSF's directional running of these trains. We note, however, that we are not imposing the compensation terms advocated by TUE because the terms of the BNSF agreement will allow BNSF to compete effectively.

We will allow the interested parties (TUE, UP/SP, BNSF, and KCS) an opportunity to reach a negotiated settlement respecting the precise details of the condition we are imposing; and, because time is not of the essence, we will allow the parties 120 days from the date of service of this decision to submit agreed-upon terms respecting implementation of the condition we have imposed. If the parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation, and we will establish the terms.

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[238] If nothing more needs to be done with respect to condition (i) and time is not of the essence with respect to conditions (i) and (iii), on or before the 10th day after the date of service of this decision, UP/SP and CPSB may jointly request an extension of the 10-day deadline, and we will extend that deadline to a later date.

Sierra Pacific Power/Idaho Power Company. We will deny the condition sought by SPP/IDPC. Post-merger, NVS will have, in addition to a UP/SP single-line option, two BNSF options: (1) a URC-BNSF joint-line haul, sourced from mines open to URC; and (2) a truck-BNSF joint-line haul, sourced from load-outs either at Provo or at other Utah points opened to BNSF under the transloading condition we have imposed. It is true, of course, that, post-merger, SPP/IDPC will have only one single-line option (UP/SP) whereas now it has two (UP and SP); but the difference between single-line service and joint-line service is less important in the coal unit train context; and the URC-BNSF joint-line routing should be quite competitive, especially in consideration of the new coal sources opened to URC under the URC agreement.

Arizona Electric Power Cooperative. We will deny AEPCO's condition #1 (the request that AEPCO be given the right to obtain, and to contest the reasonableness of, a UP/SP rate for the Deming-Cochise segment) and its condition #4 (the request for clarification of the implications of the short-haul defense). AEPCO's basic problem is that, at Cochise, it is captive to SP pre-merger and will be captive to UP/SP post-merger; but this problem is not a consequence of the merger and will not be exacerbated thereby. AEPCO's preferred solution, of course, is the prescription of a proportional rate over the Deming-Cochise segment; but this proceeding is not the proper forum for considering the merits of that solution. We affirm what the ICC said in this regard in the BN/SF decision: "A number of utility parties have cases pending before us requesting prescription of a proportional rate over the destination bottleneck segment of their coal movements, and we are not prejudging those cases here. We note, however, that approval of this merger is not intended to foreclose any shipper's right to maximum rate relief." BN/SF, slip op. at 76. We think it appropriate to add that, should we choose, we could eventually grant the relief requested by AEPCO by reopening the UP/SP merger proceeding and imposing that relief as a condition, even if the statutory long-haul/short-haul provision or other statutory provisions would otherwise preclude such relief.

We note, with respect to the other conditions requested by AEPCO: that AEPCO's condition #2 (either divest SP's Colorado lines or grant trackage rights over such lines) is both a Central Corridor divestiture condition and a Uinta Basin vs. PRB condition, and will therefore be denied for reasons previously discussed; and that AEPCO's condition #3 (disapprove the Tennessee Pass abandonments) will be granted in part (we are disapproving the abandonments but approving the discontinuances) for reasons also previously discussed.

Public Service Company of Colorado. PSCo's bifurcated condition respecting divestiture and trackage rights is both a Central Corridor divestiture condition and a Uinta Basin vs. PRB condition, and will therefore be denied for reasons previously discussed. PSCo's alternative conditions respecting the Tennessee Pass Line will be granted in part (we are disapproving the Tennessee Pass abandonments but are approving the discontinuances) for reasons also previously discussed.

Rio Bravo Poso/Rio Bravo Jasmin. We will deny the conditions sought by Rio Bravo. Rio Bravo is either captive to BNSF at destination (insofar as Rio Bravo's coal simply must be unloaded at the Wasco facility) or it is not (insofar as Rio Bravo's coal can be unloaded at a facility on the nearby SP line). If, on the one hand, Rio Bravo is captive to BNSF today, the merger will have no effect at all on Rio Bravo's competitive

options. See BN/SF, slip op. at 70-78 (extensive discussion of vertical effects). If, on the other hand, Rio Bravo is not captive to BNSF today, the merger, as conditioned by the BNSF and URC agreements, will preserve Rio Bravo's competitive options; post-merger, Rio Bravo will have access to a UP/SP single-line haul and a URC-BNSF joint-line haul.

Shippers: Plastics and Chemicals.

Dow Chemical Company. Dow is located on a UP line, but claims to have pre-merger build-out/build-in options to both BNSF and SP. The BNSF option will survive the merger; the SP option will not.

Dow's primary request has a familiar flaw: it would move the build-out point (both for BNSF and for the SP substitute) much closer to Dow (from a point in the vicinity of Texas City to a point in the vicinity of Angleton). This would greatly improve, rather than preserve, the pre-merger build-out/build-in status quo vis-à-vis both BNSF and the SP substitute; and Dow's claim that the benefits of a Texas City build-out to SP exceed the benefits of a Texas City build-out to any other carrier is not justified by the evidence of record. We will therefore deny Dow's primary request.

Dow's alternative request cures the familiar flaw by keeping the build-out point for the SP substitute in the vicinity of Texas City, but overreaches by asking that the SP substitute be given trackage rights to New Orleans and Memphis. The preservation of Dow's SP build-out option requires only that trackage rights run from the build-out point to a connection with an independent Class I carrier. We will therefore grant a modified version of Dow's alternative request, and condition the merger, by requiring that UP/SP grant trackage rights to a carrier to be named by Dow, subject to our approval, over UP's line from Texas City to Houston and over UP's or SP's line from Houston to connections with KCS and BNSF at Beaumont, with the right to connect to the build-out line in the vicinity of Texas City in order to serve Dow at Freeport and any other shippers located on the build-out line.

Montell USA Inc./Olin Corporation. The fourth and fifth sentences of Section 5b of the BNSF agreement, as amended by Section 4b of the second supplemental agreement dated June 27, 1996, read as follows (italics and underlining added):

> BNSF shall also have the right to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and West Lake, LA, and traffic of shippers open to SP and KCS at West Lake Charles, LA; *the foregoing rights at Lake Charles, West Lake, and West Lake Charles, LA shall be limited to traffic (x) to, from and via New Orleans, and (y) to and from points in Mexico, with routings via Eagle Pass, Laredo (through interchange with Tex-Mex at Corpus Christi or Robstown), or Brownsville, TX.* In addition to all other charges to be paid by BNSF to UP/SP herein, at West Lake and West Lake Charles, BNSF shall also be required to pay a fee to UP/SP equal to the fee that UP pays KCS as of the date of this Agreement to access the traffic at West Lake, adjusted upwards or downwards in accordance with Section 12 of this Agreement.

Elsewhere in this decision we have effectively granted all of the conditions requested by Montell and Olin by requiring: (1) that the italicized limitations in the fourth sentence be disregarded (the principal effect will be to allow BNSF to handle, via

single-line service, traffic moving to Houston and to other points on BNSF); (2) that KCS be allowed to interchange with BNSF, at Shreveport and Texarkana, traffic that was originated by KCS at or that will be delivered by KCS to shippers at Lake Charles, West Lake, or West Lake Charles (the principal effect will be to substitute a post-merger KCS-BNSF joint-line routing via Texarkana and Shreveport for the pre-merger KCS-UP joint-line routing via Texarkana); and (3) that the BNSF agreement be modified to eliminate the underlined fee in the fifth sentence.

Quantum Chemical Corporation. (1) We will deny QCC's Chocolate Bayou conditions because these conditions would give QCC competitive options far in excess of those it has today. We note, however, that this denial is without prejudice to QCC's assertion of its rights under the build-out/build-in condition we are imposing upon the merger. (2) We will deny QCC's Williams' condition. QCC's claim that relief is necessary to preserve competition between its UP-exclusive Chocolate Bayou facility and its SP-exclusive Williams facility is misleading because QCC has neglected to mention that its La Porte, TX, facility (served by BNSF) has more than twice the polyethylene capacity of its Chocolate Bayou facility, and that its Morris, IL, facility (served by CSX and EJE) has even greater capacity than its La Porte facility. See UP/SP-230 at 159. (3) QCC's Baytown condition has been satisfied by applicants' representation, which is consistent with our reading of Section 5b of the BNSF agreement, that the Seapac facility at Baytown will be served by BNSF. See UP/SP-230 at 136. (4) We will deny QCC's Strang condition. The two-railroad post-merger competition that will exist at Strang should suffice for QCC's purposes.

Union Carbide Corporation. We will deny UCC's first condition because BNSF trackage rights over the UP line would vastly improve (and not merely preserve) the build-out status quo.

We will grant UCC's second condition because BNSF trackage rights over the SP line will preserve the build-out status quo, as applicants themselves now appear to recognize. See UP/SP-230 at 19-20. See also Section 4a of the BNSF agreement, as amended by Section 3a of the second supplemental agreement dated June 27, 1996 (providing that BNSF will have trackage rights over SP's Port Lavaca Branch).

Enterprise Products Company. We will deny EPC's condition #1, but without prejudice to EPC's right to invoke the build-out/build-in condition we have imposed on the merger. Condition #1 would require UP/SP to build the Mont Belvieu Branch proposed by UP; any such requirement would far exceed the relief heretofore afforded in the build-out context; and the excess is underscored by the fact that, as EPC itself concedes, the Mont Belvieu Branch, as initially proposed by UP, would not even have reached EPC.

We will also deny EPC's condition #2 (in essence, the insertion of a second carrier on SP's Baytown Branch). Condition #2 is not necessary to alleviate merger-caused competitive harms and would vastly improve EPC's competitive options. Pre-merger, EPC is rail-served solely by SP; post-merger, EPC will be rail-served solely by UP/SP; the merger will not result in a reduction of EPC's competitive alternatives.

Formosa Plastics Corporation, USA. We will deny FPC's "evenhandedness" condition. We realize that the conditions we have imposed, which may enable Dow, QCC, and UCC (and perhaps

others) to attain increased competitive options via build-outs, may work to FPC's disadvantage. But that provides no "evenhanded" justification either for denying the relief awarded to Dow, QCC, and UCC or for granting matching relief to FPC. The harm that may befall FPC is not the kind of harm that the conditioning power was meant to rectify; we do not have a mandate to equalize the competitive situation among the industries served by rail carriers. FPC, after all, is not concerned that it is losing a transportation option, but that its competitors may be gaining one. Cf. BN/SF, slip op. at 99 (Bunge).

PPG Industries Inc. We will deny PPG's requests respecting the WT&J, the WVRR, and the WLPRR; the competitive situations at Bacon, Lebanon, and Corvallis, respectively, will not be affected by the merger.

Huntsman Corporation. As HC believed was required, DOJ has conducted a complete review of the impacts of the merger and we carefully have considered its comments. The conditions we have imposed ensure that UP/SP will not achieve, by virtue of the merger, sole supplier status or unacceptable market power at any significant point or in any significant corridor. Moreover, the procedural schedule under which this proceeding has been handled has allowed ample time for all concerned.

Arizona Chemical Company. We will deny the conditions sought by ACC. ACC is not a 2-to-1 shipper (its Springhill plant is served solely by KCS); and the competition formerly provided by UP and SP past Shreveport will henceforth be provided by UP/SP and BNSF past various gateways.

Monsanto Company. We will deny Monsanto's condition #1. Monsanto has specifically referenced only two of its plants: its plant at Luling (served by both UP and SP); and its plant at Chocolate Bayou (served only by UP, but with access to SP via either barge or a truck transload). Monsanto's competitive options at Luling will not be affected by the merger because the Luling plant is on the Avondale Line to be sold to BNSF (over which UP/SP will retain local trackage rights). Monsanto's competitive options at Chocolate Bayou will not be affected either because BNSF will have (under the transload condition we have imposed) the right to operate new transload facilities on the nearby SP line.

We will also deny Monsanto's condition #4, which is not justified as a remedy to any particular competitive harm. Cf. new 49 U.S.C. 10701(d)(3) (directing us to complete the non-coal rate guidelines proceeding by January 1, 1997).[239]

Shell Chemical Company. We will deny the conditions sought by SCC. The market dominance condition has no particular connection to the merger; and, in any event, we note that a shipper with access to two railroads is not captive to either, and that many shippers served by UP/SP or BNSF exclusively are adequately protected by intermodal or geographic competition. The divestiture condition is a variation on the South Central/SP East divestiture theme.

Springfield Plastics/Brandt Consolidated. We reject SPBC's procedural argument respecting lack of evidence of the I&M trackage rights. As discussed elsewhere in this decision we are

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[239] We are also denying Monsanto's conditions #2 and #3 (South Central/SP East and Central Corridor divestitures, respectively).

approving the Barr-Girard abandonment in its entirety; but we do so with the understanding that the line will be abandoned only if UP/SP first acquires the related trackage rights over I&M. The fact that such trackage rights have not yet been acquired (this appears to be the reason that evidence respecting such trackage rights has not been entered into the record) is not important; the fact that evidence respecting such trackage rights has not been entered into the record is likewise not important; what is important is that, as a very practical matter, the Barr-Girard abandonment cannot be consummated unless UP/SP has first acquired trackage rights over I&M.

Shippers: Other.

International Paper Company. (1) We will deny IPC's condition #1 (a variation on the South Central/SP East divestiture theme). (2) We will deny IPC's condition #2. 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 Traffic Protective Conditions, 366 I.C.C. 112 (1982), aff'd in relevant part Detroit, T. & I.R.R. v. United States, 725 F.2d 47 (6th Cir. 1984). (3) Our action with respect to the conditions requested by Tex Mex largely satisfies IPC's condition #3. (4) We will deny IPC's condition #4. IPC is alleging (a) that CO&PR is captive to SP pre-merger and will be captive to UP/SP post-merger, and (b) that IPC's CO&PR-served (via LP&N) Gardiner plant will not benefit from the pro-competitive provisions of the BNSF agreement. We note, however, (a) that the CO&PR problem predates the merger and will not be exacerbated thereby, and (b) that IPC's claim of competitive harm does not warrant regulatory relief. See BN/SF, slip op. at 99 (Bunge). (5) We will deny IPC's condition #5 (a variation on the Central Corridor divestiture theme). (6) We note that Turlock is a 2-to-1 point explicitly provided for in Section 8i of the BNSF agreement (the omnibus clause), and that applicants have represented that BNSF will serve 2-to-1 shippers at Turlock via haulage from Stockton. UP/SP-230 at 136 n.53; UP/SP-231, Part B, Tab 17 at 29.

United States Gypsum Company. *Empire, NV*. We will deny USG's Empire condition because the merger will have no appreciable impact at Empire. Pre-merger, USG is rail-served solely by UP; post-merger, USG will be rail-served solely by UP/SP; nothing will have changed. We add that the service problems of concern to USG are not really merger-related, but that, in any event, UP has made a commitment to stop one of its trains daily to pick up USG cars. UP/SP-230 at 307-08; UP/SP-232, Tab A at 39-40.

Plaster City, CA. We will deny USG's Plaster City condition #1 because the merger will have no appreciable impact at Plaster City. Pre-merger, USG is rail-served solely by SP; post-merger, USG will be rail-served solely by UP/SP; nothing will have changed. We add that the pre-existing service problems of concern to USG are not merger-related, that there is no reason to expect that service will deteriorate post-merger, and that USG's claim of competitive harm (vis-à-vis its Nevada-based competitors) does not warrant regulatory relief. See BN/SF, slip op. at 99 (Bunge). We will also deny USG's Plaster City condition #2, both for the reasons prompting our denial of its Plaster City condition #1 and also because we have no authority to impose conditions (a) on non-terminal trackage of a nonapplicant carrier, and (b) on a carrier with respect to track located in Mexico.

Southard, OK. We will deny USG's Southard condition, which is an attempt to solve a variation of a problem that surfaced last year in BN/SF, slip op. at 94-95; this time, however, a feasible solution cannot be found. Once again, the 3-to-2 reduction in competitive alternatives faced by GNBC (BNSF, UP, and SP, pre-merger; BNSF and UP/SP, post-merger) is in reality more complicated than a simple 3-to-2 description would indicate. Because of the blocking provision, the reduction in competitive alternatives faced by GNBC can more accurately be described as going from three (two of which can handle only such traffic as BN itself could not have handled) to two (one of which can handle only such traffic as BN itself could not have handled). GNBC, that is to say, will not really be left with two unrestricted competitive alternatives. BN/SF, slip op. at 94. In BN/SF, the ICC solved the problem by allowing SP to replace SF as a competitive alternative for GNBC. This time, however, the problem cannot be solved because the suggested substitute (CSX) is some 425 miles away; and we cannot imagine that the traffic available to GNBC will suffice to lure CSX into establishing an 850-mile round-trip connection. We generally resolve feasibility questions (as in the build-out context) by assuming feasibility and allowing the market to make the final determination; but this is not necessary when our clear assessment is that the condition sought (here, a GNBC-CSX routing) is utterly impractical.

Fort Dodge, IA. We will deny USG's Fort Dodge conditions because the merger will have no appreciable impact at Fort Dodge. Pre-merger, Fort Dodge is served by UP (formerly CNW) and IC (formerly CC&P); post-merger, Fort Dodge will be served by UP/SP and IC; and the competition that existed pre-merger will continue to exist post-merger. We add that, although UP admits that its service at Fort Dodge has been inadequate (UP/SP-232, Tab A at 39), this service problem is not merger-related.

North American Logistic Services. Section 1b of the BNSF agreement as amended by Section 1b of the second supplemental agreement dated June 27, 1996, provides that BNSF shall receive access to any existing or future transloading facility at points listed on Exhibit A to the BNSF agreement. Reno (this has reference to the point on the SP line) is listed in Exhibit A, but, prior to the second supplemental agreement, the Reno listing was qualified by the phrase "intermodal and automotive only." Section 10a of the second supplemental agreement dated June 27, 1996, changes the Reno listing in Exhibit A; the Reno listing is now qualified by the phrase "only intermodal, automotive, [BNSF must establish its own automobile facility], transloading, and new shipper facilities located on the SP line." We interpret this to mean that, even aside from the transloading condition we have imposed on the merger, Section 1b of the BNSF agreement allows BNSF to establish a transloading operation at Reno (on the SP line). Applicants apparently agree: "BNSF will be entitled under the agreement to set up a transload and serve new industries at Reno, Nevada." UP/SP-230 at 294.

We add that we understand that BNSF will have, at Reno, the reciprocal switching rights (if any) that UP had prior to the merger. Because, for Kal Kan's purposes, BNSF is replacing UP as a competitive possibility at Reno, it only makes sense that BNSF should be given, to the maximum extent possible, the rights formerly held at Reno by UP.

We will otherwise deny the conditions requested by NALS. The first condition (granting BNSF local trackage rights access to Wunotoo) is not necessary to preserve existing competition because UP presently has no such access to Wunotoo. The second condition (granting BNSF local trackage rights access to Reno

over the UP line) is unnecessary in view of BNSF's local trackage rights access to Reno over the SP line; there is no indication that the UP line is in any way superior to the SP line for that purpose.

ASARCO. The merger will not have the competitive impacts feared by ASARCO. ASARCO's El Paso copper smelter will have access to two carriers (UP/SP and BNSF); ASARCO's Hayden copper smelter will be no more captive to UP/SP than it now is to SP; Section 4b of the BNSF agreement, as amended by Section 3b of the second supplemental agreement dated June 27, 1996, provides that BNSF's access and interchange rights at Corpus Christi shall be at least as favorable as the rights SP has currently; and competition for traffic moving from/to Mexico will remain vigorous.

CIC International Corporation. We will deny the conditions sought by CIC. (1) Class III railroads and their customers that rely on the Houston-Fair Oaks line are rail-served exclusively by SP pre-merger, and will be rail-served exclusively by UP/SP post-merger; the merger will change nothing in this respect, and there is no reason to believe that new post-merger traffic flows will cause service problems. Direct access to BNSF, as sought by CIC, would vastly improve, not merely preserve, the competitive status quo. (2) CIC now has two reload options (UP at Palestine; BNSF at Cleveland), but the BNSF reload at Cleveland has clearly been the preferred option. See UP/SP-230 at 287 (the BNSF reload received 93.4% of CIC's reload business between January and October 1995). CIC's claim that the BNSF reload may be eliminated as a post-merger competitive alternative in the wake of the various realignments triggered by the BNSF agreement is unjustified; if anything, this reload operation will be strengthened because of BNSF's ability to route reload traffic over UP/SP's Houston-Memphis lines.

Weyerhaeuser Company. We will deny Weyerhaeuser's conditions #1 and #2 (variations on the Central Corridor and South Central/SP East divestiture themes, respectively). We note, however, that, with our grant of trackage rights to Tex Mex, we have effectively granted Weyerhaeuser's condition #3.

We will deny Weyerhaeuser's condition #4, which is akin to IPC's condition #4 (discussed above). Weyerhaeuser is not alleging merger-related competitive harms; what Weyerhaeuser is alleging is either (a) that CO&PR is captive to SP pre-merger and will be captive to UP/SP post-merger, and/or (b) that Weyerhaeuser's CO&PR-served plants will not benefit from the pro-competitive provisions of the BNSF agreement. We note, however, (a) that the CO&PR problem predates the merger and will not be exacerbated thereby, and (b) that Weyerhaeuser's claim of competitive harm does not warrant regulatory relief. See BN/SF, slip op. at 99 (Bunge).

With respect to Weyerhaeuser's condition #5, we note that, in approving the merger, we have imposed several conditions, included among which are the provisions in the BNSF agreement that enhance rail-to-rail competition in the Pacific Coast Corridor.

Cargill. We will deny the conditions sought by Cargill: the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition; the reciprocal switching, rate guidelines, and open gateways conditions are, for the most part, not even merger-related, 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; and the condition respecting private rail cars "is certainly not merger-related." BN/SF, slip op. at 100.

IBP, Inc. The conditions sought by IBP are directed to harms assertedly caused by the UP/CNW merger, not to harms that might be caused by the UP/SP merger. We will therefore deny the conditions sought by IBP.

Oregon Steel Mills, Inc. We will deny the conditions requested by OSM. These conditions are, by and large, directed to problems not caused by the merger, and, furthermore, 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.

Stimson Lumber Company. We will deny the conditions sought by SLC. Conditions #1 and #3 do not address merger-related competitive harms because SLC will not experience a merger-related reduction in competitive options. See UP/SP-230 at 297 (SLC's relevant facilities are located on a shortline that connects only to SP). Condition #2 is overly intrusive, and, besides, UP/SP will have every incentive to use its yards so as to maximize its competitiveness in moving Pacific Northwest lumber. Condition #4 is also overly intrusive, and, in any event, addresses a "problem" that is not merger-related; and, besides, applicants have committed to reducing the high reciprocal switch charges now imposed by SP. See UP/SP-230 at 19.

State and Local Interests.

Texas: RCT. (1) We note, with respect to RCT's Condition #1, that Tex Mex is being granted Corpus Christi-Beaumont trackage rights, and will therefore have a connection with KCS. (2) We will deny RCT's condition #2 (a variation on the South Central/SP East divestiture theme). (3) We will deny RCT's condition #3. The neutral terminal railroad proposal is a solution either to a problem that does not exist (because the conditions we have imposed will adequately preserve the rail competition that exists today in Texas) or to a problem that is not a consequence of the merger (because these neutral terminal railroads would create new rail competition far beyond that which exists today). (4) We will deny RCT's condition #4. This condition is unnecessary because the law we administer already provides numerous protections regarding abandonments. UP/CNW, slip op. at 99; BN/SF, slip op. at 101.

We note, with respect to RCT's conditions #5 and #6, that we are imposing the following environmental mitigation conditions indicated in Appendix G: mitigation conditions #3, #4, #5, #6, #7, #15, #16, and #18.

Texas: Other Parties. The Port of Corpus Christi. (1) We are imposing the BNSF agreement as a condition. (2) We note that the trackage rights granted to Tex Mex will, as a practical matter, allow KCS' affiliate, Tex Mex, to access Corpus Christi.

Texas State Representatives Robert Junell, John R. Cook, and Robert Saunders. (1) We will deny condition #1 (a variation on the South Central/SP East divestiture theme). (2) We are granting Tex Mex most of the rights sought in condition #2. (3) We note that the responsive application filed by Cen-Tex (the South Orient affiliate) was rejected as incomplete, and that its request for conditions was stricken from the record on account of its failure to comply with its discovery obligations. We add

that the conditions we have imposed will adequately preserve the rail competition that exists today in Texas. (4) Condition #4 has been addressed in our discussion of the conditions sought by RCT.

Texas State Representative John R. Cook. We will deny Rep. Cook's request for a declaratory order respecting excursion trains. Whatever the merits of Rep. Cook's arguments respecting excursion train liability law, the subject has no connection at all to the merger.

California: CPUC. (1a) We will deny CPUC's "perpetual term" condition. The 99-year term provided by Section 8i of the BNSF agreement should suffice; a perpetual term hardly seems necessary. We note also that, under current law, a carrier conducting trackage rights operations that are subject to our jurisdiction can discontinue such operations only with our approval, see new 49 U.S.C. 10903(a)(1), even if the agreement providing for such trackage rights contains an expiration date. See Arkansas & Missouri R. Co. v. Missouri Pacific R. Co., 6 I.C.C.2d 619, 622 (1990). See also Dallas Area Rapid Transit Property Acquisition Corporation--Acquisition and Operation Exemption--Rail Lines of Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, and Dallas Terminal Railway and Union Depot Company, Finance Docket No. 31786 (ICC served Feb. 20, 1991) (similar holding); Thompson v. Texas Mexican Ry., 328 U.S. 134 (1946) (ICC can impose terms to ensure that existing trackage rights agreements are not frustrated).

(1b) We note that, by virtue of the oversight condition we have imposed, we will have sufficient power to take corrective action if we conclude that the BNSF agreement has not effectively addressed the competitive issues it was intended to address.

(2) We think it appropriate to note that, pursuant to the conditions we have imposed on the merger, BNSF will have access to all new facilities (including transload facilities) located post-merger on any UP/SP-owned line over which BNSF receives trackage rights in the BNSF agreement.

(3) We believe that BNSF is committed to providing adequate competition in the Central Corridor.

(4) We will deny CPUC's condition #4. The Keddie-Stockton Line is the trackage rights segment of BNSF's new I-5 Corridor route (i.e., the segment over which BNSF will operate pursuant to trackage rights provided for in the BNSF agreement), and condition #4 is apparently intended to ensure that BNSF will have the wherewithal to operate that route even in the teeth of UP/SP recalcitrance. The conditions we have imposed, however, address discrimination (Paragraph 9 of the CMA agreement provides that UP/SP shall agree with BNSF on a dispatching protocol) and maintenance (Section 9d of the BNSF agreement provides that the trackage rights lines shall be maintained at no less than a certain level), and applicants have represented that BNSF has the power under the settlement agreement to obtain any capital improvements it wants. UP/SP-230 at 270.

(5) We will deny CPUC's Modoc Line condition. A requirement of continued operation of the Modoc Line would be inconsistent with our approval of the abandonment of the Wendel-Alturas segment thereof.

(6) We will deny CPUC's NCRA condition. With or without the 140-mile Willits-Lombard line, NCRA connects solely to SP pre-merger and will connect solely to UP/SP post-merger; and

CPUC's NCRA condition is therefore unrelated to any merger-caused harm.

(7) We note that, as a matter of general corporate law, UP/SP will succeed to SP's obligations respecting the Capitol Corridor and the Alameda Corridor. See UP/SP-230 at 271-72 (acknowledgment that UP/SP will succeed to "all valid contractual obligations of SP").

(8) We note that UP/SP has indicated that it intends to develop the Calexico gateway. UP/SP-230 at 272.

(9) We will deny CPUC's labor protection proposal, which "implicates a matter better dealt with under the labor protective conditions" imposed in this proceeding. BN/SF, slip op. at 101.

California: Other Parties. The City of Industry. We will deny the conditions requested by IUDA. Although IUDA's two parcels are "2-to-1" in an academic sense, the record does not indicate that there are any shippers on these parcels currently benefiting from direct competition between UP and SP.

County of Modoc and City of Alturas. With respect to the environmental issue raised by Modoc and Alturas, we will impose the various environmental mitigation conditions indicated in Appendix G, including specific mitigation condition #45 (an abandonment-specific condition relative to the Wendel-Alturas abandonment). With respect to the "return the gift" issue raised by Modoc and Alturas, we note that real property ownership questions are generally a matter of state law.

County of Placer. With respect to the concerns raised by Placer, we will impose the various environmental mitigation conditions indicated in Appendix G, including the specific mitigation condition relative to Placer (mitigation condition #21).

East Bay District. With respect to the concerns raised by East Bay District, we will impose the various environmental mitigation conditions indicated in Appendix G, including the specific mitigation condition relative to East Bay District (mitigation condition #19).

City of Sacramento. With respect to the concerns raised by Sacramento, we will impose the various environmental mitigation conditions indicated in Appendix G.

Oregon: Or/DOT. With respect to Or/DOT's first condition (monitor competition in the Central Corridor), we note that the oversight condition we have imposed will allow us to do just that. With respect to Or/DOT's second condition (commence an investigation respecting open access), we note that this is not a merger-related issue.

Idaho: IBC/IWC. Pre-merger, much of Idaho is rail-served exclusively by UP; post-merger, much of Idaho will be rail-served exclusively by UP/SP. We are therefore confident that the merger will not cause competitive harms in Idaho. The BNSF PRA, we realize, may cause indirect harms to those Idaho shippers now rail-served exclusively by UP; but such indirect harms (in essence, the creation of new competitive options for shippers now rail-served exclusively by BNSF but not for shippers now rail-served exclusively by UP) are not among the kinds of competitive harms that our conditioning power is intended to alleviate. We will therefore deny IBC/IWC's conditions #1 and #2 (condition #1 would require approval of the MRL application and

related relief; condition #2 would require that BNSF be granted access to shippers now rail-served exclusively by UP). We will also deny IBC/IWC's condition #3 (long-term oversight vis-à-vis captive shippers and UP/SP grain movements). The problems that condition #3 are intended to remedy (in essence, the problems of shippers now captive to UP) are not merger-related; neither the merger nor the BNSF agreement in general nor the BNSF PRA in particular will deprive any shipper of competitive options available to that shipper today.

Nevada. We will deny PSCN's conditions #1 and #3; these "open access" conditions provide a solution either to a problem that does not exist (because the conditions we have imposed will adequately preserve the rail competition that exists today in Nevada) or to a problem that is not a consequence of the merger (because these conditions would create new rail competition far beyond that which exists today). We will deny PSCN's condition #2; the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition. We will deny PSCN's condition #4a; providing timely responses to inquiries might be a good business practice, but it has no connection to the merger.

With respect to PSCN's conditions #4b and #5, and also with respect to the concerns raised by Reno, Fernley, and Winnemucca/Humboldt, we will impose the following environmental mitigation conditions indicated in Appendix G: mitigation conditions #3, #4, #5, #7, #8, #12, #15, #16, #17, #18, and #22.

Kansas. We note, with respect to Ka/DOT's condition #1, that UP has represented that it may lease, but does not intend to sell, the Pueblo line, and that, if either a lease or a sale is considered, it will work with Kansas to ensure quality service. UP/SP-230 at 273.

We will deny Ka/DOT's condition #2. Post-merger, Wichita will benefit from vigorous competition between UP/SP and BNSF.

With respect to Ka/DOT's condition #3, and also with respect to the concerns raised by Sedgwick/Wichita, we will impose the following environmental mitigation conditions indicated in Appendix G: mitigation conditions #18 and #23.

With respect to the concerns raised by Abilene, we will impose the following environmental mitigation conditions indicated in Appendix G: mitigation condition #18.

Minnesota: Mn/DOT. We will deny Mn/DOT's conditions #1, #2, and #3; the problems these conditions seek to solve are not merger-related. We will deny Mn/DOT's condition #4; we believe that the conditions we have imposed (which will strengthen, to some extent, the BNSF trackage rights) will adequately preserve the rail competition that exists today in the South Central/SP East region and in the Central Corridor, and throughout the West. We will also deny Mn/DOT's condition #5; the applicable law "already provides numerous protections regarding abandonments and line sales," BN/SF, slip op. at 101; and condition #5, insofar as it relates to labor protection, implicates a matter better dealt with under the labor protective conditions imposed in this proceeding.

Washington: Wa/DOT. We think it appropriate to note that the oversight condition we have imposed is akin to the condition sought by Wa/DOT.

Utah. We will deny the conditions sought by Governor Leavitt. Condition #1 (a reduction in the BNSF trackage rights fees) is unnecessary; we believe that the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition. Condition #2 (in essence, that UP/SP rates in Utah be linked to rates in "competitive" markets) is likewise unnecessary because the merger will not reduce competitive options for any Utah shipper; and condition #2 is overbroad and not merger-related insofar as it is intended to apply to shippers now rail-served exclusively either by UP or by SP. Condition #3 (establish oversight for at least 15 years) envisions an oversight regime lasting far longer than we hope will be necessary.

Federal Parties.

United States Department of Justice. We are denying, for reasons provided elsewhere in this decision, DOJ's conditions #1 and #2 (South Central/SP East and Central Corridor divestitures, respectively). We are also denying DOJ's condition #3 that we require applicants to divest sufficient lines to preserve a third independent competitor between Los Angeles and the eastern gateways, particularly Chicago. Applicants and DOJ agree that the largest 3-to-2 traffic flow is Los Angeles-Chicago intermodal traffic. DOJ's numbers confirm that BNSF's premium service currently dominates these movements. BNSF's share of intermodal rail traffic in this corridor is over 50%. We believe applicants' plan to assign most expedited, service sensitive intermodal and automotive traffic to SP's Tucumcari Line and most slower manifest traffic to UP's Central Corridor Line will provide more effective competition to BNSF for all traffic moving between Los Angeles and the St. Louis and Chicago gateways. Shippers and numerous other affected California parties agree. Remarkably, DOJ, alone among the major parties, has concluded that competitive harm to this traffic is so significant that it can only be cured by divestiture of one of applicants' Los Angeles to Chicago routings. We strongly disagree.

United States Department of Transportation. DOT seeks: in the South Central/SP East region, a divestiture; and, in the Central Corridor, either a strengthening of the BNSF trackage rights (DOT's preferred condition) or a divestiture (DOT's back-up condition). With respect to the South Central/SP East region, we are denying, for reasons provided elsewhere in this decision, DOT's divestiture condition. With respect to the Central Corridor, we are conditioning the merger by strengthening the BNSF trackage rights much in the fashion that DOT has suggested: we are preserving build-in/build-out and transloading options along the entire stretch of trackage rights without time limit; we are requiring UP/SP to open its contracts with shippers at all 2-to-1 points to allow BNSF access to 50% of the volume; and we are establishing an oversight procedure that, if future events require, may result in a divestiture or a transfer of trackage rights to another railroad, as necessary.

United States Department of Defense. DOD's concerns are limited to the 2-to-1 impact at five installations: Red River Army Depot and Lone Star Army Ammunition Plant, both at Defense, TX; Sierra Army Depot, at Herlong, CA; Sharpe Army Depot, at Lyoth, CA; and Defense Depot Tracy, at Lathrop, CA. With respect to Red River Army Depot and Lone Star Army Ammunition Plant, we note: that Defense, TX, is listed as a 2-to-1 point in Section 8i of the BNSF agreement (the omnibus clause); and that applicants have indicated that BNSF traffic moving from/to these two facilities will be moved by UP/SP between Defense and Texarkana. UP/SP-230 at 136. With respect to Sierra Army Depot, we note: that applicants have represented that this facility is

covered by Section 8i of the BNSF agreement (the omnibus clause),[240] and that applicants have indicated that BNSF plans to serve Herlong via trackage rights, directly picking up and setting out Herlong traffic as an adjunct to its Oakland-Denver operations. UP/SP-230 at 136. With respect to Sharpe Army Depot and Defense Depot Tracy, we note that Lyoth and Lathrop, respectively, are listed in Section 8i of the BNSF agreement (the omnibus clause) as amended by Section 6a of the second supplemental agreement dated June 27, 1996.

ABANDONMENTS AND DISCONTINUANCES. As indicated earlier, applicants seek authorization to abandon, or to abandon and to discontinue operations over, 17 line segments that total approximately 584 miles. MPRR seeks to abandon 122.4 miles in Colorado, 40.24 miles in Kansas, 28.7 miles in Arkansas, 8.5 miles in Louisiana, and 7.5 miles in Texas. UPRR seeks to abandon 67.98 miles in Illinois, 12 miles in Utah, and 10.08 miles in California. SPT seeks to abandon 178.1 miles in Colorado, 85.5 miles in California, and 23.03 miles in Texas.

Public notice was properly given and, in Decision No. 9, served December 27, 1995, the ICC accepted the abandonment requests for consideration and adopted a procedural schedule in this proceeding.[241] Because the abandonment proposals were conditioned on consummation of the merger, the ICC stated in Decision No. 9 that the abandonment requests would be processed in accordance with the overall merger procedural schedule rather than the deadlines established in section 10904 and in our regulations. Decision No. 9, slip op. at 9-10; see UP/MKT, 4 I.C.C.2d at 486 n.73. The records are complete and we will now consider the merits of each proposal under the applicable standards. Labor and environmental conditions are discussed elsewhere in the decision.

Applicants contend that the lines sought to be abandoned are presently used primarily (in a few instances, exclusively) for overhead traffic, and applicants insist, with respect to each line, that this overhead traffic will be rerouted by a commonly controlled UP/SP. Applicants add that the local traffic generated by these lines is minimal (in a few instances, non-existent), and they maintain that these lines simply cannot be sustained by the limited amounts of local traffic they generate.

As described below, we will publish all seven notices of exemption, grant all four requests for discontinuance, and grant five of six abandonment petitions and three of four abandonment applications. We are denying the petition and application relating to the abandonment of the Tennessee Pass Line for the reasons stated earlier in our discussion of conditions imposed directed to the Central Corridor and as set forth in our

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[240] Herlong was listed as a 2-to-1 point in Section 8i of the BNSF agreement dated Sept. 25, 1995, but is not listed as a 2-to-1 point in Section 8i, as amended by Section 6c of the supplemental agreement dated Nov. 18, 1995, and as further amended by Section 6a of the second supplemental agreement dated June 27, 1996. We expect, however, that applicants will adhere to their representation that Sierra Army Depot is covered by Section 8i.

[241] To the extent necessary, these abandonment proceedings are deemed to be investigations under 49 U.S.C. 10904 and 49 CFR 1152, or exemption proceedings under 49 U.S.C. 10505 and 49 CFR 1121 or 1152, as applicable.

following discussion of specific abandonment authority being sought by applicants.

Notices of Exemption. As noted, applicants have filed seven abandonment notices of exemption[242] under 49 CFR 1152 Subpart F. The notices seek to invoke the 2-year out-of-service class exemption codified at 49 CFR 1152.50, pursuant to which an abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years, that any overhead traffic on the line can be rerouted over other lines, and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period.

No individual findings under 49 U.S.C. 10505 are necessary as to these seven notices because these lines fall within the class of lines exempted by 49 CFR 1152 Subpart F. According to applicants, there has been no local traffic on the lines for 2 years and any overhead traffic on the line can be rerouted over other lines.

Only one of the notices, Docket No. AB-3 (Sub-No. 132X), has received any protests. The Harvey County Board of Commissioners, the HCJDC, and Rep. Boston submitted comments in opposition, alleging that the abandonment of the Whitewater-Newton line in Kansas will have adverse economic consequences. Protestants did not contradict MPRR's contention that the line has had no local traffic for 2 years and that the line in all other respects qualifies for the class exemption. Nor did they address the revocation criteria in section 10505.

These exemptions will be effective on September 11, 1996 (unless stayed pending reconsideration). Petitions to stay and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) must be filed by August 22, 1996, and petitions to reopen must be filed by September 3, 1996. Because the notices were previously conditioned on the merger, which has now been approved, we will, consistent with our regulations, publish notice in the Federal Register.

Petitions for Exemption. As noted, applicants have filed six abandonment petitions for exemption.[243] Our denial of the

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[242] MPRR has filed two notices of exemption: Docket Nos. AB-3 (Sub-No. 132X) (Newton-Whitewater, KS); and AB-3 (Sub-No. 134X) (Troupe-Whitehouse, TX). UPRR has filed four notices of exemption: Docket Nos. AB-33 (Sub-No. 93X) (Whittier Junction-Colima Junction, CA); AB-33 (Sub-No. 94X) (Magnolia Tower-Melrose, CA); AB-33 (Sub-No. 97X) (DeCamp-Edwardsville, IL); and AB-33 (Sub-No. 99X) (Little Mountain Junction-Little Mountain, UT). SPT has filed one notice of exemption: Docket No. AB-12 (Sub-No. 187X) (Seabrook-San Leon, TX).

[243] MPRR has filed two abandonment petitions: Docket No. AB-3 (Sub-No. 129X) (Gurdon-Camden, AR); and Docket No. AB-3 (Sub-No. 133X) (Iowa Junction-Manchester, LA). SPT has filed three abandonment petitions: Docket No. AB-12 (Sub-No. 189X) (Sage-Leadville, CO) and Docket No. AB-8 (Sub-No. 36X) (related discontinuance); Docket No. AB-12 (Sub-No. 184X) (Wendel-Alturas, CA); and Docket No. AB-12 (Sub-No. 185X) (Suman-Bryan (Benchley), TX). UPRR has filed one abandonment petition: Docket No. AB-33 (Sub-No. 98X) (Edwardsville-Madison, IL).

petition in Docket No. AB-12 (Sub-No. 189X) will be addressed in our discussion with the abandonment application below regarding the Tennessee Pass Line. We will grant the other five abandonment petitions for exemptions.

Under 49 U.S.C. 10903-04, a rail line may not be abandoned without prior approval. Under 49 U.S.C. 10505, however, we must exempt a transaction from regulation when we find that: (1) application of the statutory abandonment provisions is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the particular abandonment or discontinuance is of limited scope, or (b) the application of the statutory abandonment provisions is not needed to protect shippers from the abuse of market power.

Detailed scrutiny is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of filing abandonment applications, these exemptions will expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. 10101a(2) and (7). By allowing applicants to avoid the expense of retaining and maintaining lines that generate little or no traffic and to apply their assets more productively elsewhere on the system, these exemptions will foster sound economic conditions and encourage efficient management. 49 U.S.C. 10101a(3), (5), and (10). Other aspects of the rail transportation policy are not affected adversely.

Regulation is not necessary to protect shippers from an abuse of market power because all overhead traffic will be rerouted, and recurring traffic will have viable alternative transportation options available. Only one of these proceedings, Docket No. AB-3 (Sub-No. 129X), received a protest, which was filed by a shipper who had made only one shipment in the last 5 years, and who, applicants contend, has a transportation alternative available to it.[264] No shippers are opposing the other abandonment petitions.[265]

Given our findings regarding the probable effect of the transactions on market power, we need not determine whether the transactions are of limited scope. Nevertheless, we note that four of these five proposed abandonments involve rail lines ranging from 8.5 miles to 28.7 miles in a single state with

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[264] The Reader Railroad, a noncommon carrier tourist railroad, objected to the abandonment. According to applicants, however, it has made only one shipment (a steam locomotive on a flatcar) in the last 5 years; and this is the only local traffic that moved on the line. Applicants submit that such occasional movements of railroad equipment can be handled by "lowboy" trucks.

[265] In Docket No. AB-12 (Sub-No. 185X), the City of College Station raised concerns about negative impacts the proposed abandonment could have on northwestern Brazos County and the City of Bryan. Its opposition focuses only on general allegations of possible harm to the local area.

In Docket No. AB-12 (Sub-No. 184X), CPUC, Or/DOT, Lassen, Susanville, Modoc, and Alturas oppose the proposed abandonment of the Modoc Line. As applicants point out, however, no shippers that use this line to originate or terminate traffic have opposed the abandonment. Also, applicants are not proposing to abandon in Alturas (the abandonment limit is about 10 miles south of the area) and the concerns about the Sierra Army Depot at Herlong are unfounded because Herlong is not within the abandonment limits.

little local traffic, and the fifth one involves 85.5 miles of rail line in a single state with no recurring local traffic.

These exemptions will be effective on September 11, 1996 (unless stayed pending reconsideration). Petitions to stay and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) must be filed by August 22, 1996, and petitions to reopen must be filed by September 3, 1996.

Applications. Four formal abandonment applications have been filed to become effective contingent upon approval of the merger. Three have been filed by UP[246] and one has been filed by SP.[247] Our denial of the application in Docket No. AB-12 (Sub-No. 188) will be discussed in the Tennessee Pass Line section, below. We will grant the other three abandonment applications, each of which has received some form of opposition.

The statutory standard governing an abandonment, under 49 U.S.C. 10903, is whether the present or future public convenience and necessity require or permit the proposed abandonment. If the abandonment is unopposed, 49 U.S.C. 10904(b) requires that we make an affirmative finding and issue a certificate permitting the abandonment. Otherwise, we must weigh the potential harm to affected shippers and communities against the present and future burden that continued operation could impose on the railroad and on interstate commerce. Colorado v. United States, 271 U.S. 153 (1926). Essentially, this involves a question of whether, and to what degree, the shippers will be harmed if rail service is no longer available. For an abandonment application to be denied, protestants must show that the harm to shippers and communities outweighs the demonstrated harm to applicants and interstate commerce by continued operation of the line. Cartersville Elevator, Inc. v. ICC, 724 F.2d 668, aff'd on reh'g en banc, 735 F.2d 1059 (8th Cir. 1984).

In determining whether to grant or deny an abandonment application, we consider a number of factors, including operating profit or loss, other costs the carrier may experience (including opportunity/economic cost), and the effect on shippers and communities. No one factor is conclusive. Id.

Hope-Bridgeport Line (Kansas). In Docket No. AB-3 (Sub-No. 131), MPRR seeks by application to abandon its 31.25-mile Hope-Bridgeport Line. In the embraced Docket No. AB-8 (Sub-No. 37), DRGW seeks to discontinue its trackage rights operations over the line. We will grant the abandonment and the discontinuance. We will issue a certificate of interim trail use if no offer of financial assistance is timely made.

Train operations. Prior to October 16, 1995, the Hope-Bridgeport Line had local train service, including three cycles (six one-way trips) per week. The train originated at Herington,

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[246] MPRR and DRGW filed two applications to abandon and discontinue service, respectively, in Docket No. AB-3 (Sub-No. 130) (Towner-NA Junction, CO) and Docket No. AB-8 (Sub-No. 38) (related discontinuance); and Docket No. AB-3 (Sub-No. 131) (Hope-Bridgeport, KS) and Docket No. AB-8 (Sub-No. 37) (related discontinuance). UPRR filed an abandonment application in Docket No. AB-33 (Sub-No. 96) (Burr-Girard, IL).

[247] SPT and DRGW filed an application to abandon and discontinue service, respectively, in Docket No. AB-12 (Sub-No. 188) (Malta-Cañon City, CO) and Docket No. AB-8 (Sub-No. 39) (related discontinuance).

KS, operated over the subject line to Hoisington, KS, and returned to Herington the following day. Effective October 16, 1995, MPRR replaced this operation with a local train assignment operating three cycles a week from Hoisington to Bridgeport to Salina and return, with Bridgeport-Hope side trips as required.

In accordance with a waiver granted in Decision No. 3, served on September 5, 1995, applicants provided information relating only to local train service by MPRR. DRGW does not originate or terminate traffic on the line. Farm products are the principal commodities shipped over the line. For the three significant shippers/receivers on the subject line, 77 carloads were shipped in 1993 and 220 carloads in 1994. For the most current partial year available (January 1, 1995, through June 30, 1995), a total of only five carloads were shipped. Applicants' projected forecast year traffic of 190 carloads is not challenged.

Revenue and cost data. As shown in the following table, applicants estimate that, for the forecast year November 1, 1995, through October 31, 1996, local traffic on the line will generate avoidable losses that can be avoided by abandonment and cessation of operations. Applicants' revenue and cost estimates, including return on value, are not contested. We summarize them as follows:

		(Forecast Year)
Total Revenue		$187,384
Total On-Branch Costs	$219,915	
Total Off-Branch Costs	110,495	
Total Avoidable Costs		330,410
Avoidable Loss, Excluding Return on Value		143,026
Return on Value		581,921
Avoidable Loss, Including Return on Value		$724,947

Revenues. Total revenues for the forecast year are projected to be $187,384. This is based on the movement of 190 carloads.

Avoidable Costs. Applicants' revenue and cost estimates are based on a service frequency averaging one cycle per week. Total on-branch costs are estimated to be $219,915, consisting primarily of maintenance-of-way and structure costs of $185,890. With respect to track maintenance costs, applicants estimate a normalized annual expenditure of $5,950 per main track mile to maintain the track at Federal Railroad Administration (FRA) class 1 standards, excluding maintenance costs associated with overhead traffic.

Opportunity Costs. Return on value is the opportunity cost of the resources committed by the railroad to provide service over the line subject to abandonment. Opportunity costs are estimated to be $581,921, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property ($3,044,544) dedicated to the train operations conducted over the line and adjusting for a holding loss of $24,769.[268]

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[268] A restatement of these numbers to take into account the Board's 1995 cost of capital determination, which results in a

(continued...)

Projected Losses. Applicants project an avoidable loss, excluding opportunity costs, of $143,026. Including opportunity costs, losses are projected to be approximately $700,000 in the forecast year.

Alternative transportation. Applicants indicate that there is adequate alternative rail and motor transportation available to shippers after abandonment. There are other BNSF and UP/SP lines in the area. According to applicants, the principal shipper on the line, Agri-Producers, indicated in its discovery responses that the trucking companies it has used are too numerous to list.

Shipper and community interests. Applicants contend that this line is an insignificant part of the transportation network in the area. According to applicants, wheat is the only agricultural commodity produced in the area that moves on the line, and only about 4% or 5% of the area's wheat is transported on this line. The line's principal shipper, Agri-Producers, filed a notice of intent to participate without expressing a position on the abandonment, and it filed no evidence. The other shipper on the line, North Central Kansas Coop, did not file an individual statement, but it is a member of the Mountain-Plains Communities and Shippers Coalition which opposes the abandonment. Only one individual, Mr. Schwarz, alleges that crops would no longer be shipped by rail from his local elevator but would be moved at higher costs by motor carriers.

Discussion and conclusions. The applicable criteria weigh heavily in favor of abandonment and discontinuance. The line is unprofitable and is incurring substantial opportunity costs. There is an allegation of increased shipping costs, but shippers are using truck transport now, suggesting it is economical. Even if shippers incur some inconvenience and added expense, that by itself would be insufficient to outweigh the detriment to the public interest of uneconomic and excess facilities. We find that, on balance, the burden of operating this unprofitable line outweighs any inconvenience and the unspecified additional expense to shippers for using alternative transportation.

Towner-NA Junction Line (Colorado). In Docket No. AB-3 (Sub-No. 130), MPRR seeks to abandon its 122.4-mile Towner-NA Junction Line. In the embraced Docket No. AB-8 (Sub-No. 38), DRGW seeks to discontinue its overhead trackage rights operations over the line. As noted earlier, this abandonment generated intense opposition, although relatively few of the opponents, applicants point out, are shippers who actually use the line. We will grant the abandonment and the discontinuance. We will issue a certificate of interim trail use if no offer of financial assistance is timely made.

Train operations. For the past 2 years, local train service on the Towner-NA Junction Line has consisted of local trains operating three cycles (six one-way trips) per week. The trains originated at Pueblo, operated over the subject line to Horace, KS, and returned to Pueblo the following day. Local service trains are operated with one locomotive, a practice applicants anticipate will continue. In accordance with Decision No. 3, applicants provided the revenue and cost information in the application relating only to local train service by MPRR. DRGW does not originate or terminate traffic on the line.

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[269] (...continued)
pre-tax cost of capital of 17.5%, produces a return on value of $557,564.

Wheat and barley are the principal commodities shipped over the line. The total carloads shipped, for the five shippers on the subject line, in 1993 and 1994 were 164 and 142 carloads, respectively. For the most current partial year available (January 1, 1995, through June 30, 1995), a total of only 30 carloads of wheat were shipped by MPRR. Applicants' projected forecast year traffic is 238 cars.

Revenue and cost data. As shown in the following table, applicants estimate that for the forecast year November 1, 1995, through October 31, 1996, local traffic on the line will generate avoidable losses that can be avoided by abandonment and cessation of operations. Applicants' cost estimates, including return on value, are not contested. We summarize them as follows:

		(Forecast Year)
Total Revenue		$237,676
Total On-Branch Costs	$922,012	
Total Off-Branch Costs	127,068	
Total Avoidable Costs		1,049,080
Avoidable Loss, Excluding Return on Value		811,404
Return on Value		1,867,795
Avoidable Loss, Including Return on Value		$2,679,199

Revenues. Total revenues for the forecast year are projected at $237,676 based on the movement of 238 cars. Protestants argue that there is a much higher demand for local services than current traffic indicates. Citing a Colorado Department of Transportation study, protestants aver that potential traffic on the line could exceed 4,000 cars per year compared to the 238 cars projected. Absent specific commitments from other shippers for traffic over the line, we believe the higher 4,000 car estimate to be speculative. Applicants' revenue estimate is reasonable, and we have no basis on which to restate it.

Avoidable Costs. Applicants' cost estimates are based on a service frequency averaging one cycle per week. Total on-branch costs are estimated to be $922,012, consisting primarily of maintenance-of-way and structure costs of $613,650 and property taxes of $195,578. Because the line is classified at a level higher than FRA class 1, the line requires no rehabilitation.

Opportunity Costs. Opportunity costs are estimated to be $1,867,795, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property ($10,177,042) dedicated to the train operations conducted over the line and adjusting for a holding loss of $5,396.[249] The greater part of the property value committed to the operation of the line is the net salvage value of track structure, which is estimated to be $9,811,169. Land is valued at $450,955.

Projected Losses. Applicants project an avoidable loss, excluding return on value, of $811,404. Including return on

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[249] A restatement of these numbers to take into account the Board's 1995 cost of capital determination, which results in a pre-tax cost of capital of 17.5%, produces an opportunity cost of $1,786,378.

value, losses are projected to be approximately $2.6 million in the forecast year.

Alternative transportation. Applicants indicate that there is adequate alternative rail and motor transportation available to shippers after abandonment. An alternate UP line (the "Kansas-Pacific" line) runs parallel to this line to the north. Running parallel to the line to the south is the BNSF line through Prowers County. According to applicants, shippers who responded to discovery requests indicated that the motor carriers they were using were too numerous to list.

Shipper and community interests. As described previously, this application was vigorously opposed by shippers, individuals, and communities. Opponents argue that the abandonment of the line would have a devastating economic effect based on lost rail service and lost tax revenues.

Applicants argue, preliminarily, that the concerns of shipper and community interests have been addressed in an agreement between the State of Colorado and UP. As we have noted earlier, a letter of intent was signed by Governor Roy Romer of Colorado and Richard K. Davidson, Chairman of UP, in which UP agreed to serve active shippers on both the Tennessee Pass and Towner-NA Junction Lines for at least 6 months after the merger, and, in any case, until improvements described in the Operating Plan are completed on UP's "KP" line east of Denver to avoid congestion on the Moffat Tunnel line. Rail lines will be left in place for at least a year after the merger while other rail options are explored. This schedule can be modified by mutual agreement between Colorado and UP. For a year after merger, UP will sell the route to a new entity at net liquidation value if a viable rail option develops.

Applicants also argue that the abandonment will have little impact on shippers served by the line. They contend that most of the elevators mentioned in the submissions by farmers are not on the line, and, in any event, abandonment will cause no elevator to close.

Applicants contend that there will be only a 0.75% increase in heavy truck traffic. Finally, applicants argue that most of the tax revenue losses are not tax savings to UP because UP will be reallocating tax payments to other Colorado counties and other states. In any event, the ICC has held that the loss of taxes otherwise collectible from a line proposed for abandonment has no bearing on the public need for the line. See Burlington Northern Railroad Company - Abandonment - In Fergus, Judith Basin and Chouteau Counties, MT, Docket No. AB-6 (Sub-No. 175) (ICC served July 30, 1984).

Discussion and conclusions. The line is incurring substantial losses and opportunity costs. We conclude that the burden on shippers and communities resulting from the abandonment is outweighed by the burden imposed on MPRR and DRGW and on interstate commerce by the financial losses that would result if the carriers were required to continue to operate this line. Given the magnitude of these losses, we conclude that the line is a burden on interstate commerce, and we will grant the abandonment.

Barr-Girard Line (Illinois). In Docket No. AB-33 (Sub-No. 96), UPRR seeks to abandon its 38.4-mile Barr-Girard Line. As noted, protestants request that this abandonment be denied in its entirety, or, in the alternative, that the abandonment be denied as to the 26.7-mile Barr-Compro segment. According to

protestants, by using the Barr-Compro segment a carrier could obtain 100% of the traffic and revenues on the Barr-Girard Line while maintaining and operating only about 70% of the line. We will deny SPBC's alternative request for a partial abandonment, and we will grant applicants' abandonment application. We will impose the requested 180-day public use condition. We will issue a certificate of interim trail use if no offer of financial assistance is timely made.

Train operations. The Barr-Girard Line is part of the former CNW's route from Chicago to St. Louis. As a result of the UP/CNW consolidation and the UP/SP consolidation, the merged system will have three Chicago-St. Louis through routes. As noted, the proposed abandonment results from a decision to reroute all Chicago-St. Louis traffic from the former CNW route to an allegedly superior UP/SP north-south route. Once this through traffic is rerouted, applicants believe that continued operation of the Barr-Girard Line for only local traffic would be uneconomical. Rerouting will be effected by exiting at Barr and operating under a trackage rights agreement over the I&M line from Barr to Springfield, then operating over the SP line from Springfield to St. Louis.

Local train service on the Barr-Girard Line over the past 2 years has been provided by through trains operating daily in both directions. Due to the very low volume of local traffic generated by the line, applicants believe a service frequency of one cycle per week would be adequate if the line were operated solely for local traffic. In accordance with Decision No. 3, applicants provided the revenue and cost information in the application relating only to local train service by UPRR.

A joint protest by Springfield Plastic, Inc. (SpPl) and Brandt Consolidated, Inc. (BCI) (again, collectively, SPBC) contests applicants' forecast year traffic estimates. Applicants claim that forecast year traffic will be the same as 1994 traffic on the line: 40 carloads of polyethylene received by SpPl and 3 carloads of anhydrous ammonia received by Brandt. SpPl claims forecast year traffic will amount to 46 carloads, and BCI submits that traffic will amount to 7 carloads. In applicants' rebuttal statement, UP revises its forecast to accept BCI's claim of 7 carloads, but UP maintains its projection of 40 carloads for SpPl. SpPl states that 18 carloads have been received in the first 4 months of the forecast year for an average of 4 carloads per month. Applying that average to the final 8 months of the forecast year, skipping a month to account for an inventory buildup, SpPl adds an additional projected 28 carloads to the 18 already received to arrive at 46 carloads. UP contends that inventory buildup periods are followed by downturns in activity that are more substantial than calculated by SpPl. UP examined SpPl's traffic statistics for the period 1994 through February 1996 to determine if there were other 7-month periods in which waybilled traffic totaled at least 28 cars (the amount projected by SpPl). For each of the 8-month periods following those examined, waybillings totaled just 20 cars. Therefore UP added the projected 20 carloads to the 18 already received to arrive at 38, substantiating their original projection of 40 carloads for SpPl. We accept UP's analysis because it more accurately reflects actual carload volume in the recent past.

Revenue and cost data. The following table reflects operations over the Barr-Compro segment, the scenario most favorable to protestants. Applicants' estimates are shown in the first column of figures. Our restatement, based on arguments raised by protestants, is shown in the second column of figures. Applicants estimate that for the forecast year November 1, 1995,

through October 31, 1996, local traffic on the subject line will generate loses which can be avoided by abandonment and cessation of operations. Applicants' cost estimates are based on a service frequency of only 40 cycles per year from South Pekin-Compro and return, producing total revenues for the forecast year of $180,074. Total avoidable costs are estimated at $289,076 (including off-branch costs of $50,446). Total return on value is estimated at $803,300.

	Applicants' Estimates for Forecast Year	STB's Restated Forecast Year
Total Revenue	$180,074	$191,676
Total On-Branch Costs	$238,630	$170,075
Total Off-Branch Costs	50,446	54,790
Total Avoidable Costs	289,076	224,865
Avoidable Loss, Excluding Return on Value	109,002	33,189
Return on Value	803,300	543,383
Avoidable Loss, Including Return on Value	$912,302	$576,572

As discussed below, applicants' estimates of revenues and costs for the forecast year require restatement in light of arguments raised by protestants.

Revenues. Protestants claim that total SpPl revenues, based on 95-ton minimum rates, were understated for the forecast year by $2,040. Applicants agree with protestants but believe, on further analysis, that the understatement in revenue is $2,358.

For the additional traffic (10 carloads--6 for SpPl and 4 for BCI) that protestants estimate will be moved over the line, protestants calculate additional revenues of $42,270, based on average revenues per car of $4,227. As indicated above, we do not accept the additional 6 carloads for SpPl, and believe applicants' 40 carload figure is appropriate. While accepting the additional 4 carloads for BCI, applicants contend that, by using an average for both commodities instead of an average for each commodity, protestants' per-car revenues are erroneously high. Applicants' analysis represents a more refined approach than SpPl-BCI's use of broad averages. Applicants have developed a rate for fertilizer shipped for BCI from Lawrence, KS, of $29.63/ton. Applying the additional traffic of four BCI carloads at $29.63/ton, applicants computed additional revenues of $9,244. We agree with applicants' analysis of the additional revenues. The forecast year revenues would then be $191,676 ($180,074 original estimate + $9,244 additional revenues from increased traffic + $2,358 adjustment for SpPl traffic based on 95-ton minimum rates), as reflected in the second column of figures in the above table.

Avoidable Costs. Applicants' cost estimates are based on a service frequency averaging 40 cycles per year. Total on-branch costs are estimated to be $238,630, consisting primarily of maintenance-of-way and structure costs of $202,581 and transportation costs of $30,192. Protestants argue that transportation costs have been overstated because of an incorrect assumption by applicants that UPRR will operate the subject line at the FRA class 1 speed limit of 10 mph. Protestants contend that the appropriate speed is that permitted for FRA class 3 track (40 mph). Applicants have presented no evidence that the subject line cannot be operated at the higher speed. It is also unreasonable to assume that the crews would be required to

operate at less than optimum operating speeds. We agree with protestants. At the higher speed, locomotive hours of operation would decrease from 228 hours to 72 locomotive hours. This would decrease transportation costs by $5,794, maintenance costs by $750, and return on investment (ROI) expense for locomotives by $2,088.

With respect to track maintenance costs, applicants' estimate of $202,581 is comprised of $119,936 for nonprogram maintenance for the Barr-Compro segment, $69,263 for program maintenance for the Barr-Compro segment, and $13,382 for nonprogram maintenance on the Compro-Girard segment. Protestants argue that the Compro-Girard maintenance ($13,382) should be eliminated because that segment would be abandoned even if abandonment of the Barr-Compro segment were denied. Also, the protestants contend the Barr-Compro program maintenance ($69,263) should be eliminated since the line is now classified at the FRA class 3 level and should be allowed to evolve to FRA class 1 by eliminating maintenance. The nonprogram maintenance costs of $119,936 are not contested and appear to be reasonable. We agree with protestants that the Compro-Girard nonprogram maintenance ($13,382) should be eliminated. In their rebuttal statement, applicants contend that UPRR would incur an absolute minimum of $22,722 for program maintenance on the Barr-Compro segment (versus applicants' program maintenance estimate of $69,263). We agree with applicants' revised lower maintenance cost estimate. Accordingly, the revised maintenance cost for the Barr-Compro segment would be $142,658 annually ($119,936 for nonprogram maintenance and $22,722 for program maintenance). This would be $5,343 per mile, which is reasonable for FRA class 1 track. Because the line is classified at a level higher than FRA class 1, the line requires no rehabilitation.

Protestants argue that trackage rights payments to I&M should be treated as an offset to avoidable costs because such payments reduce the amount that would be saved as a result of the abandonment. Trackage rights compensation to I&M, however, concerns the movement of rerouted overhead traffic, which is irrelevant to our analysis. As we have discussed, in Decision No. 3 we waived the filing of revenues and costs associated with overhead traffic. Even if we were to consider the trackage rights payment, for a complete analysis we would also have to consider the revenues generated by the overhead traffic and other costs incurred in moving this traffic, such as fuel and crew wages. In other words, the amount saved by abandonment might not be reduced if both the revenues and costs associated with overhead traffic and trackage rights were considered.

We have restated total avoidable costs to reflect the adjustments to transportation costs and maintenance-of-way costs discussed above. These adjustments reduce forecast year on-branch avoidable costs from $238,630 to $170,075. Off-branch avoidable costs are increased to $54,790 for the forecast year to reflect costs associated with the forecasted additional carloads.

Opportunity Costs. Opportunity costs are estimated by applicants to be $803,300, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property ($4,155,986) dedicated to the train operations conducted over the line and adjusting for a holding loss of $42,755.[350] The greater part of the property value

[350] Applicants used the ICC's 1994 cost of capital because it was the most current return when the application was prepared.

(continued...)

committed to the operation of the line is the net salvage value of track structure, which UPRR estimates to be $2,761,100. Another component is land, which applicants value at $1,490,000. Below we discuss these two components.

Net salvage - Protestants argue that the net salvage value of almost $2 million for the Barr-Compro segment would be more than offset by the $2.6 million cost UPRR would incur to upgrade existing connections and crossings to allow implementation of UPRR trackage rights from Barr to Springfield as a result of the abandonment. If this offset is not applied, SPBC argues that net salvage for the Barr-Compro segment should be calculated by multiplying applicants' net salvage value for the line by 0.6953 (26.7 miles from Barr to Compro ÷ 38.4 miles from Barr to Girard). We believe that costs associated with upgrading existing connections should not be included in the net salvage calculations because the through traffic will be rerouted regardless of whether the line is abandoned. Moreover, if we were to consider construction costs for rerouting through traffic, it would also be necessary to consider the savings achieved by rerouting. We agree with protestants that net salvage should be prorated to take into account that no maintenance is required for the line segment between Compro and Girard. The resulting restated net salvage for the Barr-Compro line segment is $1,919,827 ($2,761,100 x 0.6953).

Land value - Applicants estimate land value for the Barr-Girard Line to be $1,490,000. Protestants argue that, because UPRR did not furnish property deeds, it has failed to prove the quality of its title. Furthermore, protestants say that, if land value is not set at zero, it should be prorated using mileage, as was done for net salvage. Protestants failed to identify specific deeds to which UPRR incorrectly claimed fee title or to provide alternative property values. Because applicants' acreage calculations and unit values appear to be reasonable, we accept applicants' land value. Furthermore, we accept protestants' method of prorating the Barr-Compro land value because applicants did not provide a separate land value for that segment. The Barr-Compro segment will be valued at $1,036,016 ($1,490,000 x 0.6953).

The sum of the restated net salvage value and land value is net liquidation value ($2,955,843). Total valuation of property is the sum of working capital ($3,998), income tax consequences (negative $99,112) and net liquidation value. Based on this total property valuation ($2,860,729), the nominal return on value is $500,628 (computed by multiplying property valuation by the 1995 pre-tax cost of capital rate of 17.5%). This is adjusted by a holding loss of $42,755 to produce a total return on value shown in the second column of the table of $543,383.

Projected Losses. Applicants project an avoidable loss, excluding return on value, of $109,002. Including return on value, losses are projected to be $912,302 in the forecast year. A restatement of these numbers using the Board's 1995 cost of capital determination and changes resulting from arguments raised by protestants produces the following numbers: an avoidable loss, excluding opportunity costs, of $33,189 and losses, including opportunity costs, of $576,572 in the forecast year.

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[250] (...continued)
Since that time, the Board has made its 1995 cost of capital determination.

Alternative transportation. Protestants are located at Compro, which, according to applicants, is about 6 miles from Interstate 55, a major Chicago-Springfield-St. Louis truck route. SpPl claims that, if the line were abandoned, it would incur at least $100,000 in added freight and handling charges. BCI's cost of receiving shipments would allegedly increase $10,000 per year if the line were abandoned. Applicants respond that, if SpPl used a rail-to-truck transfer operation in the St. Louis area, the additional cost would be $66,480, which is allegedly a very small portion of the company's profits. SpPl replies that the increased costs would reduce SpPl's yearly profit by 3.8%, while the line's claimed operating loss is less than 0.02% of UP's net income.

Shipper and community interests. Protestants argue that the $110,000 increase in costs for SpPl and BCI indicates that there would be substantial harm to local interests caused by an abandonment. The Economic Development Council for Greater Springfield contends that the abandonment will cause negative economic impacts for any business that relies heavily on rail service. Applicants contend that abandonment will not have a significant effect on shipper and community interests because the only shippers on the line will not incur significant additional transportation charges.

Discussion and conclusions. The applicable criteria weigh in favor of granting the abandonment and denying the request for a partial abandonment. We have restated the revenue and cost evidence based on the Barr-Compro segment in the scenario most favorable to protestants. Under our restatement, the avoidable loss is $33,189 based on revenues of $191,676. When opportunity costs are included, the total loss is $576,572. Although the avoidable losses are relatively low, they amount to over $700 a carload. Moreover, there are large opportunity costs. There is no evidence that there will be a significant increase in traffic in the future.

We recognize, and applicants concede, that the shippers will experience increased costs. Both the ICC and the Board have held, however, that the fact that shippers are likely to incur some inconvenience and added expense is insufficient by itself to outweigh the detriment to the public interest of continued operation of uneconomic and excess facilities. The situation in this proceeding is unusual because the loss to shippers is approximately twice as great as the avoidable loss of $33,189. As noted, however, when opportunity costs are included, the economic loss is over $575,000. Moreover, in considering the fact that only 47 cars are projected for the forecast year, applicants' avoidable loss amounts to over $700 a car, a significant subsidy by the carrier.

We therefore conclude that the burden on shippers and communities resulting from abandonment is outweighed by the burden imposed on UPRR and on interstate commerce by the financial losses that would result if UPRR were required to continue to operate this line. Given these losses, we must conclude that the line is a burden on interstate commerce, and we will grant the abandonment.

Tennessee Pass Line Abandonments. SPT seeks to abandon and discontinue operations over, and DRGW seeks to discontinue

operations over, two segments of the Tennessee Pass Line.[251] We will grant the applications and petitions for exemption to the extent to allow for discontinuance, but will deny the application and petition for abandonment authority. Because we are granting discontinuance authority, we will not consider trail use requests or impose public use conditions. We will discuss the discontinuance issues before addressing the abandonment requests.

Discontinuances granted: 10505 petitions. To the extent that SPT seeks to discontinue service in Docket No. AB-12 (Sub-No. 189X) and DRGW seeks to discontinue service in AB-8 (Sub-No. 36X), we find that SPT and DRGW have met the criteria for discontinuance exemptions.

Detailed scrutiny is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of filing discontinuance applications, these exemptions will expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. 10101a(2) and (7). These exemptions will foster sound economic conditions and encourage efficient management by allowing the carriers to discontinue uneconomic service on the line. 49 U.S.C. 10101a(3), (5), and (10). Other aspects of the rail transportation policy are not affected adversely.

Regulation is not necessary to protect shippers from an abuse of market power. No shipper that actually uses the line to originate or terminate traffic has opposed the discontinuances. Applicants claim that the major recurring source of local traffic on the line has been salvaged rolling stock and cargo from train accidents. No local traffic is expected to be generated on the line in the future.

Given our findings regarding the probable effect of the transactions on market power, we need not determine whether the transactions are of limited scope. Nevertheless, we note that the transactions involve 69.1 miles of line in a single state. Under 49 U.S.C. 10505, we will exempt from the prior approval requirements of 49 U.S.C. 10903-04, the discontinuance by both SP and DRGW of operations on the Sage-Malta-Leadville Line.

Discontinuances granted: applications. To the extent that SPT seeks to discontinue service in Docket No. AB-12 (Sub-No. 188) and DRGW seeks to discontinue service in AB-8 (Sub-No. 39), we find that SPT and DRGW have met the criteria for discontinuance. Most of the opposition to the abandonment and discontinuance applications for the Malta-Cañon City Line are from interested parties concerned about the rerouting of traffic. Also, the major shipper on the line, ASARCO, has expressed concern about the applications.

The statutory standard governing a discontinuance under 49 U.S.C. 10903 is whether the present or future public convenience and necessity require or permit the proposed discontinuance. As in abandonment proceedings, we must weigh the potential harm to affected shippers and communities against the present or future burden that continued operation could impose on the railroad and on interstate commerce. Colorado v. United

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[251] SPT and DRGW, respectively, filed applications in Docket Nos. AB-12 (Sub-No. 188) and AB-8 (Sub-No. 39), for the abandonment and discontinuance of service over the 109-mile Malta-Cañon City, CO line; and petitions for exemptions in Docket Nos. AB-12 (Sub-No. 189X) and AB-8 (Sub-No. 36X), for the abandonment and discontinuance of service over the 69.1-mile Sage-Malta-Leadville, CO line.

States, 271 U.S. 153 (1926). In this proceeding, the record indicates that the Malta-Cañon City Line is incurring significant losses, described below.

Train operations. Pursuant to Decision No. 3, applicants provided information relating only to local train service. Service to shippers is usually provided by through trains operating 7 days per week. Minerals, chemicals, and scrap metal are the principal commodities shipped over the line.

Due to the very low volume of local traffic generated by the line, a service frequency of one cycle per week would be adequate if the line were operated solely for local traffic. The total carloads shipped for the nine significant shipper/receivers on the subject line in 1993 and 1994 were 574 and 528, respectively. For the most current partial year available (January 1, 1995, through June 30, 1995), a total of 258 carloads (predominantly minerals) were shipped. Applicants' projected forecast year traffic of 492 cars is not challenged.

Revenue and cost data. As shown in the following table, applicants estimate that for the forecast year November 1, 1995, through October 31, 1996, local traffic on the line will generate avoidable losses that can be avoided by abandonment and cessation of operations. Applicants' cost estimates, including return on value, are not contested. We summarize them as follows:

		(Forecast Year)
Total Revenue		$1,286,649
Total On-Branch Costs	$891,239	
Total Off-Branch Costs	915,777	
Total Avoidable Costs		1,807,016
Avoidable Loss, Excluding Return on Value		520,367
Return on Value		1,259,808
Avoidable Loss, Including Return on Value		$1,780,175

Revenues. Total revenues for the forecast year are projected to be $1,286,649. This is based on the movement of 492 cars.

Avoidable Costs. Total on-branch costs are estimated to be $891,239, consisting largely of maintenance-of-way and structure costs, estimated by applicants to be $555,114. With respect to these track maintenance costs, applicants estimate a normalized annual expenditure of $5,093 per main track mile to maintain the track at FRA class 1 standards, excluding maintenance costs associated with overhead traffic. Because the line is classified at a level higher than FRA class 1, no rehabilitation is required. Review of applicants' calculations indicates that the maintenance estimate of $555,114, and the quantities and unit costs used to develop the estimate, appear to be reasonable.

Opportunity Costs. Opportunity costs are estimated to be $1,259,808, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property ($6,809,017) dedicated to the train operations conducted over the line, and adjusting for a holding loss of $13,758. The majority of the property value committed to the operation of the line is the net salvage value of track structure, which is estimated to be $7,079,625. Land is valued at $378,000.

Projected Losses and Estimated Subsidy. Applicants project an avoidable loss, excluding opportunity costs, of $520,367. Including opportunity costs, losses are projected to be almost $1.8 million in the forecast year. A restatement of these numbers to take into account our 1995 cost of capital determination, which results in a pre-tax cost of capital of 17.5%, produces opportunity costs of $1,205,336. Losses, including opportunity costs, would be approximately $1.73 million.

Alternative transportation. The main shipper served by the line is ASARCO, whose traffic accounts for 477 of the 492 carloads of lead and zinc ore projected for the forecast year. ASARCO and SPT have discussed building a new transload facility at a site in the Cañon City area where ASARCO could truck the ore following an abandonment or discontinuance of service. ASARCO does not claim transloading is infeasible or that its mine would not be able to operate. It does suggest, however, that the new arrangements would not be as satisfactory as the current one. No other customers who receive or ship traffic on the line filed comments. Applicants contend that trucking of ore was common when the area was much more heavily mined, and that it should not be difficult to build a transloading facility in Cañon City comparable to the one in Malta.

Shipper and community interests. As noted, no shippers besides ASARCO filed comments. CWAC argues that there is a much higher demand for local shipping than current traffic indicates. Applicants claim that the projected traffic is unrealistic, arguing that some of the movements are being shipped by truck and that some of the movements originate or terminate at Florence, CO, which is not on the line.

Discussion and conclusions. The applicable criteria weigh in favor of discontinuance. The line is incurring heavy operating losses and claims of significantly increased traffic have not been substantiated. Accordingly, the potential harm to shippers and communities from discontinuance of service is outweighed by the burden on the carriers and on interstate commerce from continued operations. Both SPT and DRGW may discontinue service over the subject line.

Abandonments not granted. In most situations, the lack of shipper opposition, little local traffic, and significant losses over the Malta-Cañon City Line, discussed above, would also support a grant of the petition and the application to allow for abandonment. Here, however, there is a significant factor that militates against granting abandonment: indications in the record that the Moffat Tunnel Line may lack the capacity to handle overhead traffic rerouted from the Tennessee Pass Line.

We have discussed this issue earlier. It is clear that, because of the importance of this through route, permitting abandonment now would be inconsistent with the rail transportation policy. We will accordingly deny the petition for exemption to the extent it seeks abandonment authority. Moreover, because of questions raised about the ability of the Moffat Tunnel Line to handle the rerouted overhead traffic, we cannot find that the present or future public convenience and necessity permit the abandonment of the Malta-Cañon City Line. We will therefore deny the abandonment application to the extent it seeks abandonment authority.

Public Interest Conditions.

Trail Use. Requests for issuance of certificates or notices of interim trail use (CITUs or NITUs) to acquire rights-of-way under the National Trails System Act, 16 U.S.C. 1247(d), were filed in 10 proceedings: Docket Nos. AB-3 (Sub-No. 130, 131, and 133X), AB-33 (Sub-Nos. 96, 97X, 98X, and 99X), and AB-12 (Sub-No. 184X, 188, and 189X). We will not issue a CITU or NITU in the two Tennessee Pass Line proceedings, Docket Nos. AB-12 (Sub-Nos. 188 and 189X), because we are denying the requested abandonments and are issuing only discontinuance authority. No trail use or public use conditions may be imposed where only discontinuances are being granted. Southern Pacific Transportation Company--Discontinuance of Service Exemption--In Ventura County, CA, Docket No. AB-12 (Sub-No. 143X) (ICC served Nov. 20, 1992).

We will issue a CITU or NITU in the other eight proceedings.[252] The criteria for imposing trail use and rail banking have been met. The parties have submitted statements of willingness to assume financial responsibility for the rights-of-way and acknowledged that use of the rights-of-way are subject to future reactivation for rail service in compliance with 49 CFR 1152.29. Applicants have indicated their willingness to negotiate trail use agreements.[253]

The parties may negotiate an agreement during the 180-period prescribed below. If the parties reach a mutually acceptable final agreement, further Board approval is not necessary. If no agreement is reached within 180 days, applicants may fully abandon the line, provided the conditions imposed in the applicable proceeding are met. 49 CFR 1152.29(c) and (d). Use of the rights-of-way for trail purposes is subject to restoration for railroad purposes.

Our issuance of the NITUs does not preclude other parties from filing interim trail use requests within 10 days after publication of the notice of exemption in the Federal Register. If, within the 10-day period following publication of the notices of exemption, additional trail use requests are filed, applicants are directed to respond to them within 10 days.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10905. As stated in Rail Abandonments--Use of Rights-of-Ways as Trails, 2 I.C.C.2d 591 (1986) (Trails), offers of financial assistance (OFAs) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and

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[252] The CITUs will be issued within 45 days of the service of this decision if no offer of financial assistance is timely made. The NITUs are being issued as part of this decision.

[253] Applicants state that, for non-Colorado lines proposed for abandonment, they are willing to negotiate trail use with any or all of the parties that have made requests. For Colorado abandonments, applicants are willing to negotiate trail use with the State or any of its designees. They are also willing to negotiate with other parties requesting trail use for Colorado abandonments so long as the State of Colorado is agreeable. Applicants have also submitted letters in various proceedings indicating their willingness to negotiate trail use.

public use.[354] Accordingly, the effective date of the decisions may be postponed during the OFA process. See 49 CFR 1152.27(c), (e) and (f). Finally, if the line is sold under the OFA procedures, the abandonment application or the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

Public Use. Various parties in eight proceedings have sought public use conditions under 49 U.S.C. 10906. They have met the criteria for imposing a public use condition by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the time period. 49 CFR 1152.28(a)(2). Accordingly, a 180-day public use condition will be imposed in Docket Nos. AB-3 (Sub-No. 133X), AB-12 (Sub-Nos. 184X), and AB-33 (Sub-Nos. 96, 98X, and 99X). A 90-day public use condition, as parties have requested, will be issued in Docket Nos. AB-3 (Sub-No. 134X) and AB-12 (Sub-Nos. 185X and 187X).

Madison County Transit and RTC ask that we impose Trails Act and public use conditions for a period of 180 days after the carrier consummates the abandonment. We will deny these requests. In issuing the NITUs and CITUs and imposing the public use conditions, we will follow our usual practice and have the 180-day Trails Act period run from the service date of the decision, while the public use condition will run from the effective date of the decision.

Continued operation of the line will not preclude the negotiation of an agreement for interim trail use. Our jurisdiction to issue rail banking or other appropriate orders will not terminate until an abandonment has finally been consummated. The maximum period that a public use condition can extend under 49 U.S.C. 10906 is 180 days from the effective date of the order authorizing abandonment. Even if applicants continue to operate during that 180-day period, this will not preclude a public use agreement from being negotiated and finalized during that statutory period.

Persons may file for both trail use and public use conditions. If a trail use agreement is reached on a portion of the right-of-way, applicants must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, applicants are not required to deal exclusively with parties who have filed requests but may engage in negotiations with other interested persons. Additional public use requests are unnecessary where the full 180-day period has been imposed.

Other Conditions Requested. We now turn to other conditions requested in the various abandonments proceedings.

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[354] The statement in Trails that section 10905 does not apply to abandonment exemptions has since been superseded by adoption of rules allowing for the use of OFAs in exemption proceedings. See 49 CFR 1152.27.

The City of Florence, CO. We are denying the requested conditions. The first condition sought by the City of Florence is a variation on the Central Corridor divestiture theme. We believe that the conditions we are imposing will adequately preserve the rail competition that exists today in the Central Corridor. Concerning the other two conditions Florence seeks, there is no statutory authority for imposition of a 24-month stand-still condition or a right-of-first-refusal condition. In any event, UP has made various commitments to the State of Colorado that address at least some of the concerns expressed by the City of Florence. See UP/SP-232, Tab G at 7-8.

The City of Fruita, CO. We are denying the requested condition as it pertains to labor-related impacts because it "implicates a matter better dealt with under the labor protective conditions" imposed in this proceeding. BN/SF, slip op. at 101. Insofar as it pertains to continued rail service, it fails because the City of Fruita has demonstrated neither (a) that the merger will cause competitive harms that should be ameliorated, nor (b) that local traffic on the Colorado lines targeted for abandonment is sufficient to sustain these lines once overhead traffic has been rerouted.

The U.S. Department of Agriculture, Rocky Mountain Region, and the U.S. Department of the Interior, Bureau of Land Management, Colorado State Office. With respect to conditions (1), (2), and (6), we are denying the conditions because there is no statutory authority for their imposition. Environmental conditions (3), (4), (5), and (7), insofar as they pertain to the Sage-Malta-Leadville and Malta-Cañon City Lines, are moot because we are denying the abandonments. With respect to conditions (3), (4), (5), and (7), insofar as they pertain to the Towner-NA Junction Line, we are imposing environmental mitigation conditions that should alleviate concerns expressed. These are indicated in Appendix G: general environmental mitigation conditions #26, #27, #28, #32, and #37, and specific environmental mitigation conditions #47 and #48.

Towner-NA Junction Parties. We are denying the condition sought because there is no statutory authority for a stand-still condition. We note, however, that the concerns raised by these parties have been addressed, to some extent, by the various commitments UP has made to the State of Colorado. See UP/SP-232, Tab G at 7-8.

The Town of Avon. We note that, as a practical matter, the two segments of the Tennessee Pass Line have been treated as a single entity in this proceeding, and that there is no reason to believe that the outcome of this proceeding would have been in any way different had applicants filed a single application with respect to the entire Tennessee Pass Line.

The Upper Arkansas Area Council of Governments. We are denying these conditions, and note that many of these conditions have been mooted by the denial of the Tennessee Pass abandonments. Moreover, there is no statutory authority for imposition of a 24-month stand-still condition or a replace-lost-taxes trust fund condition, although commitments UP has made to the State of Colorado address at least some of the concerns to which these conditions are directed, see UP/SP-232, Tab G at 7-8.

The Colorado Department of Public Health and Environment and the United States Environmental Protection Agency, Region VIII; RTC; and the Leadville Coalition. With the denial of the Tennessee Pass abandonments, these various Tennessee Pass environmental conditions are moot.

Viacom International Inc. (1) We are imposing, as indicated in Appendix G, specific environmental mitigation condition #46 to provide continued access for Viacom to the Eagle Mine site.

(2) Viacom's second condition has been mooted by the denial of the Tennessee Pass abandonments.

ENVIRONMENTAL CONSIDERATIONS.

Extensive Environmental Review Process. Under the National Environmental Policy Act (NEPA) and related environmental laws, the environmental effects of the merger and the ancillary abandonment and construction projects that were proposed by applicants must be considered, and we have thoroughly done so. Our environmental staff, the Section of Environmental Analysis (SEA), conducted various public outreach activities to inform the public about the proposed merger and to encourage and facilitate public participation in the environmental review process.[255]

As part of its environmental review, SEA prepared detailed analyses not only of the systemwide effects of the proposed merger, but also of particular merger-related activities that would affect individual rail line segments, rail yards, and intermodal facilities to a degree that would meet or exceed our thresholds[256] for environmental analysis. See 49 CFR 1105.7(e)(5)(i) and (ii).[257] SEA conducted a thorough independent analysis, which included verifying projected rail operations; verifying and estimating noise level impacts; estimating increases in air emissions; assessing potential impacts on safety; and performing land use, habitat, surface water and wetlands surveys, ground water analyses, and historic and cultural resource surveys.

Based on the information provided by the parties and other agencies, SEA issued a comprehensive Environmental Assessment (EA) on April 12, 1996. SEA received approximately 160 comments following issuance of the EA. To address those comments and the other environmental comments received throughout the environmental review process (approximately 400 in total), SEA undertook additional environmental analysis, which culminated in the issuance of a detailed Post Environmental Assessment (Post EA) on June 24, 1996, refining some of the discussion and mitigation recommended in the EA.

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[255] SEA sent approximately 400 consultation letters to various agencies seeking their comments. In addition, SEA consulted with federal, state, and local agencies, affected communities, UP and SP, and UP/SP's environmental consultants to gather and disseminate information about the proposal, identify potential environmental impacts, and develop appropriate mitigation measures.

[256] These thresholds ensure that those rail line segments and facilities that would experience a substantial increase in traffic as a result of the transaction are thoroughly analyzed for potential air quality, noise, transportation, and safety impacts.

[257] SEA and its independent third-party consultant conducted approximately 150 site visits. They also analyzed UP/SP's Environmental Report, operating plan, Preliminary Draft Environmental Assessment and other pleadings, all of the settlement agreements entered into during the environmental review process, and technical studies.

As a result of its investigation, SEA concluded that the merger would result in several environmental benefits, including a systemwide net reduction of 35 million gallons of diesel fuel consumption (based on 1994 figures) from rail operations and truck-to-rail operations, systemwide improvements to air quality from reduced fuel use, and a reduction in long-haul truck miles, highway congestion and maintenance, and motor vehicle accidents.

SEA also concluded that the merger and related rail abandonments and constructions could have potential environmental effects regarding safety, air quality, noise, and transportation, including the transportation of hazardous materials, and, in the EA, SEA proposed mitigation measures addressing the environmental concerns that were raised. In the Post EA, based on further analysis and review of the environmental comments, SEA developed more comprehensive and specifically tailored mitigation recommendations. As a result of consultations with SEA, UP/SP agreed to undertake particular mitigation measures. In addition, several local communities negotiated memoranda of understanding with UP/SP to implement mitigation measures and take other appropriate actions to address their particular environmental concerns.

SEA concluded that, with the Post EA mitigation measures, the proposed merger would not significantly affect the quality of the human environment on a systemwide, regional, or local basis. We agree that the conditions recommended in the Post EA will adequately mitigate the potential environmental impacts identified during the course of the environmental review, and we will impose those conditions here (see Appendix G).[258] We also adopt SEA's environmental analysis and the conclusions reached in the EA and the Post EA.

No Need for Environmental Impact Statement. We have considered the arguments of some parties that an environmental impact statement (EIS) is required here, but do not believe that one is needed. An EIS is required only for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C).[259] Under our environmental rules, 49 CFR 1105.6(b)(4), an EA is normally sufficient environmental documentation in rail merger cases to allow us to take the requisite "hard look" at the proposed action.[260]

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[258] We note that the mitigation recommended in the Post EA for two proposed abandonments in Colorado (Sage to Leadville and Malta to Cañon City) has been modified to reflect our decision to permit only discontinuance of rail service, and not abandonment, at this time. Other clarifying changes have been made as well.

[259] The identification of such actions is a matter for the agency to determine, as long as the determination is not arbitrary or capricious. See Goos v. ICC, 911 F.2d 1283, 1292 (8th Cir. 1990), citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989).

[260] While this merger involves somewhat more trackage than other merger proposals that have come before our predecessor agency, the ICC, that does not mean that the qualitative environmental effects of this merger are greater (or different) than those of the other railroad mergers that have been considered. Similarly, the extensive trackage rights that we are granting in this decision to preserve competition generally will not create additional traffic (or potentially significant environmental impacts). Traffic that can be efficiently handled

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Moreover, interested parties received essentially the same benefits they would have received with an EIS. As the EA and Post EA show, SEA conducted a thorough and comprehensive environmental review. There was extensive notice and opportunity for input from the public and appropriate agencies throughout the process. In addition to the EA, SEA issued a detailed Post EA which contains SEA's individual responses to the comments on the EA and thus reflects not only the work of SEA but also the critical views of interested parties and agencies.

Finally, the environmental mitigation we are imposing here is far reaching and comprehensive.[261] As appropriate, it addresses impacts on a variety of levels: systemwide, rail corridor-specific, and local. There is mitigation for particular rail line segments, rail yards, intermodal facilities, and rail abandonments and constructions. In short, no EIS is required because our environmental mitigation conditions specifically address the potential environmental impacts associated with the merger and ensure there will be no significant environmental effects.[262]

Reno and Wichita. As discussed in the Post EA, in developing mitigation for two cities, Reno, NV, and Wichita, KS, SEA concluded that further, more focused mitigation studies are warranted, notwithstanding the extensive analysis (including site visits and meetings with city officials, emergency response representatives and business interests) that already has been done to identify environmental concerns and arrive at appropriate mitigation for these two communities. Nothing in the record here, however, suggests that the potential environmental effects of the merger in Reno or Wichita are so severe that implementation of the merger should not proceed prior to the completion of the studies.[263] To the contrary, in both Reno and

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[260](...continued)
by train would be handled by train whether or not the trackage rights at issue here were granted.

[261] For example, with respect to safety, our mitigation includes more frequent track and train car inspections, signs on grade crossings identifying toll free numbers to call in the event of a signal malfunction, and a requirement that UP/SP provide emergency response personnel with information regarding anticipated train movements and work with communities to develop plans to deal with the transportation of hazardous materials, emergencies, and the upgrading of grade crossing signals. In addition, UP/SP will be required to equip certain trains carrying hazardous materials with two-way end-of-train devices to enhance braking capabilities on particular line segments. In response to concerns involving air pollution, UP/SP will have to reduce idling of locomotives, close box car doors on empty cars, and use more efficient locomotives when the equipment becomes available.

[262] See, e.g., Sierra Club v. DOT, 753 F.2d 120, 127 (D.C. Cir. 1985); Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982).

[263] We note that the Supreme Court has rejected arguments that NEPA demands the formulation and adoption of a plan that will fully mitigate environmental harm before an agency can act. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352-53 (1989). Rather, the deferral of a decision on specific mitigation steps until more detailed information is available is embraced in the procedures promulgated under NEPA. See Public
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Wichita the environmental impacts are limited to the effects of an increase in traffic on existing rail lines. Also, the mitigation conditions that we are imposing now assure that, while SEA conducts these studies, the environmental status quo will essentially be preserved in Reno and Wichita.[264]

As the EA and Post EA show, SEA already has carefully assessed the impact of the merger on Reno and Wichita and identified its likely environmental effects. Based on its analysis, SEA concluded that, with the systemwide and corridor-specific mitigation already imposed and the conditions to be arrived at following the independent mitigation studies, there will be no significant environmental impacts to Reno and Wichita, and we agree.

The sole purpose of the mitigation studies will be to arrive at specifically tailored mitigation plans that will ensure that localized environmental issues unique to these two communities are effectively addressed. For example, with respect to vehicular and pedestrian safety, SEA has determined that separated grade crossings and pedestrian overpasses and/or underpasses will be needed to address safety concerns on the existing rail lines in Reno and Wichita. Accordingly, the studies will identify the appropriate number and precise location of highway/rail grade separations and rail/pedestrian grade separations in Reno and Wichita. With respect to air quality, we have imposed mitigation measures that reduce locomotive fuel consumption and air pollution, call for more efficient railroad equipment and operating practices, and require consultation with air quality officials.[265] As further insurance, the studies will consider additional mitigation to address the air quality effects unique to Reno and Wichita. In this merger, noise impacts would result from more frequent exposure to horn noise rather than greater intensity of sound. No additional types of noise would be introduced. To address noise impacts, we are requiring UP/SP to consult with affected counties to develop focused noise abatement plans. As the Post EA notes, however, safety dictates that railroads sound their horns at grade crossings.[266] Any attempt significantly to reduce noise levels

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Utilities Comm'n of California v. FERC, 900 F.2d 269, 282-3 (D.C. Cir. 1990). NEPA "does not require agencies to adopt any particular internal decisionmaking structure." Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 100 (1983). It is well settled that NEPA does not repeal other statutes by implication and that if the agency meets NEPA's basic requirements, it may fashion its own procedural rules to discharge its multitudinous duties. Vermont Yankee v. NRDC, 435 U.S. 519 (1978); United States v. SCRAP, 412 U.S. 669, 694 (1973).

[264] The courts have recognized that there is no violation of NEPA where proposed actions will not effect a change in the status quo. See Sierra Club v. FERC, 754 F.2d 1506, 1509-10 (9th Cir. 1985).

[265] Because trains are mobile, rather than stationary sources, air quality impacts associated with locomotive emissions are spread over a large area. Therefore, the impacts at any individual location are typically relatively minor.

[266] SEA indicates that FRA has been directed by the Swift Act generally to require that horns be sounded at all grade crossings.

at grade crossings would jeopardize safety, which we consider to be of paramount importance.

The studies will be conducted by SEA with the assistance of an independent third party contractor. Although retained by UP/SP, SEA will select the contractor. The contractor will work under the sole supervision, direction, and control of SEA.

The mitigation studies will include consultations with the affected communities, counties, and states, Native American tribes, the FRA, and other appropriate agencies, as well as UP/SP. There will be public notice and participation. The public will be consulted regarding the range of additional mitigation to most effectively address increased rail traffic on the existing rail lines in Reno and Wichita. SEA will prepare draft mitigation studies and make them available to the public for review and comment. After SEA assesses the comments, it will design the most effective mitigation for these particular communities to add to the mitigation that has already been imposed.

SEA's final mitigation studies and its recommended mitigation plans for Reno and Wichita will be made available to the public and will be submitted to us for our review and approval. We will then issue a decision imposing specific mitigation measures. This entire process will be completed within 18 months of consummation of the merger.

In the meantime, as explained in the Post EA, during the 18-month study period UP/SP will be permitted to add only an average of two additional freight trains per day to the affected rail line segments (Chickasha, OK, to Wichita and Roseville, CA, to Sparks, NV),[267] which is below the threshold level for environmental analysis.[268] UP/SP will be prohibited from increasing traffic to the levels they projected under the merger (11.3 daily trains for Reno and 7.4 trains for Wichita) without our approval.[269] Thus, there will be no significant adverse environmental impacts to these communities while SEA, the Board,

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[267] For nonattainment areas such as Reno, our rules permit railroads to operate up to three additional trains per day. The threshold for attainment areas such as Wichita is normally an increase of eight trains or more a day. Here, we are taking a more conservative approach and will permit for Wichita only an average increase of two trains per day. In short, these limited increases for Reno and Wichita are at or below the threshold levels, and the environmental status quo will essentially be maintained. This addition of an average of two trains a day includes BNSF trains but does not include Amtrak trains, which are unrelated to the merger.

[268] We note that an existing railroad can increase its level of operations without coming to us, and without limitation. Thus, if UP and SP had not proposed this merger, SP on its own could have increased the number of trains on its line in Reno to any level it considered appropriate. Allowing an increase of up to two trains per day during the interim period takes into account that the number of trains going through Reno and Wichita might have been increased even without the merger.

[269] UP/SP will be required to file verified copies of station passing reports of train movements for Reno and Wichita on a monthly basis with SEA for the duration of the study period. We will review them to ensure compliance.

and the parties work to arrive at additional tailored mitigation for those cities.

It should be noted that the studies will focus only on the mitigation of the environmental effects of additional rail traffic through Reno and Wichita resulting from the merger. Mitigation of conditions resulting from the preexisting development of hotels, casinos, and other tourist-oriented businesses on both sides of the existing SP rail line in Reno, or the preexisting switching operations that are a primary source of the congestion associated with the existing UP line in Wichita, are not within the scope of the studies. Similarly, the construction of a new rail line now under consideration by Reno is too preliminary to be assessed now.[270]

The studies will carefully examine private and public funding options, as we believe that the cost of mitigation for Reno and Wichita should be shared. Finally, the studies will provide the parties with additional time to pursue and agree to independent and innovative mitigation plans (such as the memorandum of understanding executed by UP/SP and Truckee, CA, whereby UP/SP will share in the cost of an underpass construction project and contribute to a fund to buy back obsolete wood burning stoves).

In sum, pending determination of the exact mitigation measures to be required for Reno and Wichita, UP/SP will be subject to a traffic cap on the affected rail lines to ensure that no adverse effects to the environment will occur and existing environmental conditions will essentially remain unchanged. Because we already know the nature and general parameters of the appropriate mitigation measures for Reno and Wichita, based on our analysis of the environmental impacts and imposition of systemwide and regional mitigation, we find that, with the more specific mitigation that will be developed, the merger will not significantly affect the quality of the environment in those two locations.

Comments of EPA. On July 12, 1996, we received comments from the United States Environmental Protection Agency (EPA) on various aspects of the EA and the Post EA.[271] EPA notes that, in analyzing air quality, the EA failed specifically to identify "maintenance" areas,[272] which it believes may have caused air

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[270] Plans for such a line are only in the development stage. SEA indicates that such a project could take up to 10 years to finalize. If the contemplated construction reaches the stage of an actual proposal requiring our approval, SEA would prepare an appropriate environmental document at that point. See Kleppe v. Sierra Club, 427 U.S. 390, 410 n.20 (1976); Grounse Corp. v. ICC, 781 F.2d 1176, 1193-96 (6th Cir. 1986).

[271] SEA agreed to EPA's request for an extension of time to comment on the Post EA. We welcome EPA's input after reviewing our environmental analysis, since, as EPA notes, it generally does not comment on EAs.

[272] There are three classifications for air quality: attainment areas, in which levels of certain pollutants are considered equal to or better than federal and state ambient air quality standards; nonattainment areas, in which levels of one or more pollutants do not meet federal and state ambient air quality standards; and maintenance areas, which were at one time nonattainment areas but have subsequently improved their air quality and are now in attainment for the relevant pollutant(s).

quality concerns to be overlooked.[273] But maintenance areas were not ignored in SEA's analysis. For those areas that were not classified as nonattainment, SEA applied the EPA conformity emission threshold levels applicable to maintenance areas. This means that SEA analyzed both attainment and maintenance areas under the more rigorous standards applicable to maintenance areas, and that, if anything, the anticipated effects of the proposed merger on air quality are conservative. We believe that air quality has been thoroughly analyzed, and that the mitigation we are imposing here, along with the more specific measures which will be arrived at in the further mitigation studies for Reno and Wichita,[274] adequately mitigates any potential adverse air impacts.

EPA further states that the EA used the terms NO_2 and NO_x incorrectly. We recognize that NO_x is not a criteria pollutant under EPA and state ambient air quality standards. In assessing air quality emissions, SEA looked at emission factors applicable to NO_x, instead of NO_2, because NO_x emission factors are readily available through EPA documents and other sources, while NO_2 emissions are not. SEA based its calculations on the conservative assumption that all NO_x emissions are composed of NO_2. This conservative approach, which is widely accepted, ensured that the criteria pollutant NO_2 was adequately assessed in SEA's analysis. Moreover, by using this approach, SEA used higher NO_2 emissions than would actually be emitted.

EPA also expressed some difficulty understanding SEA's estimates of the projected net increase and decrease in air emissions with the mitigation measures we are imposing. While we believe that the text of the Post EA adequately explains the data in Tables 3-5 and 4-4, we have generated and attached as Appendix H an additional table to further clarify the net emissions reflecting mitigation.

EPA notes that some of the proposed rail line abandonments in Colorado run through or near EPA-designated Superfund sites. EPA is troubled that soil in and around the railroad lines could require remediation, that UP/SP might not be obligated to honor a consent decree, and that possible future trail use could expose the public to hazardous substances. These concerns are premature because, as discussed above, we are permitting only the discontinuance of rail service, and not abandonment of the involved lines. Thus there will be no salvage of these lines or opportunity for trail use unless and until UP/SP obtains our authority to abandon these lines.[275]

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[273] We note that EPA does not disagree with SEA's determination that the proposed merger is not subject to EPA's regulations entitled "Determining Conformity of General Federal Actions to State or Federal Implementation Plans" (General Conformity). The General Conformity criteria do not apply directly to railroad operations, except for future locomotive emission standards. SEA properly concluded that the proposed merger does not meet the definitions in the General Conformity regulations at 40 CFR 51.852 because, as a regulatory agency, the Board does not maintain program control over railroad emissions as part of its continuing responsibilities.

[274] SEA will take into account EPA's concerns and consult with them in conducting its mitigation studies for Reno and Wichita.

[275] At that point, we will analyze the potential environmental impacts of the proposed abandonments.

While trail use requests can be made if the abandonments are granted, any trail arrangement would not supersede the requirements of the specific laws that govern Superfund sites.[276] Nor would we thereby become involved in negotiating or enforcing consent decrees involving remediation of those sites.

EPA does not view requiring UP/SP to comply with existing federal, state, and local regulation as mitigation. We believe, however, that requiring compliance with other laws and regulations, such as FRA's safety regulations, can assist in reducing the potential environmental impacts of the actions before us. If the railroad fails to comply with conditions that we have imposed, parties can notify us and request that we (as well as the agency that has promulgated the regulation) take appropriate action.

In any event, the mitigation we are imposing here goes well beyond requiring compliance with other laws and regulations. For example, it includes more frequent track and train car inspections to reduce anticipated safety impacts and reduced idling of locomotives and the use of more efficient locomotives to offset air pollution emissions associated with the merger. Moreover, to enhance safety, UP/SP will be required to equip certain trains carrying hazardous materials with two-way end-of-train devices to improve braking capabilities on particular line segments.

EPA suggests that we failed to discuss the environmental impacts associated with the handling and disposal of waste materials for the proposed abandonments and constructions. But we have included detailed mitigation for these actions. See Appendix G, including conditions #26, #27, #62 and #63.

EPA questions whether SEA considered all the settlement agreements reached with competing railroads and trade associations. SEA specifically took all settlement agreements into account in its analysis, as the EA and Post EA show.

Finally, we disagree with EPA's suggestion that SEA should revisit its consultation efforts with Native American tribes. SEA's efforts to contact and consult with Native American tribes have been extensive. As part of its outreach activities, SEA contacted approximately 11 area offices of the Bureau of Indian Affairs to inform them about the proposed merger; three offices commented and provided the names of tribes that should be contacted. Both the EA and Post EA were distributed to 31 American Indian tribes. In addition, there was newspaper and Federal Register notice to inform all affected tribes and communities about the proposed merger and how they could participate. To ensure continued participation, SEA will contact the affected Native American tribes when initiating its mitigation studies for Reno and Wichita and invite them to participate.

FINDINGS

In Finance Docket No. 32760, we find: (a) that the acquisition by UPC, UPRR, and MPRR of control of SPR, SPT, SSW, SPCSL, and DRGW through the proposed transaction as conditioned herein, is within the scope of 49 U.S.C. 11343 and is consistent

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[276] See Union Pac. R.R. -- Abandonment -- Wallace Branch, ID, Docket No. AB-33 (Sub-No. 70) (ICC served Dec. 2, 1994).

with the public interest; (b) that the transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the transaction has requested inclusion in the transaction, and that failure to include any such railroad will not adversely affect the public interest; (d) that the transaction will not result in any guarantee or assumption of payment of dividends or of fixed charges, or any increase in total fixed charges, except as specifically approved herein; (e) that the interests of employees affected by the proposed transaction does not make such transaction inconsistent with the public interest, and any adverse effect will be adequately addressed by the conditions imposed herein; (f) that the transaction, as conditioned herein, will not significantly reduce competition in any market; and (g) that the terms of the transaction are just, fair, and reasonable. We further find that the competitive conditions imposed in Finance Docket No. 32760, including but not limited to those embraced in the BNSF,[377] CMA, and URC agreements, and further including but not limited to the various modifications we have required with respect to the terms of the BNSF and CMA agreements (particularly with respect to new facilities, transloading facilities, build-out/build-in options, contracts at 2-to-1 points, and SIT facilities), are consistent with the public interest. We further find that the oversight condition imposed in Finance Docket No. 32760 is consistent with the public interest. We further find that any rail employees of applicants or their rail carrier affiliates affected by the transaction authorized in Finance Docket No. 32760 should be protected by the conditions set forth in New York Dock Ry. --Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979), unless different conditions are provided for in a labor agreement entered into prior to consummation of the transaction authorized in Finance Docket No. 32760, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In Finance Docket No. 32760 (Sub-No. 1), we find that the trackage rights provided for in the BNSF agreement and included in the Sub-No. 1 notice filed November 30, 1995, are exempt from prior review and approval pursuant to 49 CFR 1180.2(d)(7). We further find that any rail employees of applicants or their rail carrier affiliates or of BNSF or its rail carrier affiliates affected by the transaction authorized in Finance Docket No. 32760 (Sub-No. 1) should be protected by the conditions set forth in Norfolk and Western Ry. Co.--Trackage Rights--BN, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Ry., Inc.--Lease and Operate, 360 I.C.C. 653, 664 (1980), unless different conditions are provided for in a labor agreement entered into prior to consummation of the transaction authorized

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[377] Again, by BNSF agreement, we mean the agreement dated September 25, 1995 (UP/SP-22 at 318-347), as modified by the supplemental agreement dated November 18, 1995 (UP/SP-22 at 348-359), and as further modified by the second supplemental agreement dated June 27, 1996 (UP/SP-266, Exhibit A). We wish to clarify, however, that in imposing the BNSF agreement as a condition to this merger, we will require applicants to honor all of the amendments, clarifications, modifications, and extensions thereof described in: (1) the April 18th CMA agreement (UP/SP-219); (2) the April 29th rebuttal filings (UP/SP-230 at 12-21; UP/SP-231, Part C, Tab 18 at 5-11; see also UP/SP-260 at 8-9, summarizing the clarifications and amendments described in the April 29th rebuttal filings); (3) the June 3rd brief (UP/SP-260 at 23 n.9); and (4) the June 28th filing that accompanied the second supplemental agreement (UP/SP-266 at 3).

in Finance Docket No. 32760 (Sub-No. 1), in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In Finance Docket No. 32760 (Sub-No. 2), we find that the three line sales provided for in the BNSF agreement, and operation by BNSF of these lines, are exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a or to protect shippers from the abuse of market power. We further find that any rail employees of applicants or their rail carrier affiliates or of BNSF or its rail carrier affiliates affected by the transaction authorized in Finance Docket No. 32760 (Sub-No. 2) should be protected by the conditions set forth in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979), unless different conditions are provided for in a labor agreement entered into prior to consummation of the transaction authorized in Finance Docket No. 32760 (Sub-No. 2), in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In Finance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6, and 7), we find that acquisition and exercise of control of A&S, CCT, OURD, PTRR, and PTRC, respectively, by applicants is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because each such control transaction is limited in scope, and because, in each instance, review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a or to protect shippers from the abuse of market power. We further find that any rail employees of applicants or their rail carrier affiliates affected by the transactions authorized in Finance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6, and 7) should be protected by the conditions set forth in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979), unless different conditions are provided for in a labor agreement entered into prior to consummation of the transactions authorized in Finance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6, and 7), in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In Finance Docket No. 32760 (Sub-No. 8), we find that (i) common control of UP and the two motor carriers controlled by SP, and (ii) common control of SP and the one motor carrier controlled by UP, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because each such control transaction is limited in scope, and because, in each instance, review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32760 (Sub-No. 9), we find that the terminal area trackage rights sought therein are practicable and in the public interest and will not substantially impair the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business.

In Finance Docket No. 32760 (Sub-No. 10), we find that the responsive application filed by CMTA is not consistent with the public interest.

In Finance Docket No. 32760 (Sub-No. 11), we find that the responsive application filed by MRL is not consistent with the public interest.

In Finance Docket No. 32760 (Sub-No. 12), we find that the responsive application filed by Entergy is consistent with the

public interest to the extent the application seeks to require 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. In all other respects, we find that the responsive application filed by Entergy is not consistent with the public interest.

In Finance Docket No. 32760 (Sub-No. 13), we find that the responsive application filed by Tex Mex is consistent with the public interest with respect to traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. We further find that the responsive application filed by Tex Mex is not consistent with the public interest with respect to traffic not having such a prior or subsequent movement. We further find that any rail employees of Tex Mex affected by the trackage rights authorized in Finance Docket No. 32760 (Sub-No. 13) should be protected by the conditions set forth in Norfolk and Western Ry. Co.--Trackage Rights--BN, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Ry., Inc.--Lease and Operate, 360 I.C.C. 653, 664 (1980), unless different conditions are provided for in a labor agreement entered into prior to commencement of operation of the Finance Docket No. 32760 (Sub-No. 13) trackage rights, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In Finance Docket No. 32760 (Sub-No. 14), we find that the terminal area trackage rights sought therein are practicable and in the public interest, with respect to traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line, and, with respect to such traffic, will not substantially impair the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business.

In Finance Docket No. 32760 (Sub-No. 16), we find that the responsive application filed by WEPCO is not consistent with the public interest.

In Finance Docket No. 32760 (Sub-No. 17), we find that the responsive application filed by MCC and its rail affiliates is not consistent with the public interest.

In Docket No. AB-3 (Sub-No. 129X), we find that the abandonment by MPRR of railroad lines between MP 428.3 near Gurdon, AR, and MP 457.0 near Camden, AR, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power.

In Docket Nos. AB-3 (Sub-No. 130) and AB-8 (Sub-No. 38), we find that the abandonment by MPRR of, and the discontinuance of trackage rights by DRGW on, railroad lines between MP 747.0 near Towner, CO, and MP 869.4 near NA Junction, CO, is permitted by the present or future public convenience and necessity and will not have a serious adverse impact on rural and community development. The property may be suitable for recreation and trail use. However, we note that no party has requested a public use condition, and we will not impose one at this time.

In Docket Nos. AB-3 (Sub-No. 131) and AB-8 (Sub-No. 37), we find that the abandonment by MPRR of, and the discontinuance of trackage rights by DRGW on, railroad lines between MP 459.20 near Hope, KS, and MP 491.20 near Bridgeport, KS, is permitted by the present or future public convenience and necessity and will not have a serious adverse impact on rural and community development.

The property may be suitable for recreational use as an extension of a trail. However, we note that no party has requested a public use condition, and we will not impose one at this time.

In Docket No. AB-3 (Sub-No. 132X), we find that the abandonment by MPRR of railroad lines between MP 485.0 near Newton, KS, and MP 476.0 near Whitewater, KS, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket No. AB-3 (Sub-No. 133X), we find that the abandonment by MPRR of railroad lines between MP 680.0 near Iowa Junction, LA, and MP 688.5 near Manchester, LA, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power.

In Docket No. AB-3 (Sub-No. 134X), we find that the abandonment by MPRR of railroad lines between MP 0.50 near Troup, TX, and MP 8.0 near Whitehouse, TX, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket Nos. AB-8 (Sub-No. 36X) and AB-12 (Sub-No. 189X), we find that the discontinuance by DRGW and SPT, respectively, of operations on railroad lines (1) between MP 335.0 near Sage, CO, and MP 271.0 near Malta, CO, and (2) between MP 271.0 near Malta, CO, and MP 276.1 near Leadville, CO, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power. In Docket No. AB-12 (Sub-No. 189X), however, we further find that the abandonment by SPT of railroad lines (1) between MP 335.0 near Sage, CO, and MP 271.0 near Malta, CO, and (2) between MP 271.0 near Malta, CO, and MP 276.1 near Leadville, CO, is not exempt from prior review and approval because review is necessary to carry out the transportation policy of 49 U.S.C. 10101a.

In Docket Nos. AB-8 (Sub-No. 39) and AB-12 (Sub-No. 188), we find that the discontinuance by DRGW and SPT, respectively, of operations on railroad lines between MP 271.0 near Malta, CO, and MP 162.0 near Cañon City, CO, is permitted by the present or future public convenience and necessity and will not have a serious adverse impact on rural and community development. In Docket No. AB-12 (Sub-No. 188), however, we further find that the abandonment by SPT of railroad lines between MP 271.0 near Malta, CO, and MP 162.0 near Cañon City, CO, is not permitted by the present or future public convenience and necessity.

In Docket No. AB-12 (Sub-No. 184X), we find that the abandonment by SPT of railroad lines between MP 360.1 near Wendel, CA, and MP 445.6 near Alturas, CA, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power.

In Docket No. AB-12 (Sub-No. 185X), we find that the abandonment by SPT of railroad lines between MP 117.6 near Suman, TX, and MP 105.07 near Benchley, TX, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power.

In Docket No. AB-12 (Sub-No. 187X), we find that the abandonment by SPT of railroad lines between MP 30.0 near Seabrook, TX, and MP 40.5 near San Leon, TX, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket No. AB-33 (Sub-No. 93X), we find that the abandonment by UPRR of railroad lines between MP 0.0 near Whittier Junction, CA, and MP 5.18 near Colima Junction, CA, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket No. AB-33 (Sub-No. 94X), we find that the abandonment by UPRR of railroad lines between MP 5.8 near Magnolia Tower, CA, and MP 10.7 near Melrose, CA, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket No. AB-33 (Sub-No. 96), we find that the abandonment by UPRR of railroad lines between MP 51.0 near Barr, IL, and MP 89.4 near Girard, IL, is permitted by the present or future public convenience and necessity and will not have a serious adverse impact on rural and community development.

In Docket No. AB-33 (Sub-No. 97X), we find that the abandonment by UPRR of railroad lines between MP 119.2 near DeCamp, IL, and MP 133.8 near Edwardsville, IL, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket No. AB-33 (Sub-No. 98X), we find that the abandonment by UPRR of railroad lines between MP 133.8 near Edwardsville, IL, and MP 148.78 near Madison, IL, is exempt from prior review and approval pursuant to 49 U.S.C. 10505 because such review is not necessary to carry out the transportation policy of 49 U.S.C. 10101a, regulation is not necessary to protect shippers from the abuse of market power.

In Docket No. AB-33 (Sub-No. 99X), we find that the abandonment by UPRR of railroad lines between MP 0.0 near Little Mountain Junction, UT, and MP 12.0 near Little Mountain, UT, is exempt from prior review and approval pursuant to 49 CFR 1152.50.

In Docket Nos. AB-3 (Sub-Nos. 129X, 130, 131, 132X, 133X, and 134X), AB-8 (Sub-Nos. 36X, 37, 38, and 39), AB-12 (Sub-Nos. 184X, 185X, 187X, 188, and 189X), and AB-33 (Sub-Nos. 93X, 94X, 96, 97X, 98X, and 99X), we further find that any employees affected by the abandonments and discontinuances authorized therein should be protected pursuant to Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91, 98-103 (1979), unless different conditions are provided for in a labor agreement entered into prior to consummation of the relevant abandonment or discontinuance, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

We further find that this action, as conditioned by the environmental mitigation conditions set forth in Appendix G, will not significantly affect the quality of the human environment or the conservation of energy resources.

We further find that all conditions requested by any party to this proceeding but not granted herein are not in the public interest and should not be imposed.

It is ordered:

1. The UP/SP-262 motion to strike (and request for sanctions) is denied.

2. The BN/SF-61 motion to strike is denied.

3. BNSF's request (BN/SF-54 at 32-33) that a certain document relied upon by KCS (KCS-33 at 72) be stricken from the record is denied.

4. The EBT/KCOSA joint motion dated May 10, 1996, is granted, and the new evidence tendered therewith is made part of the record in this proceeding.

5. Charles W. Downey is permitted to intervene in this proceeding and to become a party of record.

6. In Finance Docket No. 32760, the application filed by UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL, and DRGW is approved, subject to the imposition of the conditions discussed in this decision. Such conditions include but are not limited to those embraced in the BNSF, CMA, and URC agreements, and further include but are not limited to the various modifications we have required with respect to the terms of the BNSF and CMA agreements (particularly with respect to new facilities, transloading facilities, build-out/build-in options, contracts at 2-to-1 points, and SIT facilities). The Board expressly reserves jurisdiction over the Finance Docket No. 32760 proceeding and all embraced proceedings in order to implement the oversight condition imposed in this decision and, if necessary, to impose further conditions or to take such other action, including the ordering of divestiture, as may be warranted.

7. If applicants consummate the approved transaction, they shall confirm in writing to the Board, within 15 days after consummation, the date of consummation. Where appropriate, applicants shall submit to the Board three copies of the journal entries recording consummation of the transaction.

8. All notices to the Board as a result of any authorization shall refer to this decision by date and docket number.

9. No change or modification shall be made in the terms and conditions approved in the authorized application without the prior approval of the Board.

10. Applicants are hereby directed to file a progress report and an implementing plan on or before October 1, 1996, as discussed in this decision, and to file further progress reports on a quarterly basis thereafter.

11. BNSF is hereby directed to file a progress report and an operating plan on or before October 1, 1996, as discussed in this decision, and to file further progress reports on a quarterly basis thereafter.

12. In Finance Docket No. 32760 (Sub-No. 1), the trackage rights referenced in the Sub-No. 1 notice filed November 30, 1995, are exempted pursuant to 49 CFR 1180.2(d)(7).

13. Applicants and BNSF are hereby directed to file, no later than September 4, 1996, a 49 CFR 1180.2(d)(7) class exemption notice covering the trackage rights added to the

BNSF agreement in accordance with the amendments required by the CMA agreement.

14. Applicants and URC are hereby directed to file, no later than September 4, 1996, a 49 CFR 1180.2(d)(7) class exemption notice covering the trackage rights provided for in the URC agreement.

15. In Finance Docket No. 32760 (Sub-No. 2), the petition for exemption is granted.

16. In Finance Docket No. 32760 (Sub-No. 3), the petition for exemption is granted.

17. In Finance Docket No. 32760 (Sub-No. 4), the petition for exemption is granted.

18. In Finance Docket No. 32760 (Sub-No. 5), the petition for exemption is granted.

19. In Finance Docket No. 32760 (Sub-No. 6), the petition for exemption is granted.

20. In Finance Docket No. 32760 (Sub-No. 7), the petition for exemption is granted.

21. In Finance Docket No. 32760 (Sub-No. 8), the petition for exemption is granted.

22. In Finance Docket No. 32760 (Sub-No. 9), the application for terminal area trackage rights is approved. BNSF and KCS shall jointly submit, by August 22, 1996, the agreed-upon terms respecting implementation of the Sub-No. 9 terminal trackage rights. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such terminal trackage rights. The Board will then choose the better of the proposals, or some variation thereof, and make it effective on September 11, 1996.

23. In Finance Docket No. 32760 (Sub-No. 10), the responsive application filed by CMTA is denied.

24. In Finance Docket No. 32760 (Sub-No. 11), the responsive application filed MRL is denied.

25. In Finance Docket No. 32760 (Sub-No. 12), the responsive application filed by Entergy is approved to the extent the application seeks to require that the BNSF agreement be amended to allow BNSF to transport coal to and from White Bluff via the White Bluff-Pine Bluff build-out line. In all other respects, the Sub-No. 12 responsive application is denied.

26. In Finance Docket No. 32760 (Sub-No. 13), the responsive application filed by Tex Mex is approved, subject to this restriction: all freight handled by Tex Mex pursuant to its Sub-No. 13 trackage rights must have a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. Tex Mex and UP/SP shall jointly submit, by August 22, 1996, the agreed-upon terms respecting implementation of the Sub-No. 13 trackage rights. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such trackage rights. The Board will then choose the better of the proposals, or some variation thereof, and make it effective on September 11, 1996.

27. In Finance Docket No. 32760 (Sub-No. 14), the terminal trackage rights application filed by Tex Mex is approved, subject to this restriction: all freight handled by Tex Mex pursuant to its Sub-No. 14 terminal trackage rights must have a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. Tex Mex and MB&T shall jointly submit, by August 22, 1996, the agreed-upon terms respecting implementation of the Sub-No. 14 terminal trackage rights. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such terminal trackage rights. The Board will then choose the better of the proposals, or some variation thereof, and make it effective on September 11, 1996.

28. In Finance Docket No. 32760 (Sub-No. 16), the responsive application filed by WEPCO is denied.

29. In Finance Docket No. 32760 (Sub-No. 17), the responsive application filed by MCC and its rail affiliates is denied.

30. With respect to the conditions imposed in this decision respecting CPSB, the interested parties (CPSB, UP/SP, and BNSF) shall jointly submit, by August 22, 1996, the agreed-upon terms respecting implementation of such conditions. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such conditions. The Board will then choose the better of the proposals, or some variation thereof, and make it effective on September 11, 1996.[276]

31. With respect to the condition imposed in this decision respecting CMTA, the interested parties (CMTA, Longhorn, UP/SP, and BNSF) shall jointly submit, by December 10, 1996, agreed-upon terms respecting implementation of such condition. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such condition.

32. With respect to the condition imposed in this decision respecting TUE, the interested parties (TUE, UP/SP, BNSF, and KCS) shall jointly submit, by December 10, 1996, agreed-upon terms respecting implementation of such condition. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such condition.

33. In Docket No. AB-3 (Sub-No. 129X), the petition for exemption is granted.

34. In Docket Nos. AB-3 (Sub-No. 130) and AB-8 (Sub-No. 38), the application is granted.

35. In Docket Nos. AB-3 (Sub-No. 131) and AB-8 (Sub-No. 37), the application is granted.

36. In Docket No. AB-3 (Sub-No. 132X), the notice is accepted.

37. In Docket No. AB-3 (Sub-No. 133X), the petition for exemption is granted, and an NITU is hereby issued.

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[276] As previously noted, CPSB and UP/SP may jointly request, by August 22nd, an extension of the August 22nd deadline.

38. In Docket No. AB-3 (Sub-No. 134X), the notice is accepted.

39. In Docket No. AB-8 (Sub-No. 36X), the petition for exemption is granted. In Docket No. AB-12 (Sub-No. 189X), the petition for exemption is granted in part (discontinuance authority is granted) and denied in part (abandonment authority is denied).

40. In Docket No. AB-8 (Sub-No. 39), the application is granted. In Docket No. AB-12 (Sub-No. 188), the application is granted in part (discontinuance authority is granted) and denied in part (abandonment authority is denied).

41. In Docket No. AB-12 (Sub-No. 184X), the petition for exemption is granted, and an NITU is hereby issued.

42. In Docket No. AB-12 (Sub-No. 185X), the petition for exemption is granted.

43. In Docket No. AB-12 (Sub-No. 187X), the notice is accepted.

44. In Docket No. AB-33 (Sub-No. 93X), the notice is accepted.

45. In Docket No. AB-33 (Sub-No. 94X), the notice is accepted.

46. In Docket No. AB-33 (Sub-No. 96), the application is granted.

47. In Docket No. AB-33 (Sub-No. 97X), the notice is accepted, and an NITU is hereby issued.

48. In Docket No. AB-33 (Sub-No. 98X), the petition for exemption is granted, and an NITU is hereby issued.

49. In Docket No. AB-33 (Sub-No. 99X), the notice is accepted, and an NITU is hereby issued.

50. In Docket Nos. AB-3 (Sub-Nos. 132X and 134X), AB-12 (Sub-No. 187X), and AB-33 (Sub-Nos. 93X, 94X, 97X, and 99X), notice will be published in the Federal Register on August 12, 1996. In these proceedings:

(a) Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, the exemptions will be effective on September 11, 1996, unless stayed pending reconsideration.

(b) Petitions to stay, formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2), and trail use/rail banking requests under 49 CFR 1152.29[279] must be filed by August 22, 1996.

(c) Petitions to reopen must be filed by September 3, 1996. Except in Docket No. AB-33 (Sub-Nos. 94X, 97X, and 99X), requests for public use conditions must be filed by September 3, 1996.

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[279] The Board will accept late-filed trail use requests so long as the abandonment has not been consummated and the abandoning railroad is willing to negotiate an agreement.

(d) In Docket Nos. AB-33 (Sub-Nos. 94X, 97X, and 99X), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 180 days from the effective date of this decision to enable any state or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use.

(e) In Docket Nos. AB-3 (Sub-No. 134X) and AB-12 (Sub-No. 187X), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 90 days from the effective date of this decision to enable any state or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use.

51. In Docket Nos. AB-3 (Sub-Nos. 129X and 133X), AB-8 (Sub-No. 36X), AB-12 (Sub-Nos. 184X, 185X, and 189X), and AB-33 (Sub-No. 98X), notice will be published in the Federal Register on August 12, 1996. In these proceedings:

(a) Provided no formal expression of intent to file an OFA has been received, the exemptions will be effective on September 11, 1996, unless stayed pending reconsideration.

(b) Petitions to stay, formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2), and [except in Docket Nos. AB-8 (Sub-No. 36X) and AB-12 (Sub-No. 189X)] trail use/rail banking requests under 49 CFR 1152.29[280] must be filed by August 22, 1996.

(c) Petitions to reopen must be filed by September 3, 1996. In Docket Nos. AB-3 (Sub-No. 129X) and AB-12 (Sub-No. 185X), requests for public use conditions must be filed by September 3, 1996.

(d) In Docket Nos. AB-3 (Sub-No. 133X), AB-12 (Sub-No. 184X), and AB-33 (Sub-No. 98X), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 180 days from the effective date of this decision to enable any State or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use.

(e) In Docket No. AB-12 (Sub-No. 185X), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 90 days from the effective date of this decision to enable any State or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use.

52. In Docket Nos. AB-3 (Sub-Nos. 130 and 131) and AB-33 (Sub-No. 96), notice of the findings made with respect to the abandonment authorizations sought therein will be published in the Federal Register on August 12, 1996. In these proceedings:

(a) An OFA to allow rail service to continue must be received by the railroad and the Board by August 22, 1996.

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[280] The Board will accept late-filed trail use requests so long as the abandonment has not been consummated and the abandoning railroad is willing to negotiate an agreement.

The offeror must comply with 49 U.S.C. 10905 and 49 CFR 1152.27(c)(1).

(b) OFAs and related correspondence to the Board must refer to the appropriate abandonment proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "Office of Proceedings, AB-OFA."

(c) Subject to any conditions set forth and provided no offer for continued rail operations is received, an appropriate certificate will be issued. An abandonment may not be effected prior to the effective date of the certificate.

(d) In Docket No. AB-33 (Sub-No. 96), applicants shall leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 180 days from the effective date of this decision to enable any State or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use.

(e) In Docket No. AB-3 (Sub-Nos. 130 and 131), requests for public use conditions must be filed by September 3, 1996.

53. In Docket Nos. AB-8 (Sub-Nos. 37, 38, and 39) and AB-12 (Sub-No. 188), notice of the findings made with respect to the discontinuance authorizations sought therein will be published in the Federal Register on August 12, 1996. In these proceedings:

(a) An OFA to allow rail service to continue must be received by the railroad and the Board by August 22, 1996. The offeror must comply with 49 U.S.C. 10905 and 49 CFR 1152.27(c)(1).

(b) OFAs and related correspondence to the Board must refer to the appropriate abandonment proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "Office of Proceedings, AB-OFA."

(c) Subject to any conditions set forth and provided no offer to subsidize continued rail operations is received, an appropriate certificate will be issued. Discontinuance may not be effected prior to the effective date of the certificate.

54. In Docket Nos. AB-3 (Sub-No. 133X), AB-33 (Sub-Nos. 96, 97X, 98X, and 99X), and AB-12 (Sub-No. 184X), the exemption authority granted is subject to the additional condition that the carrier(s) comply with the following terms and conditions for implementing trail use/rail banking:

(a) If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad from any potential liability), and the payment of any and all taxes that may be levied or assessed against the right-of-way.

(b) Interim trail use/rail banking is subject to the future restoration of rail service and to the user's

continuing to meet the financial obligations for the right-of-way.

(c) If interim trail use is implemented, and subsequently the user intends to terminate trail use, the user must (i) send the Board a copy of the cover page of this decision and the page(s) containing this Ordering Paragraph 56, and (ii) request that Ordering Paragraph 56 be vacated in relevant part on a specified date.

(d) If an agreement for interim trail use/rail banking is reached by the 180th day after the date of service of this decision, interim trail use may be implemented. If no agreement is reached by that time, the carrier may fully abandon the line, provided any conditions imposed are met.

55. In Docket Nos. AB-3 (Sub-Nos. 130 and 131) and AB-33 (Sub-No. 96), subject to the conditions set forth above and provided no offer for continued rail operations is received, a CITU will be issued. Applicant may not effect abandonment and material salvage until permitted under the terms of the CITU.

56. Approval of the application in Finance Docket No. 32760 is subject to the labor protective conditions set out in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979).

57. The trackage rights exempted in Finance Docket No. 32760 (Sub-No. 1) are subject to the labor protective conditions set out in Norfolk and Western Ry. Co.--Trackage Rights--BN, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Ry., Inc.--Lease and Operate, 360 I.C.C. 653, 664 (1980).

58. The line sales exempted in Finance Docket No. 32760 (Sub-No. 2) are subject to the labor protective conditions set out in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979).

59. The terminal railroad control transactions exempted in Finance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6 and 7) are subject to the labor protective conditions set out in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979).

60. The trackage rights approved in Finance Docket No. 32760 (Sub-No. 13) are subject to the labor protective conditions set out in Norfolk and Western Ry. Co.--Trackage Rights--BN, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Ry., Inc.--Lease and Operate, 360 I.C.C. 653, 664 (1980).

61. The abandonments and discontinuances authorized in Docket Nos. AB-3 (Sub-Nos. 129X, 130, 131, 132X, 133X, and 134X), AB-8 (Sub-Nos. 36X, 37, 38, and 39), AB-12 (Sub-Nos. 184X, 185X, 187X, 188, and 189X), and AB-33 (Sub-Nos. 93X, 94X, 96, 97X, 98X, and 99X), are subject to the labor protective conditions set out in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91, 98-103 (1979).

62. Approval of the transactions authorized in the Finance Docket No. 32760 proceeding and in the various embraced proceedings are subject to the environmental mitigation conditions set forth in Appendix G.

63. All conditions that were requested by any party in the Finance Docket No. 32760 proceeding and/or in the various embraced proceedings but that have not been specifically approved in this decision are denied.

64. This decision shall be effective on September 11, 1996.

65. With respect to the proceedings docketed in Finance Docket Nos. 32760 and 32760 (Sub-Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, and 17):

The requirement of an initial decision is waived pursuant to 49 U.S.C. 11345(f). The decisions embraced herein are final decisions within the meaning of 49 U.S.C. 10327. Any administrative appeal will be entertained only under 49 U.S.C. 10327(g), which permits appeal only on the basis of material error, new evidence, or substantially changed circumstances.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen. Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen commented with separate expressions.

Vernon A. Williams
Secretary

CHAIRMAN MORGAN, commenting:

Introduction

The proposed merger of the Union Pacific (UP) and the Southern Pacific (SP) railroad systems -- creating the Nation's largest rail system -- stands as a true test of the statutory authority of the Surface Transportation Board (Board) to permit transportation-related transactions that are in the public interest. In determining the public interest in a rail merger case, the Board must carefully balance the benefits flowing from the consolidation against the anticompetitive consequences that may result. In this case, the transportation benefits are clear. And although the anticompetitive effects of approving this merger without conditions could be significant, the Board, through the conditioning authority granted by Congress, can and has imposed conditions to address the potentially significant adverse consequences of the merger.

Throughout this merger proceeding, the Board has heard from a broad cross-section of interests about the potential impacts, both positive and negative, associated with this merger. We have heard from shippers who support the merger and shippers who oppose the merger. We have heard from railroads that are for the merger and railroads that are against it. We have heard from some state and other governmental officials who are for it and some who are against it. We have heard from employees who support it and employees who do not. The Board's challenge has been to weigh all of the extensive evidence and to arrive at a balanced decision that addresses the potentially significant harm while preserving the significant transportation benefits that this merger will produce. I believe that the Board has met that challenge in this decision.

Outright Denial

Some parties have argued that this case should be easy to decide: if there is a competitive problem, you "just say no" and deny the whole application, leaving it to the private parties to attempt to work out a solution more acceptable to the government. With all due respect, while that may be the easy answer here, particularly given the opposition, I do not believe that it is

the right answer in this case. Government's role in today's world, in my view, should be to work in partnership with industry to empower it to take the steps necessary to compete. When private industry comes forward in good faith with what it believes to be a stimulus for economic growth and development, we should not presume collusion in the first instance and dismiss the proposal altogether. Rather, we must attempt to craft a response that balances the many competing interests.

There are clear and real pluses to this merger. First, the merger permits UP and SP to realize tremendous transportation efficiencies and other benefits. History has shown that restructuring in the rail industry has strengthened the rail transportation system in the form of better service and lower rates, and this merger should be no exception.

Second, the merger ensures that shippers on the SP system will continue to receive competitive service. Some parties have argued that we should not be concerned about SP's financial condition. However, the State of California, on behalf of its shippers, and the United Transportation Union, on behalf of its employee members, are worried, and the record, as discussed in our decision, supports their concerns. Denying the merger and risking a downsized SP or an SP broken up into pieces is not what they want. And it is not a risk that we, as guardians of the public interest under our statute, should be willing to take. Rather, consistent with the statute, the Board should strive to allow the far-reaching benefits promised by this merger and to save the SP system as a viable competitive force.

Divestiture

Some parties have argued that there is another simple, quick, and obvious way to fix the potentially significant competitive problems associated with this merger: divestiture. Divestiture may be an obvious fix to some, but it is not an obvious fix for me in this case. First, as presented, it would be a drastic solution in this case, and one that we should pursue only if there is clearly no other viable alternative. Railroads, with their network economies, are different from other industries, and taking away part of their network takes away part of their economies of operation. As the Board's decision demonstrates, there is clear evidence on this record that divestiture of the sort suggested by some of the parties would significantly undercut the transportation benefits and efficiencies associated with this merger.

Moreover, the divestiture proposals discussed in this case are far-reaching, with one proposal even suggesting the divestiture of 1200 miles. This remedy goes beyond the harm to be addressed, and it does not distinguish between those shippers that will lose direct and indirect competition and those whose competitive position will not be substantially affected by the merger. Government remedies, under our statute or any other law, should not overreach and must be specifically tailored to the identifiable harm.

Furthermore, divestiture is not necessarily simple and quick. To the contrary, it could lead to more government intrusion, more regulatory oversight, and, ultimately, more litigation when the unsuccessful suitors seek relief. This is particularly true given the fact that certain divestiture proposals were not even formally presented in the record of this proceeding. Divestiture here could mean another proceeding and more delay, creating the type of uncertainty and unpredictability

for business that the government of today, and certainly this Board, are trying to avoid.

In short, divestiture poses substantial problems of its own in this case.

Appropriate Conditions

Divestiture, with all of these potential problems, might be more palatable if there were no other way to fix the competitive harm in this case. However, there are other ways.

The applicants admit that there is much overlapping track, and they have sought to address this competitive issue by providing a private sector solution through the granting to Burlington Northern Santa Fe (BNSF) of extensive trackage rights. Parties have complained that those trackage rights will not produce as much competition as an independent SP. I disagree. BNSF is a strong competitor that wants to compete and that knows how to compete. Trackage rights are used successfully throughout the industry, and there is no evidence that, because of their nature and scope, the trackage rights here would not be an effective competitive alternative. Furthermore, as the record shows, the trackage rights agreement provides significant transportation benefits of its own. If managed properly -- and the Board has the means and the mandate to make sure that they are -- these trackage rights can replicate SP's existing competitive presence and can provide market discipline for the merged UP/SP system.

The BNSF agreement is clearly strengthened by the privately negotiated agreement with the Chemical Manufacturers Association (CMA). However, the Board has concluded, and rightly so, that more is needed to address the potential competitive harm. The Board has augmented conditions in the important areas of build-ins and build-outs, transloads, new facilities, storage-in-transit facilities, and contract service. We have responded to the concerns of various shipper groups and specific shippers, particularly western coal interests, plastic and chemical shippers, and grain and other NAFTA trade. Our conditions are carefully crafted to preserve competitive alternatives existing today without undermining the benefits of the merger.

We also provide for 5 years of oversight. Parties have attacked oversight on the one hand as a meaningless gesture. On the other hand, they have criticized oversight as burdensome overregulation. Which is it? The answer is that it is neither. The conditions that the Board has imposed require the applicants and BNSF to report periodically to demonstrate to the Board that the protective conditions are in fact working. The Board will not depend upon shippers and affected parties to do its monitoring. If competitive harm becomes a problem, we can and will act. The divestiture option will remain available during the entire oversight period. The Board has taken this case very seriously from the beginning and will continue to do so.

Closing

I believe that our decision is a balanced one that recognizes the many competing issues in this case. It preserves the transportation benefits of the transaction, benefits that the Board has a mandate not to ignore. It ensures a strong and effective competitive alternative for shippers and communities served by SP -- we owe them no less. It recognizes the importance of the transaction to the employees, for it is they who have much at stake. It mitigates as appropriate the

competitive harm without the risk of potentially more intrusive governmental action. It recognizes and affirms the importance and the benefit of market-based proposals and private sector negotiations among the various sectors of the transportation community, including management and labor. On balance, this decision is a sound one; it represents good government; it is good for transportation; and it is good for the economy.

VICE CHAIRMAN SIMMONS, commenting:

I was a member of the Interstate Commerce Commission when, in 1986, that body denied the application of the Santa Fe Southern Corporation to acquire and merge with the Southern Pacific Railroad (SF/SP). Arguably, many of the competitive problems of the ill-fated SF/SP merger exist in this case, leading one to conclude that the two cases are similar. However, I believe that it was irresponsible for some parties to conclude, summarily, that the proposed merger here is anti-competitive and ill-advised merely because applicants' lines are parallel.

Such an inflexible view with respect to this industry is abhorrently narrow minded. More important, such an unyielding view ignores the economic realities of this present day industry and the economic realities that favor a merger in this instance, but that did not favor a merger in SF/SP.

There are striking material differences between the two cases that require additional examination or analysis. First, unlike the applicants in SF/SP, here, at the outset, UP and SP have identified areas that will face a reduction in competition and have voluntarily negotiated settlements that offer remedial solutions. Second, the applicants have factually demonstrated, persuasively, that the economic forces in play today demand such a merger. Now more than ever, shippers are requiring railroads to provide seamless, single-line service, free of costly interchanges and reciprocal switching.

Thus, no one should be misled by opposing shippers who refuse to see beyond their singular concerns, thereby pitting their parochial interests against a broader public interest that demands increased efficiencies throughout the surface transportation system.

Likewise, we should also not be misled by the self-serving and centralized views of opposing railroads, who, after all, are merely bartering for a greater slice of the economic pie.

Here, as in similar cases, the analysis must be -- what as a whole is in the public interest. It is this analysis and none other that controls the debate.

Railroads have made significant productivity gains as a result of the Staggers Act, ICC actions, and improved labor agreements. However, there is sufficient evidence to credit railroad consolidations with many of the efficiency gains. This merger will further the productivity gains already achieved in the rail industry.Mergers reduce interchanges and excess equipment. Mergers also, as preferred by shippers, traditionally result in single-line operations capable of providing uninterrupted, seamless service.

Today, the single fastest growth segment for railroads is intermodal and its transportation requires certain characteristics that UPSP can deliver. This will continue to be the growth segment for the industry. While carriers can limp

along on the strength of their traditional commodities of coal, lumber, grain, automobiles, etc., and have increases in revenues and profits, they need new sources of traffic and revenues in order to grow and attract capital. Intermodalism is that source. Granted, there are no large profits in intermodal service, but that will change as the traffic increases and railroads become expert and efficient in delivering this type of service. In order for the benefits of intermodalism to realize their full potential, this merger should be approved.

Simply offering single-line service, however, is not enough in the long run to attract and hold intermodal traffic. Intermodal transportation requires substantial capital investments to operate efficiently, including large funds for clearances, double-tracking, constant maintenance of track, modernization of yards, and labor improvements, all to move this traffic at top-notch speed. The Board's analysis places emphasis on the important role this merger would play in advancing those goals of promoting intermodalism. As railroads increasingly attract this traffic, there will be less highway congestion, improvements in air quality, reduction in accidents, and better time management, as workers spend less time in costly highway tie-ups.

Intermodalism requires capacity and infrastructure. The UPSP merger will provide synergies, network efficiencies, and financial capability that are necessary to develop intermodal service. A combined UPSP will have thousands of route miles that could be exploited for high quality intermodal service. Recognizing that intermodalism is the key for future growth, applicants have committed to invest $250 million in intermodal terminals, and $500 million to upgrade key routes for intermodal movements: the Sunset, Texas and Pacific, and Tucumcari routes.

I agree with the applicants' insistence that their market coverage is incomplete. As a result of the merger, however, UPSP will have improved and shorter routes throughout the West, and will operate on a level playing field equal to BNSF. The railroad will be able to reduce hundreds of miles in travel time in such areas as California's I-5 corridor, SP's Chicago-Southern California route, and so on.

UPSP makes much of the fact that the catalyst for this merger was the consolidation of the Burlington Northern and the Santa Fe. Indeed, I tend to agree that the BNSF merger was the event that altered the competitive situation of the rail industry in the West. It particularly changed conditions for SP as that carrier was not fully positioned to deal with the competitive impacts of the BNSF. SP can continue the current situation, but given the low costs and operating ratios of BNSF and UP, the old strategy developed by SP cannot achieve the intended results and keep pace with the BNSF. It cannot just cut rates to maintain existing traffic or attract new traffic, that strategy would only further cause SP's deterioration. SP would continue to exist, but for the most part, it would effectively be eliminated as a market force, and would no longer be a significant player in the market. UP and BNSF, because of their sheer sizes, will continue to lower costs, attract traffic and investment, while SP will simply fall further behind.

Parties opposing the merger argue that SP does not need this merger to survive, that it can continue to operate on a stand alone basis and attract the necessary capital to prosper. In order to remain a stand alone railroad, however, SP would probably abandon those areas where SP has little to no negotiating leverage and focus on areas where the carrier can make a return decent enough to satisfy investors, that is in those areas where SP is the dominant or sole carrier, and need not compete as vigorously. This strategy, while economically

sound, would only further marginalize SP and prevent it from being a competitive market force in the territories it serves. SP could provide service in a few narrowly defined markets, and not play much of a competitive role in the broader markets of the West. The restructuring of the SP would mean less competition in some markets, and the possibility of abandonment of marginal lines.

Some of the opponents are calling for divestiture of key SP routes as a way to satisfy competitive problems. Conrail, Kansas City Southern, National Industrial Traffic League (NITL), Montana Rail Link, and others seek divestiture of various SP routes. History reflects that the ICC has never used divestiture of portions of an existing network as a method to preserve competition. This is so, in part, because experience shows that divestiture is not a proper remedy in the context of the rail industry. Divestiture has been ordered in other industries, where the merging partners are generally required to divest themselves of a subsidiary or some other business not necessary for the operation of the core business.

Here, by contrast, proponents of divestiture seek to destroy a unified SP system consisting of routes and corridors that are vital to its core business of providing railroad transportation. I have strong reservations against such a divestiture here, as it would cause more problems than it would actually solve. Specifically, the SP's value is as a single system, and because of the value of what is referred to as system integration, a break up of SP would not make sense. Furthermore, on the whole, divestiture would not benefit shippers, inasmuch as many current single-line moves would become two-line or three-line moves, wiping out the efficiencies of single-line service. With a merger, shippers will have the option of using two financially sound rail systems, UPSP and BNSF. I am confident that the two mega systems will compete fiercely. One only need look for evidence in the Powder River Basin and the intermodal business from the Pacific Northwest to Chicago. The competition to serve automobile plants is a constant battle between rail carriers. Western shippers can best benefit from two railroads with equal ability, resources, geographic coverage and reach, as opposed to a weak SP, whose competitiveness in the future is doubtful.

In my view, the proponents of divestiture have imprudently and irresponsibly narrowed their focus on the preservation of competition. But in so doing, they have ignored the special role overall that healthy railroads play in promoting the public interest. This perhaps can be said of no other industry. Indeed, the surface transportation industry case law, agency precedent, and common experience, requires that no one, including Federal regulators, should exalt or substitute the preservation of competition, just for the sake of having it, over the combination of other factors contributing to the public interest.

We should not forget that with respect to this industry, the Nation's antitrust laws do no more then help form the debate. They do not control the debate, as the public interest standard is much broader. See Northern Merger Lines Case, 396 U.S. 491, at 506-516 (1970). Indeed, it is well settled that federal regulators can approve rail consolidations that violate the antitrust laws. See generally United States v. I.C.C., 361 U.S. 491 (1970).

No one should be that alarmed or dismayed that the merger may produce a lessening of competition, as some lessening of competition is a logical and natural consequence of any merger. However, as history has shown, the primary concern of this federal body must be the effects of the rail consolidation on the adequacy of transportation services available to the public. Thus, since modern times the agency has been encouraged to favor

mergers, consolidations, and joint use of facilities that tend to rationalize and improve the Nation's rail system. See Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 396 (5th Cir. 1980).

In this case, competition will be preserved with the settlement agreements and the additional conditions recommended by this Board. Burlington Northern Santa Fe has the ability to offer vigorous competition to shippers at 2-to-1 points. Thus, I find arguments that trackage rights cannot work as a substitute for real competition extremely unpersuasive. Properly structured and their terms reviewed by the Board, trackage rights can provide effective competition. Both history and common experience upholds this position.

Nevertheless, opponents imprudently argue that trackage rights here will not be feasible and that the competition offered thereby is illusory, because of the so-called unprecedented length in miles involved in the trackage rights.

Such arguments not only defy good business logic, they also miss the pro-competitive public benefits to be derived from such trackage rights. Here, the trackage rights will not just allow BNSF to compete with the merged carriers for local traffic, they will also allow BNSF to fill links within its own system and provide it with the opportunity to add SP served shippers on to its existing hauls.

To the contrary, some parties argue trackage rights compensation here is set so high that BNSF will become less then enthusiastic, and as such, it will not truly offer competitive alternatives to the merged UPSP. Whether that is so remains to be seen. But agency policy has always been to encourage parties to voluntarily negotiate compensation. It is difficult to accept the notion that BNSF would have agreed to a level of compensation high enough so as to effectively cut-off its competitive options and additional sources of revenue. Why agree to the deal? BNSF could have joined others in protesting the merger and as such been a formidable foe. Because of its financial strengths and routes, BNSF is the best choice to serve those shippers in the 2-to-1 markets. If UPSP wanted little to no competition, it could have chosen weaker carriers with limited geographic reach.

The Department of Justice is concerned that the trackage rights compensation is based on usage, and would rather see BNSF make a substantial payment up-front to serve as an inducement to vigorously compete in order to recoup its investment. While initially a provocative idea, I see no need to worry under these circumstances about BNSF competing. It should be noted that BNSF has substantial fixed and common costs on its own system. That system will connect or fill in the gaps with the trackage rights, and hence additional traffic will help defray BNSF's existing costs.

Merger opponents also insist that there is not sufficient density for BNSF to compete. Again, I reject this assertion. In their rebuttal, applicants thoroughly demolish this argument by demonstrating that opponents presented flawed studies to prove their point with regard to traffic density. For example, they exclude all intermodal, grain and coal traffic from the study. Besides being misleading on available commodities, the opponents also impose geographic restrictions, failing to include local traffic flowing within Texas, Arkansas, and Louisiana. Furthermore, as UPSP point out, protestants to the merger exclude all traffic between Mexico and Texas, Louisiana, Arkansas, as well as all traffic between Mexico or those States and points in the Western United States and Canada. BNSF could use a lot of this traffic in conjunction with the western portion of its rail

network, but the opponents' study excludes all of this traffic from their calculations.

All in all, the handicaps cited -- trackage rights compensation and lack of sufficient traffic -- have not been validated. Opponents assert that BNSF will be unable to develop significant market shares, which will render it unable to develop the volumes necessary to achieve economies of density and scale. It is my view that the opposition ignores what I view as a crucial point: whether BNSF will be able to be at least as competitive as SP is on those routes. According to the best evidence of record, where there are parallel lines, and UP and SP compete head-to-head, SP has the low market share. BNSF, which has lower costs than SP, could garner at least the same amount of traffic as SP. With BNSF's larger system, financial strength, and market share, BNSF has the ability to develop even greater market share than SP currently possesses.

Nevertheless, in keeping with the congressional mandates of past and present, to ensure that competition is meaningful, the Board will actively monitor the transaction for the next five years. I want the applicants, BNSF, and all shippers to know that we are very serious about monitoring. This Board is prepared to take further action should the BNSF not live up to its common carrier obligation to effectively compete or if UPSP undertakes actions that impede BNSF's ability to compete.

Overall, the positions of DOJ and other commenting federal regulators appear to be based on the following premise: prices become higher as the number of competitors decrease. But as aforementioned, this premise is predicated on theories that do not readily apply to the railroad industry.

The evidence is conclusive, that although the number of Class I railroads have fallen, prices, for the most part have declined since enactment of the Staggers Act. There is no clearer an example of this point than the healthy competitive environment in the Southeast, where there are only two Class I railroads.

By contrast, for the West, UPSP and the State of California have presented persuasive evidence (much of which concurs with the Board's own tracking over the years) that SP is the 3rd place rail carrier in many markets, and as such it contributes very little to the level of competition in those markets where it is the third carrier.

Similarly, much as been made of the fact that Southern Pacific is not a "failing firm". Whether it is a failing firm or not, SP is certainly a very weak competitor. It cannot come near to investing the huge sums UP and BNSF will spend on capital expenditures. Without investments in plant and equipment, SP will continue to fall further behind its competitors. There is evidence that in many markets where SP competes with BNSF and UP, it is simply a marginal player. Not only are SP's shippers threatened with continuing poor service, but its thousands of employees risk losing their jobs. That possibility is why SP unionized employees support this merger.

Shipper testimony confirms that in many markets, SP is unable to meet the service demands of shippers. This merger will produce efficiencies that would increase the competitive significance of SP's assets in the marketplace. This point is key to understanding what drives this merger and the strong shipper support. Undoubtedly, SP has very attractive assets and key routes, that with shrinking capital and the intense competition offered by BNSF (as witnessed by the number of SP shippers BNSF has acquired since its merger), the current management is not in a position to fully exploit. To let SP

linger and hope for better times to appear, I believe, weakens the carrier further, and as traffic patterns adjust or alter as a consequence of BNSF and UP's relentless competitive activity at the expense of SP, the value of its assets would greatly diminish. DOJ claims that SP can continue to offer the same price-quality combinations it offers now, and that SP's position relative to the two other carriers would not change if we deny the merger. However, logic dictates that without substantial infusion of capital, SP will be unable to continue to provide those services in the few markets it has been able to do so. A rational SP would concentrate on those markets and routes where it has a competitive advantage and limit capital spending, while BNSF grows even more efficient.

Lastly, I believe that the transaction will strengthen the country's national defense. The Department of Defense supports the merger realizing that it will result in the creation of a strong rail network whose key routes will remain intact. Because of its weak financial condition over the last few years, SP has been an unreliable provider of rail service for DOD. A lack of capital investments have hampered SP's ability to provide efficient and timely service to the military. The merger will improve quality while also offering an alternative to the service of the BNSF.

In sum, I believe that this merger will result in tremendous benefits and enhancements to the Nation's economy. The founders of the Nation's railroads were individuals of vision. Because of their foresight, the country went on to create the world's most efficient transportation system, which in turn helped to create the world's most powerful industrial base and strong agricultural economy. This merger will continue to advance our strong manufacturing and agriculture sectors, and strengthen this nation's competitiveness in the global economy. The benefits enunciated are real and will produce shorter routes, new services, lower costs, better car supply, and more efficient operations. Farmers served by UP will find new markets for their wheat. Coal producers in Utah and Colorado will be able to market their coal to utilities because the SP has already invested heavily in expanding the market for western coal, and UP will not do anything to jeopardize that success, especially since a substantial amount of that coal goes to Asian markets. Chemical and plastic shippers faced with the loss of a competitive alternative, will have the services of BNSF through the settlement agreement. Although many of those manufacturers fear the consequences of the merger, BNSF will want to provide service just to increase its own market share and revenues. Besides, these captive shippers have the added protection of being able to file a rate complaint against the UPSP with the Board. Add that to the fact that the Board will monitor the transaction for the next five years to determine if BNSF is offering viable competition.

Finally, I want to personally commend the applicants here in an additional area. Specifically, I am confident that in the future we will look back at this entire episode -- at the continued advancement of the surface transportation industry -- as a sterling example of a moment in time where railroads, shippers, and labor[261] met at the conference table beforehand,

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[261] I believe that the Labor Unions deserve a special commendation here. Labor should take special pride in the level of commitment it exacted from UPSP in reconciling competing interests. The level of commitment made by the railroads to Labor is a credit to Labor's diligent efforts in striking a proper balance between its interests and the overall compelling public benefits of the merger. History will show that here,

(continued...)

and forged a marvelous market based private solution to further the industrial interests of this nation. That, coupled with the very special measured expertise of the dedicated staff of a beleaguered but valiant Federal agency, has produced an excellent result that will benefit the public for decades to come.

COMMISSIONER OWEN, commenting:

Since passage of the Transportation Act, 1920, it has been the public policy of the United States to encourage railroad mergers and consolidations that are in the public interest.[282] The 1920 congressional directive was restated by the Transportation Act of 1940, which provided that railroad mergers and consolidations be "consistent" with the public interest.[283] Again in 1976, Congress encouraged "efforts to restructure the [rail] system on a more economically justified basis, including . . . an expedited procedure" for mergers and consolidations.[284] And in 1980 and again in 1995, Congress voted to retain in the Interstate Commerce Act the provision that mergers and consolidations among two or more Class I railroads "shall" be approved if they are found by the Surface Transportation Board to be "consistent with the public interest."[285]

The recurring term "public interest" may be found in the National Transportation Policy, which instructs the Surface Transportation Board to promote safe and efficient rail transportation and to foster sound economic conditions.[286] The Supreme Court has held:[287]

> The term public interest . . . is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service . . . [and to] best use of transportation facilities . . .

Congress provides us with additional direction -- specifically, that five factors be considered when reviewing railroad merger and consolidation applications:[288]

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[281] (...continued)
Labor's participation in the debate resulted in a win-win situation for everybody.

[282] Transportation Act, 1920, 41 Stat. 456 (1920).

[283] Transportation Act of 1940, 54 Stat. 899, 905 (1940).

[284] Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, 90 Stat. 31 (1976) at Section 101(a)(2). See also Report of the Committee on Conference on S. 2718, S. Rep. No. 94-595, 94th Cong., 2d Sess., January 27, 1976, at 34.

[285] Staggers Rail Act, 94 Stat. 1895 (1980), and ICC Termination Act of 1995, 109 Stat. 803 (1995), now codified at 49 U.S.C. 11324(c).

[286] 49 U.S.C. 10101.

[287] New York Central Securities v. United States, 287 U.S. 12, 25 (1932).

[288] 49 U.S.C. 11324(b).

> 1) The effect of the proposed transaction on the adequacy of transportation to the public; 2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; 3) the total fixed charges resulting from the proposed transaction; 4) the interest of rail carrier employees affected by the proposed transaction, and; 5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

Railroads were the first major industry where merger and consolidation was promoted by the federal government. Noted Justice Brandeis as to the reason:[289]

> The new purpose was expressed in unequivocal language . . . to secure a fair return on capital devoted to the transportation service.

The Court later held:[290]

> Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern.

Moreover, Congress repeatedly has directed that railroad merger and consolidation applications be measured by a different standard than is used by the Justice Department. As the Supreme Court explained:[291]

> [T]here can be little doubt that the [Surface Transportation Board] is not to measure proposals for all-rail or all-motor [mergers and consolidations] by the standards of the antitrust laws. Congress authorized such [mergers and] consolidations because it recognized that in some circumstances they were appropriate for effectuation of the National Transportation Policy.

With regard to this alternative test for railroad mergers and consolidations, the Court observed:[292]

> [The Surface Transportation Board] must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.

Indeed, the Supreme Court repeatedly has instructed the Justice Department to leave to the Interstate Commerce Commission and its successor Surface Transportation Board the complex and specialized task of weighing the public benefit of railroad

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[289] New England Divisions, 261 U.S. 184, 189 (1923).

[290] Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118, 124 (1948).

[291] McLean Trucking Co. v. United States, 321 U.S. 67, 84-85 (1944).

[292] Id., at 87.

mergers and consolidations against the competitive harm. For example, in 1965 the Court ruled:[293]

> It matters not that the merger might otherwise violate the antitrust laws; the [Interstate Commerce] Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria . . . that such a merger would be 'consistent with the public interest.'

Again in 1970 the Court held:[294]

> We do not enquire whether the merger satisfies our own conception of the public interest. Determination of the factors relevant to the public interest is entrusted by the law primarily to the [Interstate Commerce] Commission, subject to the standards of the governing statute.

In fact, twice in recent years -- in 1980 and again in 1995 -- Congress rejected suggestions that it shift to the Justice Department regulatory authority over railroad mergers and consolidations.[295] In rejecting Justice Department oversight in 1980, Congress agreed with the Senate Commerce Committee's former chief counsel who had become chairman of the Interstate Commerce Commission, A. Daniel O'Neal:[296]

> [The Justice Department approach] would likely be quite different, as it probably would assume that [more railroads rather than fewer railroads] produces the best service for users. This is not always true. In some rail markets there may not be sufficient traffic to support multiple carriers, in which case service to all shippers may suffer.

The Supreme Court agrees that railroad mergers and consolidations be approved not just to protect financially weak railroads, but to make rail operations more efficient and more competitive with trucks and barges. As the Court observed in 1970, rail mergers and consolidations are not to be confined "to combinations by which the strong rescue the halt and the lame," adding:[297]

> [A] rail merger that furthers the development of a more efficient transportation unit and one that results in the joining of a 'sick' with a strong carrier serve equally to promote the long-range objectives of Congress . . .

When railroad operations can be made more efficient and less costly, the savings are shared through lower freight rates -- or

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[293] Seaboard Air Line R. Co. v. United States, 382 U.S. 154, 156-157 (1965).

[294] Penn-Central Merger and N&W Inclusion Cases, 389 U.S. 486, 498-499 (1968).

[295] "Administration's Rail Merger Position Hit by AAR, ICC in Senate Hearing," Traffic World, June 25, 1979, at 10; and "DOT Says Justice Should Review Rail Mergers," Traffic World, January 30, 1995, at 10.

[296] "Administration's Rail Merger Position Hit by AAR, ICC in Senate Hearing," Traffic World, June 25, 1979, at 10.

[297] Northern Lines Merger Cases, 396 U.S. 491, 508 (1970).

a forbearance to raise those rates -- which are reflected in lower consumer prices for everything from electricity to automobiles to food to clothing.

These public benefits, however, must be balanced against competitive harm, and the Surface Transportation Board has the authority to mitigate competitive harm by imposing a broad range of reasonable conditions, such as trackage rights.[398]

In this decision, the Surface Transportation Board has balanced the verifiable public benefits of the proposed transaction against the potential competitive harm; and while determining that the competitive harm is outweighed by the public benefits has nonetheless addressed each allegation of competitive harm and imposed conditions to mitigate that harm.

Overwhelming evidence was presented that this merger will result in broad public benefits such as substantial operating cost savings, improved rail service, renewed financial strength for Southern Pacific and more effective rail competition. This is important to existing and future customers of these railroads as well as the ultimate consumers of the products hauled who will reap the lower consumer prices stemming from transportation-cost savings. More efficient, lower-cost railroads also make American industry more competitive in world markets and make American jobs more secure. Furthermore, efficient railroads attract freight from the highway, relieve traffic congestion, reduce highway accidents, save lives, decrease pavement damage caused by heavy trucks, conserve fuel and improve the environment. Each is a worthy public goal.

Nonetheless, this agency is obliged to consider the likelihood of competitive harm. Indeed, competitive harm is likely to be substantial in certain important markets. Therefore, we imposed extensive conditions to mitigate that competitive harm. Among the conditions is a five-year oversight provision and a requirement that both the merged railroads as well as Burlington Northern Santa Fe -- which is being given extensive trackage rights -- make periodic progress reports to this agency. During this oversight period we have authority to impose additional conditions and we will be an alert and aggressive policeman.

With regard to oversight, there are two specific issues that are perennial problems in the railroad industry and that I do not intend to treat lightly if they recur as a result of this merger. One is the freight railroads' treatment of Amtrak passenger trains; the other is the railroads' respect for their unionized employees.

I remind the applicants that the Rail Passenger Service Act of 1970 requires that Amtrak trains have preference over freight traffic and that the conditions we have imposed temporarily limiting rail traffic in certain corridors applies to freight trains only and not to Amtrak passenger trains.[399]

Furthermore, I remind the applicants' of their assurances given during oral argument that their merged railroad will move immediately to correct persistent Amtrak service problems on Southern Pacific lines. I encourage Amtrak to keep this agency

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[398] 49 U.S.C. 11324(c).

[399] The requirement that Amtrak passenger trains receive priority handling by freight railroads is found at Rail Passenger Service Act of 1970, 84 Stat. 1327, as amended through 1982, Section 402(e)(1).

aware of every failure on the part of the applicants to translate those words into deeds.

With regard to labor relations, I note that this is the only railroad merger in recent history to receive widespread labor-union support. Railroads operate the largest outdoor factory in America, often stretching tens of thousands of miles. The existence of a well-trained, motivated and loyal workforce is essential to safe and efficient train operations. Employee support of this transaction will be a crucial factor in its economic success. The applicants are to be applauded for their sincere efforts at reaching out toward their employees and including them in the planning process. All too often, in recent years, labor relations in the railroad industry have been unnecessarily acrimonious.

The applicants entered into a number of good-faith agreements with their dedicated employees in which both sides vowed to cooperate in implementing this merger. Specific pledges were made in a series of letters exchanged between the applicants and their unions.

Among those pledges is that the applicants will use the immunity provision of 49 U.S.C. 11341(a), now 49 U.S.C. 11321(a), only to seek those changes in collective bargaining agreements that are actually "necessary" -- and I read the word "necessary" to mean "required" -- to implement the transaction and not merely as a convenient means of achieving cost savings or, as a federal appeals court noted, "merely to transfer wealth from employees to their employer."[399]

The very fact that the applicants addressed this matter positively in their agreement with the United Transportation Union is evidence that the issue has merit. The purpose of implementing agreements is to permit consummation of a merger or consolidation, not to achieve other objectives properly handled through collective bargaining under the Railway Labor Act.

Finally, there is an interest group that rarely is recognized but is essential to making our capitalist system function. They are the investors who make possible more efficient transportation, American competitiveness in world markets and more secure jobs.

It is the investors who spend less than they earn and lend the difference -- their savings -- to companies such as railroads so that they might build, renew and expand and become more efficient.

In recent months, Union Pacific stockholders repeatedly have been asked to give up portions of the projected merger savings -- to share them with shippers, unionized employees and communities.

Union Pacific has negotiated in good faith and entered into concessionary agreements. They have gone the extra mile with regard to environmental concerns.

The stockholders and management of Union Pacific -- the capitalists -- are to be congratulated. Capitalism is about building and creating. It always has been; it always will be.

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[399] See, e.g., Railway Labor Executives Association v. United States, 987 F.2d 806, 814, 815 (D.C. Cir. 1993). The D.C. Circuit held (at 814) that, "at a minimum," an arrangement cannot be considered fair if it modifies a collective bargaining agreement more than is necessary to effectuate the transaction.

APPENDIX A: EMBRACED PROCEEDINGS

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This decision covers both the Finance Docket No. 32760 lead proceeding and the following embraced proceedings: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; Finance Docket No. 32760 (Sub-No. 3), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Alton & Southern Railway Company; Finance Docket No. 32760 (Sub-No. 4), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Central California Traction Company; Finance Docket No. 32760 (Sub-No. 5), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Ogden Union Railway & Depot Company; Finance Docket No. 32760 (Sub-No. 6), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Terminal Railroad Company; Finance Docket No. 32760 (Sub-No. 7), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Traction Company; Finance Docket No. 32760 (Sub-No. 8), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Overnite Transportation Company, Southern Pacific Motor Trucking Company, and Pacific Motor Transport Company; Finance Docket No. 32760 (Sub-No. 9), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Terminal Trackage Rights--Kansas City Southern Railway Company; Docket No. AB-3 (Sub-No. 129X), Missouri Pacific Railroad Company--Abandonment Exemption--Gurdon-Camden Line In Clark, Nevada, and Ouachita Counties, AR; Docket No. AB-3 (Sub-No. 130), Missouri Pacific Railroad Company--Abandonment--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO; Docket No. AB-3 (Sub-No. 131), Missouri Pacific Railroad Company--Abandonment--Hope-Bridgeport Line In Dickinson and Saline Counties, KS; Docket No. AB-3 (Sub-No. 132X), Missouri Pacific Railroad Company--Abandonment Exemption--Whitewater-Newton Line In Butler and Harvey Counties, KS; Docket No. AB-3 (Sub-No. 133X), Missouri Pacific Railroad Company--Abandonment Exemption--Iowa Junction-Manchester Line In Jefferson Davis and Calcasieu Parishes, LA; Docket No. AB-3 (Sub-No. 134X), Missouri Pacific Railroad Company--Abandonment

Exemption--Troup-Whitehouse Line In Smith County, TX; Docket No. AB-8 (Sub-No. 36X), The Denver and Rio Grande Western Railroad Company--Discontinuance Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO; Docket No. AB-8 (Sub-No. 37), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Hope-Bridgeport Line In Dickinson and Saline Counties, KS; Docket No. AB-8 (Sub-No. 38), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO; Docket No. AB-8 (Sub-No. 39), The Denver and Rio Grande Western Railroad Company--Discontinuance--Malta-Cañon City Line In Lake, Chaffee and Fremont Counties, CO; Docket No. AB-12 (Sub-No. 184X), Southern Pacific Transportation Company--Abandonment Exemption--Wendel-Alturas Line In Modoc and Lassen Counties, CA; Docket No. AB-12 (Sub-No. 185X), Southern Pacific Transportation Company--Abandonment Exemption--Suman-Bryan Line In Brazos and Robertson Counties, TX; Docket No. AB-12 (Sub-No. 187X), Southern Pacific Transportation Company--Abandonment Exemption--Seabrook-San Leon Line In Galveston and Harris Counties, TX; Docket No. AB-12 (Sub-No. 188), Southern Pacific Transportation Company--Abandonment--Malta-Cañon City Line In Lake, Chafee, and Fremont Counties, CO; Docket No. AB-12 (Sub-No. 189X), Southern Pacific Transportation Company--Abandonment Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO; Docket No. AB-33 (Sub-No. 93X), Union Pacific Railroad Company--Abandonment Exemption--Whittier Junction-Colima Junction Line In Los Angeles County, CA; Docket No. AB-33 (Sub-No. 94X), Union Pacific Railroad Company--Abandonment Exemption--Magnolia Tower-Melrose Line In Alameda County, CA; Docket No. AB-33 (Sub-No. 96), Union Pacific Railroad Company--Abandonment--Barr-Girard Line In Menard, Sangamon, and Macoupin Counties, IL; Docket No. AB-33 (Sub-No. 97X), Union Pacific Railroad Company--Abandonment Exemption--DeCamp-Edwardsville Line In Madison County, IL; Docket No. AB-33 (Sub-No. 98X), Union Pacific Railroad Company--Abandonment Exemption--Edwardsville-Madison Line In Madison County, IL; Docket No. AB-33 (Sub-No. 99X), Union Pacific Railroad Company--Abandonment Exemption--Little Mountain Jct.-Little Mountain Line In Box Elder and Weber Counties, UT; Finance Docket No. 32760 (Sub-No. 10), Responsive Application--Capital Metropolitan Transportation Authority; Finance Docket No. 32760 (Sub-No. 11), Responsive Application--Montana Rail Link, Inc.; Finance Docket No. 32760 (Sub-No. 12), Responsive Application--Entergy Services, Inc., Arkansas Power & Light Company, and Gulf States Utility Company; Finance Docket No. 32760 (Sub-No. 13), Responsive Application--The Texas Mexican Railway Company; Finance Docket No. 32760 (Sub-No. 14), Application for Terminal Trackage Rights Over Lines of The Houston Belt & Terminal Railway Company--The Texas Mexican Railway Company; Finance Docket No. 32760 (Sub-No. 15), Responsive Application--Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd.;[301] Finance Docket No. 32760 (Sub-No. 16), Responsive Application--Wisconsin Electric Power Company; and Finance Docket No. 32760 (Sub-No. 17), Responsive Application--Magma Copper Company, The Magma Arizona Railroad Company, and The San Manuel Arizona Railroad Company.

[301] In Decision No. 29 (served April 12, 1996), the responsive application filed by Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd. was rejected as incomplete.

APPENDIX B: ABBREVIATIONS

A&S	The Alton & Southern Railway Company
AAR	Association of American Railroads
ACC	Arizona Chemical Company
Acquisition	UP Acquisition Corporation
AEPCO	Arizona Electric Power Cooperative
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
AGNC	Associated Governments of Northwest Colorado
ALK	ALK Associates, Inc.
AP&L	Arkansas Power & Light Company
ARU	Allied Rail Unions
ASARCO	ASARCO Incorporated
ATDD	American Train Dispatchers Department, BLE
AUNW	Austin Railroad Company, d/b/a Austin Northwest Railroad
BC Rail	BC Rail Ltd.
BCI	Brandt Consolidated, Inc.
BEA	Business Economic Area
BLE	Brotherhood of Locomotive Engineers
BMWE	Brotherhood of Maintenance of Way Employees
BN	Burlington Northern Railroad Company
BNSF	BN and SF
Board	Surface Transportation Board
BRGI	The Brownsville and Rio Grande International Railroad
BRS	Brotherhood of Railroad Signalmen
Cargill	Cargill, Incorporated
CBA	Collective Bargaining Agreement
CBRY	Copper Basin Railway Company
CC&P	Chicago Central & Pacific Railroad Company
CCRT	Coalition for Competitive Rail Transportation
CCT	Central California Traction Company
CDPHE	Colorado Department of Public Health and Environment
Cen-Tex	Cen-Tex Rail Link, Ltd., and South Orient Railroad Company, Ltd.
CIC	Champion International Corporation
CIPSC	Central Illinois Public Service Company
CITU	Certificate of Interim Trail Use or Abandonment
CMA	Chemical Manufacturers Association
CMTA	Capital Metropolitan Transportation Authority
CMW	Chicago, Missouri & Western Railway Company
CN	Canadian National
CNW	Chicago and North Western Railway Company
CNWT	Chicago and North Western Transportation Company
CO&PR	Central Oregon and Pacific Railroad
COFC	Container-on-flatcar
COGA	COGA Industries, L.L.C.
Conrail	Consolidated Rail Corporation
CP	Canadian Pacific Limited
CP&L	Central Power & Light Company
CPSB	City Public Service Board of San Antonio
CPUC	Public Utilities Commission of the State of California
CRA	The Corn Refiners Association, Inc.
CRD	Crop Reporting District
CSX	CSX Corporation, CSX Transportation, Inc., CSX Intermodal, Inc., and Sea-Land Service, Inc.
CTC	Centralized Traffic Control
CWAC	Colorado Wheat Administrative Committee
DM&E	Dakota, Minnesota & Eastern Railroad Corporation
DOD	United States Department of Defense
DOL	United States Department of Labor
DOJ	United States Department of Justice
DOT	United States Department of Transportation
Dow	The Dow Chemical Company

DRGW	The Denver and Rio Grande Western Railroad Company
EA	Environmental Assessment
EBT	The Enid Board of Trade
EDC	Economic Development Council for Greater Springfield
EJE	Elgin, Joliet and Eastern Railway
EIS	Environmental Impact Statement
Entergy	ESI, AP&L, and GSU
EPA	United States Environmental Protection Agency
EPA Region VIII	United States Environmental Protection Agency, Region VIII
EPC	Enterprise Products Company
ESI	Entergy Services, Inc.
FCP	Ferrocarriles Nacionales de Mexico - Region Pacifico
FEAM	Farmers Elevator Association of Minnesota
FERC	Federal Energy Regulatory Commission
FNM	Ferrocarriles Nacionale de Mexico
FPC	Formosa Plastics Corporation, USA
FPP	Fayette Power Project
FRA	Federal Railroad Administration
Freeman	Freeman United Coal Mining Company
FTC	Federal Trade Commission
Geon	The Geon Company
GNBC	Grainbelt Corporation
GSU	Gulf States Utilities Company
GTRR	Georgetown Railroad Company
GTW	Grand Trunk Western Railroad
GWWR	Gateway Western Railway Company
HB&T	Houston Belt & Terminal Railway
HC	Huntsman Corporation
HCC	Hoisington Chamber of Commerce
HCJDC	Harvey County Jobs Development Council, Inc.
HHI	Herfindahl-Hirschman Index
Ia/DOT	Iowa Department of Transportation
IBC/IWC	Idaho Barley Commission/Idaho Wheat Commission
IBP	IBP, Inc.
IBT	International Brotherhood of Teamsters
IC	Illinois Central Railroad Company
ICC	Interstate Commerce Commission
ICTF	Intermodal Container Transfer Facility
IDPC	Idaho Power Company
IES	IES Utilities
ILP	Illinois Power Company
IPA	Intermountain Power Agency
IPC	The International Paper Company
ISRI	The Institute of Scrap Recycling Industries, Inc.
IUDA	Industry Urban-Development Agency
JIT	Joint Intermodal Terminal
JSC	Joint Shippers Coalition
Ka/DOT	Kansas Department of Transportation
Kal Kan	Kal Kan Foods, Inc.
KCOSA	Kansas-Colorado-Oklahoma Shippers Association
KCS	The Kansas City Southern Railway Company
KCSI	Kansas City Southern Industries, Inc.
KJRY	Keokuk Junction Railway
L&D	Louisiana and Delta Railroad
LCRA/Austin	Lower Colorado River Authority and the City of Austin, TX
Longhorn	Central of Tennessee Railway & Navigation Company Incorporated, d/b/a Longhorn Railway Company
LP&N	Longview, Portland & Northern Railroad
MAA	Magma Arizona Railroad Company
Mars	Mars, Incorporated
MCC	Magma Copper Company
MCT	Madison County Transit
MFU	Montana Farmers Union
MKT	Missouri-Kansas-Texas Railroad Company

Mn/DOT	Minnesota Department of Transportation
Monsanto	Monsanto Company
Montell	Montell USA Inc.
MP	Milepost
MPCSC	Mountain-Plains Communities & Shippers Coalition
MPRR, MP	Missouri Pacific Railroad Company
MRL	Montana Rail Link, Inc.
MRLAC	MRL's Acquisition Company
MWBC	Montana Wheat and Barley Committee
NAFTA	North American Free Trade Agreement
NALS	North American Logistic Services
NCGA	National Corn Growers Association
NCRA	North Coast Railroad Authority
NEPA	National Environmental Policy Act
NITL	The National Industrial Transportation League
NITU	Notice of Interim Trail Use or Abandonment
NS	Norfolk Southern Corporation
NVS	North Valmy Station
OFA	Offer of Financial Assistance
OKT	Oklahoma-Kansas-Texas Railroad Company
Olin	Olin Corporation
Or/DOT	Oregon Department of Transportation
OSM	Oregon Steel Mills
OURD	The Ogden Union Railway & Depot Company
Overnite	Overnite Transportation Company
PE	Polyethylene
PMT	Pacific Motor Transport Company
Post EA	Post Environmental Assessment
PP	Polypropylene
PPG	PPG Industries, Inc.
PRA	Proportional Rate Agreement
PRB	Powder River Basin
PRC	Pioneer Railcorp
PSCN	Public Service Commission of the State of Nevada
PSCo	Public Service Company of Colorado
PTRA	Port Terminal Railway Association
PTRC	Portland Traction Company
PTRR	Portland Terminal Railroad Company
QCC	Quantum Chemical Corporation
RCAF	Rail Cost Adjustment Factor
RCT	Railroad Commission of Texas
Rio Bravo	Rio Bravo Poso and Rio Bravo Jasmin
RLA	Railway Labor Act
Rock Island	Chicago, Rock Island and Pacific Railroad Company
ROI	Return on Investment
RTC	Rails to Trails Conservancy
SCC	Shell Chemical Company
SCRRA	Southern California Regional Rail Authority
SDIV	San Diego & Imperial Valley Railroad
SEA	Section of Environmental Analysis
SF	The Atchison, Topeka and Santa Fe Railway Company
SFETF	Serenata Farms Equestrian Therapy Foundation
SIT	Storage-In-Transit
SLC	Stimson Lumber Company
SMA	San Manuel Arizona Railroad Company
Soo	Soo Line Railroad Company
Southern Pacific	SPR, SPT, SSW, SPCSL, and DRGW
SP	SPT, SSW, SPCSL, and DRGW
SpPl	Springfield Plastics, Inc.
SPBC	Springfield Plastics, Inc. and Brandt Consolidated, Inc.
SPCSL	SPCSL Corp.
SPI	The Society of the Plastics' Industry, Inc.
SPLC	Standard Point Location Code
SPMT	Southern Pacific Motor Trucking Company
SPP	Sierra Pacific Power Company
SPP/IDPC	SPP and IDPC
SPR	Southern Pacific Rail Corporation
SPRB	Southern Powder River Basin

SPT	Southern Pacific Transportation Company
SSACC	South San Antonio Chamber of Commerce
SSW	St. Louis Southwestern Railway Company
STB	Surface Transportation Board
STCC	Standard Transportation Commodity Code
STRICT	Save the Rock Island Committee, Inc.
TCSC	Texas Crushed Stone Company
TCU	Transportation•Communications International Union
Tex Mex	The Texas Mexican Railway Company
TMM	Transportacion Maritima Mexicana
TOFC	Trailer-on-flatcar
TP&W	Toledo, Peoria & Western Railway Corporation
TRA	Trackage Rights Agreement
TTD	Transportation Trades Department, AFL-CIO
TUE	Texas Utilities Electric Company
TUMC	Texas Utilities Mining Company
UCC	Union Carbide Corporation
Union Pacific	UPC, UPRR, and MPRR
UP	UPRR and MPRR
UPC	Union Pacific Corporation
UPMF	Union Pacific Motor Freight Corporation
UPRR, UP	Union Pacific Railroad Company
URC	Utah Railway Company
URCS	Uniform Railroad Costing System
USDA	United States Department of Agriculture
USG	United States Gypsum Company
UTU	United Transportation Union
Viacom	Viacom International Inc.
WC	Wisconsin Central Ltd.
WCTL	The Western Coal Traffic League
WEPCO	Wisconsin Electric Power Company
Weyerhaeuser	Weyerhaeuser Company
WIFE	Women Involved in Farm Economics
WLPRR	Willamette Pacific Railroad
WP&L	Wisconsin Power & Light Company
WPRR, WP	The Western Pacific Railroad Company
WPS	Wisconsin Public Service Corporation
WSC	Western Shippers Coalition
WT&J	Wichita, Tillman & Jackson Railway
WVRR	Willamette Valley Railroad
Yolo	Yolo Shortline Railroad Company

APPENDIX C: SUB-NO. 1 TRACKAGE RIGHTS

The trackage rights provided for in the BNSF agreement (not including the additional trackage rights provided for in the CMA agreement) are covered by the notice of exemption filed in Finance Docket No. 32760 (Sub-No. 1), and are divided into six categories: Western Trackage Rights; South Texas Trackage Rights; Eastern Texas/Louisiana Trackage Rights; Houston, TX, to Memphis, TN, Trackage Rights; St. Louis Area Coordinations; and Trackage Rights Grants to UP/SP.

Western Trackage Rights. BNSF will receive trackage rights over UP: between Salt Lake City, UT, and Ogden, UT; between Salt Lake City, UT, and Alazon, NV; between Alazon, NV, and Weso, NV; between Weso, NV, and Stockton, CA; between Riverside, CA, and Ontario, CA; and between Basta, CA, and Fullerton and La Habra, CA. BNSF will receive trackage rights over SP: between Denver, CO, and Salt Lake City, UT; between Ogden, UT, and Little Mountain, UT; between Alazon, NV, and Weso, NV; between Weso, NV, and Oakland, CA (via the "Cal-P" line between Sacramento and Oakland); and between Oakland, CA, and San Jose, CA. The trackage rights specified in this paragraph are bridge rights for the movement of overhead traffic only, except for local access to industries served by UP and SP and no other railroad at the following points: Provo, UT; Salt Lake City, UT; Ogden, UT; Ironton, UT; Gatex, UT; Pioneer, UT; Garfield/Smelter/Magna, UT (access to Kennecott private railway); Geneva, UT; Clearfield, UT; Woods Cross, UT; Relico, UT; Evona, UT; Little Mountain, UT; Weber Industrial Park, UT; points on paired track between Weso, NV, and Alazon, NV; Reno, NV (intermodal and automotive only); Herlong, CA; Johnson Industrial Park at Sacramento, CA; Farmers Rice at West Sacramento, CA; Port of Sacramento, CA; points between Oakland, CA, and San Jose, CA (including Warm Springs, CA, Fremont, CA, Shinn, CA, Elmhurst, CA, Kohler, CA, and Melrose, CA); San Jose, CA; Ontario, CA; La Habra, CA; Fullerton, CA; and access to the Oakland Joint Intermodal Terminal (JIT), or similar public intermodal facility, at such time as the JIT is built.

South Texas Trackage Rights. BNSF will receive trackage rights over UP: between Ajax, TX, and San Antonio, TX; between Houston (Algoa), TX, and Brownsville, TX; between Odem, TX, and Corpus Christi, TX; between Ajax, TX, and Sealy, TX; between Kerr, TX, and Taylor, TX; between Temple, TX, and Waco, TX; between Temple, TX, and Taylor, TX; and between Taylor, TX, and Smithville, TX. BNSF will receive trackage rights over SP: between San Antonio, TX, and Eagle Pass, TX; and between El Paso, TX, and Sierra Blanca, TX. The trackage rights specified in this paragraph are bridge rights for the movement of overhead traffic only, except for local access to industries served by UP and SP and no other railroad at the following points: Brownsville, TX; Port of Brownsville, TX; Harlingen, TX; Corpus Christi, TX; Port of Corpus Christi, TX; Sinton, TX; San Antonio, TX; Halsted, TX (LCRA plant); Waco, TX; and points on the Sierra Blanca, TX - El Paso, TX, line.

Eastern Texas/Louisiana Trackage Rights. BNSF will receive trackage rights over UP: between Avondale, LA, and West Bridge Jct., LA; and between West Bridge Jct., LA (MP 10.2), and the Westwego, LA, intermodal facility (MP 9.2). BNSF will receive trackage rights over SP: between Houston, TX, and Iowa Jct., LA; between Dayton, TX, and Baytown, TX; between Avondale, LA (MP 16.9), and West Bridge Jct., LA (MP 10.5); and over Bridge No. 5-A at Houston, TX. The trackage rights specified in this paragraph are bridge rights for the movement of overhead traffic only, except for local access to industries served by UP and SP

and no other railroad[302] at the following points: Baytown, TX; Amelia, TX; Orange, TX; Mont Belvieu, TX (Amoco, Exxon, and Chevron plants); Eldon, TX (Bayer plant); and Harbor, LA.

Houston, TX, to Memphis, TN, Trackage Rights. BNSF will receive trackage rights over UP: between Fair Oaks, AR, and Bridge Jct., AR; and between North Little Rock, AR, and Pine Bluff, AR. BNSF will receive trackage rights over SP: between Houston, TX, and Fair Oaks, AR (via Cleveland, TX, and Pine Bluff, AR); and between Brinkley, AR, and Briark, AR. The trackage rights specified in this paragraph are bridge rights for the movement of overhead traffic only, except for local access to industries served by UP and SP and no other railroad[303] at the following points: Camden, AR; Pine Bluff, AR; Fair Oaks, AR; Baldwin, AR; Little Rock, AR; North Little Rock, AR; East Little Rock, AR; and Forrest City, AR.

St. Louis Area Coordinations. BNSF will receive overhead trackage rights over UP in St. Louis, MO (between Grand Avenue and Gratiot Street).

Trackage Rights Grants to UP/SP. UP/SP will receive trackage rights over BNSF: between Chemult, OR, and Bend, OR (overhead rights only); between Barstow, CA, and Mojave, CA (overhead rights only); between West Memphis-Presley Jct., AR (overhead rights only); between Saunders, WI, and Superior, WI (overhead rights only, with access to MERC Dock in Superior); and over the Pokegama connection at Saunders, WI (i.e., the southwest quadrant connection at Saunders, including the track between BN MP's 10.43 and 11.14). UP/SP will retain trackage rights over BNSF: at Keddie, CA (MP 0 to MP 2; to turn equipment; UP/SP will retain trackage rights between these mileposts over the Bieber-Keddie Line to be sold to BNSF); between Dallas, TX, and Waxahachie, TX (overhead rights and exclusive right to serve local industries; UP/SP will retain trackage rights after sale of the Dallas Line to BNSF); and between Iowa Jct., LA, and Avondale, LA (overhead rights and the right to serve all local industries, with right for Louisiana and Delta Railroad to serve as UP/SP's agent between Iowa Jct. and points served by L&D; UP/SP will retain trackage rights after sale of the Avondale Line to BNSF).

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[302] As respects the Eastern Texas/Louisiana trackage rights, the Sub-No. 1 notice filed by applicants refers to "local access to industries served by *UP/SP* and no other railroad," see UP/SP-26 at 004-005 and 060-061 (italics added). The context, however, indicates, and all concerned have understood, that the reference was intended to be to local access to industries served by *UP and SP* and no other railroad, see, e.g., UP/SP-22 at 325.

[303] As respects the Houston, TX, to Memphis, TN, trackage rights, the Sub-No. 1 notice filed by applicants refers to "local access to industries served by *UP/SP* and no other railroad," see UP/SP-26 at 005 and 061 (italics added). The context, however, indicates, and all concerned have understood, that the reference was intended to be to local access to industries served by *UP and SP* and no other railroad, see, e.g., UP/SP-22 at 327.

APPENDIX D: DETAILS OF PUBLIC BENEFITS

Summary. As explained below, the merger will result in clear transportation benefits that will ensure competitive rail service for commodities that are sensitive to intermodal competition, and improved service to all the commodities affected by the merger.

1. **Improved Routings:**

California-Dallas-Memphis. UP/SP will be able to assemble segments of UP and SP lines via El Paso to create the shortest route from Los Angeles to Memphis, as well as fully competitive routes from Oakland and Stockton to the South Central region, in competition with BNSF, which previously had the best routes in those corridors.

Northern California-Midwest. SP has the most direct route between Northern California and Ogden, UT, while UP has the most direct routes from Ogden to the Midwest. The merged system will assemble these segments into a through route 180 miles shorter than either existing route, permitting UP/SP to match BNSF's now-dominant intermodal service.

BNSF will gain a new trunk line traversing the Central Corridor between Northern California and Denver, providing access to western natural resources industries and shippers to and from Nevada and Utah, and routing flexibility for intermodal and other traffic between California and the Midwest.

Southern California-Midwest. The merger will make SP's route between Southern California and the Midwest more competitive. Between Los Angeles and El Paso, SP's current route is severely congested, and SP has not been able to provide adequate capacity to meet its shippers' needs. From El Paso into Kansas, SP's route lacks Centralized Traffic Control and adequate sidings. To upgrade the entire route, UP/SP will spend more than $360 million--funds that SP has not generated, and cannot generate, on its own.

Pacific Northwest-Texas. BNSF now has the only direct route between the Pacific Northwest and Texas. The merged carrier will link the UP and SP route networks in Texas with SP's route from Ft. Worth to Denver and UP's routes from Denver to Utah, Idaho, Montana, Oregon and Washington. This will make UP/SP a real competitor for this traffic and provide entirely new single-line services to shippers in the Intermountain West.

Colorado/Utah Coal Route. SP carries growing volumes of coal from Colorado and Utah to the Midwest on two alternate circuitous routes. One route climbs Tennessee Pass, the nation's steepest main line grade, while the other uses a crowded joint line with BNSF along the Front Range of the Rockies. Both routes require helper locomotives. UP/SP will be able to reroute this traffic directly east from Denver to Kansas City.

Kansas City Bypass. UP currently must handle increasing volumes of PRB coal and heavy grain unit trains through the congested Kansas City terminal area. By using an SP line in Central Kansas and upgrading UP's OKT line from north of Wichita to Ft. Worth, UP/SP can reroute this traffic out of Kansas City and speed shipments, not only for coal and grain shippers, but also for other shippers now using the Kansas City gateway.

California-Laredo. Trade between California and Mexico offers great promise under NAFTA. UP's route from California to Laredo, the premier Mexican gateway, via Utah and Wyoming can be reduced by 1,000 miles. SP does not reach Laredo and had tried, ineffectively, to move intermodal traffic by truck from San

Antonio. The merger will permit UP/SP to link SP's line from Los Angeles to San Antonio with UP's line to Laredo, providing a very efficient route for this growing business.

2. **Expanded Single-line Service:**

Canada/Pacific Northwest-California/Mexico. Western Canada will receive much-improved rail links with the United States and Mexico. Substantial parts of the Pacific Northwest, including Seattle/Tacoma and the Vancouver/Alberta Canadian gateways, have never been connected to California by a direct single-line rail route. 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/SP will offer new single-line service between many UP points in the Northwest and many UP and SP points throughout California, Arizona, New Mexico, and West Texas (including the Mexican gateways of Calexico, Nogales, and El Paso). Eastbound traffic will also gain a shorter route, via Colorado and the Texas Panhandle, to Dallas, Houston and New Orleans. BNSF will have new single-line routes from the Vancouver and Sumas gateways to California, the Southwest, and the San Diego and El Paso gateways to Mexico.

Competition will also be stronger for traffic moving in interchange with CN via Duluth/Superior and CP via the Twin Cities because all SP points will now be accessible on a single-line basis from those interchanges.

California-Gulf Coast-Midwest. As a result of this merger, California will be connected to the New Orleans gateway and large parts of the Texas Gulf Coast by a second single-line rail route, as BNSF will gain its own line to New Orleans and access to Corpus Christi, Brownsville, and numerous competitive points along the Texas coast.

BNSF also will gain direct routes between Houston and Memphis and Houston and East St. Louis. These routes, which will link with existing routes in the South Central United States, will make BNSF better able to compete for Gulf Coast petrochemical shipments to the Midwest and Northeast. BNSF will also have extensive new access to customers in Arkansas.

Mexican Gateways. (Brownsville, Eagle Pass, Laredo, El Paso, Nogales, and Calexico). Laredo is the premier Eastern Mexico gateway because of its excellent infrastructure and customs facilities. Shippers will gain single-line access between Laredo and SP points. Shippers will have access also to the new Tex Mex trackage rights connection with KCS at Beaumont, TX, and to BNSF as a replacement for SP for Laredo traffic routed over Tex Mex. There will also be new single-line intermodal and carload service between Laredo and the West Coast. Shippers via El Paso will have two strengthened rail alternatives, with UP/SP and BNSF single-line service to the Pacific Northwest and Western Canada, upgrading of the SP lines west to Colton and northeast to Kansas City, new BNSF single-line service to New Orleans, and shorter routes for Southern Idaho grain, Wyoming soda ash and other products. Finally, shippers via the Western Mexico gateways that are solely served by SP--Nogales and Calexico--will gain single-line access to hundreds of UP points, including Midwest grain origins, Pacific Northwest points and Canada gateways.

BNSF will also gain trackage rights access to Brownsville, and shippers will gain single-line access to BNSF points via that gateway, rather than having single-line access only to UP and SP points. At Eagle Pass, the settlement will convert BNSF's access from haulage via a Caldwell junction to more direct trackage

rights, efficiently linking Eagle Pass with all points on the BNSF system, including New Orleans. BNSF will also serve San Antonio en route to Eagle Pass, which will allow it to mount a more effective operation.

3. **Expanded Market Coverage**

The expanded coverage that common control promises will have numerous beneficial impacts.

International Markets. The UP/SP merger transaction will foster the goal of North American economic integration embodied in the NAFTA agreement by greatly strengthening competition for traffic to and from both Canada and Mexico. The proportional rate arrangement will allow UP/SP to compete via Portland for traffic to and from BNSF's Western Canada gateways, including lumber originating on BC Rail and Alberta grain and chemicals originating on CN. There will be stronger rail competition at every UP and SP gateway to Mexico as a result of the merger and the BNSF agreement, and the Tex Mex trackage rights we have imposed. Overall, BNSF's much-expanded access to Mexico, as well as within Texas and at New Orleans, will bring greater balance to the competition for Mexican rail traffic, which at present is largely handled by SP to and from points to the west and UP to and from points to the north and east.

The more efficient Mexican routings for both UP/SP and BNSF will help improve the rail share of traffic to and from Mexico. Today, trucks dominate this traffic. Even at Laredo, the most efficient Mexican rail gateway, trucks handle approximately 86% of the cross-border traffic. Upgrading the Southern Corridor lines, instituting new Laredo-California intermodal service, and greatly improving the efficiency of operations in the Laredo-Memphis-St. Louis-Chicago corridor will give rail a much better ability to capture a larger share of this market.

Intermodal. The merger and the BNSF agreement will create competitive benefits for intermodal shippers: third-morning services that will for the first time challenge BNSF's dominance in the Midwest-California markets; the ability of both UP/SP and BNSF to link all the West Coast ports with short, fast routes to all the midcontinent gateways from Chicago to New Orleans; construction of a new Inland Empire terminal east of Los Angeles; two new, truck-competitive, single-line services in the I-5 Corridor from Seattle/Tacoma to Los Angeles, where none exists now; new Pacific Northwest-Phoenix-El Paso-Texas service, made possible in part by the ability to support train connections at the new Inland Empire terminal near Colton rather than at Los Angeles; better terminal access for UP/SP in Chicago, Portland and Seattle, and for BNSF in Oakland and Los Angeles; better equipment availability, thanks to new repositioning capability and other efficiencies; new California-Laredo service; much-improved Twin Cities-Kansas City-Texas service; new Upper Midwest-Phoenix service; faster and more frequent Los Angeles-Dallas and Los Angeles-Memphis service; higher-quality service in many lanes as a result of combining and improving UP and SP terminals; and improved schedules, train frequency, and reliability in virtually every rail corridor in the West.

Intermodal is perhaps the area where BN and SF gained their greatest competitive advantage by merging, and where a UP/SP merger is most needed to meet the competitive challenge of the new BNSF system. By merging, BNSF created a rail system that serves all major West Coast ports, with superior service to Chicago, Kansas City, St. Louis, Memphis, Dallas and Houston, new single-line service to Birmingham, outstanding terminals at all of those points (e.g., the new SF Alliance terminal near Dallas/Fort Worth), and the financial strength to invest in further technological and service improvements.

SP is especially vulnerable in this area. Because of its service weaknesses, it has been unable to compete for high-end transcontinental intermodal traffic. In part because of the advantageous location of its ICTF facility in Los Angeles, SP has held on to a large share of its international container business, particularly in the Southern Corridor, but now major shipping companies have created, or are in the process of creating, on-dock loading capability at the Ports of Los Angeles and Long Beach, which will undercut the advantage that the well-located, state-of-the-art ICTF facility has conferred on SP since it opened in 1984.

Food Products. Competition will be stronger for food products shipments throughout the West. California and Pacific Northwest perishables, frozen foods, canned goods and other food products will move over shorter, faster routes to the Midwest, and on new north-south single-line routes in the I-5 Corridor. Equipment supply, which is crucial to food products shippers, will be greatly improved. With the rectification of SP's inadequate service and the institution of new carload train services such as a new direct Roseville-Chicago carload train and a second daily North Platte-Conrail run-through train, large volumes of food products will return to boxcar handling on the merged system. Upper Midwest food products producers will gain single-line access to SP markets in the West and Southwest, and to additional Mexican gateways. And, BNSF, which is already a very strong competitor for this traffic, will be even stronger after the settlement, with new I-5 and Central Corridor routes.

Forest Products. Lumber and wood products originate primarily in the Pacific Northwest and Western Canada, and in the Southeast. Canadian products, handled to the Midwest by CN, CP and BNSF, have increasingly been eclipsing Pacific Northwest products. South Central and Southeastern output has also been making inroads against the Pacific Northwest. SP's service in Oregon and Northern California has deteriorated, and much SP volume has been lost to reload centers and trucks.

The merger will greatly benefit lumber and wood products producers. SP Pacific Northwest producers will gain much shorter routes to the Midwest and the South Central region, and single-line service to UP destinations in the Midwest and elsewhere. UP Pacific Northwest producers will gain new access to California and Arizona, a shorter route to Texas, Louisiana and Eastern Mexico, and single-line access to SP receivers. SP's poor service and equipment supply problems will be remedied, enabling lumber shippers to avoid the added expense of truck-rail reload programs. South Central and Southeastern producers will gain shorter routes to Southern California, better service in the Houston-Memphis-St. Louis-Chicago corridor, better equipment supply, and wider access to end markets. The BN/SF merger is further strengthening BNSF's already very strong position as a competitor for lumber and wood products traffic, and the efficiencies of the merged UP/SP will enable it to meet that competitive challenge.

There will be a similar enhancement of competition for paper and paper products traffic. New paper production tends to be concentrated in the South Central and Southeast regions (where KCS, IC and BNSF, among others, are strong competitors) and in the Upper Midwest and Canada. South Central and Southeastern paper mills will enjoy the same service and equipment benefits as lumber producers in those regions, and 2-to-1 mills will receive stronger competition from UP/SP and BNSF as a result of the settlement. Upper Midwest paper producers will have shorter, faster routes to Northern California and better service to the South Central region. Scrap paper moves in a variety of markets, and will benefit from the elimination of interchanges between UP and SP and better equipment supply.

Autos. Two decades ago, SP was the dominant automotive carrier in the West, with large volumes to Portland, the Bay Area, Los Angeles, Phoenix, and Texas, and direct service to and from four automobile assembly plants in California. Since then, SP has fallen to a very small share of western rail-handled auto movements (less than 10% of automotive business handled by western railroads in 1994) as a result of the closure of three of the four California plants, deregulation (which has allowed for more creative contracting by the auto companies), the general decline in SP's service levels, and its financial inability to make major investments in new auto facilities and auto-handling freight cars.

As in the intermodal arena, the UP/SP merger will create a real competitive contest of equals for automotive traffic, rather than one in which BNSF is dominant and SP is a weak third. UP/SP will be able to tie points such as Seattle and Phoenix into an efficient, comprehensive transportation network for auto shippers, as BNSF already can. Shorter routes and expanded single-line service will speed the handling of motor vehicles, yielding major savings in inventory and equipment costs. For example, UP/SP will run a new through 70-hour auto train from Chicago to the merged system's Milpitas facility in the Bay Area, with blocks of automobile-carrying freight cars for Denver, Salt Lake City, Martinez (to serve the Benicia facility) and Milpitas, and a similar through train from Kansas City to the Bay Area.

The upgrading of the Tucumcari line, and of the Colton-El Paso line, will make UP/SP more competitive in the key Kansas City-Los Angeles corridor, with new through auto trains both from Kansas City to Southern California and from Chicago to Southern California. There will also be dedicated auto trains from Dallas/Fort Worth to Conrail destinations; from Chicago to San Antonio, including Mexican business; and from GTW at Chicago to the major auto facilities at Reisor, Louisiana, and Arlington, Texas.

The merged system will be able to offer the combined strengths of UP's and SP's auto ramps, and will have the financial wherewithal to make improvements in those ramps and to invest in new ones. The merged system will be better able to invest in improved bi-level and other specialized cars, and to reduce shippers' equipment costs by improving cycle times and efficiently repositioning equipment. Service to and from Mexico, where many of the auto companies have located manufacturing facilities, will be improved and, under the BNSF agreement and Tex Mex trackage rights, competition for Mexican traffic will be strengthened. Shipper concerns about the quality of SP service will be overcome.

Chemicals/Plastics. The merger and the BNSF agreement will greatly increase UP/SP competitiveness for chemical and plastic traffic, both in the Gulf Coast and elsewhere, enhancing the position of UP/SP-served chemical and plastic producers in their end markets. A particular concentration of chemical and plastic production is on the Texas/Louisiana Gulf Coast, where UP and SP, as well as BNSF, KCS and IC, each serve numerous plants. Most of the Texas and Louisiana plants are located on water, and can and do use low-cost water transportation for their incoming and outgoing product in lieu of rail if rail is not fully competitive.

Both UP and SP producers will gain greatly improved operations, including new run-through operations to eastern roads in the Houston-Memphis-St. Louis-Chicago corridor, shorter routes to the Pacific Northwest, faster turn times on costly, shipper-owned equipment, and additional SIT yard opportunities. Gulf Coast shippers will save a day in transit time to and from both the Memphis/St. Louis/Chicago gateways and the West Coast. Also,

under the BNSF agreement and additional conditions we have imposed, BNSF will be a much stronger competitor for Gulf Coast traffic with new access to major chemical and plastic plants at, among other locations, Mont Belvieu, Seldon, Bayport, Corpus Christi, Orange, and Amelia, TX, and Lake Charles, LA; new single-line access to New Orleans; a new direct route to Memphis; and shorter routes to the key gateways of St. Louis and Chicago.

Chemical producers elsewhere also will benefit competitively. For example, Wyoming soda ash producers will gain shorter routes to Northern California markets, Texas and Louisiana markets, and new single-line service to Arizona, New Mexico, SP-served Mexican gateways, and other SP destinations not served by UP.

Grain. UP is a major originator of wheat, corn, barley and other grains, whereas SP, which originates very little grain, serves major end markets for grain that UP cannot reach. Among these are the feeder markets in California's San Joaquin and Imperial Valleys, Arizona, the Texas Panhandle, and Mexico. BNSF is a major grain originator and serves all of these end markets. Thus, the merger will create new single-line service opportunities for UP grain producers and SP grain consumers, and will provide stronger competition to BNSF in grain markets it already serves on a single-line basis. The merger also will create a new capability to move 286,000-lb. cars of wheat and feed grains to Houston and other ports for export, another capability that BNSF already has.

Coal. The merger, by creating new single-line routing opportunities and operating efficiencies, will benefit producers and consumers of both the Utah and Colorado coals that SP originates and the PRB coal that UP originates.

Utah and Colorado coal will particularly benefit. Smoother operations in Utah and a direct single-line route to the Ports of Los Angeles and Long Beach will promote Utah and Colorado coal exports to Pacific Rim countries. There will also be a much shorter single-line route from Utah to domestic coal users in Southern Nevada and Southern California. Single-line access to UP-served consumers in the Midwest and South Central regions and to Mississippi River barge terminals will promote additional domestic and export opportunities. Handling of eastbound movements of Utah and Colorado coal via Denver, and thence on either UP's "KP" line across Kansas or the UP mainline from North Platte to Chicago, will provide much better service than SP's current route via Pueblo, Topeka, and Kansas City, which is mountainous, slow, and congested. Also, coal producers on the URC will have access to BNSF, which will open up new domestic and export opportunities.

PRB coal users will benefit also from the new Kansas City bypass and from other efficiencies that will shorten cycle times and increase reliability.

Metals and Minerals. Metals and minerals producers throughout the West will enjoy more competitive rail service as a result of the merger. The Arizona and New Mexico copper industry will benefit from the upgrading of the Colton-El Paso and El Paso-Dallas lines and shorter routes to Memphis and the Southeast. The varied minerals producers in Wyoming, Utah and Nevada will benefit from improved operations of the merged system across the Central Corridor, and in other ways as well. Nevada barites producers and Utah and Nevada copper producers will be served by both UP/SP and BNSF, opening up new single-line opportunities for their production and inputs. Midwest steel producers will benefit from shorter routes to Northern California and improved service to the South Central region. Traders and consumers of metal scrap will gain a multiplicity of new single-

line service opportunities. SP metals shippers will benefit from access to UP's gondola fleet. More metals and minerals will move at lower cost as a result of the merged system's expanded triangulation and backhaul opportunities.

APPENDIX E: DUOPOLY ISSUES

OVERVIEW

It is true that tacit collusion is more likely in two-firm markets, where one firm can anticipate the other's response, than in multi-firm markets. Multi-market contact, which will take place here, can also facilitate tacit collusion. Nevertheless, other important factors indicate that these carriers are more likely to compete than tacitly collude. One significant factor here is the heterogeneity of rail service,[304] which would make it very difficult to maintain a tacitly agreed rate level.

Another factor making tacit collusion unlikely is the secrecy about rail price and service offerings that now characterizes the rail industry. Contracts between railroads and shippers for major movements are now the rule, and railroads are no longer required to file public tariffs for the remainder of their traffic. Contracts often incorporate detailed specifications for a wide variety of service aspects. Confidentiality clauses in those contracts effectively deter collusive action because information about these competitive actions is shielded from competitors.[305]

The significant economies of density and of scope exhibited by railroads also make tacit collusion less likely. A given increment of traffic represents not only the contribution to be earned from that increment, but additional contribution on other traffic, whose average costs are reduced. These economies create strong incentives for railroads to compete for all profitable volumes, rather than tacitly agreeing to an above-market rate level that restricts service. Given all these factors, we do not think that tacit collusion is a likely outcome for this traffic.

We do not believe that trackage rights agreements tend to facilitate collusion either. Although the landlord is in a position to be somewhat better informed than it might otherwise be--it knows the tenant's capacity limitations and some elements of its cost structure, and it can more readily observe its market participation--trackage rights tenants and landlords do keep secret many aspects of service from each other in bidding for traffic. We do not believe that trackage rights, even on the scale involved here, will dampen competition.

EMPIRICAL RATE STUDIES

Studies Aimed At Measuring 3-to-2 Effects. Here we assess a number of studies submitted by parties and aimed at estimating whether shippers whose rail alternatives are reduced from three to two by this merger are likely to face increased rates. In general, the studies compare rates in markets served by three railroads with rates in markets served by two. One common problem with these studies is the use of a static context to project post-merger rate increases. Protestants' studies neglect to account for a key dynamic element of this merger, the dramatic cost reductions it will make possible. They generally fail to acknowledge that any limited ability this merger creates to raise

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[304] Service dimensions include car types and supply, schedules, terminal support, and car repositioning for customers. The various dimensions of service constitute different avenues of response available to rivals, complicating any one firm's efforts at inflicting retaliatory losses on the other to enforce non-competitive rate levels.

[305] Indeed, this is the main reason for the protective orders that we have entered in this proceeding.

rates over costs will be offset to the extent the merger results in significant reductions in applicants' costs. Another dynamic element of this merger, the deteriorating condition of SP and the effect this has on rail pricing, is discussed in a separate section.

As we explain below, each study also suffers from specific infirmities. McDonald's study (for KCS) has limited utility because it is based solely on rail grain movements. Even for that commodity, certain data limitations have led to an upward bias in its 3-to-2 rate projections. Majure's study (for DOJ) updates certain of McDonald's results for western wheat originations. This study is so inherently flawed that it cannot be given much substantial weight. KCS witness Grimm's 1992 study does not present sufficient information for us to use its results to measure merger-related competitive harm in this proceeding. Further, it contains key findings that were recently rejected by the ICC in BN/SF, slip. op. at 73 n.94. And Kwoka's study (for Dow) must be given little weight because it is not based on rail industry data.

a. MacDonald. KCS witness MacDonald analyzed rail movements of wheat, corn, and soybeans. His analysis resulted in estimates of rate differentials between markets served by three carriers and markets served by two carriers of 6.7% for corn, 10.9% for wheat, and intermediate results for soybeans. To put these numbers in perspective, we note that, even under DOJ's broad definition, there would be only $129 million of 3-to-2 wheat traffic, and $50 million of 3-to-2 corn traffic that could be affected by this merger.

MacDonald used 1983 ICC Waybill Sample data for one study, and 1981-85 data for another. The origin areas were Crop Reporting Districts (CRDs), criticized by applicants as unrealistically large. MacDonald's objective was to determine the statistical relationship between the number of origin rail carriers and rates. Another important feature of his analysis was the use of a variable representing distance from waterways.

MacDonald's use of the Waybill Sample was proper, despite strong criticism on this point from applicants.[306] Of somewhat greater concern is his use of CRDs, which may be so large that where MacDonald counts them as two railroad areas, they may be closer to one railroad area. This would tend toward overstatement of 3-to-2 effects.[307]

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[306] One charge was that MacDonald ignored this agency's guidelines respecting level of detail at which inferences can be drawn given sample variability. MacDonald replies, correctly, that his statistical analysis took proper cognizance of this in performing significance tests. The other was that waybill data mask true contract movement revenues. MacDonald not only replied, again correctly, that his data came from years when this was not a problem, but also performed special tests to verify lack of masking.

[307] An empirical analysis that overstates the geographic scope of rail markets understates the true level of concentration affecting rates. The way this bias affects estimates of rate changes in going from three to two railroads is as follows: the analysis classifies some markets as having three railroads when the underlying structure is that of two railroads; likewise, it classifies some markets as duopolies when the true underlying structure is monopoly. Then, rather than estimating the change from three to two railroads, as intended, the analysis actually measures a change from, say, 2.5 to 1.5 railroads. All the studies presented in this record indicate that 2-to-1 price

(continued...)

Another error that could result in overstatement of impacts on rates is his failure adequately to account for transit movements. In such movements, a first waybill is cut, based on a local rate that is normally relatively high on a per-mile basis, for the movement to the transit point. Because the destination has not yet been determined, it is impossible to determine what through rate might be applicable. When the grain is shipped from the transit point to its ultimate destination, the movement is rebilled, usually at a lower rate per mile, as a through movement from origin to destination. When the second bill of lading is cut, only the transit balance, the difference between the original local rate and the ultimate through rate, is shown on the bill. This balance may be very low, and in some cases will be negative. And as applicants point out, there tend to be more railroads providing service associated with these movements from transit points, that are in turn attributed with deceptively low transit balance rates. The net effect is to accord too strong a rate effect to a reduction in the number of participating railroads. It also should be kept in mind that MacDonald's study is only useful for analyzing grain transportation markets.

b. Majure. Although Majure predicts more than $800 million of competitive harm from the merger, his study contains major conceptual errors that make it totally unreliable. Majure derives his estimate by predicting a 19.4% rate increase estimate for $1.5 billion of 2-to-1 traffic, and by predicting a 10.9% increase for $4.75 billion of 3-to-2 traffic. Even if we assume that those projected increases correctly predict the price effects of going from 2-to-1 and 3-to-2, and that DOJ has correctly measured the amount of 2-to-1 and 3-to-2 traffic at risk, there are still major problems with Majure's calculations. A basic flaw is that the $291 million rate increase predicted for 2-to-1 traffic presumes either total ineffectiveness of BNSF service under trackage rights or full collusion between UP/SP and BNSF, allowing both carriers to implement pure monopoly pricing. Because the conditions we are imposing will ensure that BNSF will be an effective replacement for SP with respect to this traffic, we cannot give any weight to Majure's estimate of 2-to-1 harm.

Concerning 3-to-2 traffic, we would begin by removing from the traffic base that Majure assumes will be affected the intermodal and automotive traffic, comprising over 70% of the total 3-to-2 traffic by DOJ's estimates. Shippers moving this traffic, which enjoys vigorous motor competition,[388] uniformly support the merger. There is simply no basis for assuming that these shippers will be charged higher rates after the merger.

We also reject Majure's application of the updated MacDonald study results, which were based only on wheat and corn traffic, to 3-to-2 traffic with markedly different transportation

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[387](...continued)
effects are much larger than 3-to-2. For this reason, overstating the geographic scope of rail markets will tend to overstate 3-to-2 pricing effects.

[388] Evidence submitted by DOT shows why DOJ's assumption that trucks do not compete with rails at distances exceeding 500 miles even for truck-competitive intermodal traffic is incorrect:

> A well-received 1990 study commissioned by DOT's Federal Railroad Administration determined that this [rail intermodal] service does not begin to compete with trucks (on a cost basis) until the rail linehaul exceeds 730 miles, and that assumes a dray of only 30 miles at either end of the move.

DOT-4 at 17 n.17.

characteristics. The geographic market definition that is selected for a particular study strongly influences its estimated pricing results. Although applicants' definition focuses on carriers to which shippers have direct access, Majure and other protestants advocated a broader geographic definition intended to reflect distances that shippers can truck to competing railroads.[309] In the case of corn and wheat, we agree that the broader definition more accurately reflects the grain shippers' transportation options. (For some unexplained reason, however, in his own study Majure did not use the broad definition he advocates, but used a narrow definition, the 6-digit SPLC, in deriving his rate projections.)

Almost all grain is trucked from the farm to grain elevators on rail sidings or to waterways for barge transport. This means that, within certain limits, a farmer can ordinarily truck the grain to whatever available carrier offers the price and service that it desires. If there are three railroads in a particular geographic area, it is likely that, all things being equal, they will compete on an equal basis for grain traffic. Although almost all grain shipments originate with a truck movement, truck movements of grain do not tend to be competitive over very long distances, and barge and rail options usually have a significant advantage for long hauls. The transportation market for other 3-to-2 commodities is very different from that for grain, and price effects derived from 3-to-2 grain studies will dramatically overstate 3-to-2 price effects for other commodities. As we have noted, some of these commodities are extremely truck competitive. In those cases, the number of available railroads is a much less important variable in the pricing equation, and any 3-to-2 pricing effect will be negligible. Further, for movements that are not truck competitive, the number of nearby railroads will provide far less effective competition, primarily via potential build-outs or transloading operations, than is the case for grain. In such situations, any 3-to-2 pricing impact derived from grain studies will again dramatically overstate the likely 3-to-2 price effect.

Majure merely updated MacDonald's study of western wheat originations, using 6-digit SPLCs rather than CRDs. He was unable to incorporate an explanatory variable for distance from waterways, as MacDonald did. He ran tests with data from those railroads that do not mask contract rate information.[310] His estimate of percentage rate impact of going from 3-to-2 railroads is 10.9%. Majure's study is undermined by his omission of a factor adjusting for distance from waterways. This omission results in an overstatement of 3-to-2 impacts. Nearby waterways significantly lower grain transportation rates. Majure has speculated that fewer railroads operate near waterways, since "whenever water transportation is in the market, fewer railroads could afford the fixed costs of participating in that market." DOJ-8 at 34 n.33. But, applicants have shown that areas near waterways are served by a greater number of railroads. Majure has failed to recognize that much of our nation's early urban growth centered on the confluence of rail and water transportation. UP/SP-231, VS Caron, at 3-5. Thus, the lower rail rates Majure ascribes to the presence of more railroads could just as well be caused by the presence of nearby barge competition. In sum, there are many reasons to conclude that his entire 3-to-2 traffic analysis is inherently flawed.

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[309] Protestants have used the available geographic standards for collecting and disseminating relevant data (BEAs, SPLCs, or CRDs) that they believe most accurately reflect the ability of shippers to reach alternative carriers.

[310] The railroads that mask their data by reporting coded contract revenues are CNW, Conrail, NS, CSX, and UP.

c. **Grimm.** Some of KCS Witness Grimm's studies come under attack for relying on pre-Staggers Act data, but he has also conducted studies using post-Staggers Act data. Unlike MacDonald's study, Grimm's studies are not limited to grain. They use the number of independent routings between origin and destination as an explanatory variable. His 1992 published study was based on rate data obtained from railroads directly rather than from the Waybill Sample. He concluded that the number of independent routings affects rail rates. The study does not present sufficient information for us to use its results to measure merger-related competitive harm in this proceeding. Further, it contains key findings that were recently rejected by the ICC in BN/SF, slip. op. at 73 n.94.

d. **Peterson.** Applicants' witness Peterson contributes a study based on a 100% UP traffic data base. It compares UP's average revenue per ton-mile where (1) UP is the sole carrier serving; (2) UP and one other carrier serve; and (3) UP and two other carriers serve. The greatest differential, as expected, is between the one and two-railroad categories. But from 3-to-2 the differential was minimal: less than 1%. This result is not surprising to us. If a shipper has direct access to three railroads and must go down to two, it still has alternative rail service to which it can switch at low (if any) cost.

e. **Kwoka.** Dow's witness Kwoka reported on a 1979 cross-industry study showing that the market share of the top two firms better explains price/cost margins than more commonly used concentration measures such as the HHI. To Kwoka this underscores the need to inject a third mid-ranked firm more likely to compete than coordinate with the other two. Because Kwoka's approach is outside the realm of the rail industry, we find it difficult to make relevant inferences. The focus in this case is effects of fewer rail participants in individual markets, not of higher concentration across whole industries.

Studies About The Role Of SP In The Pricing Equation. Though all the foregoing studies bear on the question of 3-to-2 pricing impacts generally, others focus on SP's role in particular 3-to-2 markets.[111] This is of special interest because it is SP's competitive presence that is being lost. There is much discussion in the record as to how aggressive a

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[111] The studies by Peterson and by Majure discussed above do include an ancillary analysis of the difference made by SP. Peterson breaks down his 2-to-1 category of traffic (from the 100% UP 1994 traffic data) into a UP/SP category and a UP and one other railroad category. The category involving SP as the second competitor has a revenue per ton-mile that is higher than the category involving other carriers (UP/SP-231, RVS Peterson, at 92). A caveat to this analysis is that it does not correct for movement characteristics that might affect the level of rates but might differ between SP and other railroads (e.g., commodity, costs, length of haul, etc.).

Majure included SP's identity as originating carrier as an explanatory variable in his analysis. He found essentially that SP was a less effective competitive restraint in two carrier markets than other carriers. (DOJ-8, VS Majure, at 36 n.37).

Applicants' witness Bernheim has explained that any lower prices offered by SP are likely due to its inferior service. He also notes that Majure's estimating equations contain a variable to adjust for cost differences among carriers. He asserts that this means that Majure has merely estimated that SP's rates would be lower than those other carriers if its costs were the same as the costs of other carriers. But, its costs are about 20% higher. UP/SP-260 (App. E), Bernheim Dep., at 139-42.

competitor SP is today. Applicants view SP as a constrained competitor, one unable to replicate the quality levels of competing railroads and whose effectiveness is further hampered by the higher cost structure associated with an antiquated plant. Protestants describe SP as a maverick, aggressively offering rate reductions in markets that would otherwise be much less competitive. We agree with applicants and interpret lower rate levels offered by SP in certain examples as indicative of the lower quality product it has been constrained to offer. Moreover, 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.

a. **Ploth.** A study was submitted by Ploth for KCS concerning military traffic, on which very detailed bidding information is accessible where similar information from the private sector is highly secretive. Ploth used a DOD data base concerning its movements, which showed rail transport bids of various competing carriers. Ploth shows point-to-point summaries of pricing bids and routings. He finds SP to rank highest in average savings per bid. These results are not surprising, because, as applicants point out, special circumstances govern DOD procurement. DOD must award contracts to the lowest bidder. For repetitive business, however, the procedure is to line up back-up providers that can keep supplying if the initial provider fails to deliver. This happens often with SP; it runs out of equipment for a move, and other carriers are relied on for the balance of the business (UP/SP-231, RVS Gazzetta, at 11).

Bernheim for applicants criticizes Ploth's data. He argues that the number of independent routes, not the number of bids, should be the prime explanatory variable (to allow for potential as well as actual bids). In general, Bernheim's results show that rates are nearly 30% lower where there are two fully independent routes rather than just one. Beyond that, especially with inclusion of SP, Bernheim notes, the effect is negligible. The results do not show aggressive pricing on the part of SP. Bernheim's results appear in line with the general pattern we discern of SP as working under constraints making it unable to exert significant competitive pressure on other participants in the same market.

b. **Bernheim.** In addition to assessing other parties' rate studies, Bernheim also submitted, on behalf of applicants, a study that focuses on 3-to-2 impacts on automotive traffic, with special focus on SP's competitive influence. He used UP's 1994 100% traffic data base to explain the effects on UP's revenue per ton-mile of various categories of market participation. Bernheim found that the 2-to-1 differential is much greater when UP competes against a carrier other than SP. Where SP appears as a third competitor, rates are on average higher than when UP competes with a second carrier only, not SP (24%). Bernheim infers that three carrier markets likely involve dilution of density and higher unit costs and that SP's presence, again, is ineffective in pressuring rates down. This study seems to indicate that the loss of SP's competitive presence in 3-to-2 markets is relatively unimportant because of SP's poor service quality and high cost levels.

c. **Conrail.** Conrail adduces specific rate comparisons to demonstrate that SP is an aggressive competitor (CR-22, VS Bridges, at 2-3; CR-22, VS McNeil, at 5-6). It reports from the vantage point of a co-bidder on joint movements, where shippers receive bids for individual legs of the movements. The focus is on international container traffic from Southern California, through the Southwest, to the East Coast (land bridge movements) and automotive traffic moving West Coast to Midwest and Midwest to Mexico. Conrail claims SP has the best routes for

such traffic and that its lower bids do put pressure on others, specifically, UP, to come up with lower bids than otherwise. Conrail's anecdotal evidence here is not very persuasive, especially when compared to applicants' rate study of all its 3-to-2 automotive traffic, which reaches the contrary result.

APPENDIX F: FINANCIAL RATIOS

Table 1
UPC/SPR
Various Pro Forma Results
(Dollars in millions)

	Base Year	Year 1	Year 2	Year 3	Year 4	Year 5	Normal Year
I. Pro Forma Fixed Charge Coverage Ratio							
1. Income Available for Fixed Charges	$1,798.0	$1,862.0	$2,094.3	$2,226.2	$2,257.5	$2,275.0	$2,275.6
2. Fixed Charges	594.1	722.6	761.8	777.1	765.9	744.9	711.4
3. Times Fixed Charge Coverage (L1/L2)	3.0	2.6	2.7	2.9	2.9	3.1	3.2
II. Pro Forma Cash Throw-Off-To-Debt Ratio							
1. Net Income	$744.2	$704.0	$823.7	$896.0	$922.4	$946.2	$967.3
2. Depreciation & Amortization	831.3	918.9	945.5	959.2	966.3	967.8	966.1
3. Deferred Income Taxes	253.9	247.5	292.5	283.2	274.6	259.4	246.2
4. Gain on Property Sales, Other, Etc	19.1	(84.6)	(64.2)	3.2	10.3	11.2	12.3
5. Cash Flow From Operations (L1+L2+L3-L4)	1,848.5	1,785.8	1,997.5	2,141.6	2,173.6	2,184.6	2,191.9
6. Long-Term Debt Due Within One Year	581.7	581.7	581.7	581.7	581.7	581.7	581.7
7. Cash Throw-Off-To-Debt Ratio (L5/L6)	3.2	3.1	3.4	3.7	3.7	3.8	3.8
III. Pro Forma Operating Ratio							
1. Operating Revenues	$10,629.1	$10,698.7	$10,791.4	$10,814.6	$10,838.6	$10,861.0	$10,861.0
2. Operating Expenses	8,810.6	8,846.1	8,687.2	8,569.0	8,561.7	8,566.6	8,564.8
3. Operating Ratio (L2/L1)	82.9%	82.7%	80.5%	79.2%	79.0%	78.9%	78.9%
IV. Pro Forma Return on Equity							
1. Net Income	$744.2	$704.0	$823.7	$896.0	$922.4	$946.2	$967.3
2. Shareholders' Equity	7,423.6	7,383.4	7,463.0	7,614.9	7,793.1	7,995.2	8,218.3
3. Return on Equity (L1/L2)	10.0%	9.5%	11.0%	11.8%	11.8%	11.8%	11.8%
V. Pro Forma Debt to Debt Plus Equity Ratio							
1. Long-Term Debt Due After One Year	$7,447.5	$7,902.1	$8,074.8	$7,936.0	$7,682.4	$7,282.2	$6,884.5
2. Shareholders' Equity	7,423.6	7,383.4	7,463.0	7,614.9	7,793.1	7,995.2	8,218.3
3. Total Debt Plus Equity	14,871.1	15,285.5	15,537.8	15,550.9	15,475.5	15,277.4	15,102.8
4. Ratio of Debt to Debt Plus Equity (L1/L3)	50.1%	51.7%	52.0%	51.0%	49.6%	47.7%	45.6%

NOTES TO TABLE 1

Sources of Data

The data in this table were derived and computed from information contained in the following submissions by applicants: (1) Volume 1 of the Application, Appendix B (pro forma balance sheets for the base year, the first 5 years after the merger, and the normal year); and (2) Volume 1 of the Application, Appendix C (pro forma income statements for the base year, the first 5 years after the merger, and the normal year).

Base Year Data

The data shown in this table for the base year are from the 1994 10-K Annual Reports for UPC, CNWT, and SPR. These data were adjusted to account for the UP/CNW merger, which occurred during 1995. They were also adjusted to record after-tax losses and benefits associated with the BN/SF merger, elimination of CNWT's 1994 special charges, elimination of losses from discontinued operations associated with UPC's waste management operation (sold at year-end 1994), recordation of the spin-off of Union Pacific Resources, elimination of SP's after-tax gains on property sales, and elimination of the cumulative effect of accounting changes recorded by SPR in 1994.

Data Subsequent to Base Year

Data subsequent to the base year (i.e., data for the first 5 years after the merger and the normal year) give effect to the estimated benefits from the merged operations, including net revenues from diverted traffic and net receipts from trackage rights which, while not recognized as public benefits, are private benefits realizeable from the merger. These data also incorporate changes to equipment costs, debt and interest expense, deferred income taxes, revenues, expenses, and income resulting from the merger.

APPENDIX G: ENVIRONMENTAL MITIGATING CONDITIONS

The environmental mitigating conditions imposed in Finance Docket No. 32760 are categorized as follows: (A) Systemwide, (B) Corridor-Specific, (C) Rail Line Segments, (D) Rail Yards and Intermodal Facilities, (E) Proposed Abandonments, and (F) Construction Projects. These mitigation conditions are numbered sequentially.

A. SYSTEMWIDE MITIGATION

The following systemwide mitigation conditions apply to rail line segments, rail yards, intermodal facilities, and rail line construction projects on new right-of-way.

1. UP/SP shall adopt UP's existing formula-based standards for track inspection for all rail lines of the merged system, which will increase the frequency of inspections on SP rail lines.

2. UP/SP shall adopt UP's existing tank car inspection programs for all appropriate facilities on the merged system.

3. For all highway grade crossing signals, UP/SP shall provide visible instructions designating an 800 number to be called if signal crossing devices malfunction.

4. UP/SP shall provide 800 numbers to all emergency response forces in all communities. These numbers shall provide access to UP/SP supervisors who shall provide train movement information and work cooperatively with communities in emergency situations. These numbers are not to be disclosed to the general public.

5. UP/SP shall participate on a systemwide basis in the TRANSCARE program to develop hazardous material and emergency response plans in cooperation with communities.

6. UP/SP shall redistribute personnel to respond to hazardous materials emergencies in unprotected areas on the SP rail lines, such as in Arizona, New Mexico, and West Texas.

7. UP/SP shall adopt UP's training program for community and emergency response personnel for locations on the SP rail lines, and include personnel from SP served locations in UP's school at Pueblo, CO, for additional emergency response training.

8. UP/SP shall adopt existing UP training and operating practices that are designed to reduce locomotive fuel consumption and air pollution. These include: throttle modulation, use of dynamic braking, increased use of pacing and coasting trains, isolating unneeded horsepower, shutting down locomotives when not in use for more than an hour when temperatures are above 40 degrees and maintaining and upgrading SP locomotives to UP standards.

9. As suggested by UP/SP, UP/SP shall extend to SP rail lines UP's program of closing boxcar doors on empty cars before movement on the system in order to reduce wind resistance and, thereby, fuel consumption.

10. As suggested by UP/SP, UP/SP shall use its own security forces to conduct its own arrests and bookings, reducing reliance on local police forces.

11. UP/SP shall convert all railroad locomotives to the standards for visible smoke reduction that are established in the South Coast Air Quality Basin.

12. UP/SP shall adopt UP's existing policy of using head-hardened rail on curves in mountainous territory for SP rail lines to promote safer operations.

13. UP/SP shall comply with all applicable FRA rules and regulations in conducting rail operations on the merged system.

B. CORRIDOR MITIGATION -

General

The following mitigation conditions apply to the Central, Southern, Northern, Illinois-Gulf Coast, and Pacific Coast (I-5) Corridors.

14. UP/SP shall implement the draft emissions standards for diesel-electric railroad locomotives that the Environmental Protection Agency (EPA) has developed. It is the Board's understanding that EPA plans to propose these standards and make them available for public comment in December 1996. Under these standards, UP/SP shall utilize newly manufactured or re-built locomotives that are more fuel efficient and produce less emissions. When this equipment becomes available, UP/SP shall assign these locomotives on a priority basis to the corridors or portions thereof specified below:

- **Southern Corridor:**
  - Fort Worth, TX, to West Colton, CA.
- **Central Corridor:**
  - Cheyenne, WY, to Hinkle, OR.
  - Chicago, IL, to Fremont, NE.
  - Ogden, UT, to Roseville, CA.
  - Denver, CO, to Grand Junction, CO.
- **Pacific Coast (I-5) Corridor:**
  - Seattle, WA, to West Colton, CA.
  - Sacramento, CA, to Bakersfield, CA.

15. To further facilitate the improvement of air quality for specific locations, UP/SP shall consult with appropriate state and local air quality officials in the States of Arizona, California, Colorado, Illinois, Nevada, Oregon, Texas, Washington, and Wyoming, through which the Pacific (I-5), Southern, Central, and Northern Corridors extend in part. UP/SP shall advise SEA as to the status and the results of these consultations.

16. To address noise impacts, UP/SP shall consult with the affected counties that have communities that would experience an increase of 3 dBA or more as a result of the increased rail traffic over rail lines in the States of California, Colorado, Illinois, Kansas, Louisiana, Nebraska, Nevada, Oklahoma, and Texas. If appropriate, UP/SP shall develop a noise abatement plan. UP/SP shall submit the result of these consultations to SEA who will review these findings with FRA.

Specific

The following mitigation conditions apply to specific rail line segments within the Central, Southern, and Illinois-Gulf Coast Corridors.

17. UP/SP shall give priority to equipping key trains, as defined by Union Pacific Railroad Form 8620, on the corridor segments listed below with two-way end of train devices. This requirement also applies to BNSF key trains operating between Iowa Junction, LA, and Avondale, LA.

- **Central Corridor**
  - North Platte, NE, to Oakland, CA (UP and SP).
  - Cheyenne, WY, to Denver, CO (UP).

- **Southern Corridor**
  - Houston, TX, to Avondale (New Orleans), LA (SP).
  - Iowa Junction, LA, to Avondale, LA, via Kinder and Livonia (UP).
  - Houston, TX, to West Colton, CA (SP).

- **Illinois-Gulf Coast Corridor**
  - St. Louis, MO, and East St. Louis/Salem, IL, to Houston, TX, and Avondale, LA (UP and SP).

C RAIL LINE SEGMENT MITIGATION

General

The following mitigation conditions apply to all of the rail line segments in the states identified below.

18. UP/SP shall consult with the states and appropriate local officials as well as FRA to develop a priority list for upgrading grade crossing signals, where necessary, due to increases in rail traffic resulting from the proposed merger. This process shall be undertaken for all rail line segments in the States of Arkansas, California, Colorado, Kansas, Nevada, Oregon, and Texas. UP/SP shall advise SEA as to the status and the results of these consultations.

Specific

The following detailed mitigation conditions apply to the specific rail line segments and/or locations identified below.

Martinez, CA, to Oakland, CA:

East Bay Regional Park District

19. UP/SP shall comply with the terms of the Memorandum of Understanding executed with the East Bay Regional Park District and UP/SP.

Roseville, CA, to Sparks, NV:

Town of Truckee

20. UP/SP shall comply with the terms of the Memorandum of Understanding executed with the Town of Truckee and UP/SP.

Placer County

21. UP/SP shall comply with the terms of the Memorandum of Understanding executed with Placer County and UP/SP.

City of Reno

22a. UP/SP shall operate no more than a daily average count of 14.7 freight trains per day through the City of Reno. (This reflects the Base Year daily average of 13.8 trains -- 12.7 freight trains and 1.1 passenger trains -- plus 2 additional freight trains.) The addition of two freight trains per day does not exceed the Board's threshold for environmental analysis at 49 CFR 1105.7(e)(5)(ii). The 14.7 average freight train count per day does not include the following types of movements: (1) maintenance-of-way trains, (2) light locomotive movements, (3) local and industry switching train movements, (4) emergency trains operated under detour authority, for snow removal, for fire or other natural disaster purposes, and wreck removal purposes. This condition will be effective upon consummation of the merger and will continue in effect for 18 calendar months in total.

22b. For the purpose of monitoring the preceding condition, UP/SP shall file on a monthly basis with the Board verified copies of station passing reports of train movements through Reno, NV, for each day of each preceding month in the specified 18-month period. These reports shall also identify those train movements, specified in the above condition, that are excluded from the 14.7 trains per day average count.

22c. UP/SP, in consultation with and subject to the approval of SEA, shall retain an independent, third-party consultant to prepare a specific mitigation study to address the environmental effects on the City of Reno of the additional rail freight traffic projected as a result of the proposed merger. This study shall be prepared under the sole direction and supervision of SEA. It shall include a final mitigation plan based on a further study of the railway, highway, and pedestrian traffic flows and associated environmental effects on the City of Reno. This study would tailor mitigation to address environmental effects such as safety, hazardous materials transport, air quality, noise and water quality. UP/SP shall comply with the final mitigation plan developed under this study.

The study, which shall be completed within 18 months from the date of consummation of the merger, shall include the following:

- Projected post-merger increases in rail freight traffic on the Sparks to Roseville line segment.
- Consultations with the City of Reno, Washoe County, the Federal Railroad Administration, affected Native American Tribes, and other appropriate Federal, state and local agencies, and other interested parties.
- Consultations with UP/SP.
- Review of all existing information and studies including those prepared by the City of Reno, Washoe County and UP/SP.
- Independent analyses.
- With respect to vehicular and pedestrian safety, mitigation measures that identify the number and location of highway/rail grade separations and rail/pedestrian grade separations in downtown Reno.
- Funding options.
- Submission of a draft study to the public for review and comment and then issuance of a final mitigation study.

22d. SEA will submit the final mitigation study and its recommendations to the Board, which shall then issue a decision imposing mitigation. In the event UP/SP and the City of Reno and other appropriate parties reach agreement on a final mitigation plan, UP/SP and the City of Reno shall immediately notify SEA, and the Board will take appropriate action consistent with such an agreement.

Chickasha, OK, to Wichita, KS:

<u>City of Wichita, Kansas</u>

23a. UP/SP shall operate no more than a daily average count of 6.4 trains per day through the City of Wichita. (This reflects the Base Year daily average of 4.4 trains plus 2 additional trains.) The addition of two trains per day essentially maintains the environmental status quo. The 6.4 average train count per day does not include the following types of movements: (1) maintenance-of-way trains, (2) light locomotive movements, (3) local and industry switching train movements, (4) emergency trains operated under detour authority, for snow removal, for fire or other natural disaster purposes, and wreck removal purposes. This condition will be effective upon consummation of the merger and will continue in effect for 18 calendar months in total.

23b. For the purpose of monitoring the preceding condition, UP/SP shall file on a monthly basis with the Board verified copies of station passing reports of train movements through Wichita, KS, for each day of each preceding month in the specified 18-month period. These reports shall also identify those train movements, specified in the above condition, that are excluded from the 6.4 trains per day average count.

23c. UP/SP, in consultation with and subject to the approval of SEA, shall retain an independent, third-party consultant to prepare a specific mitigation study to address the potential environmental effects on the City of Wichita of the additional rail freight traffic projected as a result of the proposed merger. This study shall be prepared under the sole direction and supervision of SEA. It shall include a final mitigation plan based on a study of the railway, highway, and pedestrian traffic flows and associated environmental effects on the City of Wichita. This study would tailor mitigation to address environmental effects such as safety, hazardous materials transport, air quality, and noise. UP/SP shall comply with the final mitigation plan developed under this study.

The study, which shall be completed within 18 months from the date of consummation of the merger, shall include the following:

- Projected post-merger increases in rail freight traffic on the Chickasha to Wichita line segment.
- Consultations with the City of Wichita, Sedgwick County, the Federal Railroad Administration, affected Native American Tribes, and other appropriate Federal, state and local agencies, and other interested parties.
- Consultations with UP/SP.
- Review of all existing information and studies including those prepared by the City of Wichita, Sedgwick County and UP/SP.
- Feasibility of a bypass route.
- With respect to vehicular and pedestrian safety, mitigation measures that identify the number and location of highway/rail grade separations in Wichita.
- Funding options.
- Submission of a draft study to the public for review and comment and then issuance of a final mitigation study.

23d. SEA will submit the final mitigation study and its recommendations to the Board, which shall then issue a decision imposing mitigation. In the event UP/SP and the City of Wichita and other appropriate parties reach agreement on a final mitigation plan, UP/SP and the City of Wichita shall immediately notify SEA, and the Board will take appropriate action consistent with such an agreement.

D. RAIL YARDS AND INTERMODAL FACILITIES

24. UP/SP shall consult with appropriate state and local agencies to develop noise abatement plans for rail yards in the following cities: Herington, KS; Salem, IL; and Bellmead, TX. UP/SP shall advise SEA of the results of these consultations and provide SEA with a copy of any resulting noise abatement plans.

25. To further facilitate the improvement of air quality in the States of California and Illinois, UP/SP shall consult with appropriate state and local air quality officials concerning the intermodal facilities in East Los Angeles, CA, and the Global II and Canal Street intermodal facilities in Chicago, IL. UP/SP shall advise SEA as to the status and the results of these consultations.

E. ABANDONMENTS

The following 15 abandonments and two related discontinuances are subject to the mitigation conditions specified below:

- Gurdon to Camden, AR (UP) - Docket No. AB-3 (Sub-No. 129X).
- Whittier Junction to Colima Junction, CA (UP) - Docket No. AB-33 (Sub-No. 93X).
- Magnolia Tower to Melrose, CA (UP) - Docket No. AB-33 (Sub-No. 94X).
- Alturas to Wendel, CA (SP) - Docket No. AB-12 (Sub-No. 184X).
- Towner to NA Junction, CO (UP):
  - Docket No. AB-3 (Sub-No. 130) - UP Abandonment.
  - Docket No. AB-8 (Sub-No. 38) - Discontinuance of Service by SP.
- Edwardsville to Madison, IL (UP) - Docket No. AB-33 (Sub-No. 98X).
- DeCamp to Edwardsville, IL (UP) - Docket No. AB-33 (Sub-No. 97X).
- Barr to Girard, IL (UP) - Docket No. AB-33 (Sub-No. 96).
- Whitewater to Newton, KS (UP) - Docket No. AB-3 (Sub-No. 132X).
- Hope to Bridgeport, KS (UP):
  - Docket No. AB-3 (Sub-No. 131) - UP Abandonment.
  - Docket No. AB-8 (Sub-No. 37) - Discontinuance of Service by SP.
- Iowa Junction to Manchester, LA (UP) - Docket No. AB-3 (Sub-No. 133X).
- Seabrook to San Leon, TX (SP) - Docket No. AB-12 (Sub-No. 187X).
- Suman to Benchley, TX (SP) - Docket No. AB-12 (Sub-No. 185X).
- Troup to Whitehouse, TX (UP) - Docket No. AB-3 (Sub-No. 134X).
- Little Mountain Junction to Little Mountain, UT (UP) - Docket No. AB-33 (Sub-No. 99X).

General

At all abandonment locations, the general mitigation conditions listed below apply to reduce or avoid potential environmental impacts.

26. UP/SP shall observe all applicable Federal, state, and local regulations regarding handling and disposal of any waste materials, including hazardous waste, encountered or generated during salvage of the proposed rail line.

27. UP/SP shall dispose of all materials that cannot be reused in accordance with state and local solid waste management regulations.

28. UP/SP shall restore any adjacent properties that are disturbed during right-of-way salvaging activities to pre-salvaging conditions.

29. Before undertaking any salvage activities, UP/SP shall consult with any potentially affected American Indian Tribes adjacent to, or having a potential interest in, the right-of-way.

30. UP/SP shall use Best Management Practices to encourage regrowth in disturbed areas and to stabilize disturbed soils.

31. UP/SP shall use appropriate signs and barricades to control traffic disruptions during salvage operations at or near grade crossings.

32. UP/SP shall restore roads disturbed during salvage activities to conditions as required by state or local jurisdictions.

33. UP/SP shall comply with all applicable Federal, state, and local regulations regarding the control of fugitive dust. Fugitive dust emissions created during salvage operations shall be minimized by using such control methods as water spraying, installation of wind barriers, and chemical treatment during salvaging.

34. UP/SP shall control temporary noise from salvage equipment through the use of work hour controls and maintenance of muffler systems on machinery.

35. If previously unknown archaeological remains are found during salvage operations, UP/SP shall cease work in the area and immediately contact the appropriate State Historic Preservation Officer.

36. As appropriate, UP/SP shall use appropriate technologies, such as silt screens, to minimize soil erosion during salvaging. UP/SP shall disturb the smallest area possible around streams and tributaries and shall revegetate disturbed areas immediately following salvage operations.

37. As appropriate, UP/SP shall transport all hazardous materials generated by salvage activities in compliance with U.S. Department of Transportation Hazardous Materials Regulations (49 CFR parts 171 to 180).

38. As appropriate, UP/SP shall assure that all culverts are clear from debris to avoid potential flooding and stream flow alteration, in accordance with Federal, state and local regulations.

39. As appropriate, UP/SP shall obtain all necessary Federal, state, and local permits if salvaging activities require the alteration of wetlands, ponds, lakes, streams, or rivers, or if these activities would cause soil or other materials to wash into these water resources. UP/SP shall use appropriate techniques to minimize impacts to water bodies and wetlands, such as positioning salvaging equipment on barges, matting, or skids.

Specific

The following mitigation conditions specifically apply to the abandonment under which they appear.

Gurdon to Camden, AR (UP)
Docket No. AB-3 (Sub-No. 129X)

40. UP/SP shall limit salvage activities within 1,000 feet of residences to daytime hours to mitigate noise impacts on nearby receptors.

41. To further assess the potential occurrence of threatened and endangered plants, UP/SP shall coordinate with U.S. Fish & Wildlife Service and the Arkansas Department of Game and Fish, prior to salvage activities, to determine whether surveys of vegetation types in areas of potential disturbance due to salvage activities are needed and shall conduct any such surveys during an appropriate time of year.

42. UP/SP shall retain its interest in and take no steps to alter the through-plate girder bridge at MP 436.70, until the Section 106 process of the National Historic Preservation Act (16 USC 470f, as amended) has been completed for this structure.

43. Prior to the start of salvage operations in the vicinity of the three Emergency Response Notification System (hazardous waste) spill sites, UP/SP shall contact the Arkansas Pollution Control and Ecology Department, Hazardous Waste Division, to confirm that remediation has been completed to agency satisfaction.

Whittier Junction to Colima Junction, CA (UP)
Docket No. AB-33 (Sub-No. 93X)

No specific mitigation is imposed.

Magnolia Tower to Melrose, CA (UP)
Docket No. AB-33 (Sub-No. 94X)

44. UP/SP shall retain its interest in and take no steps to alter the Magnolia Tower or WP Oakland Depot until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for these structures.

Alturas to Wendel, CA (SP)
Docket No. AB-12 (Sub-No. 184X)

45. UP/SP shall retain its interest in and take no steps to alter the integrity of the 9 eligible and 11 potentially eligible prehistoric sites along this abandonment until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for these sites.

Sage to Leadville, CO (SP)
Docket No. AB-8 (Sub-No. 36X) - Discontinuance of Service by SP

46. UP/SP shall provide continued access for Viacom International, Inc. to the Eagle Mine site to facilitate ongoing remediation activities.

Malta to Cañon City, CO (SP)
Docket No. AB-8 (Sub-No. 39) - Discontinuance of Service by SP

No specific mitigation is imposed.

Towner to NA Junction, CO (UP)
Docket No. AB-3 (Sub-No. 130) - Abandonment by UP
Docket No. AB-8 (Sub-No. 38) - Discontinuance of Service by SP

47. To further assess the potential occurrence of the seven threatened and endangered species of plants and animals, UP/SP shall coordinate with U.S. Fish & Wildlife Service and the Colorado Department of Natural Resources to determine if surveys in areas of potential disturbance due to salvage activities are needed and shall conduct any such surveys during an appropriate time of the year.

48. UP/SP shall consult with the Colorado Department of Public Health and Environment to confirm that assessment and remediation has been completed to the agency's satisfaction.

Edwardsville to Madison, IL (UP)
Docket No. AB-33 (Sub-No. 98X)

49. Prior to the start of abandonment activities in the vicinity of any known hazardous waste sites, UP/SP shall consult with the Illinois Environmental Protection Agency to assess procedures necessary to address issues related to the sites.

DeCamp to Edwardsville, IL (UP)
Docket No. AB-33 (Sub-No. 97X)

50. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the one historic bridge until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) is completed.

Parr to Girard, IL (UP)
Docket No. AB-33 (Sub-No. 96)

51. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the three historic bridges until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) is completed.

Whitewater to Newton, KS (UP)
Docket No. AB-3 (Sub-No. 132X)

No specific mitigation is imposed.

Hope to Bridgeport, KS (UP)
Docket No. AB-3 (Sub-No. 131) - UP Abandonment
Docket No. AB-8 (Sub-No. 37) - Discontinuance of Service by SP

No specific mitigation is imposed.

Iowa Junction to Manchester, LA (UP)
Docket No. AB-3 (Sub-No. 133X)

No specific mitigation is imposed.

Seabrook to San Leon, TX (SP)
Docket No. AB-12 (Sub-No. 187X)

52. U.S. Fish & Wildlife Service indicated a possible desire to obtain permission to determine if Windmill-grass is present along the rail line. Should U.S. Fish & Wildlife Service follow up with such a request, UP/SP shall cooperate in granting the necessary authorizations.

53. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the through-plate girder bridges at MPs 31.99 and 38.77 until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for these structures.

54. UP/SP shall continue Section 106 consultation with the Texas State Historic Preservation Officer to determine the need and extent of a recovery and treatment program for the three known archaeological sites along this segment.

55. Prior to the start of abandonment activities in the vicinity of any known hazardous waste sites, UP/SP shall contact the Texas Natural Resources Conservation Commission, Waste Management Office, to assess procedures necessary to address issues related to the sites.

56. UP/SP shall limit construction work within 1,000 feet of residences to daytime hours to mitigate noise impacts on nearby receptors.

Suman to Benchley, TX (SP)
Docket No. AB-12 (Sub-No. 185X)

57. To further assess the potential occurrence of Navasota Ladies'-tresses (*Spiranthes parksii*), a federally listed endangered species, UP/SP shall conduct a survey and consult with the U.S. Fish & Wildlife Service and the Texas Parks and Wildlife Department prior to salvage operations to determine if this species is present in any areas to be cleared or modified by the proposed abandonment.

58. UP/SP shall continue Section 106 consultation with the Texas State Historic Preservation Officer to determine the need and extent of a recovery and treatment program for the known archaeological site.

59. Prior to the start of abandonment activities in the areas containing copper slag ballast, UP/SP shall contact the Texas Natural Resources Conservation Commission, Waste Management Office, as required to assess procedures necessary to address issues related to the sites.

60. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the three deck plate girder bridges at MPs 109.73, 112.96, and 117.55, until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for these structures.

Troup to Whitehouse, TX (UP)
Docket No. AB-3 (Sub-No. 134X)

61. Prior to the start of abandonment activities in the vicinity of any known hazardous waste sites, UP/SP shall contact the Texas Natural Resources Conservation Commission, Waste Management Division, and other appropriate agencies as necessary to assess procedures for addressing issues related to the sites.

Little Mountain Junction to Little Mountain, UT (UP)
Docket No. AB-33 (Sub-No. 99X)

No specific mitigation is imposed.

F. CONSTRUCTION PROJECTS

General

The following mitigation conditions apply to all new construction sites not on existing right-of-way and also apply to the new construction projects that result from the BNSF agreement.

62. UP/SP shall observe all applicable Federal, state, and local regulations regarding handling and disposal of any waste materials, including hazardous waste, encountered or generated during construction of the proposed rail line connection.

63. UP/SP shall dispose of all materials that cannot be reused in accordance with state and local solid waste management regulations.

64. UP/SP shall consult with the appropriate Federal, state and local agencies if hazardous waste and/or materials are discovered at the site.

65. UP/SP shall transport all hazardous materials in compliance with U.S. Department of Transportation Hazardous Materials Regulations (49 CFR parts 171 to 180). UP/SP shall provide, upon request, local emergency management organizations with copies of all applicable Emergency Response Plans and participate in the training of local emergency staff for coordinated responses to incidents. In the case of a hazardous material incident, UP/SP shall follow appropriate emergency response procedures contained in its Emergency Response Plans.

66. UP/SP shall use appropriate signs and barricades to control traffic disruptions during construction.

67. UP/SP shall restore roads disturbed during construction to conditions as required by state or local jurisdictions.

68. UP/SP shall obtain all necessary Federal, state, and local permits if construction activities require the alteration of wetlands, ponds, lakes, streams, or rivers, or if these activities would cause soil or other materials to wash into these water resources. UP/SP shall use appropriate techniques to minimize impacts to water bodies and wetlands.

69. UP/SP shall use Best Management Practices to control erosion, runoff, and surface instability during construction, including seeding, fiber mats, straw mulch, plastic liners, slope drains, and other erosion control devices. Once the track is constructed, UP/SP shall establish vegetation on the embankment slope to provide permanent cover and prevent potential erosion. If erosion develops, UP/SP shall take steps to develop other appropriate erosion control procedures. UP/SP shall use Best Management Practices to encourage regrowth in disturbed areas and to stabilize disturbed soils.

70. UP/SP shall use only EPA-approved herbicides and qualified contractors for application of right-of-way maintenance herbicides, and shall limit such application to the extent necessary for rail operations.

71. UP/SP shall comply with all applicable Federal, state, and local regulations regarding the control of fugitive dust. Fugitive dust emissions created during construction shall be minimized by using such control methods as water spraying, installation of wind barriers, and chemical treatment.

72. UP/SP shall control temporary noise from construction equipment through the use of work hour controls and maintenance of muffler systems on machinery.

73. UP/SP shall restore any adjacent properties that are disturbed during construction activities to their pre-construction conditions.

74. Before undertaking any construction activities, UP/SP shall consult with any potentially affected American Indian Tribes adjacent to, or having a potential interest in, the right-of-way.

75. If previously undiscovered archaeological remains are found during construction, UP/SP shall cease work and immediately contact the State Historic Preservation Officer to initiate the appropriate Section 106 process.

Specific

The following mitigation conditions apply to the specific construction sites identified below.

Arkansas - Camden

76. UP/SP shall restrict mechanized equipment to upland areas to complete construction activities. UP/SP shall obtain and comply with all applicable permits for any construction activity within streams or wetlands. Also, UP/SP shall submit its final construction plans to appropriate state and local agencies for review.

77. Prior to construction, UP/SP shall provide final plans to the Arkansas Department of Transportation (Arkansas DOT) and appropriate local agencies for review.

Arkansas - Pair Oaks

78. Prior to construction, UP/SP shall provide final plans to the Arkansas DOT and appropriate local agencies for review.

Arkansas - Pine Bluff (East)

79. Prior to construction, UP/SP shall provide final plans to the Arkansas DOT and appropriate local agencies for review.

Arkansas - Pine Bluff (West)

80. Prior to construction, UP/SP shall provide final plans to the Arkansas DOT and appropriate local agencies for review.

Arkansas - Texarkana

81. Prior to construction, UP/SP shall provide final plans to the Arkansas DOT and appropriate local agencies for review.

California - Lathrop

82. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the Sharpe Army Depot, until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for this property.

California - Stockton (El Pifal)

83. UP/SP shall monitor noise resulting from train operations over the connection and implement mitigation measures to control excessive wheel squeal.

California - West Colton (UP to SP)

No specific mitigation is imposed.

California - West Colton (SP to UP)

No specific mitigation is imposed.

Colorado - Denver (Utah Jct.)

84. UP/SP shall retain its interest in and take no steps to alter the historic integrity of the North Yard water tower, until the Section 106 process of the National Historic Preservation Act (16 U.S.C. 470f, as amended) has been completed for this property.

Colorado - Denver

85. In and near the South Platte River and associated wetland areas, UP/SP shall restrict mechanized equipment to the area required to complete construction activities.

86. UP/SP shall perform hydrologic and hydraulic analyses for any modifications to the South Platte River bridge, to ensure the changes would have no effect on the 100-year floodplain.

87. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.

Illinois - Girard

88. UP/SP shall consult with the District Soil Scientist of the U.S. Department of Agriculture, Natural Resources Conservation Service, for recommendations to reduce impacts to prime farmland soils.

89. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.

Illinois - Salem

90. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.

Kansas - Hope

91. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.

Louisiana - Kinder

92. In and near the areas of Kinder Ditch and the fringe wetlands, UP/SP shall restrict mechanized equipment to the area required to complete construction activities.

93. UP/SP shall design all drainage structures to maintain existing flows for the Kinder Ditch.

Louisiana - Shreveport

94. UP/SP shall coordinate the design and construction of the U.S. Highway I-71 overpass pier replacement with the Louisiana Department of Transportation and the Louisiana Division of the Federal Highway Administration.

95. UP/SP shall monitor noise resulting from trains operating over the curved section of the connection and implement mitigation measures to control excessive wheel squeal.

96. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.

Missouri - Dexter

97. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.

98. In and near the two small wetland areas, UP/SP shall restrict mechanized equipment to the area required to complete construction activities.

Missouri - Parent

99. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.

100. In and near the wetland areas, UP/SP shall restrict mechanized equipment to the upland areas to complete construction activities.

101. UP/SP shall coordinate with the Missouri Department of Conservation prior to final design of the project to avoid adverse impacts to the state-endangered gold-striped darter. UP/SP shall not conduct in-stream construction activities during the breeding season of this species.

Texas - Carrollton

102. UP/SP shall monitor noise from train operations over the new connection and implement mitigation measures to control excessive wheel squeal.

Texas - West Point

No specific mitigation is imposed.

Texas - Houston (Tower 26)

103. UP/SP shall monitor noise resulting from train operations over the new connection and implement mitigation measures to control excessive wheel squeal.

Texas - Houston (Tower 87)

104. UP/SP shall store all construction equipment, petroleum products, and other hazardous materials outside the area of the 100-year floodplain.

105. Prior to construction, UP/SP shall consult with the Army Corps of Engineers and obtain and comply with any permits under Section 404 of the Clean Water Act.

Texas - Houston (SP to UP)

106. UP/SP shall monitor noise resulting from train operations over the new connection and implement mitigation measures to control excessive wheel squeal.

Texas - Fort Worth (Ney Yard)

107. UP/SP shall monitor noise resulting from train operations over the new connection and implement mitigation measures to control excessive wheel squeal.

Texas - Fort Worth (UP to SP)

108. UP/SP shall monitor noise resulting from train operations over the new connection and implement appropriate mitigation measures to control excessive wheel squeal.

Constructions That Result from the BNSF Agreement

Richmond, CA

No specific mitigation is imposed.

Stockton, CA

No specific mitigation is imposed.

Robstown, TX

No specific mitigation is imposed.

APPENDIX E: NET EMISSIONS (AIR QUALITY)

NET EMISSIONS CONSIDERING MITIGATION MEASURES

AQCR	STATE NAME	HC	CO	NOX	SO2	PM-10
20	AR Northeast Arkansas	49.07	152.56	1142.00	82.75	24.76
501	AZ Southeast Arizona	10.17	52.99	159.83	28.74	5.71
502	AZ Pima	15.31	71.35	270.73	38.70	8.37
503	AZ Mohave-Yuma	10.89	64.29	143.86	34.87	6.32
504	AZ Maricopa	11.41	62.65	151.93	30.93	7.04
505	AZ Central Arizona	13.21	65.40	219.61	35.48	7.32
24	CA Metropolitan Los Angeles	14.61	80.34	32.67	7.84	14.79
27	CA Northeast Plateau	-4.30	-9.39	-114.36	-5.09	-2.06
28	CA Sacramento Valley	-18.23	-39.90	-484.66	21.64	-8.74
30	CA San Francisco Bay Area	14.78	39.39	184.33	12.43	7.22
31	CA San Joaquin Valley	12.69	124.73	-43.70	61.38	9.85
33	CA Southeast Desert	37.83	180.82	652.62	98.08	20.80
508	CA Mountain Counties	-5.29	64.50	-446.54	28.72	0.66
34	CO Commanche	-3.07	-9.54	-71.44	-5.18	-1.55
35	CO Grand Mesa	-80.91	-195.49	-2084.93	-106.04	-39.31
36	CO Metropolitan Denver	41.51	148.26	877.82	76.69	22.14
37	CO Pawnee	22.61	70.29	526.11	38.12	11.41
40	CO Yampa	15.93	76.06	275.03	41.25	8.75
88	IA Northeast Iowa	-35.68	29.73	- 1337.25	16.13	-14.20
91	IA Southeast Iowa	-5.43	4.82	-204.60	2.61	-2.15
93	IA Southwest Iowa	-37.70	102.52	-1669.40	55.60	-13.08
65	IL Burlington-Keokuk	-4.93	-15.33	-114.74	-8.31	-2.49
66	IL East Central Illinois	12.26	38.12	285.34	20.68	6.19
67	IL Metropolitan Chicago	2.01	100.68	-508.98	12.22	11.24
69	IL Metropolitan Quad Cities	-28.46	29.78	-1088.57	16.15	-11.16
70	IL Metropolitan St. Louis	-2.64	-1.11	-142.00	-11.41	0.82
71	IL North Central Illinois	-9.39	23.57	-408.83	12.79	-3.31
73	IL Rockford-Janesville-Beliot	-7 48	32.22	-373.86	17.47	-2.27
74	IL Southeast Illinois	37.05	115.19	862.25	62.48	18.69
94	KS Metropolitan Kansas City	39.20	-114.95	-990.68	-72.88	-17.68
95	KS Northeast Kansas	-64.72	-201.23	-1506.28	-109.15	-32.66
96	KS North Central Kansas	-28.66	-89.11	-667.05	-48.33	-14.46
97	KS Northwest Kansas	3.00	9.33	69.81	5.06	1.51
99	KS South Central Kansas	57.98	180.28	1349.43	97.78	29.26
100	KS Southwest Kansas	-42.10	-130.90	-979.81	-71.00	-21.24
138	MO Southeast Missouri	8.53	26.53	198.55	14.39	4.30
85	NE Metro Omaha-Council Bluffs	-19.99	-15.28	-634.30	-8.29	-8.82
145	NE Lincoln-Beatrice-Fairbury	1.72	5.35	40.05	2.90	0.87
146	NE Nebraska	58.10	211.58	1240.49	114.76	30.15
12	NM New Mexico Southern Border	29.47	147.27	485.37	79.88	16.37
154	NM Northeastern Plains	11.88	36.94	276.50	20.04	5.99
155	NM Pecos-Permian Basin	7.64	23.75	177.75	12.88	3.85
147	NV Nevada	-22.61	152.87	-1330.41	82.92	-5.27
148	NV Northwest Nevada	-10.17	0.83	-353.66	0.45	-4.25
184	OK Central Oklahoma	34.84	108.31	810.77	8.75	17.58
185	OK North Central Oklahoma	22.23	69.11	517.32	37.49	11.22
187	OK Northwestern Oklahoma	13.39	41.64	311.72	22.59	6.76
189	OK Southwestern Oklahoma	20.69	64.32	481.44	34.89	10.44
190	OR Central Oregon	13.59	48.21	294.93	26.15	7.02
191	OR Eastern Oregon	-50.35	42.63	-1889.72	23.12	20.02
193	OR Portland	36.77	139.61	679.92	59.05	22.25
22	TX Shreveport-Texarkana-Tyler	49.69	154.49	1156.43	83.80	25.07
106	TX So. Louisiana-SE Texas	18.90	58.75	439.80	31.87	9.53
153	TX El Paso-Las Cruces-Almagordo	13.78	122.61	33.33	66.50	9.11
210	TX Abilene-Wichita Falls	45.00	194.89	849.01	105.71	24.15
211	TX Amarillo-Lubbock	39.51	122.85	919.59	66.63	19.94
212	TX Austin-Waco	-27.02	-84.00	-628.74	-45.56	-13.63
215	TX Metropolitan Dallas-Ft. Worth	-4.37	21.72	-260.23	5.64	-0.14
217	TX Metropolitan San Antonio	-43.63	-131.00	-1067.91	-78.12	-20.61
218	TX Midland-Odessa-San Angelo	28.03	159.27	392.35	86.39	16.05
219	UT Utah	15.97	108.60	159.18	58.91	9.65
220	UT Wasatch Front	-85.51	-257.43	-2020.39	-139.63	-42.92
228	WA Olympic-Northwest Washington	0.79	3.42	15.03	1.86	0.43
229	WA Puget Sound	4.58	19.99	67.68	7.25	3.12
239	WI Southeastern Wisconsin	0.81	2.51	18.82	1.36	0.41
242	WY Metropolitan Cheyenne	8.89	110.01	-89.92	59.68	6.72
243	WY Wyoming	-27.81	158.91	-1531.43	86.19	-7.35

NEW YORK DOCK CONDITIONS

Finance Docket No. 28250

APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. (formerly Sections 5(2) and 5(3) of the Interstate Commerce Act), except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. Definitions.-(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of Section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which

such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and Agreement or Decision.-(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days' written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this Section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. Displacement allowances.-(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances.-(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of Section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation Allowance.- A dismissed employee entitled to protection under this appendix, may at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump-sum payment computed in accordance with Section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits.- No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses.- Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes.-(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except Sections 4 and 12 of this Article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal.-(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this Section.

(c) No claim for loss shall be paid under the provisions of this Section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furioughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under Sections 1 or 2 of the Article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, be shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad

and employees of any other enterprise within the definition of common carrier by railroad in Section 1(3) of Part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 USC 11347 before February 5, 1976, and under Section 565 of Title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in Article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 USC 11347 before February 5, 1976 and under Section 565 of Title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

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Chairman McDonald,

FINANCE DOCKET NO. 28905 (SUB-NO. 23)

CSX CORPORATION - CONTROL - CHESSIE SYSTEM, INC., AND SEABOARD COAST LINE INDUSTRIES

Decided August 13, 1992

Prior decision (not printed) in this proceeding reexamined and affirmed on other grounds.

BY THE COMMISSION:

This proceeding is one of several cases[1] on remand to the Commission from the United States Court of Appeals for the District of Columbia Circuit. In its order dated September 17, 1991, the court requested the Commission to reexamine its prior decision, served October 3, 1989, (*October 3, 1989, Decision*), in light of the Supreme Court's recent decision in *Norfolk & Western Ry. v. American Train Dispatchers*, 499 U.S. 117 (1991) (*Train Dispatchers*). After reexamining our *October 3, 1989, Decision*, we reaffirm it.

BACKGROUND

This proceeding arose out of a proposal by CSX Transportation, Inc. (CSXT),[2] a Class I carrier, to consolidate its power coordination operations

[1] Along with this case, the Court of Appeals also remanded three other proceedings to the Commission: Finance Docket No. 28905 (Sub-No. 22), *CSX - Control - Chessie System, Inc., and Seaboard Coast Line Industries*; Finance Docket No. 29430 (Sub-No. 20), *Norfolk So. Corp. - Control - Norfolk & W. Ry. Co.*; and Finance Docket 30582 (Sub-No. 2), *Norfolk & W. Ry. Co., Southern Ry. Co. and Interstate R.R. - Exemption - Contract to Operate and Trackage Rights*. The first two of those cases will be decided separately from this one. The third has already been decided.

[2] The formation of CSXT had a long history. It began when the Commission, in *CSX Corp. - Control - Chessie and Seaboard C. L. I.*, 363 I.C.C. 518 (1980) (*CSX-Chessie-Seaboard*), authorized the CSX Corporation (CSX) to acquire control of the 6 subsidiary rail carriers of (continued...)

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and train dispatching functions on a system-wide basis at Jacksonville, FL. American Train Dispatchers Association (ATDA) and CSXT entered into an agreement on January 9, 1988, whereby CSXT would transfer train dispatching operations to Jacksonville on May 2, 1988. This agreement, however, did not include four Assistant Chief/Power (dispatcher) positions at Corbin, KY.

On February 12, 1988 CSXT notified ATDA that it would abolish the four dispatcher positions at Corbin and that non-union management personnel in Jacksonville would take over the dispatching work. ATDA objected and claimed that the Corbin dispatchers were entitled to follow their jobs to Jacksonville. Unable to reach a negotiated settlement, the parties referred their dispute to arbitration.

In an arbitration award dated November 11, 1988, the arbitrator, Robert J. Ables, approved CSXT's plan to transfer the dispatchers' work to Jacksonville. He found that there was nothing in the Commission's authorization of the original acquisition transaction that precluded managers from taking over the dispatching work. He reasoned that the Commission could not reasonably anticipate all of the changes that would arise out of the principal transaction and, thus, that the authorization extended to new operating proposals that logically flowed from the approved transaction. He noted that the benefits from consolidating CSXT's system-wide power functions in one place (Jacksonville) were obvious, and that a large rail system like CSXT's seemed to require such a move. (*Arbitration Award* at 16). Arbitrator Ables concluded that the four dispatchers in Corbin were entitled to the same level of protection extended to about 20 other employees under the January 9, 1988,

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[2](...continued)
the Chessie System, Inc. (Chessie), and the 10 subsidiary rail carriers (the so-called "Family Lines") of Seaboard Coast Line Industries, Inc. (SCLI), through the merger of Chessie and SCLI into CSX. Two years later, in Finance Docket No. 30053, *Seaboard Coast Line R.R. - Merger Exemption - Louisville & N. R.R.* (not printed), served November 8, 1982 (*Seaboard-L&N*), the Seaboard Coastline Railroad Company and the Louisville and Nashville Railroad Company (L&N) [both of which were subsidiaries of SCLI in 1980] merged to form the Seaboard System Railroad, Inc. (SSR). Subsequently, in Finance Docket No. 31033, *Baltimore & O. R.R. and Chesapeake & O. Ry. - Merger Exemption* (not printed), served May 22, 1987, the Baltimore and Ohio Railroad Company (B&O) merged into the Chesapeake and Ohio Railway Company (C&O). Later that year, C&O merged into the recently created CSXT. *See* Finance Docket No. 31106, *Chesapeake & O. R.R. and CSX Transp., Inc. - Merger Exemption* (not printed), served September 18, 1987 (*CSXT-C&O*).

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implementing agreement, *i.e.*, they were entitled to the so-called *New York Dock* labor protective conditions [those described in *New York Dock Ry.- Control - Brooklyn East. Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*)]. *Id.* at 2-3.

ATDA appealed the award to the Commission. It argued that: (1) neither § 11341(a) of the Interstate Commerce Act (ICA) nor *New York Dock* protection provides an arbitrator or the Commission with the authority to override collective bargaining agreements or other rights arising under the Railway Labor Act (RLA);[3] and (2) even if the ICA or the *New York Dock* conditions did grant such authority, the Commission did not sanction the coordination transaction at issue here, and thus, under the RLA, without employee assent through collective bargaining, the carrier could not make operating changes adversely affecting employees.

The Commission rejected both arguments and affirmed the Ables arbitration award.[4] The Commission stated its view that the language of § 11341(a), which exempts a Commission-approved consolidation from "all other laws" where it is necessary to do so to effectuate the transaction, includes exemption from the RLA.[5] *October 3, 1989, Decision*, at 4. But the Commission also stated that it did not need to rely solely on § 11341(a),

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[3] 45 U.S.C. § 151, *et seq.*

[4] The Commission applied the review criteria enunciated in *Chicago & North Western Tptn. Co. - Abandonment*, 3 I.C.C.2d 729 (1987); *aff'd sub nom. International Bhd. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988) (*Lace Curtain*). In *Lace Curtain*, the Commission defined the scope of review it would use for arbitration awards. The Commission stated that it would only review recurring issues or significant issues of general importance regarding the imposition of Commission-imposed labor protective conditions. It also specifically stated that it would not review issues dealing with the calculation of benefits, causation, and other factual questions. *Id.* at 736.

[5] In confirming its view of the effects of § 11341(a), the Commission dismissed the idea that this view was affected by the holding of *Brotherhood of Ry. Carmen v. ICC*, 880 F.2d 562 (1989), *rev'd Train Dispatchers, supra*. In that decision, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's decision in *CSX Corp. - Control - Chessie and Seaboard C.L.I.*, 4 I.C.C.2d 641 (1988) (*Carmen*), in which the Commission had found that an arbitrator possessed the authority to override collective bargaining and RLA rights that prevented the implementation of the proposed transaction.

The Commission also stated that the § 11341(a) immunity provision covers future coordinations and the public benefits expected to flow from the principal Commission-approved control transaction, such as the coordination of locomotive power. *See Norfolk Southern Corp. - Control - Norfolk & W. Ry. Co.*, 4 I.C.C.2d 1080, 1084 (1988) (*Norfolk Southern*).

but would also rely on § 11347 for the authority to impose implementing agreements that require displacing employees and work functions in contravention of existing collective bargaining agreements.[6] *October 3, 1989, Decision*, at 5. The Commission explained that the Arbitrator did not have to make a finding that the elimination of the dispatcher positions was necessary to effect the control transaction. The Commission found that the Arbitrator was only required to determine whether the coordination reasonably flowed from the control transaction approved by the Commission in 1980, and that he had made such a determination.[7] *Id.* at 6. As we are relying in this decision upon the authority derived from § 11341(a) to override collective bargaining agreements, we need not comment or rule on the § 11347 rationale outlined in the *October 3, 1989, Decision*.

ATDA sought review of the *October 3, 1989, Decision* in the United States Court of Appeals for the District of Columbia Circuit. ATDA presented three issues for review: (1) whether any section of the ICA grants the Commission, or arbitrators acting pursuant to the Commission's authority, the power to abrogate collective bargaining agreements between rail carriers and employee representatives; (2) whether the Commission exceeded its jurisdiction when it held that the RLA rights of employees could be abrogated, but failed to make a necessity determination; and (3) whether the Commission exceeded its jurisdiction when it held that employee rights provided by the RLA and by contract could be overridden by Commission orders approving a merger 8 years earlier.

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[6] The Commission noted that this authority has resided in arbitrators pursuant to labor protective conditions, such as *New York Dock* protection, imposed under § 11343, *et seq.*, of the ICA, which are also the sections that govern the procedures for achieving implementing agreements in Commission-approved transactions.

[7] The Commission also rejected, as too broad a proposition, ATDA's argument that the arbitrator was obliged to fashion an implementing agreement that would allow the coordination but impose the least possible disruption on the affected employees. Citing Commission precedent, the majority stated that the arbitrator's duty is to fashion an implementing arrangement that will reconcile worker protections with the terms and objectives of the Commission-approved transaction. *See* Finance Docket No. 30965, *Delaware & H. Ry. Co. - Lease and Trackage Rights Exemption - Springfield Terminal Ry. Co.* (not printed), served January 10, 1989, at 6.

The Court of Appeals held ATDA's petition for review in abeyance pending a decision by the Supreme Court in *Train Dispatchers*.[8] In *Train Dispatchers*, the Supreme Court found that the provision in § 11341(a) exempting a carrier from all other law as necessary to carry out a Commission-approved transaction includes a carrier's legal obligations under a collective bargaining agreement.[9] *Train Dispatchers* at 127-28. The Court reasoned that such a conclusion was consistent with the consolidation provisions of the ICA, which were designed to promote economy and efficiency in interstate transportation by removing the burdens of excessive expenditure. It noted that, as the RLA is the law that governs the formation, construction, and enforcement of the collective bargaining agreements at issue here, it would be the law that, "under § 11341(a), is superseded when an ICC-approved transaction requires abrogation of collective bargaining obligations." *Id.* at 132 (citing 45 U.S.C. §§ 152, 156).

DISCUSSION AND CONCLUSIONS

It is not clear whether the arbitrator found that there was some legal impediment to the transfer of work to management personnel or, if so, the exact nature of that impediment. He framed the issue as follows (*Arbitration Award, at 12*): "can contract jobs be abolished and the work, still to be performed in those jobs, be transferred to non-contract employees at a different location?" There seems to have been no question in his mind that CSXT could shift the work from Corbin to Jacksonville at will. Rather, the arbitrator seems to have viewed the dispute as being limited to whether the work would be performed there by union workers (presumably, the incumbents) or by management employees. He stated (*Arbitration Award*, at 16, n.10): "Where this power distribution work is to be done no longer is in question. It will be done in Jacksonville." He went on to find (*Arbitration Award*, at 16 and 17) that there was no reason why

[8] In its September 17, 1991, order to the Commission, the Court of Appeals stated that it was remanding the case for "reconsideration in light of the Supreme Court's decision in" *Train Dispatchers*. (Slip Op. at 5).

[9] In reaching this holding, however, the Court did not rule on the questions of whether the transaction had been properly approved or whether changes in the collective bargaining agreements were necessary. Since these "predicates" were not at issue before the Court, the Court assumed that the changes were necessary and that the Commission had properly considered and approved the transaction. *Train Dispatchers*, at 127.

the incumbents should be allowed to follow their jobs to Jacksonville and then to impose the same implementing agreement which had been extended to the other union workers who had been affected earlier.

While the arbitrator ruled against the union, he did not specify whether he was doing so because: (1) there was no impediment preventing the transfer of work or (2) there was an existing impediment (due to an existing contract or the RLA, or both) but that it was necessary to override the obstacle(s) so that CSXT could achieve the efficiencies of the approved transaction. We could speculate through inference as to why he ruled in management's favor, but we see no reason to do so here. We will assume that either the existing contract or the RLA, or both, would have barred the transfer unless some other provision of law overrode the barrier(s). We now turn to whether it was possible to do so under other provisions of law.

In light of the Supreme Court's decision in *Train Dispatchers*, there is no longer any dispute that under § 11341(a) the Commission may exempt approved transactions from certain laws, such as the RLA and collective bargaining agreements subject to the RLA, that would prevent the transactions from being carried out.[10] This authority extends to arbitrators as well, when they are working under the delegated authority of the Commission. *See United Transp. Union v. Norfolk and Western R. Co.*, 822 F.2d 1114, 1120 (D.C. Cir. 1987) (An "arbitral award must be treated as an order of the Commission."). As we indicated in footnote 9, *supra*, however, the Supreme Court did set forth certain "predicates" to the use of § 11341(a), specifically, that "the exemption applies only when *necessary* to carry out an *approved* transaction." *Train Dispatchers*, at 127 (emphasis by Court).

In our view, "approved" transactions include those specifically authorized by the Commission, such as the various proposals we have approved which led to the formation of CSXT (*see* n. 2, *supra*) and those that are directly related to and grow out of, or flow from, such a specifically authorized transaction. The instant transaction, the transfer of the dispatching functions, falls into the latter category. The existence of this

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[10] The Court found that: "[A]s necessary to carry out a transaction approved by the Commission, the term "all other law" in § 11341(a) includes any obstacle imposed by law. In this case, the term "all other law" in § 11341(a) applies to the substantive and remedial laws respecting enforcement of collective bargaining agreements." *Train Dispatchers*, at 133 (emphasis added).

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second category of transactions is implicit in the definition of the term "transaction" in the standard labor protective provisions: "[A]ny action taken pursuant to authorizations of this Commission on which these provisions have been imposed." *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84 (1979) (*New York Dock II*).[11]

Furthermore, the "necessity" predicate is satisfied by a finding that some "law" (whether an antitrust, RLA, or a collective bargaining agreement formed pursuant to the RLA) is an impediment to the approved transaction. In other words, the necessity predicate assures that the

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[11] The circumstances surrounding the development of this definition confirm this understanding. A prior formulation defined "transaction" as "a transaction involving a common carrier by railroad subject to part I of the Interstate Commerce Act which requires Commission approval under § 5(2)(a)(i) of the act [since recodified as 49 U.S.C. § 11343(a)]." *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 354 I.C.C. 399, 415 (1978) (*New York Dock I*).

Rail Labor objected to the New York Dock I definition. "RLEA [the Railway Labor Executives' Association] states that the term 'transaction' as defined in article I, § 1, must be redefined so as to encompass not only the initial transaction which requires Commission approval but also future related actions made pursuant to that approval. Assertedly, this change is necessary to insure that the notice provisions of article I, § 4 (which provisions are set in motion 'when a railroad contemplates a transaction ***') are triggered in the same situations as they were in §§ 4 and 5 of WJPA [the Washington Job Protection Agreement of May 1936], those situations being when the carrier contemplated a coordination." *New York Dock II*, 360 I.C.C. at 65 (ellipsis in original; footnote omitted).

The Commission, in the *New York Dock II* decision, accepted Rail Labor's objection to the New York Dock I definition. "The labor organizations also request that the definition of the term 'transaction' in article I, section 1(a), be modified to encompass the same situations as the complementary term 'coordination' does in WJPA. These terms are the triggering mechanisms of article I, § 4 [of the New York Dock conditions] and §§ 4 and 5 of WJPA, respectively. Since article I, § 4 here is intended to incorporate the full protections of sections 4 and 5 of WJPA, the term 'transaction' should be redefined to set the notice, negotiation, and arbitration provisions in motion in the same situations as does the term 'coordination.' We also note that the broad definition is necessary in the types of transactions for which approval is required under 49 U.S.C. § 11343 *et seq.*, because the event actually affecting the employees might occur at a later date than the initial transaction, yet still pursuant to our approval (consolidation of employee rosters, *et cetera*). In all these situations, employees should be given notice and the right to negotiation and arbitration; therefore, we will modify the term 'transaction' so that it will apply to any action taken pursuant to a Commission authorization upon which these conditions are imposed." *New York Dock II*, 360 I.C.C. at 70.

See below, at 722-25, for further discussion of subsequent transactions that grow out of specifically authorized transactions.

exemption is no broader than the barrier which would otherwise stand in the way of implementation. It constrains the breadth of the remedy, not the circumstances under which it applies.

As noted earlier, § 11341(a) provides that a carrier or other person participating in an "approved transaction" is "exempt from antitrust laws and from all other law" "as necessary to let that person carry out the transaction." In our view, the term "transaction" refers to the change in the *status quo* which is currently at issue in this case, the transfer of dispatching functions from union to non union management employees. The union, however, mistakenly focuses on the 1980 decision authorizing CSX's control of various carriers. (Even then, it does not explain why the other decisions listed in n.2, *supra*, would not be at least equally germane.) We see no basis in the statute or legislative history of § 11341(a) for testing the alleged impediments to the proposed transfer in the context of our 1980 order.

We look to the 1980 decision (as well as the other decisions in n.2, *supra*) to see if the proposed transfer has been "approved." The approval of a principal transaction extends to and encompasses subsequent transactions that are directly related to and fulfill the purposes of the principal transaction (*i.e.*, those which, the Supreme Court noted, would allow "the efficiencies of consolidation" to be achieved). But finding that the current transaction is approved for the purposes of § 11341(a) because of its relationship to the 1980 and subsequent transactions leading to the formation of CSXT does not mean that the necessity finding relates back to the earlier orders.

The unions contend that there are two principal impediments to the proposed transfer. They allege that their collective bargaining agreements would be violated and that the arbitrator may not adopt an implementing agreement moving the work without following RLA procedures. Assuming *arguendo* that the transfer does offend both existing collective bargaining agreements and the RLA, it follows that CSXT may only carry out the transfer if it is exempted from the restraining provisions of the collective bargaining agreements and the RLA. Thus, the "necessary" finding must relate to carrying out the change in the *status quo* that is being proposed and challenged. It follows, then, that it would make no sense to test the impediments alleged today against the long-consummated principal transactions.

We turn now to a discussion of whether an exemption from § 11341(a) was actually necessary here. The appropriate tribunal to determine whether

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the proposed change in the *status quo* is directly related to and grows out of, or flows from, a specifically authorized principal transaction is this Commission, or the arbitrator acting pursuant to the Commission's authority. *See ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 300 n.13 (1987) (Stevens, J., concurring). If so, § 11341(a) exempts the carrier from any impediments of law which would prevent the change as proposed.[12] In affirming the arbitrator's decision, we find that he correctly concluded that the change at issue here flowed from the various approved transactions listed in n.2, *supra*. As a result, if there were in fact impediments which would prevent CSXT from achieving the efficiencies of the approved merger, an exemption would be necessary to the carrying out of such transfer, and thus CSXT is exempted from any provisions of the collective bargaining agreements and the RLA that might bar the immediate consummation of the transfer of dispatching functions. In adopting this view, we are helping to realize what the Supreme Court termed the "guarantee" of § 11341(a) that "obligations imposed by laws such as the RLA will not prevent the efficiencies of consolidation from being achieved."[13] *Id.* at 133.

We now consider ATDA's argument that even if it were found that § 11341(a) did allow the abrogation of rights arising under the RLA or existing collective bargaining agreements, the Commission did not sanction the specific coordination at issue here in *CSX-Chessie-Seaboard*. For the reasons set forth in the *October 3, 1989, Decision*, we disagree. We will repeat the substance of that discussion.

In *Norfolk Southern Corp.-Cont.-Norfolk & W. Ry. Co.*, 4 I.C.C.2d 1080 (1988), we rejected the argument that the immunity from the operation of other laws under § 11341(a) extends only to matters specifically mentioned

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[12] Section 11341 is self-executing and does not condition exemptions on the Commission's announcing that a particular exemption is necessary to an approved transaction. "Rather, § 11341 automatically exempts a person from 'other laws' whenever an exemption is 'necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.' The breadth of the exemption is defined by the scope of the approved transaction, and no explicit announcement of exemption is required to make the statute applicable." *Id.* at 298 (Stevens, J., concurring) (citations omitted).

[13] As noted above, the Supreme Court found that its interpretation of § 11341(a) made sense of the consolidation provisions of the ICA, which, in the Court's view, were designed to promote "economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure." *Train Dispatchers*, at 132 (citations omitted).

by us in approving the transaction. Rather, § 11341(a) immunity covers the future coordinations expected to flow from the control transaction that we approved, and our approval of the principal transaction also extends to these directly related actions. Indeed, "the * * * coordination of locomotive power is precisely the type of action that might reasonably be expected to flow from the control transaction." *Id.* at 1084.[14] Here, the arbitrator considered CSXT's reasons for proposing the job transfer and concluded that locating power distribution functions for all points on the entire system in Jacksonville would permit "obvious efficiencies and thus economies, as information about all power needs is centralized with the dispatchers and policy deciders in one place to make rational decisions that far-flung, complex operations seem to require." (*Arbitration Award*, at 16.)

We see nothing in the Supreme Court's decision in *Train Dispatchers* that would alter our earlier findings on this point. In fact, if anything, the Court's decision, which upheld this Commission's views regarding the immunity provision of § 11341(a), strengthens this reasoning. The Court discussed the ICA's goal of promoting economy and efficiency in interstate transportation. It also noted Congress's recognition that consolidations in the public interest will result in "extensive transfers, involving expense to transferred employees". *Train Dispatchers*, at 132-133 [citing *United States v. Lowden*, 308 U.S. 225, 233 (1939)].

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[14] A railroad's ability to effect operational changes arising out of a Commission-approved merger that will be immunized by § 11341(a) is not limitless. For the New York Dock conditions and their dispute resolution provisions to be applicable, there must be a reasonably direct causal connection between the merger transaction and the operational changes sought to be implemented. *See Southern Ry. Co.-Control-Central of Georgia Ry. Co.*, 317 I.C.C. 729, 730-731 (1963), *aff'd sub nom.* RLEA v. U.S., 226 F. Supp. 521 (E.D. Va. 1964), vacated on other grounds, 379 U.S. 199 (1964); Finance Docket No. 28490 (Sub-No. 1), *Atlantic Richfield and Anaconda-Control-Butte, Anaconda & Pacific Rd. (Arbitration Review)* (not printed), served March 2, 1988; Finance Docket No. 28583 (Sub-No. 24), *Burlington Northern-Control and Merger-St. Louis-San Francisco Ry.* (not printed), served June 23, 1988. Such a relationship may be shown or rebutted in various ways, e.g., the nature of the transaction; the length of the time between the control transaction and the changes sought to be implemented. Causality, however, is not *per se* diminished by a lengthy delay in exercising authority previously granted. This is not analogous to laches. There could be any number of reasons why an entity formed as the result of a Commission-approved transaction might wish to postpone a coordination which could have been undertaken earlier. Accordingly, the eight-year lapse in this case between the Commission's 1980 order and the transfer of dispatching functions does not invalidate our approval of the transfer, since a sufficient causal relationship with the transaction authorized in 1980 has been shown.

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In view of this language, we believe that our approval of future transactions that may logically arise out of a consolidation transaction, even though they are not mentioned at the time of the original transaction's approval, is consistent with the ICA's goals, as expressed by the Court. Indeed, in *CSX-Chessie-Seaboard, supra*, at 589, we specifically noted that coordinations other than those specifically discussed in the decision could well be undertaken. We stated: "[i]t is certainly possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements." *Id.* Obviously, then, as far back as 1980, we contemplated that the applicants could undertake operational changes to improve efficiency which we had not considered in the decision and that specific approval of these coordinations was not necessary. To the extent these changes adversely affect employees, they are entitled to the full panoply of protective benefits available to rail employees adversely affected by a transaction approved by us. As a result, we reaffirm our previous finding that the transfer of the Corbin dispatcher jobs was directly related to our earlier approval of the underlying consolidation transaction.

We have reexamined our *October 3, 1989, Decision* in light of the Supreme Court's decision in *Train Dispatchers*, and we reaffirm our prior decision.

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

It is ordered:

1. As supplemented in this decision, we reaffirm our prior decision in this proceeding affirming the arbitration award issued by Arbitrator Ables dated November 11, 1988.

2. This decision is effective on August 21, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett.

Before
ROBERT J. ABLES
Arbitrator

CSX Transportation, Inc., Employer and American Train Dispatchers Association, Organization	Dispute Concerning New York Dock Conditions

Proceedings: Robert J. Ables, Washington, D. C., appointed by the National Mediation Board on April 27, 1988, as neutral referee to decide this dispute. Pre-hearing submissions by each party received by the neutral referee on June 16, 1988. Arbitration hearing: Jacksonville, Florida; June 23, 1988. Post-hearing submissions concerning Public Law Board No. 3829 received by the neutral referee on June 30, 1988. Post-hearing briefs received: July 25, 1988. Carrier submission with respect to the decision in Public Law Board No. 3829 received by the arbitrator: October 11, 1988.

Date of Decision: November 11, 1988.

CSX Transportation, Inc.

and

American Train Dispatchers Association

Dispute Concerning New York Dock Conditions

OPINION

I. ISSUE

This dispute is simple to identify but difficult to resolve.

It is, after authorized merger of railroads, the next step in a series of steps to effect the efficiencies and economies contemplated by Interstate Commerce Commission when it authorized the merger, with certain built-in,

statutory, protection for employees adversely affected by the merger (consolidation, coordination, etc.), requiring thereby an award favoring the carrier. In the alternative, it is such a big step as to constitute a difference in kind, raising very large questions about the fundamental relationship of labor and management during active merger action in the railroad industry, requiring, possibly, an award favorable to the union.

In a metaphor, the question is whether railroads, such as this one, propose to get a foot in the door to potentially big, big changes in employee protective considerations after merger and, if so, what to do about it, and, if not, to help stop so much litigation about what is a relatively small labor problem in the scheme of things for the four employees involved in this dispute, represented by their union, American Train Dispatchers Association (ATDA).[1/]

1/ The arbitrator's vantage point is as author of probably the first published treatise of employee protection in the railroad industry in the United States and service as neutral referee in subsequent evolving problems. Report of the Presidential Railroad Commission, Appendix Volume III, "The History of and Experience Under Railroad Employee Protection Plans" (1962).

II. FACTS

CSX Transportation, Inc. (CSXT), one of the nation's largest railroads, evolving after mergers of the Seaboard Coastline Railroad and Louisville and Nashville Railroad, which merged with the Chesapeake and Ohio Railroad and the Baltimore and Ohio Railroad, asks to have it determined in this proceeding that the "New York Dock" employee protection conditions prescribed by the Interstate Commerce Commission, when it authorized the underlying railroad mergers, which were exempted from the anti-trust laws, should be considered such that the work of four, union, high-ranked dispatchers (of locomotive power)[2/] in the coal producing area around Corbin, Kentucky, be transferred to Jacksonville, Florida where the company is near completing plans to centralize, for the entire system, all such power distribution, and where the work in dispute would be performed by non-bargaining unit employees (non-contract dispatchers).

The fundamental dispute between the parties, CSXT and ATDA, is not so much the content or application of New York Dock protective conditions for the four contract dispatchers affected by the planned change, as it is the right of the company to abolish those four jobs at Corbin, Kentucky and not give the work of those

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2/ Now known as "Assistant Chief/Power" or, as in this proceeding, "contract dispatchers".

jobs to contract dispatchers, at Jacksonville, since dispatching of locomotive power is still required in Corbin as much, if not more, as before.

The contest is not new.

For 10 years, the parties have been locked in arbitration proceedings, or in court, whether the classification rule of one of the parties' collective bargaining agreement must be construed to preserve the dispatching work for contract dispatchers, as the union maintains, or not, as the carrier maintains.

The latest round in this litigation favors the carrier.[3/]

3/ Very pertinent to the question and to the present proceeding is that, in October, 1988, CSXT submitted to this arbitrator the decision of Herbert L. Marx, Jr., chairman and neutral member of Public Law Board No. 3829, concurred in by the CSXT representative of that board, favoring the carrier's position on the question. After a long recitation of previous litigation in the question, the arbitrator, in his findings, noted: that there exists, now, in Jacksonville the position of Power Coordinator -- a management job; the union's argument was unpersuasive that such management work duplicates, replaces or substitutes for covered -- contract -- dispatcher jobs; and that the carrier was persuasive "the new positions, at or near the top of the management hierarchy of the Operations Control Center, are concerned with overall system-wide control and direction, overseeing the continuing functions of those in the Train Dispatcher Group". Opinion p. 9. Arbitrator Marx concluded the union had not shown that the management level positions established at Jacksonville fit the definition of positions, the duties of which fall within the scope of the train dispatcher group. Thus, he denied the claim to classify dispatching work in issue as within the train dispatcher classification.

The union, considering the contingency of an adverse finding under Public Law Board No. 3829, argues, in the present proceeding, that the present arbitrator may still find under New York Dock that "the work of power distribution now being performed at Corbin should be performed by agreement employees at Jacksonville because the carrier cannot show that to do otherwise is necessary to effectuate the Commission's original order". It argues further that, because there are assistant chief positions at Jacksonville, "it is the carrier's burden to convince this panel that depriving agreement dispatchers of their work is necessary to effectuate the Commission's control order". ATDA pre-hearing submission, Opinion, pp. 7 and 14.

The union has been on a failing track on neutral decisions on these matters. It points to no recent decision by court, arbitrator, Interstate Commerce Commission or other neutral tribunal, preserving work of the kind in issue under New York Dock or other employee protective conditions, upon authorized merger.

The carrier, to the contrary, is alive with decisions supporting its asserted right to take implementing action to effect economies and efficiencies of operations.

It argues here that precedent is so clear and substantial, stare decisis controls, obviating thereby need to examine further the legal basis of its decision to

transfer locomotive power dispatching work from Corbin to Jacksonville under systemwide, centralized, control.[4/]

In any event, the carrier argues the implementing agreement it proposed to the union following it having served a New York Dock Article 1, Section 4 notice on the ATDA on February 12, 1988 ("to transfer certain work associated with train operations to Jacksonville, Florida", proposing in this respect the abolishment of four (4) CSXT Assistant Chief/Power positions at Corbin, Kentucky) "fully and adequately protects the interests of the affected employees" and is consistent with conditions imposed by the Interstate Commerce Commission in relevant proceedings (Finance Dockets 30053, 31033 and 31106) and "with implementing agreements previously negotiated between the parties in similar transactions". Pre-hearing submission, pp. 3 and 4.

In support of its argument that proposed actions under New York Dock conditions (New York Dock Ry-Control -- Brooklyn East. Dist. 60 I.C.C. 60 (1979)) are not different from previous authorized actions involving this and other merged railroads, the carrier relies primarily on the following referee decisions: David H. Brown (December 16, 1986); H. Raymond Cluster (November 23, 1982);

4/ Transfer of other than locomotive power dispatching duties by Assistant Chief/Power is not involved in this dispute because unit employees have been assigned such work.

Robert O. Harris (May 19, 1987), sustained by the Interstate Commerce Commission, with dissent, on June 10, 1988;[5/] and Robert E. Peterson (May 24, 1982).[6/]

5/ The ATDA has advised it will appeal this decision.

6/ Special deference at the "trial" level is given to decisions of labor arbitrators as contrasted, for example, with the Interstate Commerce Commission decisions which lately seem to treat decisions of neutral arbitrators, who are selected by the parties or appointed by the National Mediation Board, as decisions by Interstate Commerce Commission Administrative Law Judges, with "remand" and other like action. See, for example, I.C.C. Decision, Finance Docket No. 28905 (Sub. No. 22), CSX Corp. - Control - Chessie System, Inc. and Seabord Coast Line Industries, Inc. (June 8, 1988). At the arbitration level, the railroad industry should enjoy no special status. Arbitrators who decide cases about the operation and therefore the safety of nuclear power or ammunitions plants, deep coal mining operations and the like, or whether thousands of employees should lose their pensions on a buy-out, need no special review cushion before appropriate court consideration to maintain the essence of arbitration, which should be final and binding decisions, with very narrow exceptions, recognizing that difficult questions in dynamic times -- like employee protection after merger -- may produce unclear and, possibly contrary, results, to be resolved by new agreements, changes in law, etc.

III. FINDINGS

A series of favorable awards on the application of New York Dock conditions is better than none but none of those referenced awards is hard precedent, on-point, concerning transferring work which clearly has been done by contract employees and where <u>that work</u> remains to be done after the consolidating action, as here.

Arbitrator Brown, in a dispute between this company and the UTU on New York Dock conditions, had before him the question whether a tentative agreement for the selection and assignment of conductors and trainmen was equitable. The ultimate decision allocating work on a percentage basis between these two covered crafts does not reach the question of abolishing work of covered employees to be done by non-contract employees.

Arbitrator Cluster was concerned with the number of yard assignments resulting from a consolidation. The arbitrator made a series of findings on: protection for (covered) engineers off the consolidated railroads; an order selection list to fill regular and extra yard engineer positions in the consolidated terminal; home road rules under "schedule", i.e., union agreements; and certain travel allowances under consolidated yard conditions. None of these findings reaches the present question.

Arbitrator Harris, in a dispute concerning New York Dock conditions between the Norfolk and Western Railway Company, Southern Railway Company, and the American Train Dispatchers Association, had before him a proposed transfer of work "of supervising the locomotive power distribution and assignment from the N&W System Operations Center in Roanoke, Virginia, to Southern's Control Center in Atlanta, Georgia". Opinion, p. 2. The N&W, a product of earlier mergers, did not itself have an agreement with the ATDA but the union had agreements with each of the railroads which had merged into the N&W. When the merged company proposed to assign power distribution in a "power bureau" to non-ATDA dispatchers, the ATDA, in a dispute before the Third Division of the National Railroad Adjustment Board, prevailed, following which the parties agreed that "supervisors" who worked out of such power bureau would be represented by ATDA. The Southern Railroad, however, controlled its distribution of power out of Atlanta, with non-contract dispatchers. The question before the arbitrator was the effect on bargaining rights when the merged carrier proposed to concentrate power distribution for the entire system in Atlanta using non-contract dispatchers. The arbitrator, noting the "unusual rearrangement" (p. 9) concerning contract and non-contract dispatchers, decided that the "central issue" (p. 11) in the case was the

reconciliation of Sections 2 and 4 of Appendix I to New York Dock.[7/]

Concentrating on this issue of relative authority under the Railway Labor Act and the Interstate Commerce Act for a substantial part of his opinion, the arbitrator then reaches what was the question in dispute, which was whether the resulting work of distributing power was to be done by contract or non-contract dispatchers. In an opinion going off on representation rights, to be determined by the National Mediation Board,[8/] but noting that the carrier, in its last proposed implementing agreement, offered to consider awarding new dispatcher positions in Atlanta to covered dispatchers, the arbitrator concluded he could not change the terms of New York Dock and, because the union proposed an implementing agreement.

7/ This is a heavy litigated matter involving the precedence of the Railway Labor Act or the Interstate Commerce Act in New York Dock employee protection conditions, where the parties cannot agree on an implementing agreement following an authorized merger. The question, following a number of arbitration and court decisions seems settled in favor of the Interstate Commerce Act.

8/ The Interstate Commerce Commission found this explanation to be "confusing". I.C.C. Decision, Finance Docket No. 29430 (Sub. No. 20, Norfolk Southern Corp. - Control - Norfolk & Western Railway Co. and Southern Railway Co. (June 10, 1988), p. 5.

and one such by the carrier being beyond the terms of New York Dock, they could not be acted on, but that the carrier's second proposal "will be placed in effect" (p. 17). Presumably, the carrier's second proposal was adopted on the basis it did not exceed New York Dock, although such presumption is by inference, since the opinion does not identify the basis for the conclusion. The employee member, in a strong dissent, did not accept the arbitrator's decision favoring the carrier's position.

Arbitrator Peterson, in a dispute between the Southern and N&W Railroads as the employer and the Railroad Yardmasters of America, had before him whether proposed implementing agreements provided an appropriate basis for the selection of forces. He adopted a "fair and reasonable" standard, noting that "consideration could not be given to a supposed superiority of rights for represented employees to retain job opportunities to the detriment of non-represented, non-contract, employees by the same job class or craft" (p. 17) where the union contract provides that non-contract employees -- presumably doing the same work as contract employees -- "shall have afforded substantially the same levels of protection as afforded to members of labor organizations" ibid. in selection of forces. Since the union held no representation rights at the surviving yard under the proposed rearrangement of forces, the union agreement could not be extended to the yard.

The Brown decision did not involve work transferred to uncovered employees. The Cluster decision was a garden variety dispute under New York Dock as to which covered employees get resulting work. Harris was lost -- which happens to all arbitrators in different cases, during changing times, in cases argued by very able attorneys -- as here -- with a dizzying array of court, arbitration and agency awards. The Peterson case did not involve management people doing scope work.

These are not ringing decisions demanding their adoption in this dispute, as the carrier argues.

Each of such decisions however is a bit in a mosaic favoring the consensus of neutrals that a railroad should have reasonable opportunity to effectuate the improvements of operations and cost it persuaded the Interstate Commerce Commission was the object of the proposed merger sufficient to be granted authority to make implementing changes without undue concern about restrictions under otherwise applicable anti-trust law.

But the question remains: how far?

For the first time under New York Dock, based on the sophisticated submissions of the parties, the question is clear: can contract jobs be abolished and the work, still to be performed in those jobs, be transferred to non-contract employees at a different location ?

It must be clear. The work in issue is not to be done by unrepresented, non-supervisory, employees, or union employees represented by another craft off another railroad, or by road and yard employees with different seniority rights. The work is to be done by managers, "low level" managers, as the carrier makes clear -- but managers.

Scattering its shots somewhat, the union here argued various theories to support its claim that the employer was violating applicable agreements by not letting contract locomotive power dispatchers at Corbin follow their work to Jacksonville. It argued precedence of the Railway Labor Act over the Interstate Commerce Act and of Section 2 over Section 4 of Article I of New York Dock, and the scope rule, with many footnoted references to court decisions on employee protection conditions upon authorized merger. In its pre-hearing brief, the union made what may be taken as a collateral argument on the effect of the carrier's action on the union, as distinct from employees affected by this transaction. It notes that, although the centralization of train dispatching functions was contemplated, "de-unionization of an integral part of the operation -- the distribution of locomotive power -- was in [no] way alluded to" by the Commission authorizing the overall consolidation. (p. 10.)

By the time of post-hearing brief, the union argued strongly that the effect of the carrier's proposal "is

to take the work out of the union's jurisdiction" and that if the carrier's position in this dispute is accepted,

> The carrier can use New York Dock time after time as a tool to reduce its organized work force and the influence and ability of this organization to represent its employees in the process. (pp. 3 and 4).

The union's concern is real -- which is not to say sufficient to sustain its claim.

A "coordination" was a term more commonly used than merger, in earlier times going back to the Washington Job Protection Agreement of 1936, describing changes to make railroad operations more efficient and less costly. They frequently were limited to consolidating yards or tracks. Now, whole companies are absorbed in mergers, sometimes repeatedly. Displacement of employees and concomittant need for protection from the effects of such actions, as prescribed by statute[9/] and underlying protective conditions prescribed by the Interstate Commerce Commission or Department of Transportation (for airline mergers) are now much more widespread.

9/ 49 U.S.C. § 11341, et seq.

As a determined tide is hard to stop, it is with increasing difficulty neutrals can see a particular consolidation, change in operation, purchase of new equipment, or application of new technology, as not being within the intent of the Commission's blessing when it approved the merger. The Commission could not reasonably anticipate all the changes -- either in kind or degree -- that would logically flow from its authorization to merge carriers. Absent the parties themselves agreeing how to accommodate the changes, neutrals are hard-put to consider substituting their judgment for that of carriers why the change either will not effect the economies and efficiencies projected or that some artificial bar, like limits of New York Dock conditions or the public interest connection between authorized mergers and changes, prevent the proposed operational changes.

In this case, the carrier's action may be seen as a first new step, having the potential of union busting. It will not be found however that this was a purpose of the carrier. (If so, the decision might have gone for the union.)

Despite protestations to the contrary, the union relied heavily on a favorable award in the scope dispute before arbitrator Marx. If the union had prevailed, the decision here could have flowed logically that distribution of power, at least in Corbin, Kentucky, should be done by contract dispatchers, particularly as the carrier

accepts such operations as being "unique" to other carrier operations, with its special requirements for movement of coal, often inter-divisional as well as local.

That decision having gone against the union, the only basis for deciding this New York Dock question in the union's favor is to find the coal movement work so special that only Corbin locomotive power dispatchers can do the job (at Jacksonville),[10/] or that the Interstate Commerce Commission order permitting this underlying merger contained at least an implicit bar against allowing consolidations permitting transfer of bargaining unit work to managers.

The union has not shown either of these conditions.

Clearly, distribution of power for locomotives at Corbin can be done at Jacksonville, the same as presently -- or soon will be -- done for all other points on the entire system, permitting obvious efficiencies and thus economies, as information about all power needs is centralized with the dispatchers and policy deciders in one place to make rational decisions that far-flung, complex operations seem to require.

10/ Where this power distribution work is to be done no longer is in question. It will be done in Jacksonville.

It is also pertinent in the carrier's favor that CSXT has used non-contract power distribution dispatchers at Jacksonville for a long time, thus eliminating any thought that, in this operation, it is consolidating power dispatch responsibilities with a purpose of taking the work from the union.

As to the Commission's order containing any bar to the disputed transfer, the Commission traditionally has shied away from being too specific in these matters and there is no history, precedent or other legal basis to infer that the Commission intended to include a bar to the disputed transfer.

That part of the organization's case, therefore, asking that New York Dock conditions be interpreted or applied to require Corbin, Kentucky contract locomotive power dispatchers to follow the work to Jacksonville is denied.

Subject to this finding, there is no legal or fair reason not to authorize the protective conditions for the four identifiable assistant chief/power dispatchers at Corbin the same protective conditions as was extended to about 20 other unit employees under an implementing agreement by the parties on January 9, 1988.[11/]

11/ The parties disagree whether the agreement on January 9, 1988 was meant to apply to the four unit employees involved in this dispute. Except for following the work, as the union urges in its proposed implementing agreement -- but which is denied -- the question is academic because the carrier is willing to extend the same protection to the four unit employees at Corbin, Kentucky as it provided to other unit employees not involved in this dispute.

IV. DECISION

The claim that four Assistant Chiefs/Power at Corbin, Kentucky shall follow their work to Jacksonville, Florida is denied.

Subject to this denial, the implementing agreement of the parties on January 9, 1988 shall apply to such unit employees.

Robert J. Ables
Neutral Referee

Dated: November 11, 1990

IV. DECISION

The claim that four Assistant Chiefs/Power at Corbin, Kentucky shall follow their work to Jacksonville, Florida is denied.

Subject to this denial, the implementing agreement of the parties on January 9, 1988 shall apply to such unit employees.

Robert J. Ables
Neutral Referee

Dated: November 11, 1990

IV. DECISION

The claim that four Assistant Chiefs/Power at Corbin, Kentucky shall follow their work to Jacksonville, Florida is denied.

Subject to this denial, the implementing agreement of the parties on January 9, 1988 shall apply to such unit employees.

Robert J. Ables
Neutral Referee

Dated: November 11, 1988

314 F.2d 424 printed in FULL format.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an Unincorporated Association, et al., Appellants, v. CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation, Appellee

Brotherhood of Locomotive Engrs. v. Chicago & N. W. Ry. Co.

No. 17098

UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

314 F.2d 424; 52 L.R.R.M. 2595; 46 Lab. Cas. (CCH) P18,125

March 7, 1963

COUNSEL:

H. E. Wilmarth, Cedar Rapids, Iowa, for appellants; V. C. Shuttleworth and W. R. Shuttleworth, of Elliott, Shuttleworth & Ingersoll, Cedar Rapids, Iowa, with him on the brief.

Jordan Jay Hillman, Chicago, Ill., for appellee; Frank W. Davis, of Davis, Huebner, Johnson, Burt & Fulton, Des Moines, Iowa, with him on the brief.

JUDGES: Before SANBORN, VAN OOSTERHOUT and MATTHES, Circuit Judges.

OPINIONBY: OOSTERHOUT

OPINION: {*426}

Plaintiff Chicago and North Western Railway Company (North Western) brought this action against the defendant labor organizations and officers thereof for declaratory judgment as authorized by 28 U.S.C.A. @@ 2201, 2202, to determine the rights of the parties with respect to the lawful procedures to be followed in adjusting seniority rights of employees affected by the consolidation of plaintiff's railroad yard with the newly acquired Minneapolis & St. Louis Railway Company (M. & St. L.) yard at Marshalltown, Iowa.

North Western and M. & St. L. are common carriers by railroad engaged in interstate commerce and are subject to the provisions of the Interstate Commerce Act, 49 U.S.C.A. @ 1 et seq., as well as the Railway Labor Act, 45 U.S.C.A. @ 151 et seq. It is conceded that each of the railway employees affected by the consolidation is represented by a defendant labor organization. Railway Labor Executives' Association (RLEA) is the duly authorized representative of the defendant labor organizations.

Jurisdiction as asserted reason of 28 U.S.C.A. @ 1337 was challenged and upheld by the trial court. The issue presented is thus stated by the trial court:

'The basic question presented herein is, whether the parties are required to follow the procedures of the Railway Labor Act (45 U.S.C.A. @ 151 et seq.) in effecting the proposed coordination of North Western's railroad yards at

Marshalltown, Iowa, or whether the parties are required to follow the procedures prescribed by the 'stipulation' entered into by the parties and authorized by the Interstate Commerce Commission in its order approving the merger under the provisions of Section 5(2)(f) and Section 5(11) of the Interstate Commerce Act, 49 U.S.C.A. @ 5(2)(f), 5(11).'

The trial court thus resolved such issue:

'1. That the Railway Labor Act (45 U.S.C.A. @ 151 et seq.) is inapplicable to the proposed coordination of plaintiff's Marshalltown railroad yards.

'2. The parties hereto in carrying out the proposed coordination are required to follow the procedures prescribed by the stipulation entered into on August 4, 1960 and filed in Finance Docket No. 21115 before the Interstate Commerce Commission.'

The trial court's well-considered opinion setting out the pertinent facts and applicable law is reported at 202 F.Supp. 277.

Defendants as a basis for reversal urge:

'I. The District Court erred in holding that it had jurisdiction of the controversy under Section 1337 of Title 28, U.S.C.

'II. The District Court should have dismissed the action as involving an abstract question.

'III. The Court erred in its ruling and judgment as to jurisdiction and as to the merits of the controversy.'

As a background for the consideration of the errors asserted, we will set out some of the pertinent facts. There is no dispute between the parties as to the basic facts. On October 13, 1960, by order entered in Finance Docket No. 21115, the Interstate Commerce Commission (ICC), acting under @ 5(2) of the Interstate Commerce Act, after considering appropriate applications on file and after due notice and hearing, entered an order authorizing North Western to acquire by purchase the railroad properties and operating rights of M. & St. L. The purchase authorized was consummated. North Western took over the operation of M. & St. L. on November 1, 1960.

The present controversy arising out of the aforesaid merger proceedings relates to the provision made for the protection of the employees and to the Commission's {*427} right to make such provisions which conflict with existing collective bargaining agreements and the prescribed procedures set forth in the Railway Labor Act. The ICC report reads in part:

'Applicants also entered into a stipulation with railway labor organizations represented by the Railway Labor Executives' Association for the protection of all employees of the applicants whose bargaining representatives are members of the association. The stipulation is of the character contemplated by section 5(2)(f) of the act for the protection of railway employees who may be adversely affected by the transaction authorized. as to the employees covered by the stipulation, no conditions in our order are necessary.'

The stipulation referred to in the report and order was made between North Western and M. & St. L. and RLEA, the authorized representative of the employees. Material portions of the stipulation are set out at pages 280, 281, 285 and 286 of 202 F.Supp. The stipulation followed generally the pattern of the Washington Job Protection Agreement of 1936, n1 with some modifications.

The stipulation provides 'the Commission may accept this agreement as one providing a fair and equitable arrangement for the protection of the interests of such employes as provided in Section 5(2)(f) of the Interstate Commerce Act, as amended.'

The stipulation incorporating the employees' agreement filed with the Commission states: 'the protection of the interests of the employees of the carrier parties to the above-entitled proceeding has been provided by said agreement, and any report and order issued by the Commission in said proceeding approving the application may so state.'

The stipulation provides the basis for determining compensation to be paid employees adversely affected by the merger. Section 5 of the Washington Agreement, incorporated in and made a part of the stipulation, reads:

'Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected, parties hereto.'

The stipulation further provides that in event a controversy cannot be decided as set out above, it may be referred to an arbitration committee composed of one member selected by each party and a third member to be selected by such members, or if they are unable to agree, either party may request the National Mediation Board to appoint a third member and that 'the decision of the majority of the arbitration committee shall be final and conclusive.'

On December 16, 1960, North Western gave notice in the manner prescribed in the stipulation that it contemplated coordinating its yard and the yard formerly operated by M. & St. L. at Marshalltown, Iowa, not earlier than March 17, 1961, and that such consolidation would result in the abolishment of one yard engine assignment (one engineer, one fireman, one foreman and two helper assignments). North Western also sent {*428} letters to the representatives of the yard employees requesting conferences contemplated by the stipulation for the purpose of reaching an agreement as to employees to be released and the solution of the labor problems flowing from the coordination. Numerous letters were exchanged between plaintiff and defendants wherein plaintiff contended that the controversy should be settled in the manner provided by the stipulation while defendants contended that the dispute must be handled under the provisions of 6 of the Railway Labor Act. After it became apparent that any attempt to adjust the differences by negotiation would be futile, plaintiff invoked the arbitration provisions of the stipulation, notifying the defendants of the identity of its arbitrator, and plaintiff later requested the National Mediation Board to designate the neutral arbitrator pursuant to the stipulation provisions. Defendants, upon the basis that the Railway Labor Act controls, refused to name an arbitrator. The National Mediation Board did not act upon

plaintiff's request that it appoint a neutral arbitrator.

Defendants' first point, to the effect that the court lacks jurisdiction, is without merit. The trial court states in its opinion, 'The problem is not one of interpretation of collective agreements, but as heretofore set out, primarily involves the interpretation and effect of Section 5(11) of the Interstate Commerce Act on an agreement for the protection of employees approved by the Interstate Commerce Commission under Section 5(2) of the Act.'

28 U.S.C.A. @ 1337 confers jurisdiction upon federal courts over actions arising under any act of Congress regulating commerce. We agree with the contention of the parties that Gully v. First National Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70, prescribes the rules to be applied in determining whether an action arises under the provisions of the Interstate Commerce Act and the Railway Labor Act. Gully thus states the test of jurisdiction: 'The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.' 299 U.S. 112, 57 S.Ct. 97, 81 L.Ed. 70. The problem of statutory construction here presented is a substantial one and fully satisfies the Gully test.

Defendants' contentions that the action should be dismissed as presenting only an abstract question and that the court erred in ruling upon the merits present complex problems of statutory interpretation and accommodation. Such issues are closely related and will be considered together.

It is agreed that the unification of the yards at Marshalltown will affect the seniority rights of the employees who are presently assigned to those yards. Their seniority rights arise out of separate collective bargaining agreements with North Western and M. & St. L., and consequently they do not apply uniformly to both groups of employees.

Defendants appear to regard the dispute as a major dispute which must be resolved, if at all, according to the procedures set out in @ 6 of the Railway Labor Act. They urge that @ 2, Seventh, forbids North Western to make any consolidation which alters seniority rights except in accordance with @ 6.

We do not deem it necessary to determine whether the dispute here involved is major or minor within the meaning of the Railway Labor Act. For discussion of the distinction between major and minor disputes and the available remedies, see Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722 et seq., 65 S.Ct. 1282, 89 L.Ed. 1886. See also Brotherhood of Locomotive Engineers v. Baltimore & O.R.R., 7 Cir., 310 F.2d 503. If either a major or minor dispute exists here and if the Railway Labor Act applies under the present factual situation, exclusive jurisdiction for resolution of the dispute would rest in the instrumentalities established by the Railway Labor Act.

The trial court held that 'under the circumstances of this case the parties hereto in carrying out the consolidation {*429} of yards are relieved from the requirements of the Railway Labor Act by virtue of Section 5(11) of the Interstate Commerce Act (49 U.S.C.A. @ 5(11)).' We thus direct our attention now to the basic issue of whether the statutory authority conferred upon the ICC by the Interstate Commerce Act to approve and facilitate mergers of carriers includes the power to authorize changes in working conditions necessary to

effectuate such mergers.

Section 5 of the Interstate Commerce Act vests in the Commission broad powers to approve, authorize, and facilitate railroad mergers. Section 5(2)(b) includes the following:

'If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *.'

Section 5(2)(c)(4) directs the Commission to consider the interests of the employees affected by a proposed transaction in determining whether the transaction is consistent with the public interest.

Section 5(2)(f) gives more particular consideration to the effects of the merger upon the railroad employees by providing in part:

'As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment * * *.'

Section 5(11), the provision specifically relied upon by the trial court, states:

'The authority conferred by this section shall be exclusive and plenary * * * and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. * * *'

Kent v. Civil Aeronautics Board, 2 Cir., 204 F.2d 263, also relied upon by the trial court, supports its decision. That case involved the merger of air carriers. The statutory provisions for protection of air carrier employees are very similar to those for the protection of railroad labor. See International Association of Machinists v. Northwest Airlines, Inc., 8 Cir., 304 F.2d 206, 211. The approval power for the merger of air carriers vested in the Civil Aeronautics Board is quite similar to that of the ICC in railroad merger cases. The basic problem presented in Kent was the jurisdiction of the Board to determine seniority rights of the flight engineers of the merging airlines. The court held that the Board's power to approve mergers carries with it, in furtherance of the public interest in effecting mergers, the right to resolve

conflicting seniority rights of employees of the merging carriers. In response to the argument that {*430} the order was invalid because it was in conflict with existing collective bargaining agreements, the court said:

'A private contract must yield to the paramount power of the Board to perform its duties under the statute creating it to approve mergers and transfers of certificates, such as are here involved, only upon such terms as it determines to be just and reasonable in the public interest. National Licorice Co. v. National Relations Board, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799; Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230; National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344.

'The paramount public interest required that due consideration be given conflicting seniority interests of both groups of these engineers. The Board has done that with meticulous care and, far from acting in an arbitrary and capricious way, has provided a method which fairly distributes the burdens and the benefits. Alternative methods suggested are at least no better and it was within the competence of the Board to make its determination free from private contract restraint.' 204 F.2d 266.

In Brotherhood of Maintenance of Way Employes v. United States, 366 U.S. 169, 81 S.Ct. 913, 6 L.Ed.2d 206, Mr. Chief Justice Warren, speaking for the Court, gave detailed consideration to the interpretation of @ 5(2)(f) as it relates to the power of the Commission to impose conditions for the protection of employees. Appellants there contended that no compensation plan was adequate unless it was based upon the premise that all the employees currently on the payroll remain in the surviving carrier's employment for at least their prior length of service up to four years. The Court rejected such contention upon the basis of a detailed study of the legislative history of the statute and its administrative interpretation. Attention was called to the rejection by Congress of the Harrington amendment which, if adopted, would have brought about a freeze of existing employees in their job rights.

Railway Labor Executives' Association v. United States, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721, involves another aspect of the interpretation of @ 5(2)(f). The Court set out the legislative history of the statute which in our view lends much support to the trial court's interpretation of the statutes before us. The issue presented in the case just cited is whether the ICC had power in approving a merger to grant employees protection beyond the period of four years from the effective date of the approval of the merger. The Court answered this question in the affirmative. In discussing the legislative history, the Court states:

'The second sentence of @ 5(2)(f) has a significant history of its own. On the floor of the House, Representative Harrington suggested the following proviso to follow the first sentence:

"Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.'

'The Harrington Amendment thus introduced a new problem. Until it appeared, there has been substantial agreement on the need for consolidations, together with a recognition that employees could and should be fairly and equitably protected. This amendment, however, threatened to prevent all consolidations to which it related.' 339 U.S. 150-151, 70 S.Ct. 534-535, 94 L.Ed. 721.(Emphasis added.)

The Harrington amendment was defeated. We believe that the italicized sentence clearly points out the Court's view that the ICC power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist. {*431} Such interpretation is supported by legitimate inferences flowing from the rejection by Congress of the Harrington amendment. Under the Railway Labor Act in a major dispute employees cannot be compelled to accept or arbitrate as to new working rules or conditions. Elgin, Joliet & Eastern Ry. v. Burley, supra; Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R., supra. Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations.

In United States v. Lowden, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208, the issue was whether the ICC in approving a lease by one railroad to another has authority to prescribe as a condition that certain displaced employees be granted compensation. The case arose before the enactment of @ 5(2)(f) in its present form. The Court recognized that under what is now @ 5(2)(b) the welfare of affected employees was to be considered in determining the public interest. The Court held that the Commission had jurisdiction to impose conditions for the protection of the affected employees. The Court stated that the Commission had estimated that 75% Of the savings resulting from consolidations will be at the expense of railroad labor. The Court states:

'Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions. It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee moral as to require their mitigation both in the interest of the successful prosecution of the Congressional policy of consolidation and of the efficient operation of the industry itself, both of which are of public concern within the meaning of the statute.' 308 U.S. 233, 60 S.Ct. 252-253, 84 L.Ed. 208.

The Court also observed:

'If we are right in our conclusion that the statute is a permissible regulation of interstate commerce, the exercise of that power to foster, protect and control the commerce with proper regard for the welfare of those who are immediately concerned in it, as well as the public at large, is undoubted. * * * Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the costs of performance of its carrier duties, on condition

that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege.' 308 U.S. 240, 60 S.Ct. 255-256, 84 L.Ed. 208.

While the three Supreme Court cases just discussed do not deal directly with the specific problem now confronting us (namely, whether the provisions relating to merger and providing for compensation for affected employees take precedence over the provisions of the Railway Labor Act) in the situation here presented we believe that the cases afford very substantial support for the view that Congress intended the ICC to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers. Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of @ 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving {*432} the carrier from all other restraints of federal law.

Unquestionably, the Railway Labor Act is a federal law. We find no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of @ 5(11). n2

The defendants argue that even if it be assumed (which is not conceded) that the ICC had jurisdiction under @ 5(11) to render the provisions of the Railway Labor Act inoperative, it did not exercise such jurisdiction. While the carriers asked ICC to relieve them from the restraint of federal law, the Commission made no express finding or order to such effect. Thus defendants urge that only an abstract question is presented. In answer to a similar defense, the Commission in Chicago, St. P., M. & O. Ry. Lease, 295 I.C.C. 696, states:

'We find nothing in that paragraph (@ 5(11)), or in other portions of section 5, which authorizes us to determine and declare the particular laws within the scope of paragraph (11) from which a carrier shall be relieved. The terms of this paragraph are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do.'

We agree with the views just expressed. The Commission did actually approve the proposed merger and the included agreement for the protection of railroad employees as it was authorized to do. Such approval, in absence of language manifesting a contrary intent, carried with it any exemption from the restraints of other laws as contemplated by @ 5(11) to the extent necessary to carry out the merger. We reject defendants' contention that the statutory interpretation problem before us presents only an abstract question.

Defendants further urge that the Commission made no finding that it was exercising a right to modify the collective bargaining agreements. The Commission did in fact prescribe the terms of compensation to be paid employees affected by the merger and the machinery agreed to by the parties for resolving any dispute that might arise in connection therewith. We have heretofore held that the Commission had jurisdiction to do so. As heretofore pointed out, the Commission at the express invitation of the carriers and the employees adopted the method agreed upon by them for solving any labor dispute which might arise out of displacement of employees as a result of the merger. The Commission

found such agreement to be of the character contemplated by @ 5(2)(f). It is apparent from the Commission's report and order that it considered the agreement which it had approved to have satisfied the obligations resting upon the Commission to protect the employees affected by the merger. Since the parties had completely agreed upon this matter in a manner which satisfied the Commission, no occasion arose for the ICC to take any further action with respect to specifying the conditions. Doubtless the Commission has a broad discretion in determining what conditions should be imposed for the protection of labor and the method of working out any dispute that might arise in connection therewith. It is entirely possible that under some circumstances, the Commission would deem it best to leave the resolution of the dispute to the Railway Labor Act machinery. However, such course was not adopted here. The ICC merely approved {*433} the solution of the problem which had been agreed upon by the parties.

Thus, it is our view that the stipulated agreement became part of the conditions which @ 5(2)(f) required the Commission to impose for employee protection.

Defendants did not treat the stipulation as being an amendment to their collective bargaining agreement when North Western acted to consolidate the Marshalltown yards. Defendants took the position that the notice was a @ 6 notice for new contract provisions.

No question is raised as to the authority of the labor signers of the stipulation to act, nor is any attack made upon the fairness or adequacy of the stipulation. In effect the stipulation provides substantially the same machinery for arbitration that exists under @ 7 of the Railway Labor Act in the event of an agreement of the parties to arbitrate after negotiations for adjustment under other provisions of the Railway Labor Act have failed. The ICC has many times provided for compulsory arbitration to settle labor disputes arising out of mergers where the parties have been unable to agree. See Arnold v. Louisiville & Nashville R.R., D.C.M.D.Tenn., 180 F.Supp. 429, 435-436.

In New Orleans & Northeastern R.R. v. Bozeman, 5 Cir., 312 F.2d 264, the court, in approving a merger, imposed the so-called 'Oklahoma conditions' for the protection of affected employees. Said conditions included a provision for compulsory arbitration of disputes relating to employees discharged as a result of the merger. The parties were unable to settle a dispute which arose from the dismissal of some employees. The railroad contended that under the Railway Labor Act it could not be compelled to arbitrate the question. The court, after stating that it found no authorities directly passing upon a complaint to compel arbitration in such a situation, states:

'We conclude that Section 8 of the Conditions gave either party the absolute right to select arbitration as a means for settling the dispute and when such selection was made then arbitration was mandatory on the other party. We also conclude that the (employees) made this election, as found by the trial court, and we find that there is no prohibition in the statute against giving effect to this term of the I.C.C. order.'

We consider the Bozeman case to be based upon should reasoning. Said decision affords substantial support for the trial court's decision. The fact that in Bozeman the employees were seeking arbitration while here arbitration

is sought by the railroad is a distinction without difference under the peculiar facts of this case. In Bozeman, the railroad was bound to arbitrate because it accepted the merger upon the conditions imposed by the Commission which included compulsory arbitration. Here both parties are bound by their voluntary agreement to arbitrate merger labor disputes, which agreement was approved by the Commission and made a part of the @ 5(2)(f) conditions.

The Railway Labor Act fosters no overriding policy or purpose which would deny enforcement of an agreement to arbitrate. See Brotherhood of Locomotive Engineers v. Baltimore & O.R.R., 7 Cir., 310 F.2d 503, 507, 511; Dwellingham v. Thompson, D.C.E.D.Mo., 91 F.Supp. 787, 792, aff'd sub nom Rolfes v. Dwellingham, 8 Cir., 198 F.2d 591. See also Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. 353 U.S. 30, 34-35, 77 S.Ct. 635, 1 L.Ed.2d 622.

On the other hand, the situation here is distinguishable in many respects from that presented in Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, 5 Cir., 307 F.2d 151. There the Norris-LaGuardia Act was also invoked and the railroads had actually instituted @ 6 proceedings to change the contract. That case did not present a situation such as we have here, where both carriers and labor have joined in an agreement for the adjustment of labor disputes which would arise out of the approved merger. See also McDow v. Louisiana So. Ry., 5 Cir., 219 F.2d 650.

{*434} Other issues are raised. We deem what we have said heretofore to be dispositive of this case. The result to be reached is often governed by the precise factual picture presented. We limit our decision to the peculiar factual situation of the present case.

We hold that the court had jurisdiction; that a justiciable controversy on statutory construction was presented; that the court committed no error in holding that the Commission acted within its jurisdiction in providing for the adjustment of labor disputes arising out of the approved merger; and that the court correctly decided the parties to this action should follow the procedures prescribed by the stipulation approved and adopted by the Commission.

Affirmed.

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n1. The Washington Job Protection Agreement is an industry-wide collective bargaining agreement entered into by most railroads, including North Western and M. & St. L., and the labor organizations. It specifies conditions for the protection of employees in event of mergers. For further details as to the Washington Agreement, see Brotherhood of Maintenance of Way Employes v. United States, 366 U.S. 169, 173, 81 S.Ct. 913, 6 L.Ed.2d 206; United States v. Lowden, 308 U.S. 225, 234, 60 S.Ct. 248, 84 L.Ed. 208; Railway Labor Executives' Ass'n v. United States, 339 U.S. 142, 147 et seq., 70 S.Ct. 530, 94 L.Ed. 721; and the trial court's opinion.

n2. As appellee points out in its brief, Congress has demonstrated by the proviso it attached to Title I, 10 of the Emergency Railroad Transportation Act of 1933 (48 Stat. 211-17) that it knows how to expressly exclude the Railway Labor Act from the operation of a statute such as this. As the Supreme Court

points out in Texas v. United States, 292 U.S. 522, 534, 54 S.Ct. 819, 825, 78 L.Ed. 1402 (dealing with other sections of the 1933 Act), 'The insertion of the provision in Title I, with its restricted application, and the omission of a similar provision from Title II, indicate an intentional distinction.'

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

SERVICE DATE

OCT 25 1983

EC

INTERSTATE COMMERCE COMMISSION

DECISION

Cc-CBS
WPH
PAC
PWH
Decisions ✓
Labor
DRG
MKT

Finance Docket No. 30,000 (Sub-No. 18)

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY-TRACKAGE RIGHTS-MISSOURI PACIFIC RAILROAD COMPANY-BETWEEN PUEBLO, CO AND KANSAS CITY, MO

Finance Docket No. 30,000 (Sub-No. 25)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY-TRACKAGE RIGETS-MISSOURI PACIFIC RAILROAD COMPANY-BETWEEN KANSAS CITY, KS AND OMAHA, NE

PETITION FOR CLARIFICATION

Decided: October 19, 1983

By petition filed May 31, 1983, the Brotherhood of Locomotive Engineers (BLE) and United Transportation Union (UTU) seek reconsideration of our decision served May 18, 1983, denying BLE's petition for clarification in these proceedings. Replies have been filed by Missouri-Kansas-Texas Railroad Company (MKT), Denver and Rio Grande Western Railroad Company (DRGW), and jointly by Union Pacific Railroad Company (UP) and Missouri Pacific Railroad Company (MP). UTU has petitioned for leave to file a reply to the replies.

PROCEDURAL MATTER

Our Rules of Practice do not permit a reply to a reply, 49 C.F.R. 1104.13(c). UTU, however, contends that its tendered reply is necessary for a clear presentation of the issues. As the reply does not broaden the scope of UTU's petition, we will accept the reply for filing so that we may fully address the issues.

BACKGROUND

By decision served October 20, 1982, the Commission approved the consolidation of UP and MP under the common control of Union Pacific Corporation and Pacific Rail System, Inc. Union Pacific-Control-Missouri Pacific; Western Pacific. 366 I.C.C. 459 (1982). Several railroads, including DRGW and MKT, opposed the consolidation and filed responsive applications for the imposition of trackage rights conditions. BLE, UTU, and various other railway labor organizations opposed the consolidation and actively participated in the consolidation and responsive trackage rights applications proceedings.

As conditions to approval of the consolidation we approved DRGW's application for trackage rights over MP's line between Pueblo, CO and Kansas City, MO, and MKT's applications for trackage rights over UP and MP lines extending between Kansas City, KS, Topeka, KS, Omaha, NE, and Lincoln, NE. Pursuant to 49 U.S.C. 11343-4, we approved the proposed trackage rights agreements submitted by DRGW and MKT in their responsive applications, subject to determination of fair compensation for use of the trackage rights and further subject to our usual employee protective conditions.1/ DRGW's proposed agreement specified that DRGW could, at its option, perform trackage rights operations using its own crews. MKT, pursuant to its proposed agreement, would use its own crews in performing its operations.

After consummation of the consolidation, DRGW and MKT began performing the approved trackage rights operations. A dispute then arose between the involved railroads and BLE over whether the trackage rights tenants could perform operations over MP's

1/ Norfolk and Western Ry. Co. - Trackage Rights-BN, 354 I.C.C. 605 (1978), as modified by Mendocino Coast Ry., Inc.-Lease and Operate, 360 I.C.C. 653, 664 (1980) (N&W-BN conditions).

lines using their own crews without the consent of the unions representing MP's employees. BLE's petition for clarification sought a decision stating that this Commission has no jurisdiction over these crew assignment disputes and that the consolidation decision and approval of trackage rights did not authorize DRGW and MKT to operate over MP lines using their own crews. BLE and UTU now seek reconsideration of our decision denying that request for relief.

In its petition for reconsideration, BLE contends that this Commission has no jurisdiction over crew assignment disputes and that they must be settled under the procedures of the Railway Labor Act (RLA) 45 U.S.C. 151, et seq. BLE further asserts that trackage rights operations by DRGW and MKT using their own crews constitute a unilateral change in working conditions by MP in violation of the labor protective conditions imposed on the consolidation.2/

UTU argues that the Commission's plenary jurisdiction over railroad consolidations does not authorize us to immunize a transaction from the requirements of the RLA or to approve unilateral changes of collective bargaining agreements. UTU states in the alternative that if the Commission has jurisdiction it failed to make necessary findings supporting overriding the RLA or showing how the policies of the RLA were accommodated with those of the Interstate Commerce Act.

In their replies, DRGW, MKT, and UP-MP assert that the arguments of BLE and UTU are legally incorrect, that petitioners have failed to satisfy the procedural requirements for reopening

2/ The consolidation is subject to the usual labor protective conditions as set forth in New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock conditions).

a proceeding, and that the allegations of violations of the RLA and collective bargaining agreements were not raised during the course of the proceedings on the consolidation and the responsive trackage rights applications.

UTU, in its response to the railroads' pleadings, makes further arguments regarding purported violations of the RLA, collective bargaining agreements, and the New York Dock conditions. It asserts that the trackage rights operations involve work which, by custom, is to be performed by MP employees. Thus, operations using the tenants' crews are unauthorized transfers of the work in violation of the RLA. It further states that only the Federal Courts have jurisdiction to determine whether an agreement violates the RLA. UTU also argues that we did not, and could not, determine that MP employees have no right to participate in the trackage rights crew selection process. It contends that such a determination would deprive MP employees of property rights without due process and would violate the requirements of 49 U.S.C. 11347 and of the NW-BN and New York Dock conditions.

DISCUSSION AND CONCLUSIONS

The various arguments of BLE and UTU are all based essentially on the assertion that the proposed trackage rights operations which we have approved involve UP-MP unilaterally changing the working conditions of their employees by transferring work which, by custom and under collective bargaining agreements, is to be performed by UP-MP employees. This purported change, petitioners argue, violates the RLA and the New York Dock and NW-BN conditions. Petitioners contend that UP-MP employees, through their bargaining agents, have the right

to participate in the trackage rights crew selection process and have the right to have any related disputes resolved pursuant to the RLA and the applicable labor protective conditions. We find these arguments to be unpersuasive and unsupported by the record in these proceedings.

Jurisdiction. Although we conclude that the trackage rights agreements do not involve a change in UP-MP employees' working conditions in a manner contrary to RLA requirements, we will address UTU's argument that we lack jurisdiction under 49 U.S.C. 11341 to exempt a transaction from the requirements of the RLA.

The Commission's jurisdiction over railroad consolidations and trackage rights transactions, within the scope of 49 U.S.C. 11343, is exclusive. Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA. See Brotherhood of Loc. Eng. v. Chicago & North Western Ry. Co., 314 F.2d 424, 432 (8th Cir. 1963), cert. denied 375 U.S. 819 (1963).

Contrary to UTU's arguments, the 4-R Act3/ did not limit our authority to exempt a transaction from the RLA. Rather, the 4-R Act specified standards for the minimum level of employee protection to be imposed as conditions to the approval of certain transactions. Those standards, however, do not require preserving rights under the RLA. Affected carrier employees have rights to the extent specified in the protective conditions imposed pursuant to 49 U.S.C. 11347.

3/ Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976).

As UTU notes, standard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

Employees adversely affected by the transaction may receive benefits under the protective conditions and under pre-existing agreements to the extent those benefits are not pyramided. If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent. The discussion of this point in Brotherhood of Loc. Eng., supra, at 430-1, is persuasive and we conclude that this reasoning is unaffected by the enactment of the 4-R Act.

Supporting Findings. Petitioners argue that even if the Commission has jurisdiction to exempt the transactions from the RLA, we failed to do so in this proceeding. Further, they argue that we have not attempted to reconcile the decision with the policies of the RLA nor made any findings supporting an exemption from the RLA.

Docket No. 30,000 (Sub-No. 25) (MKT-25). DRGW's application provided: "Rio Grande may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars to points on or over the Joint Track ...." Proposed agreement Section 6(c)(3), DRGW trackage rights application, Finance Docket No. 30,000 (Sub-No. 18) (DRGW-8). Therefore, in January 1981, over a month before the commencement of hearings, all parties had notice that the responsive trackage rights applicants sought authority to perform operations using their own crews.

On February 20, 1981, DRGW and MKT filed their verified statements in support of their responsive applications. These statements further make clear the position of those carriers that, if their applications were approved, they would have the right to conduct trackage rights operations using their own crews. For example, DRGW's evidence stated: "If our trackage rights applications are granted, both over WP4/ and MP, we anticipate that a fewer number of employees will be displaced, or a reduction of 176 jobs as opposed to 350 jobs if these applications are not granted." Verified Statement of A.E. Nance, at 15. MKT's evidence stated: "The projected position impacts shown on Exhibit 4 [to the trackage rights applications] reflect our determination of the number of positions that would be created, eliminated or transferred, or the other affects of such actions due to the acquisition of trackage rights. Our determinations were based primarily on the essential provisions of the applicable labor agreements and consultation with other carrier officers." Verified Statement of Harold M. Hacker, at

4/ The application for trackage rights over the Western Pacific Railroad Company was subsequently withdrawn.

2. These verified statements clearly demonstrate the intent of MKT and DRGW to operate using their own crews. The assessments of labor impacts make no mention of any possibility of UP-MP employees having any right to perform the proposed operations.

During the course of hearings in these proceedings, DRGW and MKT witnesses Nance and Hacker were cross-examined on the testimony in their verified statements. No labor party cross-examined Mr. Hacker. See Transcript, Finance Docket No. 30,000, Bifurcated Hearing, June 23, 1981, at 3398-3417. Thus, Mr. Hacker's testimony regarding labor impact on MKT employees as a result of approval of the proposed trackage rights operations stands in the record without qualification.

Mr. Nance was cross-examined by various parties, including UTU. Under cross-examination by counsel for UP-MP, Mr. Nance testified that DRGW was willing to negotiate with UP-MP regarding whose crews would perform operations. Transcript, Finance Docket No. 30,000, June 23, 1981, at 8432-3. He testified that "as these trackage rights are granted to us we are willing to sit down and work out any kind of arrangement you [UP-MP] want." at 8433, also see at 8449-50. Mr. Nance's testimony clearly states that the decision whether to use UP-MP or DRGW crews would be a matter solely within the discretion of the managements of the railroads. At no point does he indicate that UP-MP employees would have any right to participate in the decision-making process.

Following cross-examination by applicants, the labor parties had the opportunity to cross-examine Mr. Nance. BLE did not question him. Counsel for UTU's cross-examination dealt exclusively with Mr. Nance's projection of the impact of the

The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints. See Brotherhood of Loc. Eng. supra, citing Chicago, St. P., M. & O. Ry. Lease, 295 I.C.C. 696, at 432 (1958).

In evaluating a transaction under the criteria of 49 U.S.C. 11344, we must consider the policies of statutes other than the Interstate Commerce Act to the extent that those policies are relevant to the determination of whether a proposal is consistent with the public interest. For example, the public interest evaluation must include consideration of the policies of the antitrust laws. See McLean Trucking Co. v. United States, 321 U.S. 67, 87 (1944).

While the RLA, like the antitrust laws, embodies certain public policy considerations, the Interstate Commerce Act also specifies that the interests of affected employees must be considered. In these proceedings we gave full consideration to the impact of the consolidation on railroad employees in accordance with our established policies. 366 I.C.C. 618-22.

The record in these proceedings is devoid of any suggestion by BLE, UTU, or any other party that the approval of the responsive trackage rights applications, subject to the usual labor protective conditions, would be in any way inconsistent with the policies of the RLA. In these circumstances, we can find no merit in UTU's argument that we improperly failed to reconcile the policies of the RLA with our decision.

Labor Conditions. Petitioners contend that operations by the trackage rights tenants, using their own crews, over UP-MP lines would constitute a unilateral change in working conditions for UP-MP employees in violation of the NW-BN and New York Dock conditions. They further contend that these crew assignment disputes are labor issues in which the Commission should not be involved. As previously discussed, the standard labor conditions do not freeze working conditions which must be altered to implement an approved transaction. The record in these proceedings strongly supports the conclusion that the approved trackage rights operations are not inconsistent with the terms of any collective bargaining agreements or of the imposed labor conditions.

BLE, UTU, and various other railway labor organizations participated in these proceedings, and none made any argument or presented any evidence that the responsive trackage rights proposals would violate any applicable labor agreements. Rather, the record supports the conclusion that the trackage rights operations, using the tenants' crews, could be implemented as approved without raising any dispute over crew assignments between the employees of different railroads.

The responsive trackage rights applications in these proceedings were filed in January 1981, and in accordance with regulations, included proposed trackage rights agreements which specified the operating conditions for the trackage rights. The agreement in MKT's application specified: "MKT, with its own employees, and its sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." Proposed agreement Section 5, MKT trackage rights application, Finance

primary transactions on DRGW's employees. No questions were asked regarding DRGW's assessment of the labor impacts of its sought responsive trackage rights. Transcript at 8555-8.

BLE and UTU submitted evidence and presented witnesses in opposition to the responsive trackage rights applications. Nowhere in these evidentiary presentations did the labor parties indicate that UP-MP employees would have a right to participate in the selection of which railroad's crews would perform trackage rights operations.

On July 3, 1981, BLE submitted the verified statement of Edmund G. Becker in opposition to trackage rights over UP lines. Prepared Statement BLE-1, entered into evidence as BLE-H(VS)-2. Mr. Becker noted that the trackage rights applicants intended to perform operations using their own crews. He testified that granting the responsive applications "would have an adverse effect on the engineers currently handling the traffic received from and delivered to the Missouri-Kansas-Texas Railroad at Kansas City [and] ... it would be safe to say that no less than two hundred-sixty (260) engineers would be affected due to the ripple effect ...." BLE-H(VS) 2, at 4. The verified statement does not suggest that UP engineers would have any protection from these adverse consequences under any collective bargaining agreements or the RLA. Further, on cross-examination, Mr. Becker did not indicate that UP engineers would have any right to participate in trackage rights work force selection. Rather, he testified that UP engineers would be adversely affected by approval of the responsive applications. Transcript, at 12,974-81, September 16, 1981.

On August 31, 1981, the parties identified as Various Labor Organizations, including UTU, submitted verified statements (VLO-H(VS)-2). Representatives of UTU provided verified statements included in VLO-H(VS)-2. None of those statements, however, contain testimony supporting the assertion that UP-MP employees would have any right to participate in the trackage rights crew selection process.

Finally, in their post-hearing briefs neither UTU nor BLE made any arguments or cite any evidence in support of the positions they now advocate. The brief for Various Labor Organizations, in its statement of facts, cites Mr. Hance's testimony regarding labor impact of the consolidation, with and without approval of DRGW's trackage rights application. Thus, the brief filed on behalf of UTU accepts labor impact evidence which assumes that trackage rights operations would be performed by the tenant using its own crews. BLE's brief does not discuss the labor impacts of the responsive trackage rights. Rather, it merely made reference to BLE-H (VS)-2 on that point. Thus, the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the trackage rights crew selection process.

Further, petitioners' argument regarding the alleged unilateral change of working conditions mischaracterizes the nature of the trackage rights operations. BLE and UTU have cited decisions such as St. Louis Southwestern Ry. Co. v. Broth. of Railroad Signalmen, 665 F.2d 987 (10th Cir. 1981) for the proposition that railroads cannot transfer or contract out work which, under collective bargaining agreements and by custom, is

to be done by their own employees. These decisions are not relevant with respect to the trackage rights crew assignments in issue here. We approved the MKT and DRGW trackage rights applications to ameliorate certain anticompetitive impacts of the UP-MP consolidation. Those trackage rights operations will be conducted in competition with UP-MP operations. MKT and DRGW will be handling traffic for their own accounts not for UP-MP. UP-MP has not transferred or contracted out any work by agreeing to the trackage rights as a condition to the consolidation.

BLE and UTU both contend that our decision denying BLE's petition for clarification is inconsistent with our general policy of not injecting the Commission into labor disputes. In support, petitioners cite Finance Docket No. 28046, Illinois Central Gulf R. Co.-Trackage Rights-Over Chicago & I.M. Ry. Co. (not printed), served February 22, 1977 and Finance Docket No. 30138, Cairo Terminal Railroad Co.-Trackage Rights Exemption-Illinois C.G. R. Co. (not printed), served May 17, 1983.

In Illinois Central Gulf, the Commission approved a trackage rights agreement which included a provision that the trackage rights tenant would perform operations using its own crews. UTU filed a petition for reconsideration asserting that the Commission had no authority to impose a crew assignment condition and requesting that the condition be removed. The Commission, Division 3, dismissed the petition for reconsideration finding that the crew assignment provision of the agreement was not a condition imposed by the Commission pursuant to the section of the Interstate Commerce Act now codified as 49 U.S.C. 11347. Rather, the provision was a negotiated agreement between the

railroads. The provision was approved (and thus immunized it from all other laws) because it would have no adverse transportation effects. The Division noted that the Review Board, in approving the trackage rights, declined jurisdiction over all other subject matters and the Division concluded that the Commission has no jurisdiction to impose or to remove crew assignment provisions.

UTU and BLE ask us for the same relief the Commission denied in Illinois Central Gulf. The Commission has the power to approve (and to immunize from other laws) crew assignment provisions in trackage rights agreements. These provisions are not labor conditions and cannot be removed or modified in the manner applicable to labor conditions.

In Cairo Terminal, the involved railroads sought an exemption for a proposed trackage rights agreement. The agreement contained a provision regarding which carrier's employees would perform the trackage rights operations. UTU protested the exemption request and requested that the Commission expressly disclaim jurisdiction over the crew assignment provision. UTU's argument was not considered because the Commission's action in that proceeding was based on 49 U.S.C. 10505, not on 49 U.S.C. 11344 relating to approval of trackage rights agreements. The decision noted, however, that "Crew assignment provisions in trackage rights agreements are within this Commission's subject matter jurisdiction to the extent they relate to the transportation effects of the proposed transaction." Slip op., at 8.

Trackage rights agreements are considered under the criteria of 49 U.S.C. 11344 and if those criteria are met, the agreement is approved. The approval confers self-executing immunity on all material terms of the agreement from all other law to the extent necessary to permit implementation of the agreement. To the extent employees are adversely affected by the transaction they are entitled to benefits under the conditions imposed pursuant to 49 U.S.C. 11347.

Provisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and may be implemented without any other approval. Further, the agreement is exempted from any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision.

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

It is ordered:

1. The petitions of BLE and UTU for reconsideration are denied.

2. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

(SEAL)

Agatha L. Mergenovich
Secretary

appropriate for the Commission, the Courts, and Zola if there is a prior predicate of administrative findings such as those made herein.

In the end this matter is a simple one which is made difficult only by the amazing ability of Zola to stretch adverse facts and simple legal doctrine into an elaborate self-serving maze. In my opinion he must assume responsibility for the uninterrupted perpetuation of AAACon and must be ordered to cease and desist so that the Commission's termination of AAACon finally may be accomplished.

FINDINGS AND ORDER

Ralph J. Zola intentionally and willfully evaded the effect of the Commission's August 1984 revocation order (affirmed by the U.S. Court of Appeals for the District of Columbia on June 12, 1986) by purchasing the Commission license of a motor carrier NATCO, and continuing the AAACon operations. Zola's actions and intentions in acquiring NATCO were solely for the purpose of continuing the AAACon operations which this Commission ordered terminated in August 1984. NATCO also is in wilful violation of the revocation order. The only *effective* remedial device is the extinguishment of the Zola/NATCO/AC subterfuge through an order revoking NATCO's operating authority (No. MC-162160, *North American Transport Company, Inc.*) and directing Zola to cease and desist from engaging, directly or indirectly, in any for-hire transportation activities within the Commission's jurisdiction. Therefore, the motor carrier operating authority of NATCO in No. MC-162160 is revoked. Zola is prohibited from engaging either directly or indirectly in transportation activities within the jurisdiction of the Commission. The Commission upon a petition or application by Zola, may remove this prohibition in whole or in part upon a finding that it is no longer necessary. Such action shall not be unreasonably withheld.[5]

By the Commission, Paul S. Cross, Administrative Law Judge.

[5] For cause shown, any discretionary administrative prohibition may be removed. The order explicitly notes the possibility, but should not be viewed as an enticement to file a petition.

FINANCE DOCKET NO. 29430 (SUB-NO. 20)

NORFOLK SOUTHERN CORPORATION--CONTROL--NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

Decided May 24, 1988

Affirmed the decision and award in *Norfolk and Western Railway Company, Southern Railway Company, and American Twin Dispatchers Association.*

BY THE COMMISSION:

The American Train Dispatchers Association (ATDA) seeks review of an arbitration panel's decision and award in *Norfolk and Western Railway Company, Southern Railway Company, and American Train Dispatchers Association*, (Harris, May 19, 1987) ("referee's award"). Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern) filed a joint reply. ATDA invokes our jurisdiction to review the referee's award under the standards announced in *Chicago & North Western Tptn. Co. - Abandonment*, 3 I.C.C.2d 729 (1987) (the so-called *Lace Curtain* decision). The carriers agree that we have jurisdiction but urge that the arbitration decision be affirmed.

We are accepting administrative review of this arbitration decision because it involves a dispute under the labor protective conditions imposed in *Norfolk Southern Corp.–Control–Norfolk & W. Ry. Co.*, 366 I.C.C. 173 (1982) (*Norfolk Southern Control*), and raises significant issues of general

importance regarding the interpretation of those conditions.[1] *See Lace Curtain, supra.*

Lace Curtain essentially adopted the standard enunciated by the Supreme Court in the so-called *Steelworkers Trilogy*.[2] In reviewing arbitral resolutions of disputes arising under collective bargaining agreements, courts do not vacate awards because of substantive mistake unless there is egregious error, the award fails to draw its essence from the collective bargaining agreement, or the arbitrator exceeds the specific contract limits on his authority. *Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272, 1275-76 (11th Cir. 1982). We adopted similar standards.

BACKGROUND

In 1982 in *Norfolk Southern Control*, this Commission authorized Norfolk Southern Corporation (NS) to acquire control of the separate railroad systems of N&W and Southern under 49 U.S.C. § 11343, subject to the employee protective conditions in *New York Dock Ry. - Control - Brooklyn East. Dist.*, 360 I.C.C. 60 (1979), (*New York Dock*). On September 12, 1986, N&W and Southern notified ATDA that they intended to coordinate N&W's "distribution of power" work from an N&W facility in Roanoke, VA, to a Southern facility in Atlanta, GA. Distribution of power refers to the assignment of locomotives to particular locations and trains. At N&W, the work had been performed by Systems Operations Control (SOC) supervisors who are represented by ATDA in a collective bargaining agreement with N&W.[3] Under the carriers' coordination plan, the N&W

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[1] On January 5, 1988, ATDA filed a so-called supplement to its earlier petition to review the arbitration award. It submitted a corrected filing on January 15, 1988. The carriers replied on January 26, 1988. The supplement is apparently intended to show that the award has potentially wider ramifications than the instant dispute and is being used by the carrier as precedent for adverse actions against ATDA members at other locations. The carriers deny that any breach of agreement has occurred and state that the practice ATDA mentions has been in effect for 28 years.

We need not address this matter further, because it appears that, even if an adverse action has occurred, it is wholly unrelated to the instant dispute. The proper procedure is for petitioners to submit such additional disputes to arbitration, where they can be resolved on their own merits on a complete record.

[2] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[3] In 1964, the former New York, Chicago, and St. Louis Railroad Company (the Nickel Plate) was merged into N&W, which agreed to assume all the Nickel Plate labor contracts including a 1951 agreement with ATDA. On August 2, 1968, the National Rail Adjustment Board in Award No. 16556 sustained ATDA's claim that the newly established N&W

(continued...)

work would be centralized into the Southern Railway Control Center, which would be responsible for the distribution of power for the entire combined N&W/Southern System. The work would be performed by Southern's Superintendents of Transportation (ST), who historically have been considered as management employees and as such would not be subject to a collective bargaining agreement. In a proposed implementing agreement, N&W and Southern offered the SOC supervisors the opportunity to follow their work by granting them first consideration for new ST positions to be created on the Southern, which are higher paid than the SOC positions on the N&W.

It is the intent of the carriers ultimately to distribute locomotive power throughout the combined system without regard to the historical territorial division, generally north-south, between N&W and Southern. Instead, power distribution functions would be aligned along an assertedly more efficient east-west division of the combined system. This will permit substantial cost savings because fewer locomotives will be needed and the remaining locomotives can be used more efficiently. Moreover, the technology and procedures at Southern's Railway Control Center differ from N&W's in that Southern ST's have computer access to other divisions whereas the N&W SOC supervisors produce internal information that is displayed on a board located at the center. Thus, while N&W's SOC supervisors were given first consideration for the new jobs, the carriers have been unwilling to assign the transferred SOC supervisors the same duties and territorial responsibility they had on the N&W.

Believing that the proposed work coordination was a part of the *Norfolk Southern Control* transaction, the carriers opened negotiations with ATDA under Article I, section 4 of *New York Dock* in an effort to reach a mutually acceptable implementing agreement. After negotiations proved unsuccessful, the carriers invoked mandatory arbitration. A three-member panel was selected, and a hearing held before neutral referee.[4] The referee's award found (organization member Mahoney dissenting) that: the transfer was authorized by this Commission in *Norfolk Southern Control*; the arbitral issue was the proper application of *New York Dock* standards;

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[3](...continued)
position of "power supervisor" embraced work subject to the agreement. Consequently, on April 1, 1971, N&W and ATDA executed a memorandum of agreement which recognized that the distribution of power by SOC supervisors was to be subject to the collective bargaining agreement between N&W and ATDA. The latest such agreement, executed in 1979, is still in force. It is not a part of the record in this proceeding, but there is no dispute between the parties as to its terms.

[4] The neutral, Mr. Harris, was selected by the National Mediation Board (NMB) when the two partisan members were unable to agree on a neutral.

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and Article I, section 4 of *New York Dock* empowers the arbitral panel to modify existing collective bargaining agreements or to approve the transfer of work from a location subject to an agreement to a location where no agreement will apply. Accordingly, a revised implementing agreement submitted by the carriers (which granted SOC supervisors consideration, but no priority, for ST jobs) was placed in effect.[5]

In Finance Docket No. 29430 (Sub-No. 20), *Norfolk Southern Corp.--Control--Norfolk & W. Ry. Co.* (not printed), served June 10, 1987, we denied ATDA's petition to stay the referee's award. Subsequently, the carriers effected the coordination of work and offered Southern ST positions to all nine active and three furloughed N&W SOC supervisors. Nine of the twelve accepted and are now so employed; two declined and one retired. There were no displacements of other employees.

DISCUSSION AND CONCLUSIONS

Article I, section 2 of *New York Dock* requires that collective bargaining rights be preserved in a § 11343 transaction. Also, the Railway Labor Act (RLA) contains extended dispute resolution procedures and prohibits any unilateral change in rates of pay, rules, or working conditions during pendency of those procedures. However, Article I, section 4 of *New York Dock* provides for compulsory, binding arbitration of disputes. It has long been the Commission's view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission.[6] Absent such a resolution, the intent of Congress that Commission-authorized transactions be consummated and fully implemented might never be realized. Moreover, 49 U.S.C. § 11341(a) exempts from other law a carrier participating in a § 11343 transaction as necessary to carry out the transaction.

ATDA argues first that: (1) the transfer of locomotive distribution functions from Roanoke to Atlanta was in violation of the RLA, and the arbitration panel's authorization of the transfer was in excess of its jurisdiction; and (2) the Commission's approval of NS's control of N&W

[5] The carriers' original proposed agreement and ATDA's proposed agreement were rejected as going beyond the terms of *New York Dock*, and the parties were thus given 14 days to negotiate revisions to the adopted agreement.

[6] The panel notes (at 14) that the arbitration panel was created under the *New York Dock* conditions and then states, "[A]s a creature of the ICC, this panel is bound to the ICC view." We agree.

and Southern did not exempt the carriers from the RLA in regard to the subject transfer because (a) the coordination of locomotive distribution is not a transaction subject to approval by the Commission, and (b) the transfer was not specifically mentioned, and thus was not exempted, in the Commission's authorization in *Norfolk Southern Control*.

In our June 10th stay decision, we rejected this line of argument. We found that the arbitration panel's jurisdiction over the transfer stems from the Commission's jurisdiction over the control transaction. The transfer is not subject to the RLA because the Commission, in *Norfolk Southern Control*, authorized the coordination of N&W and Southern under NS, subject to *New York Dock*. The mandatory arbitration provisions of *New York Dock* take precedence over the RLA dispute resolution procedures in transactions approved by this Commission because, as we stated at 6-7 in Finance Docket No. 30532, *Maine Central R.R. Co. et al. - Exemption from 49 U.S.C. §§ 11342 and 11343* (not printed), served September 13, 1985 (*Main Central*) (quoted in the referee's award at 12):

> It is the Commission order, not RLA or [the Washington Job Protection Agreement of 1936] that is to govern employee-management relations in connection with the approved transaction. Such a result is essential if transactions approved by us are not to be subjected to the risk of non-consummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions * * *. Since there is no mechanism [in RLA] for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected.

Similarly, there can be no assurance that post-consummation coordinations contemplated as part of the transaction could ever be accomplished if RLA dispute resolution mechanisms were followed. Thus, the panel correctly found (referee's award at 12-14) that terms of the Commission's order, and specifically the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements. *Maine Central*, *supra*, at 6-7. Moreover, an action taken under our control authorization is immunized from conflicting laws by § 11341(a). *Brotherhood of Loc. Eng. v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir. 1963). The proposed transfer, although not specifically mentioned in *Norfolk Southern Control*, is one of the future coordinations and public benefits expected to flow from, and is therefore part of, the control transaction that we approved. Indeed, the arbitration panel found that coordination of locomotive power is precisely the type of action that might reasonably be expected to flow from the control transaction. *See* referee's award at 10-11. The carriers do not disagree. The arbitration panel, citing *Maine Central*, correctly exercised its

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jurisdiction over the dispute arising from the transfer. *See Brotherhood of Loc. Eng. v. Chicago & North Western Ry., supra*; *compare United Transp. Union v. Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987).

Nor does the collective bargaining agreement between N&W and ATDA impair the panel's jurisdiction to authorize the transfer. *See Maine Central, supra*, at 6-7 n.11 (rejecting argument that the preservation of collective bargaining rights and agreements in Article I, section 2 of the *New York Dock* somehow displaced the Article I, section 4 mechanism for resolving disputes). *See also, Brotherhood of Loc. Eng. v. ICC*, 808 F.2d 1570, 1576-78 (D.C. Cir. 1987) (collective bargaining rights normally preserved pursuant to Commission-imposed labor protection conditions must give way to permit consummation of a Commission-approved transaction despite unilateral management change of working conditions.) Moreover, in Finance Docket No. 30,000 (Sub-No. 18), *Denver and R. G. W. R.R. Co.–Trackage Rights–Missouri P. R.R. Co. Between Pueblo, CO and Kansas City, MO, et al.* (not printed), served October 25, 1983, *rev'd sub nom. Brotherhood of Loc. Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd on other grounds*, 482 U.S. 270, 107 S.Ct. 2360 (1987), *cert. den.*, 482 U.S. 927, 107 S. Ct. 3209 (1987) (*DRGW*), we found that:

> As UTU notes, standard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing work conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under [49 U.S.C.] § 11347 preserve conditions and agreements in the context of the authorized transaction.

ATDA further contends that, even if the arbitration panel had authority to override the collective bargaining agreement and the RLA, it should not have done so. Assertedly, the transfer of power distribution work to Atlanta could have been effected without abrogating the SOC supervisors' collective bargaining and contract rights, because the continuation of those rights would not create a "risk of non consummation." *See Maine Central, supra.* The jobs could simply be transferred subject to the collective bargaining agreement. ATDA notes that the arbitration panel made no factual finding that abrogation of the agreement was necessary to the transfer, much less to the ultimate control transaction. Rather, the referee's award simply states (*id.* at 15): "It is clear that if the employees who are moved to Atlanta are consolidated with the present Atlanta employees, the present collective bargaining agreement between N&W and ATDA may not be carried along * * *."

In reply, the carriers acknowledge that the referee's award did not recite the record evidence upon which the panel based this conclusion. However, the carriers contend that, under the *Steelworkers Trilogy* standards, an arbitrator need not give his reason for an award and is entitled to deference in his ultimate factual findings. In any event, they argue, the record shows that the collective bargaining agreement would be inconsistent with and would frustrate the purpose of the coordination by preventing the carriers from realigning SOC job responsibilities to officer status and thus creating an integrated systemwide facility without regard to the historical N&W-Southern separation. In their view, ATDA's proposal would result in covered employees being limited to the work previously performed in Roanoke by SOC supervisors and to their work rules and lower salary schedule.

In *Lace Curtain*, we stated that "[w]e do not intend to review arbitrators' decisions on issues of causation, the calculation of benefits, or the resolution of other factual questions." We believe that this is precisely the nature of the review ATDA seeks. Petitioner does not contend that the referees' award contains egregious error, fails to "draw its essence" from the *New York Dock* conditions, or exceeds the panel's authority under *New York Dock*. Instead, in regard to this issue, it criticizes the panel's judgment and lack of detailed discussion. These alleged shortcomings are not matters we would review under *Lace Curtain*.

In any event, the record supports the conclusion of the arbitration panel. Imposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function. Moreover, ATDA's unsupported allegation that jobs can be transferred subject to the agreement misconstrues the nature of the transaction. It is the work function, not jobs, that will be transferred, and new jobs will be created to perform this and other functions.

The referee's award is somewhat confusing on the related issue of whether Southern must recognize ATDA as the bargaining representative of the transferred SOC supervisors. Representation is a collective bargaining "right" and, as such, is protected by Article I, section 2 of the *New York Dock*. The panel suggests (*id.* at 15) that its award abrogates not only the collective bargaining agreement but ATDA's representative status as well, yet it acknowledges (*ibid.*) that ATDA's rights as an incumbent bargaining representative are for determination by the National Mediation Board (NMB). It also acknowledges that the former SOC supervisors may join with the Southern ST's as a bargaining unit and petition the NMB for the selection of a bargaining representative.

We find that, under the circumstances present here, *New York Dock* does not preempt any NMB determination as to representation, as the panel seems clearly to have recognized. To the extent the award could be construed as suggesting otherwise, that construction is erroneous. This is not to say that ATDA may in fact retain its status. That, as the panel recognized, is for the NMB to determine, and we recognize that there are legal as well as practical obstacles to such recognition.[7]

Finally, ATDA complains that the panel improperly imposed the carriers' proposed implementing agreement and not ATDA's. ATDA's proposed agreement provided for enhanced economic benefits, as well as continuation of its collective bargaining agreement. The panel concluded that ATDA's proposed implementing agreement, and the carriers' initial proposed agreement as well, could not be imposed because they went "beyond the terms of an implementing agreement set forth in *New York Dock*."

ATDA contends that the *New York Dock* conditions are only a baseline, which the arbitrator may exceed. It contends further that the panel mistakenly assumed that it must adopt one of the proferred agreements in its entirety. We noted in our June 10th stay decision that ATDA has raised an interesting and perhaps significant issue concerning the authority of the arbitration panel. As such, we will review the panel's determination as meeting the *Lace Curtain* criteria for review.

We fashioned the *New York Dock* conditions to satisfy the level of employee protection mandated by § 11347. We have consistently recognized our authority to require a greater level of protection in any given case. *See D&H Ry.--Lease and Trackage Rights Exempt. Springfield Term.*, 4 I.C.C.2d 322 (1988). It does not follow, however, that, once we determine the appropriate level of protection, an arbitrator is free to impose a higher level. On the contrary, the arbitration panel's authority is

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[7] The policy of the NMB is to recognize systemwide bargaining units. ATDA correctly points out that exceptions have been made, but the case it relies on, *Burlington Northern, Inc. v. American Railway Supervisors Assn.*, 503 F.2d 58 (7th Cir. 1974), is inapposite because its recognition of a less-than-systemwide class was based on the common law of contracts. It is unclear whether Southern's status as a successor employer mandates an exception to the NMB policy.

The courts have apparently not addressed this issue under the RLA. Under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, a successor employer may in some circumstances be obligated to recognize and bargain with the representative of its predecessor's employees. *See John Wiley & Sons, Inc. v. Livingstone*, 376 U.S. 543 (1964) and *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). NLRA cases are not controlling but have been held to offer an analogy in the solution of similar RLA problems. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), *reh. den.*, 394 U.S. 1024 (1969).

derived solely from the *New York Dock* conditions themselves, and nothing in those conditions authorizes the arbitrator to expand the basic benefit structure prescribed by the Commission. Rather, it is the arbitrator's task to determine the appropriate *application* of conditions prescribed by the Commission. The proper forum for employees seeking a level of labor protection in excess of *New York Dock* is thus not in the arbitration of individual disputes but rather before this Commission where we consider the merits of the § 11343 transaction. In fact, in *Norfolk Southern Control*, *supra*, at 229-31, labor interests sought a higher level of protection, but we found that *New York Dock* was appropriate. In so doing, we did not delegate to an arbitrator the authority to overturn this determination.

Of course, an arbitrator has discretion to fashion a remedy within the limits of *New York Dock*. To this end, he may combine specific proposals of the parties, may develop compromises, or may even develop his own conditions, limited only in each case by the Commission-mandated level of protection. Nothing in the referee's award demonstrates a misunderstanding of this principle. On the contrary, the referee's award expressly modifies the proposed implementing agreement by adding a condition that the parties meet to consider whether any mutually agreeable revisions could be imposed.

ATDA does not contend that the higher level of protection it seeks is consonant with *New York Dock*. In fact, it tacitly acknowledges that the implementing agreement adopted by the panel provides the minimum economic benefits described in Article I, section 9 of *New York Dock*. It follows that the additional economic benefits ATDA proposed, *i.e.* priority consideration for ST positions,[8] transfer of accrued vacation and sick leave, additional moving allowances,[9] and displacement allowances for employees who choose not to follow their jobs, exceed *New York Dock* and were properly rejected.[10] As noted above, ATDA's proposal that its collective bargaining agreement be maintained (mischaracterized in ATDA's petition as a proposal for continued representation) was also properly rejected. In the circumstances, it is inconsequential that the panel did not explain exactly how the implementing agreements it rejected exceeded *New York Dock*.

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[8] The proposal for priority consideration is moot in light of Southern's hiring of all willing SOC supervisors. The record does not indicate whether those who declined Southern positions would be eligible for the proposed displacement allowance.

[9] The carriers state in this regard (reply at 20) that, "[b]y virtue of being Southern Railway officers, the former SOC supervisors have already received a generous package of relocation benefits." *See also* reply at 31.

[10] A particular benefit may "draw its essence" from *New York Dock* without being specifically enumerated there. ATDA has made no such allegation here.

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The referee's award will be affirmed. This decision will not significantly affect the quality of the human environment or energy conservation.

COMMISSIONER LAMBOLEY, dissenting:

The decision of the arbitration panel failed to appropriately accommodate the aspects of representation and recognition under the RLA with the consolidation transaction under the ICA. In my view, the failure to do so requires reversal and remand.[11]

The matter should be remanded to the arbitration panel with instructions to reconcile the perceived RLA/ICA conflict and effect a balancing of interests necessary to achieve transfer of SOC work activity from Roanoke to Atlanta without termination of representation rights or other unnecessary displacement of RLA rights. It should be recognized that § 11341(a) does not operate in absolute terms exempting application of other laws, rather only to the extent necessary to carry out the proposed transaction. Moreover, conditions imposed under § 11347 operate to preserve conditions and agreements ion the context of the authorized transaction, wherever possible. Thus, assuming the transaction at issue is proximally within the scope of the approved transaction, the arbitration must specifically determine whether, and to what extent, (1) other laws need be necessarily displaced and (2) existing working conditions and provisions of collective bargaining agreements are in conflict with the transaction approved by the Commission.[12]

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[11] Because I find representation and recognition the central issues on appeal, I do not address the disposition of other issues in this case. Although causation is neither free from doubt nor necessarily clear after reviewing the original consolidation case or the underlying panel decision, I do assume the transfer transaction here at issue is one reasonably contemplated or foreseeable as a consequence of the 1982 consolidation transaction approved in the *Norfolk Southern-Control* case. Consequently, the transaction is properly subject to the *New York Dock* conditions and dispute resolution procedures.

In short, while distant in time, it has not been satisfactorily established on the record that transfer does not have a proximate nexus with original consolidation. *See Southern Railway Company - Control - Central of Georgia Railway Company*, 317 I.C.C. 729 (1963), *aff'd sub. nom., Railway Labor Executives' Assn v. U.S.* 226 F. Supp. 521 (E.D. VA 1964), vacated on other grounds, 379 U.S. 199 (1984). This is not to say on remand such a showing could not be made in this case.

[12] *See generally Schwabacher v. United States*, 334 U.S. 182 (1948); *City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977) *cert. den.*, 435 U.S. 950 (1978); and *Denver & R.G.W. R.R. Co. - Trackage Rights - Missouri Pac. R.R. Co. Between Pueblo CO and Kansas City, MO* (not printed), served October 25, 1983; *rev'd sub nom., Brotherhood of Loc. Eng. v. I.C.C.*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd on other grounds*, 482 U.S. 270 (1987). *Also Leavens v. Burlington Northern*, 348 I.C.C. 962 (1977).

For the Commission's part, I believe the majority's affirmation of the panel decision merely compounds the error on appeal. The majority attempts, after a fashion, to rationalize a position affirming the arbitration award. The reasoning is not altogether clear.

Representation rights accorded to employees, individually and as a group, under the RLA basically provide that employees shall have the rights (1) to select a representative chosen by the majority and (2) to have the representative so chosen recognized by their employer for the purposes of collective bargaining.[13] It is from provisions of the RLA, not the collective bargaining agreement, that the right to representation and recognition derive. Indeed, the contrary is true; it is the collective bargaining agreement which is derived from the exercise of the rights of representation and recognition.

In this case, ATDA has been selected as the employee representative, and has been recognized as such by the employer, initially the N&W,[14] and now, following the *Norfolk Southern-Control* merger/consideration, the NS.[15]

In this instance then, the status of representation and recognition may not be terminated by a transaction under the ICA. Exclusive jurisdiction over representation issues belongs to the National Mediation Board under the RLA.[16]

Both the arbitration panel and Commission majority acknowledge that basic proposition, but nevertheless, proceed to terminate RLA representation rights. The RLA rights at issue here are not in conflict with the ICA. Although in the absence of an agreement or an appropriate order, the portability of the collective bargaining agreement may be open to question,[17] the portability of representation and recognition rights are not

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[13] 45 U.S.C. § 152.

[14] This flows from the 1964 Nickel Plate merger, assumption of contracts, the 1968 NRAB Award No. 16566, and the 1979 Agreement.

[15] If the employees, although subject to transfer, nonetheless remain employees, their employer, *i.e.* the entity with ultimate employment authority, is the NS. The *Norfolk Southern-Control* case confers such authority and status on NS. To conclude otherwise would deny NS the requisite control authority to effect the transfer under the ICA, and the corresponding ICA jurisdictional considerations here. In another case, the RLA alone would apply to changes here proposed if employer status was confined to N&W. Indeed, the entire proceedings are premised on ICA jurisdiction and *NS-Control*, both before the arbitration panel and the Commission.

[16] *See e.g.*, "Switchman's Union" Trilogy; *Switchman's Union v. Board*, 320 U.S. 297 (1943); *Gen Committee v. M.-K.-T. R. Co.*, 320 U.S. 323 (1943); *Gen. Committee v. Sou Pac. Co.*, 320 U.S. 338 (1943).

[17] *See Burlington Northern, Inc. v. Am. Ry. Super. Assn.*, 503 F.2d 58 (7th Cir. 1974) *Cf. Norfolk & Western R. Co. v. Nemitz*, 404 U.S. 37 (1971); *Lausmer v. BN, Inc.*, 501 F.2d 593 (9th Cir 1974) and *Miller v. Missouri Pac. Ry. Co.*, 372 F. Supp. 170 (W.D. LA 1974).

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so dubious. Indeed, such rights and status are generally presumed to continue until the contrary is shown.[18]

The arbitration panel was in error in finding that "this (transfer) does not change the rights of individual employees."[19] Such rights have surely been changed, both individually and collectively, despite their establishment and protection under the RLA.

The panel was simply wrong when it asserted "what is lost by the transfer is the incumbency status of the ATDA, a status arrived at through recognition, not through election."[20] Not only does this statement seemingly confuse the status of recognition with the process by which employees select their representative, it is clear that the legally protected status of recognition of an employee representative is the same whether achieved through voluntary recognition by an employer or as a mandatory result of an election process. The panel's attempted distinction is not only contrary to law,[21] it is the contrary to fact.[22]

The panel, likewise, erred when concluded that "the protection afforded by *New York Dock* are to individual employees, not their collective bargaining representatives."[23] First, as mentioned previously, the rights at issue are those of the employee, individually, and collectively, flowing from and protected by statute. The essence of representation and recognition is the right of individual employees to act collectively through a freely selected representative. It is that employee right ATDA is here asserting as the employees' representative, and for which ATDA has an affirmative obligation and duty to do so.[24] The panel's position suggests that employees themselves, rather than their representative are somehow the proper and necessary parties to here claim representation and recognition rights. This position I find wholly untenable.

Without doubt, no tribunal established under the ICA may claim authority to terminate representation rights. The arbitration panel expressly acknowledges its jurisdictional limitations,[25] but nonetheless proceeds to

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[18] *See Dooley v. Lehigh Valley R. Co.*, 21 A.2d 334 (NJ *e.g.* 1941).
[19] Award, at 15.
[20] *Id.*
[21] *See Assn. of Flight Attendants, et al., and TWA*, N.M.B. No. 63 (1987); *also Akron, Canton & Y. R. Co. v. IBEW*, 237 F. Supp. 343 (N.D. IL 1964).
[22] N&W's recognition of ATDA was initially voluntary, and later was required by the National Rail Adjustment Board in Award No. 16556 (1968).
[23] Award, at 15.
[24] The duty of fair representation is an evolutionary product of federal common law with statutory origins. *See e.g.* 45 U.S.C. § 152 (ninth), *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944).
[25] Award, at 15.

effectively terminate those rights. On appeal, the majority of the Commission also acknowledges that the ICA cannot and does not pre-empt RLA representation rights, yet in its affirmation, exercises its authority to approve termination of RLA rights.

In my view, this case should be remanded to the arbitration panel for purposes of accommodating RLA representation rights and/or seeking views of NMB regarding construction of such rights in instances of transfer within a commonly controlled, merged rail system.[26] The latter course may be particularly helpful since this admittedly is a case of first impression, and the NMB has long been recognized as being vested with exclusive authority over representation issues.[27]

It is ordered:

1. The decision and award in *Norfolk and Western Railway Company, Southern Railway Company, and American Train Dispatchers Association* is affirmed.

2. This decision is effective on June 10, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Lamboley dissented with a separate expression.

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[26] *See* comment on "employer" status of NS as successor employer in context of merger. (Footnote 4) Obviously, an ICA control case does not bind the NMB in determining employer status for purposes of the RLA.

[27] *Cf. Southern Ry. Co. v. Combs.*, 484 F.2d 145 (6th Cir. 1973), suspension of proceedings and referral to NMB under doctrine of "primary jurisdiction."

IX

ral Regulations is amended as follows:

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first sentence of paragraph (a) to read as

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be the Commission's Ethics Counselor.

FINANCE DOCKET NO. 28905 (Sub-No. 22)

CSX CORPORATION--CONTROL--CHESSIE SYSTEM, INC.[1] AND SEABOARD COAST LINE INDUSTRIES, INC.

Decided May 21, 1990

On remand from court decision, Commission established guidelines under 49 U.S.C. § 11347 for application of Commission-imposed labor protective conditions to collective bargaining agreements in connection with the carrying out of approved mergers and consolidations. Commission authorized by 49 U.S.C. § 11341(a) to exempt approved transactions from Railway Labor Act procedures. Arbitration awards vacated.

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BY THE COMMISSION:

By decision in *CSX Corp.--Control--Che* *Seaboard C.L.I.* (not printed), served September 20, 1989, we rec these proceedings for public comment. This action followed the ad cision of the Court of Appeals for the District of Columbia Circuit *erhood of Ry. Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989)(*Carmen* will briefly describe the events leading to the *Carmen* decision and opening.

The two captioned proceedings involve the tion of Commission-imposed labor protective conditions to the com of railroad operating functions (heavy equipment repair shops in Fin cket No. 28905 (the *CSX* decision)), locomotive dispatching in Fin cket No. 29430 (the Norfolk Southern or *Dispatchers* decision owing Commission authorization of the consolidation of the railroa volved. In each case, the Commission reviewed an arbitration award, found that the modification

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ne application of Commission- mbining of railroad operating inance Docket No. 28905 (the nance Docket No. 29430 (the on)) following Commission roads involved. In each case, d, found that the modification

not trigger the procedures of the Railway Labor Act (RLA), and approved an implementing agreement that permitted the railroad to move employees and work without resort to RLA procedures.[2] The Commission relied on its authority to regulate the effect on labor of railroad consolidations given in § 11347 of the Interstate Commerce Act (ICA) and the labor protective conditions adopted thereunder (particularly the provision for binding arbitration) as well as the provisions of § 11341(a) exempting railroads carrying out an approved consolidation "from all other laws."

The unions appealed. The *Carmen* court concluded that the Commission had no authority to modify contracts (or CBAs) under § 11341(a). The court did not, however, rule on the Commission's argument based on the labor protective conditions required by § 11347, finding that argument insufficiently articulated on appeal. The court also declined to rule on the effect of § 11341(a) on the RLA, or the unions' argument that Congress had specifically preserved CBA rights in 1976.

In our September 20, 1989 order reopening these proceedings, we announced "our intention to conduct a comprehensive examination of our authority under 49 U.S.C. §§ 11341, 11343, and 11347, etc. and the labor conditions we have customarily imposed in approving railroad consolidations." We requested "further comment by the parties to these proceedings as well as any other interested parties." We also petitioned the *Carmen* court for a rehearing of its decision, advising the court of the reopening and requesting that the court refrain from ruling on the petition until the agency issued its decision on remand. On September 29, 1989, the court issued an order stating that consideration of our petition "is deferred pending release of the ICC's decision on remand." The court also amended its decision to remand only the "record," thus retaining jurisdiction over the case. Briefs by interested parties were filed and the Commission held oral argument on January 4, 1990.

SUMMARY OF CONCLUSIONS

The vast majority of railroad employees work under contracts, or collective bargaining agreements (CBAs), entered into between their union and the railroad. These CBAs often provide that certain specific work on the railroad will be performed by specific employees, or groups of employees. When two separate railroads are authorized by the Commission to merge or consolidate, it is usually anticipated that there will be some integration of the two work forces to permit more efficient operation of the new enterprise. This may require some modification of

[2] The *CSX* decision was served June 23, 1988 and is reported at 4 I.C.C.2d 641. The *Norfolk Southern* decision was served June 10, 1988 and is unreported.

the two separate CBAs governing the work formerly performed for the two separate railroads. Section 6 of the Railway Labor Act requires 30 days notice of "an intended change in agreements affecting rates of pay, rules, or working conditions" and sets in motion an elaborate bargaining process.

There are three propositions that were amply demonstrated in this reopened proceeding. First, any merger or consolidation of significance will require the modification of existing CBAs to carry out the transaction. Second, the procedures of the RLA are incompatible with the efficient consummation and effectuation of a merger or consolidation. The third, and perhaps most significant, proposition established here is that this dilemma was recognized by the industry more than 50 years ago and resolved through agreement between rail labor and management. This agreement was confirmed by Congress. We will briefly describe the resolution and the subsequent harmonious accommodation of the potentially conflicting merger and labor policies which lasted until almost 1980. This was followed by a period of real or apparent conflict between ICA provisions and RLA provisions. We propose essentially to return to the pre-1980 approach based upon harmonizing the provisions of these Acts.

In 1936, the owners of 85% of the railroad mileage in the country and 20 of the 21 railroad labor unions entered into the Washington Job Protection Agreement (WJPA). That agreement provided for prior notice of a proposed merger or consolidation and negotiation between the unions and management leading to an agreement on the implementation of the transaction with respect to affected employees. Mandatory, binding arbitration was provided for in case of a deadlock over the agreement. Substantial benefits extending up to five years were provided for displaced and dismissed employees. It was recognized that significant changes in CBAs involving such matters as work assignments and seniority would of necessity take place and that this could implicate the provisions of the RLA adopted in 1926. Nevertheless, the unions and railroad management adopted the WJPA procedures for resolving labor displacements arising from mergers and consolidations, reserving the RLA for all other matters involving CBAs.

In hopes of strengthening the nation's railroads through consolidations, this Commission had been given authority in 1920 to establish a master plan for such consolidations and to approve those that conformed to the master plan. In the Transportation Act of 1940, Congress dropped the master plan concept to make it easier to consolidate and reiterated its desire that the Commission continue to foster consolidations. Congress also directed the Commission to include in its orders approving consolidations "a fair and equitable arrangement to protect the interests of the railroad employees affected." Congress did not specify the terms of the "arrangement" in the 1940 Act. It is clear from the legislative history that

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Congress intended that the WJPA or its essential features be imposed by the Commission.

In fashioning the labor protective conditions required by the Congressional directive in the 1940 Act, the Commission followed the WJPA, adopting the precise language to a large extent. In the 1940-80 period, with few exceptions, labor and management employed the WJPA, either on its own or as incorporated in separate agreements or in this agency's conditions, as the procedural vehicle for resolution of employee impact issues arising from consolidations and mergers, including issues involving the modification of CBAs. Claims of RLA rights in connection with ICC-approved mergers were rare and of very limited effect.

Thus the dual purposes of Congress were being carried out. Mergers and consolidations of the nation's railroads were being proposed, approved and carried out, goals endorsed by Congress in 1920 and 1940. Also, rail employees were being given a full opportunity to bargain over the effects on them of these transactions, consistent with the goals of the Railway Labor Act. The RLA was promulgated to assure railroad employees a meaningful opportunity to bargain collectively over the terms of their employment and this goal was not being undermined by the procedures being followed during this period to resolve merger-related impacts of employees. It is apparent that those involved in the process, labor, management, arbitrators and the Commission were attempting to accommodate the Interstate Commerce Act and the RLA and that these efforts were generally successful.

This essentially harmonious relationship between management and labor when implementing ICC-approved mergers and consolidation deteriorated in the 1980's. One of the reasons for the change was the adoption by the Commission of new labor protective conditions in 1979, as required by the Railroad Revitalization and Regulatory Reform Act (4R Act), Pub. L. No. 94-210, 90 Stat. 31 (1976). Included in the conditions (at the direction of Congress) was Section 2 preserving "rates of pay, rules, working conditions and all collective bargaining and other rights." During 1981-83, several arbitrators found that this Section meant that absolutely no changes could be made in CBAs without resort to RLA procedures. As we have indicated, a ban on changes in CBAs would prevent most mergers. The pendulum, however, quickly swung the other way.

In 1983, the Commission stated that our authority under § 11341(a) was sufficient to override all laws as necessary to carry out an approved transaction, including RLA, and that CBAs conflicting with a transaction must give way. Finance Docket No. 30,000 (Sub. No. 18), *Denver and Rio Grande Western R. Co.–Trackage Rights– Missouri Pacific R. Co.* (not printed), served October 25, 1983 (*DRGW*). In 1985, we again stated that § 11341(a) overrode the RLA and CBAs if necessary to implement an approved consolidation or merger. Finance Docket No. 30532, *Maine*

Central R.R.Co. Et al.--Exemption f[illegible] 49 U.S.C. §§ 11342 and 11343, (not printed), served September 13, 198[illegible] *d mem. sub nom. RLEA v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987) (*Maine [illegible]tral*). Arbitrators (including those in the two reopened cases) felt the[illegible]es bound to follow these decisions. Accordingly, the status of CBAs we[illegible]rom immutable under the Section 2 theory to subject to complete cance[illegible]ation for conflicting with an approved transaction under *DRGW* and *Maine Central*.

Since the matter is before us on remand from the court of appeals, we do not here consider the general question of the effect of § 11341(a) on the authority to modify existing con[illegible]cts. We do note, however, that whatever the extent of authority unde[illegible]hat Section, it is also defined and limited by the labor protective condi[illegible]ons adopted by the Commission pursuant to § 11347. With respect to t[illegible]se conditions, however, we do not believe that Congress could have mea[illegible] that Section 2 should prevent all changes in CBAs without RLA bargai[illegible]ng. We did not intend that when we adopted the section. The silence [illegible]f Congress, this agency and all interested parties belies such a radi[illegible]al change in labor-management relations. Nevertheless, we believe tha[illegible] Section 2 does have significance as a Congressional directive that, to the [illegible]xtent possible, the terms of CBAs are to be preserved. We also believe th[illegible]t parties to contracts should not easily be relieved of obligations voluntari[illegible]y undertaken. In any event, if we understand the Railway Labor Executives [illegible]Association's (RLEA's) position, RLEA now agrees that RLA bargaining [illegible]s not needed when the notice and negotiation provisions of our condition[illegible] are observed. They limit the topics for which RLA is waived to "selection of forces" and "assignment of employees," but this does not necessarily indicate any disagreement with our position on Section 2, as we will discuss.

We believe that our decision marks a return to the era of accommodation when the ICA and the [illegible]A were harmonized in their administration. We wish to reestablish the [illegible]ance between the employee's legitimate right to bargain over the condi[illegible]s of his employment and the railroads' equally legitimate right to prom[illegible]arry out transactions found by this Commission to be in the public in[illegible]t. This would not only be consistent with the administration of thes[illegible]utes in the past, but would also be in accord with recent pronouncer[illegible]s of the Supreme Court in *Pittsburgh & Lake Erie R. Co. v. RLEA*, 10[illegible]t. 2584 (1989). There the Court spoke of the RLA and the ICA as [illegible]plementary regimes" and urged interpretations that would "harmon[illegible]e statutes." 109 S.Ct. at 2597.

We wish to apply this attitude of a[illegible]odation of the competing policies of the ICA and the RLA to all a[illegible]f this problem, including the difficult issue of the nature of the CBA [illegible]sions that can be modified under our conditions to permit a merger [illegible]e carried out. As we have noted, RLEA agrees that CBAs can be modified under our conditions,

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without resort to RLA procedures, so long as the changes are limited to "selection of forces" and "assignment of employees," terms found in WJPA and in our conditions. RLEA does not define the extent of these terms. If the 1940-80 arbitrators felt themselves bound by these terms, they must have defined them broadly enough to include contract changes involving the movement of work (and probably employees) as well as adjustments in seniority. These are the changes so prominently mentioned in the history of the accommodation of RLA to consolidations following negotiation of WJPA.

The record does not indicate the precise extent of the CBA provisions that could be modified during that period, or whether it was consciously or unconsciously bounded by the "selection-assignment" rubric. We hesitate to establish any rigid definition of CBA provisions that can be modified, since it may defeat the purpose of the process--to effectuate the merger, and to compensate affected employees while making the minimal encroachment on the employees' right to bargain collectively over their terms of employment. It appears that arbitrators, management and labor developed approaches in the 1940-80 period for resolution of the inevitable conflicts with CBAs that permitted the carrying out of the transaction while maintaining labor peace. We trust that these parties will be able to call upon their institutional memories to again resolve these matters consistently and amicably, now that we have removed two major impediments to the process.

Although, in accordance with the opinion of the Court of Appeals, we do not here rely on § 11341 as a source of the authority to modify CBAs, that provision does, in our view, furnish authority to foreclose resort to RLA remedies for modification or enforcement of CBAs--an authority that is no greater in the context of mergers and consolidations than our authority to obviate the necessity of resort to RLA under our conditions and § 11347. Its existence as so circumscribed reflects the consistency of the overall statutory scheme for dealing with CBA modifications required to implement Commission-approved mergers and consolidations.

Since the arbitrators in both reopened cases based their decisions on pronouncements that the *Carmen* court found to be incorrect statements of the law and that we modify in this decision, we are reversing and vacating those arbitral decisions. We are remanding the proceedings to the parties to continue the implementing process pursuant to Section 4 of the *New York Dock* conditions through further negotiations or by arbitration, if necessary, to reach a new implementing agreement in accordance with the standards set forth in this decision.

DISCUSSION

THE REOPENED CASES

A. *CSX/Carmen.*

1. *Background.*

The background to the proceeding is described in our report, *CSX Corp.–Control–Chessie and Seaboard C. L. I.*, 4 I.C.C.2d 641, 643-48 (1988), and we will only set forth the essential facts here. In 1980, the Commission approved the control by CSX Corporation of (1) the Chessie System, Inc., parent of the Chesapeake and Ohio Railway Company and the Baltimore and Ohio Railroad Company; and (2) Seaboard Coast Line Industries, Inc., parent of the Seaboard Coast Line Railroad (Seaboard). *CSX Corp.–Control–Chessie and Seaboard C. L. I.*, 363 I.C.C. 521 (1980) (*CSX Control*).

As required by § 11347 of the ICA, the agency imposed the standard set of labor protective conditions for consolidations, the *New York Dock* conditions.[3] Section 4 of the *New York Dock* conditions provides for resolution of employee impact disputes through negotiation, and mandatory, binding arbitration if negotiations fail.

At the time of the consolidation, Chessie operated a heavy freight car repair shop at Raceland, Kentucky, and Seaboard operated a heavy freight car repair shop at Waycross, Georgia. In August 1989, CSX management served notice under Section 4 of *New York Dock* on the Brotherhood of Railway Carmen (Brotherhood) and other involved unions that it intended to close the Waycross shop and transfer the employees and the work that otherwise would be performed there to Raceland. The transfer was to result in a net decrease in available jobs at the two shops. *CSX*, at 645.

Negotiations between the unions and CSX foundered, principally because of a 1966 collective bargaining agreement known as the "Orange Book." This agreement was entered into during the Commission's 1963 approval of the formation of Seaboard through merger of the Seaboard Air Line and the Atlantic Coast Line Railroad Companies. The Orange Book provided, among other things, that the carrier would continue to employ covered employees (those employed before July 1, 1967) for

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[3] These conditions were fashioned by the Commission in *New York Dock – Control – Brooklyn East. Dist.*, 360 I.C.C. 60, 84-90 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979), and are attached as Appendix A.

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the remainder of their working lives. Seaboard was given the right to transfer work and employees throughout the consolidated Seaboard system. *CSX*, at 644. The Brotherhood contended that the provisions of the Orange Book prevented CSX from moving work or any covered employees from Waycross (in former Seaboard territory) to Raceland (outside former Seaboard territory).

2. *The Arbitration Award.*

Both the Brotherhood and CSX invoked arbitration under Section 4 of *New York Dock* to resolve the dispute. The Brotherhood later reversed its position and argued to the three-man arbitration committee that it lacked authority to impose an agreement implementing the proposed consolidation of the car repair shops. The Brotherhood contended that (1) the shop consolidation was not contemplated in the *CSX Control* decision and (2) CSX had to first exhaust the bargaining procedures of Section 6 of the RLA.

The Committee found that it had jurisdiction to resolve the dispute and then agreed with the union that the terms of the Orange Book forbad the transfer of either Orange Book-protected employees or their work beyond former Seaboard territory. Nevertheless, the Committee found that it was empowered to override terms of a CBA if they stand in the way of an operational change that was "authorized or required by" the *CSX Control* decision approving the 1980 merger.

The Brotherhood's principal argument against this asserted power was based on Section 2 of the *New York Dock* conditions which states, in part, that "existing collective bargaining agreements * * * shall be preserved."[4] The union contended that Section 2 barred the arbitration committee from changing contract rights, and asserted that such rights could only be changed under the notice and bargaining procedures of the RLA. CSX Arbitration Award, at 9-10. The Committee rejected these arguments, basing its decision on the 1983 decision of the Commission in DRGW. That case involved an alleged conflict between existing CBAs. The Commission discussed its power under § 11341(a), which provides that a carrier or person participating in a transaction approved under § 11343 *et seq.* "* * * is exempt from the antitrust laws and from all other law * * * as necessary to let that person carry out the transaction * * * ." The Committee quoted the Commission's interpretation in *DRGW* of the scope of its authority under § 11341(a): "Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to

[4] See Appendix A for the full text of Sections 2, 3 and 4 of the *New York Dock* conditions.

be carried out, and includes an exemption from the requirements of the RLA."[5] Based on this precedent, the Committee ruled that it had the authority under Section 4 of *New York Dock* to modify the Orange Book despite the language of Section 2 or the RLA (Award, 31-32):

> As a quasi-judicial extension of the ICC, this Committee must strictly follow the ICC's interpretation of its own authority. In the *DRGW* case, the ICC decided that 49 U.S.C. § 11341(a), the source of the exemption, granted the Commission expansive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements to the extent that statute and terms of the agreements bar implementation of the transaction. According to the ICC, § 11341(a) insulates a transaction from all legal obstacles preventing or impeding effectuation.

Accordingly, the Committee ruled that CSX could move the heavy repair work from Waycross to Raceland. Otherwise, the carriers could not carry out the proposed shop consolidation. Nevertheless, the Committee

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[5] In light of the substantial influence of *DRGW*, we will quote from it at some length (at 5-6):

> Although we conclude that the trackage rights agreements do not involve a change in UP-MP employees' working conditions in a manner contrary to RLA requirements, we will address UTU's argument that we lack jurisdiction under 49 U.S.C. § 11341 to exempt a transaction from the requirements of the RLA.
>
> The Commission's jurisdiction over railroad consolidations and trackage rights transactions, within the scope of 49 U.S.C. § 11343, is exclusive. Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA. *See Brotherhood of Loc. Eng. v. Chicago & North Western Ry. C* F.2d 424, 432 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963).
>
> Contrary to UTU's arguments, the 4-R Act [776] did not limit our authority to exempt a transaction from the RLA. Rather, the 4-R Act specified standards for the minimum level of employee protection to be imposed conditions to the approval of certain transactions. Those standards, however, do not preserving rights under the RLA. Affected carrier employees have rights to the extent specified in the protective conditions imposed pursuant to 49 U.S.C. § 11347.
>
> As UTU notes, standard labor protective conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision and the involved transaction and the underlying statutory scheme. To the extent that working conditions and collective bargaining agreements conflict with a transaction we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under § 11347 preserve conditions and agreements in the context of the authorized transaction.

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declined to permit the movement of Orange Book-protected employees, since this would "only slightly impair the transaction while preserving the essence of the Orange Book * * * ."[6] The Committee found that permitting the transfer of only non-Orange Book employees would not bar the transaction. Award, 37. The Committee questioned whether prior merger protective agreements adopted under Section 11347 (such as the Orange Book) might be "more inviolable" than the usual CBA adopted under the RLA. Award, 33-34. Finally, the Committee ruled that the Waycross work and employees (presumably non-Orange Book[7]) who were transferred to Raceland would be placed under the CSX CBA since "[m]aintaining the work or employees under the [Seaboard] working agreement would, for all practical purposes, block the transaction." Award, 38.

3. *The Commission Decision.*

Both parties appealed to the Commission. The agency agreed that the Committee was "empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement." *CSX*, at 649. The Commission quoted from the Award (at 34), "the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation," and then stated, "This is a correct statement of our position * * *" *Id.* The Commission affirmed the transfer of work, but rejected the Committee's refusal to permit the transfer of Orange Book employees to Raceland. The agency reasoned that if, as the Committee had found, the Orange Book prohibits such a transfer of employees, then to enforce the Orange Book in this setting would "serve[] as an impediment to implementation of a transaction authorized by the Commission." *CSX*, at 650. After discarding the Committee's "slight

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[6] The Committee expressed its desire to harmonize or accommodate conflicting statutes and policies(Award, 33):

[T]he § 11341(a)] exemption is only triggered when necessary. The ICC has never indicated that an approved transaction can be utilized as a pretext for extinguishing or amending existing collective bargaining agreements. To the extent that terms of collective bargaining agreements and collective bargaining rights do not thwart or substantially impede the approved transaction, those agreements and rights are preserved. Therefore, there is some harmony between § 11341(a) of the Interstate Commerce Act and Section 6 of the Railway Labor Act * * * . If feasible, the transaction should reasonably accommodate existing collective bargaining agreements and collective bargaining rights.

[7] "Of the 86 Waycross carmen who are eligible for those positions [at Raceland], 57 are entitled to Orange Book protection." CSX, at 650.

impediment" standard, the agency was not to find that, in any event, this case did not meet that standard, concluding that "[i]mposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction." *Id.*[8] Commissioner Lamboley dissented. *CSX*, at 651-55.

B. *Norfolk Southern/Dispatchers.*

1. *Background.*

The background to the *Dispatchers* proceeding is set forth more fully in Finance Docket No. 29430 (Sub-No. 20), *Norfolk Southern Corporation–Control–Norfolk and Western Railway Company and Southern Railway Company* (not printed), served June 10, 1988. In March 1982 the Commission approved the control by Norfolk Southern Corporation of Norfolk and Western Railway Company (N&W) and the Southern Railway Company (Southern). The agency imposed the *New York Dock* conditions. In September 1986 railroad management informed the American Train Dispatchers' Association, the bargaining representative of the N&W employees responsible for "power distribution" (the assignment of locomotives to particular trains and facilities), that it proposed to consolidate all power distribution for the combined Norfolk Southern. This would involve transfer of the work performed in the N&W power distribution center in Roanoke, Va. to the Southern center in Atlanta, Ga. N&W employees were to be "given consideration" for employment in Atlanta. In the Atlanta center, the work was performed by supervisors, who were considered management and, accordingly, were not union members or covered by a CBA.

The parties negotiated but failed to reach agreement, with the principal hurdles being the Association's contentions that (1) the proposal was subject to mandatory bargaining under the RLA; (2) the carriers were required to preserve the right of the transferred employees to representation under the RLA; and (3) the N&W power distribution work could only be performed at Atlanta under the terms of the existing CBA between N&W and the union. The railroads invoked arbitration under Section 4 of the *New York Dock* conditions.

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[8] The agency did not find it necessary to consider CSX's alternate contention that the Committee had misinterpreted the Orange Book as prohibiting the transfer of work and employees outside the former Seaboard system, *i.e.*, whether labor's agreement to permit movement throughout the system becomes a prohibition on movement beyond those bounds if the system is expanded.

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2. *The Arbitration Award.*

The Arbitration Committee ruled in favor of the carriers on each of the disputed issues. In an opinion signed by the neutral, Referee Harris, the committee concluded that (1) it had the authority to abrogate any provision of a collective bargaining agreement or of the RLA that impedes implementation of the ICC-approved merger between N&W and Southern; (2) the transfer of power distribution was part of the control transaction approved by the ICC; and (3) because application of the N&W CBA to the Southern Center would apparently impede the transfer, transferred employees could not retain their rights under that CBA.

Referee Harris described the basis for the Award (at 11-13):

> The central issue in this case is the reconciliation of the conflict between Sections 2 and 4 of [the *New York Dock* conditions] • • • Section 2 deals with the right of the employees to continue to enjoy the protection of the Railway Labor Act and any agreements which may have been bargained by the collective bargaining representatives of the affected employees. Section 4, on the other hand, indicates the method by which a carrier may give notice of a change in its operations and the method of resolving disputes which may arise thereafter. This proceeding results from the application of section 4, and its authority derives from that section.
>
> Prior to 1981, the question of whether a carrier could, through a consolidation of forces, effect changes in rates of pay, rules, or working conditions had never been raised before an arbitrator in a Section 4 proceeding. Between 1981 and 1983 at least five arbitrators ruled that the ICC did not desire that changes of pay, rules, or working conditions, or representation under the RLA occur through arbitration under the NYD conditions.

Referee Harris then quoted at length from the Commission's decision in *Maine Central*.[9]

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[9] We will supply excerpts of his quotation, Award. 12-13):

> • • • • It is [the Commission's] order, not RLA • • • , that is to govern employee-management relations in connection with the approved transaction.
>
> Such a result is essential if transactions approved by us are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions • • • [Applying RLA procedures] is unacceptable and inconsistent with § 11341 of our act.
>
> [W]e reject the argument that [Section 2] of our conditions reinvigorates the RLA and causes its provisions to supersede the mechanism for resolving disputes associated with negotiating implementing agreements contained in the labor protective conditions we impose on approved transactions.

Following the quotation from *Maine Central*, Referee Harris continued his analysis:

> Whatever may have been the view prior to the ICC decision in the Maine Central case, it is clear that the ICC believes that its order supersedes the Railway Labor Act protection. While it did not state specifically that the inconsistencies between Sections 2 and 4 of [the] New York Dock conditions are to be resolved in favor of Section 4, that conclusion is inescapable. Furthermore, as a creature of the ICC, this panel is bound to the ICC view.

3. *The Commission Decision.*

The Commission affirmed the Committee, Commissioner Lamboley dissenting (Decision, 8-12). The agency explained that "[i]t has long been the Commission's view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission" (*id.* at 3). Accordingly, the Commission stated, "the panel correctly found • • • that • • • the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements," citing *Maine Central* (*id.* at 4). Moreover, because the proposed transfer was deemed to be part of the merger approved by the Commission, it was "immunized from conflicting laws by § 11341(a)" (*id.*). The Commission upheld as appropriate the decision to override the CBA and the RLA provisions. Reviewing the record, the Commission noted that "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function" (*id.* at 5). Finally, the Commission interpreted the award as properly finding that the representational status of the union in Atlanta was a matter for the National Mediation Board (*id.* at 5-6).

THE COURT OF APPEALS DECISION

The court of appeals considered the two cases together and reversed and remanded to the agency. The court held that § 11341(a) by its terms does not authorize the Commission to relieve a party to a § 11343 transaction of CBA provisions that impede implementation of the transaction, finding that the Commission's contrary view had "no support in the statute." (*Carmen*, at 567). The court saw no reference to "contracts" or "CBAs" and could not read the phrase "other law" in § 11341(a) to include "all legal obstacles" (*idem.*). The court discussed

Maine Central, Referee Harris

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(*Carmen*, at 568-70) the legislative history of the Commission's exemptive power. This power was added to the Interstate Commerce Act in 1920 in connection with the return of the nation's railroads to private ownership from federal control. In the court's view, "* * * Congress focused nearly exclusively * * * on specific types of law it intended to eliminate--all of which were positive enactments, not common law rules of liability, as on a contract" (*Carmen*, at 570).

The court next "decline[d] to address the question" (*Carmen*, at 570-71) whether § 11341(a) may operate to override provisions of the RLA, choosing instead to remand that issue to the Commission. The court asserted that the Commission's present position with respect to the RLA "depart[s] from its earlier precedent " (*Carmen*, at 572), and it therefore directed the agency on remand either to "provide an explanation for its new position on that issue, or adhere to its prior position" (*Carmen*, at 573).

The court "decline[d] to address either the ICC's theory that the labor protective conditions required by § 11347 are exclusive, or its related assertion * * * that section 4 of *New York Dock* conditions gives the arbitrator the 'absolute right' to effectuate the transfer of employees, and to override any contrary provisions of a CBA" (*idem.*). In the court's view, the Commission had not adequately raised those claims in its court of appeals brief. "In any event," the court concluded (*Carmen*, at 574), it is "best for the ICC, if it has not abandoned its § 11347 and section 4 rationales altogether, to reconsider them in the first instance in light of" the intervening decision in *Pittsburgh & Lake Erie R. v. RLEA*, 109 S. Ct. 2584 (1989). Since it held the ICC had no power to override CBAs under § 11341(a), the court found it unnecessary to "address either the Union's argument that to do so would be unconstitutional or their claim that, in amendments to the [Interstate Commerce] Act in 1976, Congress specifically preserved employees' contractual rights." *Idem.*

As previously discussed, we reopened these proceeding by our order served September 20, 1989, sought rehearing by the court of appeals, but requested the court to refrain from ruling on our petition until we had completed our review on reopening. The court remanded the proceedings to the Commission and ruled that it would defer acting on our petition for rehearing until we issued our decision on remand.

In our September 20 order, we requested that the parties and other interested persons file comments. Comments were received from CSX Corporation, Norfolk Southern Corporation, Union Pacific Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Consolidated Rail Corporation, National Railway Labor Conference, Railway Labor Executives' Association. The foregoing parties, with the exception of the Santa Fe, participated in the oral argument held before the full Commission on January 4, 1990.

HISTORICAL BACKGROUND

A. *The Transportation Act of 1920.*

The nation's railroads were nationalized during World War I. *See Carmen*, at 568. When preparing to return the railroads to private ownership, Congress determined to continue the process of consolidation begun under federal ownership. In the Transportation Act of 1920, the Commission was directed to prepare and adopt a master plan for nationwide consolidations. Consolidations were to be voluntary but would only be permitted if in harmony with the master plan. *Idem. Schwabacher v. United States*, 334 U.S. 182, 192-93 (1948); *St. Joe Paper Co. v. Atl. Coast Line R. Co.*, 347 U.S. 298, 315-321 (1954).

The 1920 Act also gave the Commission its exemptive power now set forth in § 11341(a). *Carmen*, at 568-70. Finally, the 1920 Act contained, as described in *Carmen*, at 572, "comprehensive provisions • • • governing labor-management relations • • • that were • • • the immediate precursor to the RLA." These provisions established a "Labor Board" to decide railroad labor disputes and declared it to be the duty of carriers and their employees "to exert every reasonable effort" to prevent service interruptions from disputes. *United States v. Lowden*, 308 U.S. 225, 236 (1939).

B. *The Railway Labor Act.*

In the Railway Labor Act of 1926, 45 U.S.C. § 151 *et seq.*, Congress imposed for the first time legally enforceable obligations on rail carriers to bargain collectively. The 1926 Act also established procedures for the handling and resolution of labor disputes. Disputes were divided between "major" and "minor" disputes. In a recent case, the Supreme Court stated that it had "not articulated an explicit standard for differentiating between these two classes of disputes," but described them as follows: "major disputes seek to create contractual rights, minor disputes to enforce them." *Consolidated Rail v. Railway Labor Exec. Ass'n*, 109 S.Ct. 2477, 2479-80 (1989), *citing Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723 (1945).

The Act established a lengthy process of bargaining and mediation for *major* disputes, commencing with the required service of notice of a proposed change in an agreement under Section 6 of the Act. 45 U.S.C. § 156. Arbitration is provided for, but participation is voluntary. The parties are obligated to maintain the status quo until these procedures are exhausted. If no agreement has been reached, the parties may resort to economic self-help, *i.e.*, strikes or lock-outs. 109 S.Ct. at 2480.

The treatment given *minor* disputes in the RLA is now substantially different, involving compulsory and binding arbitration for a dispute arising

"out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." RLA, Section 2 Sixth. In 1926, minor disputes were initially sent to "adjustment" boards, but ended up on the same voluntary path as major disputes. *See Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30, 35 (1957). The weaknesses of this system led to the 1934 revisions in the procedures for minor disputes discussed below.

In the landmark case, *Southern Ry. Co.–Control–Central of Georgia Ry. Co.*, 331 I.C.C. 151, 154 (1967)(footnote omitted), we stated:

The enactment in 1926 of the Railway Labor Act * * * provided basic protection to railroad employees in cases where the carriers did not attempt to consolidate, merge, or pool their separate railroad facilities or any of their operations or services. However, no protection was provided for employees adversely affected by railroad consolidations.

The first statutory provision which specifically required protection for employees adversely affected by railroad consolidations was contained in the Emergency Railroad Transportation Act of 1933.

C. *The Emergency Railroad Transportation Act of 1933.*

The 1933 Act created a Federal Coordinator of Transportation with sweeping authority to issue orders that would require carriers to coordinate their services. The Act sought to protect affected railroad employees by mandating a "job freeze" so as to guarantee the continued employment of the entire labor force of the railroads involved. The Emergency Act was initially enacted for a one year period, but was extended for two additional years into 1936. The Act was allowed to expire once the Washington Job Protection Agreement was in place, as described below. We noted in *Southern* that the Act required a carrier to notify employees of a contemplated coordination and to give employee representatives a reasonable opportunity to present their views of the action. "These requirements are, in essence, the consist of sections 4 and 5 of the [WJPA]." *Southern*, at 155. Before turning to the WJPA, we will briefly treat another precursor and an arguably influential factor on that Agreement.

D. *The 1934 Amendments to the RLA.*

Due to the lack of any mechanism in the 1926 Railway Labor Act requiring resolution of minor disputes, thousands of such cases had piled up before boards of adjustment. The solution adopted by Congress in 1934 was mandatory, binding arbitration of minor disputes. Crucial to the

resolution was labor's concession of their right to strike over these disputes in favor of the procedures of a National Railroad Adjustment Board. See statement of ICC Commissioner Joseph P. Eastman, Federal Coordinator of Transportation, "principal draftsman of the bill," quoted in *Trainmen*, at 37-39.

Under the 1934 Act, either party can submit the dispute to the Board and the award is "final and binding upon both parties." *Id.* at 34. A minor dispute is first referred to the National Railroad Adjustment Board, or a division thereof, composed of an equal number of labor and management representatives; if no agreement is reached, a "referee" sits as a member; if the parties cannot agree on a referee, the National Mediation Board is advised and that Board has ten days within which to appoint a neutral referee. RLA Section 3 First (l). These procedures were duplicated in WJPA.

E. *The Washington Job Protection Agreement of 1936.*

The Emergency Act was set to expire in 1936. The consolidations that Congress desired were not materializing, in large measure due to the potential cost of the "job freeze" provision of that Act. Conflicting legislation backed by labor and the railroads was stalled in Congress. *See Southern*, 331 I.C.C. at 155. Federal Coordinator Eastman called on the parties to negotiate a solution to the impasse. Finally, in March, 1936, President Roosevelt appealed to management and labor to negotiate a solution.

In May, 1936, representatives of approximately 85% of the railroad mileage in the country agreed with 20 of the 21 national labor organizations representing railroad workers to the Washington Job Protection Agreement of 1936. That agreement was described in *New York Dock Ry. v. United States*, 609 F.2d 83, 86 (2d Cir. 1979) as:

> a form of job security arrangement that provided bargaining and compensation protection to employees but left employers free to alter the size of their work force. That agreement . . . generally is conceded to be the blueprint for all subsequent job protection arrangements.

The WJPA (attached as Appendix B) was applicable to any "coordination," i.e., "joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations previously performed by them through such separate facilities." Section 2(a). It provided that employees dismissed or displaced as a result of such coordination would be entitled to a monthly allowance (Sections 6, 7), or a lump sum payment (Section 9), and certain other benefits, including moving expenses (Section 10) and reimbursement for losses from the sale of homes (Section 11). The

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"protective period" for an affected employee--during which he could not be placed in a worse position with respect to compensation and working conditions than he was in prior to the time of coordination -- was up to five years from the date of coordination, *i.e.*, the date the employee is first adversely affected as a result of the coordination (Sections 6, 2).

WJPA had significant provisions for notice and negotiation, characterized by one court as "the heart of the WJPA." *Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248, 1250 (D.C. Cir. 1982). That court described these provisions (*idem.*):

> The heart of the WJPA was sections 4 and 5, which required the carriers to give advance notice to all employees at least ninety days prior to the proposed coordination, and which provided that no coordination could be effective until the carrier and its employees had reached an implementing agreement providing for employee selection and assignment.

Section 5 provided for mandatory, binding arbitration of disputes "in accordance with Section 13." Section 13 duplicates the procedure established for minor disputes in the 1934 amendments to RLA.

Thus, labor and management were able to accomplish through the WJPA what they were seeking in legislation. As we described the efforts leading up to WJPA in *Southern*, at 155:

> Employee representatives continued to press for more complete and permanent employment protection, and carrier representatives sought more convenient means than were then available for placing into effect planned consolidations.

The trade-off was an exchange of substantial monetary and other benefits to employees for management's enhanced ability to make changes required by consolidations or "coordinations." A major aspect of that new freedom involved the RLA and its application to such changes.

As Referee Merton C. Bernstein explained generally in *Southern Railway System and American Railway Supervisors Association*, WJPA Docket No. 141 (1966)(at 230)[10]:

> The interplay of the Washington Agreement and the Railway Labor Act must be understood. The Agreement was designed to facilitate mergers, consolidations, and the like but on stated conditions (notice, implementing agreements, benefits to those adversely

[10] This decision was furnished by RLEA and the National Railway Labor Conference. We will use the numbering in the RLEA version. These awards are apparently not kept in a centralized location or in a standard form. We will identify the party furnishing the decisions to simplify research.

affected). The Railway Labor Act prevents either carriers or unions from making unilateral changes in those agreed provisions * * *. Hence, when a merger etc. is undertaken * * * this Agreement binds the union to permit the joint combinations required by the merger and requires the carriers involved to follow its procedures and accord its benefits.

Earlier in the decision, Referee Bernstein focused on the specific problem of the conflict of CBAs with changes proposed in consolidations (at 228, emphasis supplied):

> [I]n the railroad industry the recognition and scope provisions of rules agreements commonly are regarded as defining jurisdiction and job "ownership" which prohibit the transfer of work from employees under one agreement to employees - even in the same craft - under another rules agreement. As a result, combining the work of employees of two carriers or shifting work from employees of one carrier to those of another, the most common means of effectuating coordinations, could not be accomplished without incurring penalty payments to those employees who lost the work. As the savings to be achieved by reducing employment by the combination and rationalization of work of two or more carriers is a major purpose of railroad mergers and acquisitions, *a means to overcome the barrier imposed by the rules agreements was necessary.*

The referee went on to describe the resolution achieved in 1936(*idem.*):

> The Washington Agreement serves that purpose [of overcoming the rules barrier] - it permits such combinations and transfers of work under specified conditions - including notices of intended coordination, negotiated implementing arrangements, guarantees for employees whose earning or employment are adversely affected and other benefits."

Finally, Referee Bernstein referred to the WJPA as the "key" that unlocks the RLA's prohibitions on contract changes--a theme echoed by RLEA in this proceeding and endorsed by this Commission in the *Southern*

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[11] CSX submitted two other decisions of Referee Bernstein containing similar pronouncements:. 1. *Southern Pacific Company and Brotherhood of Railroad Trainmen*, WJPA Docket No. 10 (1961) (at 37-38): "[T]he [WJPA] permits changes by carriers in work assignments that are not possible under rules agreements * * *. [If agreement cannot be reached], the way is open to invoke the powers of the Section 13 Committee which has in the past directed the proper bases for implementing coordinations." 2. *New York, Chicago and St. Louis R. Co. and Brotherhood of Railroad Trainmen*, WJPA Docket No. 119 (1965)(at 173): "[T]he Washington agreement provides for compensation payments as the major means of employee protection in return for which carriers are enabled to put into effect coordinations otherwise barred by rules agreements * * *. [I]n a deadlock situation, this Committee can write an agreement for the parties."

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decision. He stated (*id.* at 231) (emphasis added): "The [WJPA] is a voluntary national collective bargaining agreement which stems from the peculiar nature of railroad rules agreements--*it is the key which unlocks the rules preventing transfer and consolidation of work.*"

During the January 4, 1990 oral argument in this proceeding, counsel for RLEA described Sections 4 and 5 of WJPA (the notice and negotiation provisions) as permitting "the selection of forces and the assignment of employees without the necessity of the service of Section 6 notices under the Railway Labor Act. That, as one of the arbitrators mentioned and I have cited in these materials, *that was the key that unlocked the Railway Labor Act.*" Transcript at 55, emphasis added.[12]

In our 1967 *Southern* opinion, we responded to the Supreme Court's direction in *Railway Labor Assn. v. U.S.*, 379 U.S. 199 (1964) to clarify our intentions as to including the substance of Sections 4 and 5 of WJPA in our labor conditions. We concluded that such protections were to be included when mergers or consolidations were involved. We analyzed the interplay between the WJPA, RLA and our consolidation proceedings in much the same manner as Referee Bernstein. We noted that, in the consolidation under consideration (the acquisition by Southern Railway Company of the control of Central of Georgia Railway Company), it was proposed that work and employees would be transferred from the Central of Georgia to the Southern. We continued (*Southern*, at 165): "However, applicants omitted any explanation of how the prohibition against transferring work from one railroad to another, contained in the collective bargaining agreements, would be avoided in the absence of a contract which would permit such work to be transferred."

We then described how the WJPA permitted consolidations to be accomplished, while accommodating the dictates of the Railway Labor Act (*idem.*, emphasis supplied):

> [I]f * * * work was to be transferred from Central of Georgia to the Southern, it would be necessary for the railroads to first secure a modification of such prohibitions [in the CBAs] by pursuing the procedures provided in the agreement *or by obtaining superseding contracts which would permit such transferring of work to occur.*
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> *The Washington Agreement is such a superseding contract.* It provides the means for satisfying the requirement that the carriers must follow the provisions of the collective bargaining agreements and section 6 of the Railway Labor Act in transferring work from one

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[12] RLEA filed an "Outline of Oral Argument." The following paragraph appears at 3:

> - To accomplish that purpose [of WJPA], the negotiators drafted sections 4 and 5 of WJPA to permit the "selection of forces" and "assignment of employees" without necessity of Section 6 notices under RLA.

carrier to another. In instances where, as here, the facilities or services of two or more railroads are to be coordinated, the Washington agreement permits work to be transferred from one railroad to another, but only after service of a 90-day notice, as provided by section 4 of that agreement, and the negotiation of an implementing agreement in accordance with section 5 thereof.

If the railroads complied with Sections 4 and 5 of WJPA, they would be able to carry out "job abolishment, the dismissals, furloughs, and work reassignments but on bases negotiated by the parties." *Southern*, at 166. In that case, "the basic and substantive rights of all of the employees involved would be adequately protected." *Idem.* We concluded our discussion by pointing out that, without something comparable to WJPA permitting modification of CBAs, "section 6 of [the RLA] would seriously impede mergers." *Southern*, at 171.

Following the establishment of the WJPA, the Commission began imposing employee protective conditions that Commissioner Eastman described as "substantially the same" as those in WJPA. *Chicago, R.I. & G. Ry. Co. Trustees Lease*, 230 I.C.C. 181, 187-89 (1938), 233 I.C.C. 21, 27 (1939).[13] Despite the absence of specific statutory authority for this action, the Supreme Court upheld the Commission's imposition of conditions as falling within the "public interest" standard for approval of mergers. *United States v. Lowden*, 308 U.S. 225, 232 (1939). The Court recognized that the WJPA-like protections were appropriate to compensate for the inevitable adverse effects from coordinating transactions, including the loss of contractual seniority rights (*Id.* at 233):

> Not only must unification result in wholesale dismissals and extensive transfers, but in the loss of seniority rights which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions.

F. *The Transportation Act of 1940.*

We have described above the mandate to the Commission in the Transportation Act of 1920 requiring it to prepare a master plan for the nationwide consolidations of railroad properties. Compliance with that plan was the governing consideration in approving voluntary consolidations of railroads. This procedure was proposed as the most effective means to promote a principal purpose of the 1920 act, to promote consolidations of railroad properties. Unfortunately, as stated in *Schwabacher v. United States*, 334 U.S. 182, 193 (1948), "it was a case where the best was an enemy

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[13] The Commission described these conditions as "almost identical to those contained in [WJPA]" in *Southern*, *supra*, at 158.

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of the good, and waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements." It was apparent by 1940 that the ambitious plan was not working.

Accordingly, in the Transportation Act of 1940, the Commission was relieved of its responsibility to plan unifications. "Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transaction met with certain tests of public interest, justice and reasonableness * * * * *Idem.*

Despite this change in tactics, the goal of Congress continued to be the facilitation of mergers and consolidations in the national rail system. "In short, the result of the [1940] Act was a change in the *means*, while the *end* remained the same." *County of Marin v. United States*, 356 U.S. 412, 417 (1958)(emphasis in original). The Court continued (*Id.* at 417-18, footnote omitted): "The very language of the amended 'unification section' expresses clearly the desire of Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification."

The 1940 Act also contained the first statutory provision specifically requiring the protection of employees affected by consolidations of railroad facilities. *See, generally, Southern*, at 156-58; *Railway Labor Assn. v. U. S.* 339 U.S. 142, 145-50 (1950). Under the first sentence of a new section 5(2)(f), the Commission was to require, as a condition of its approval of a merger or consolidation, "a fair and equitable arrangement to protect the interests of the railroad employees affected." The second sentence required that conditions be included assuring that, during a period of four years, affected employees will not be "in a worse condition with respect to their employment." The third sentence provided, "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier * * * and the * * * representatives of its * * * employees."

The genesis of these provisions lay in the 1938 appointment by President Roosevelt of a "Committee of Six," composed of an equal number of rail management and labor representatives. Both labor and management supported a principal recommendation of the Committee that the Commission require, "as a prerequisite of * * * its approval, a fair and equitable arrangement to protect the interests of [affected] employees." *RLEA*, at 149. When expressing his support to Congress for the inclusion of this requirement in the proposed legislation, George M. Harrison, a member of the Committee of Six and President of RLEA, testified that the protection was only needed for those employees not protected by the WJPA. He believed that no legislative protection would have been necessary if all railroads had signed WJPA. *See Southern*, at 152.