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SERVICE DATE - LATE RELEASE DECEMBER 21, 1998

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32760 (Sub-No. 26)¹

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

[HOUSTON/GULF COAST OVERSIGHT]

Decision No. 10

Decided: December 18, 1998

This decision reviews requests by various parties for conditions in the "Houston/Gulf Coast" oversight proceeding that would modify the way in which rail service is provided in the Houston area. The proceeding was initiated in connection with the recent rail service crisis in the western United States. Among other things, we have decided to adopt a so-called "clear route" condition to enhance efficiency and facilitate the smooth movement of railcars through the Houston Terminal. Under the "clear route" condition, the neutral and highly efficient joint Union Pacific Railroad Company (UP)/Burlington Northern Santa Fe Railway Company (BNSF) dispatching center at Spring, TX, will have the authority through its Joint Director to route traffic through Houston over any available route, even a route over which the owner of the train does not have operating authority. Thus, as a result of the Board's decision, a BNSF train may be permitted to operate over track of UP; a UP train may be permitted to operate over track of BNSF; and a Texas Mexican Railway Company (Tex Mex) train may be permitted to operate over track of either UP or BNSF.

¹ This decision embraces: (1) Finance Docket No. 32760 (Sub-No. 27), Texas Mexican Railway Company & Kansas City Southern Railway--Construction Exemption--Rail Line Between Rosenberg and Victoria, TX; (2) Finance Docket No. 32760 (Sub-No. 28), Burlington Northern and Santa Fe Railway Company--Terminal Trackage Rights--Texas Mexican Railway Company; (3) Finance Docket No. 32760 (Sub-No. 29), Burlington Northern and Santa Fe Railway Company--Application for Additional Remedial Conditions Regarding Houston/Gulf Coast Area; Finance Docket No. 32760 (Sub-No. 30), Texas Mexican Railway Company, et al.--Request For Adoption of Consensus Plan; Finance Docket No. 32760 (Sub-No. 31), Houston & Gulf Coast Railroad--Application for Trackage Rights and Forced Line Sales; Finance Docket No. 32760 (Sub-No. 32), Capital Metropolitan Transportation Authority--Responsive Application--Interchange Rights.

We do not, however, adopt the so-called "Consensus Plan" sponsored by a group of shippers that seek open access in Houston; two affiliated railroads that seek to increase their traffic and revenues through government directive; and the Railroad Commission of Texas (RCT), which, for some years, has wanted to undo the Union Pacific/Southern Pacific (UP/SP) merger for the Houston/Gulf Coast region and to use the merger proceeding as a way to provide many Houston shippers with more rail competitors than they had before the merger. While we understand and share Houston's interest in averting a future service crisis, we will not undo the merger in the way that has been proposed. We find that implementation of the merger has provided important solutions for the recent emergency, and the Consensus Plan, which would undo the merger in the Houston area, conflicts with our governing statute and with fundamental policies underlying it.

1. The Consensus Plan is premised on the idea that shippers should, wherever possible, be served by more than one railroad, even if, in order to produce such a system, railroads that own the majority of an area's rail infrastructure would be required to share their property with others that do not. Here, the conditions that the Consensus Plan Parties seek would add two new competitors — BNSF and Tex Mex — for numerous Houston-area shippers that were served by only one carrier before the merger, and that therefore did not lose competitive rail service as a result of the merger. Because we find that the Consensus Plan is not necessary to remedy any merger-related harm, it effectively constitutes "open access." If we adopt the Consensus Plan, then there is no basis on which we could refuse to provide for open access throughout the rail system.

Whether an open access regulatory scheme for the railroad industry is good for carriers, shippers, and the Nation, absent demonstrated merger-related harm open access — as even a representative of the Consensus Plan Parties conceded at oral argument (Transcript at 17-18) — is not provided for in the statute that the Board currently administers, and thus, in our view, is a matter more appropriately debated in Congress.

2. The Houston/Gulf Coast Oversight proceeding was initiated in connection with the UP/SP merger. Well-established transportation law recognizes that some shippers are served by a single railroad. It also recognizes that such "captive shippers" may pay higher rates under "demand-based differential pricing" legal principles that govern the railroad industry, to reflect the economies of the railroad industry and the fact that some rail traffic is more captive and some more competitive. Because the railroad industry is not an open access industry, and because some shippers may pay more than others under the law that we administer, merger proceedings are not used as vehicles to equalize the competitive positions of shippers generally. The Board does adopt competitive conditions to ensure that a merger does not put shippers into a worse position than they were in before, and in this case it imposed several such conditions. But a well-established principle of rail merger law is that the conditions that the Board imposes in a merger proceeding are designed to ameliorate specific merger-related harm, not to simply add more competitors.

3. Another principle of transportation merger law is that the conditions adopted not be disproportionate. Here, the Board decided to ameliorate potential competitive harm through extensive trackage rights to BNSF. The Consensus Plan Parties argue that the BNSF trackage rights have not been adequate to achieve the Board's objectives. Rather than attempting to improve the less intrusive remedy that the Board adopted, however, the Consensus Plan would move immediately to the most extreme remedy possible.² Even if there were additional harm that the initial conditions did not fully ameliorate, the Consensus Plan remedies — which do not seek to improve the existing remedies, but rather to set up a series of far more drastic and intrusive ones — would necessarily be disproportionate.

In this regard, during the proceeding, the parties argued at some length about when a government-imposed merger condition constitutes a "taking" of property. The answer, of course, depends on the facts of the case. Narrowly tailored merger conditions imposed to address merger-related harm are not considered a taking, but overreaching, disproportionate conditions could become confiscatory, particularly where it is not clear that carriers will be fully compensated for the traffic and revenues they would lose. And once a merger has been consummated, and the carrier can no longer choose to walk away from it, the imposition of disproportionate new conditions becomes increasingly inconsistent with notions of commercial certainty and fairness.

4. Finally, during the proceeding, the Consensus Plan Parties argued that adding more competitors in Houston would be appropriate because carriers and the shippers they serve will, as a rule, invest in their businesses and in infrastructure only where there is competition. Thus, Dow Chemical and Formosa Plastics indicated that, if they obtain additional rail service, they would consider paying for infrastructure improvements, while Tex Mex indicates that it would consider investing in Houston infrastructure, but only if the restriction limiting the service it can provide for Houston shippers is removed. UP, in response to these arguments, points out that reducing its revenues by adding competitors for its more lucrative business (without providing it the opportunity to compete for other carriers' more captive traffic) will undercut its ability to invest in infrastructure. Thus, UP argues, even if Dow, Formosa, and Tex Mex did make investments, which, as competent businesses, they would expect to recover in rate reductions (or in Tex Mex's case additional traffic), the net effect would be that UP would reduce its investment and that investment overall would be lower.

UP has promised to invest \$1.4 billion in Houston area infrastructure if the Consensus Plan is not adopted. There is no way to determine on this record whether the Consensus Plan would

² A representative of the Consensus Plan admitted that its approach would not be the only way to address the group's concerns about whether the Board's conditions were effective. See the Transcript of the December 15 oral hearing at 191 ("Yes, one way to do it would be to somehow look at BNSF and try to figure it out. Another way to do it is to lift [the restriction on Tex Mex's trackage rights].")

ultimately produce, for the Houston infrastructure, more, less, or the same level of investment. Indeed, more broadly, we cannot determine here, and do not need to determine here, how the railroad system would evolve if open access were adopted in Houston and, ultimately, the rest of the Nation: it could have unknown but significant effects on infrastructure, employment, and traffic patterns. Perhaps the plastics and chemicals shippers in Houston, with their high-volume, lucrative traffic, would indeed be net beneficiaries of an open access system, while small, lower-volume shippers in rural areas could lose their rail service entirely. Perhaps short-line railroads would step in to provide service to some shippers on lines that might be abandoned by the larger railroads. And perhaps the Federal government or state agencies would provide funds to augment infrastructure funding and to ensure that any such abandonments would not occur.

Right now, however, we have a commitment from UP to make sizable and sorely needed investments in the Houston area infrastructure, which were not capable of being made by the financially weakened SP before UP took it over. Whatever the merits of the "more-competitors-enhance-infrastructure-investment" argument, they are more appropriately made in an open access debate before Congress involving the entire rail system than in this case.

BACKGROUND

Although the parties argued this case against a backdrop of the service emergency that crippled railroads in the West for months — with effects that, we recognize, were serious, and that must be avoided in the future — in many respects it represents a continuation of the original merger proceeding. In that case, UP paid a substantial purchase price for the entire Southern Pacific Rail Corporation (SP) system, which had a poor infrastructure but an attractive shipper base, particularly in the Houston area.³ In the merger proceeding, several of those shippers, the RCT, and other railroads that could benefit from increased traffic sought to open up access. The Board, as noted, adopted several conditions to preserve competition, but it did not open up access as those parties sought. Many of those parties are now before us in this proceeding, seeking much of what they unsuccessfully sought in the merger proceeding. For that reason, some detailed background of the merger is needed to put this case into further perspective.

By decision served August 12, 1996, the Board approved the common control and merger of the UP and SP rail systems.⁴ UP consummated its acquisition of common control on September 11, 1996, and it then began the lengthy and ongoing process of integrating these two systems.

³ Some of the parties in this case suggest that UP was "given" the SP system by the Government. Nothing could be farther from the truth.

⁴ Union Pacific Corp.--Control and Merger--Southern Pacific Rail Corp., Finance Docket No. 32760 (UP/SP Merger), Decision No. 44 (STB served Aug. 12, 1996) (Decision No. 44).

In evaluating the UP/SP merger, we followed policies long established by Congress — and continued most recently in the ICC Termination Act of 1995 — that direct the Board to approve mergers that are “consistent with the public interest.” 49 U.S.C. 11324(c). In carrying out this directive, we approve consolidations where we determine that the gains in operating efficiencies, cost savings, and marketing opportunities typically realized through rail mergers — and the resulting benefits those gains confer upon the shipping public — outweigh the potential harm to competition and essential services. 49 CFR 1180.1(c). We typically condition our approval of a merger to mitigate potential competitive harm, as we did in the UP/SP merger. We tailor our conditions, however, to ensure that they ameliorate harm resulting from a merger, are operationally feasible, and result in net public benefits. 49 CFR 1180.1(d)(1). Moreover, we impose conditions commensurate with the competitive harm threatened and therefore do not, as a rule, use mergers as occasions to open a merged system’s facilities to rail competitors for shippers that had none previously, or to restructure the competitive balance among railroads with unpredictable results.

Using these established criteria, we approved the UP/SP merger, determining that the combined UP and SP networks would realize quantifiable public benefits of more than \$627 million annually once the merger was fully implemented. Decision No. 44, at 109-12. As importantly, we also determined that the merger would place a deteriorating SP system within a larger and healthier UP system that, after absorbing SP, could better compete with the previously combined and strengthened BNSF network and provide shippers throughout the western United States with two balanced rail systems capable of offering efficient and competitive rail service. *Id.* at 104, 113-16.

Our approval of the merger, however, was heavily conditioned to mitigate the competitive harm that we determined it otherwise would produce. Most significantly, we afforded BNSF trackage rights over almost 4,000 miles of the merged UP/SP network to replace competitive service lost by “2-to-1” shippers as a result of the merger — those shippers that, before the merger, were served by both UP and SP. Decision No. 44, at 16-17, 103, 145.⁵ We also imposed a 5-year oversight condition to ensure that the BNSF trackage rights and other conditions that we imposed effectively addressed the competitive concerns they were designed to remedy, and we reserved jurisdiction to impose further conditions if those afforded previously proved insufficient. *Id.* at 146-

⁵ We did not grant BNSF trackage rights to serve shippers that, before the merger, had been exclusively served either by UP or SP, and that, after the merger, remained exclusively served by UP (“1-to-1” shippers), or to serve shippers previously served by UP, SP, and another carrier that, after the merger, would be served only by UP and that other carrier (“3-to-2” shippers). We found, once we maintained shippers’ build-out, new facilities, and transload opportunities, that “1-to-1” shippers did not, as a result of the merger, suffer a loss of rail options or the benefits of source or other indirect forms of competition. Decision No. 44, at 124-32. We also determined that “3-to-2” traffic--primarily intermodal or automotive traffic that, after the merger, remained subject to both competitive rail service and significant motor carrier competition--would not likely suffer any significant merger-related competitive harm. *Id.* at 119-22.

47. In each of our initial "general" oversight proceedings, including the most recent one reported today, we found that the merger, as conditioned, has thus far not produced any unanticipated, adverse competitive harm requiring further conditions.⁶

During the summer and fall of 1997, prior to UP's implementation of the merger in Texas, UP and SP lines in and around Houston became severely congested, leading to a lengthy and damaging service breakdown dramatically affecting rail transport throughout the West. To address this crisis, we issued a series of unprecedented service order decisions pursuant to our emergency authority under 49 U.S.C. 11123, directing temporary changes to the way in which rail service was provided in the Houston area.⁷ To help divert traffic off of affected UP and SP lines and away from Houston, we authorized the Tex Mex to provide expanded service in and around Houston and directed UP to release certain Houston area shippers from their obligations under their transportation contracts so that they could use either Tex Mex or BNSF in addition to UP.⁸ We also permitted UP to modify some of its operations and directed it to cooperate with other carriers to help route traffic around Houston, and we required UP to provide, on a weekly basis, extensive data to help us assess the conditions on its lines, and, ultimately, the success of its service recovery. UP was also required to submit its plans to address the region's infrastructure needs.

Our remedies under the service order were purposely measured, designed to help free up traffic in the Houston area without further aggravating the congestion or impeding UP's own efforts (including cooperative efforts with other carriers in the region) to work through the emergency and restore adequate service. This approach worked. Before the end of the service order period, operations in and around Houston became fluid, and service improved significantly. As a result, we

⁶ Union Pacific Corp.--Control and Merger--Southern Pacific Rail Corp., Finance Docket No. 32760 (Sub-No. 21), Decision No. 10 (STB served Oct. 27, 1997) (UP/SP Oversight I); Decision No. 13 (STB served Dec. 21, 1998) (UP/SP Oversight II).

⁷ STB Service Order No. 1518, Joint Petition for Service Order (STB served Oct. 31 and Dec. 4, 1997, and Feb. 17 and 25, 1998) (Service Order 1518). The service order lasted for 270 days — the maximum period permitted under section 11123 — until August 2, 1998.

⁸ In approving the UP/SP merger, we imposed a condition granting Tex Mex access to Houston area shippers switched by the Port Terminal Railroad Association (PTRA) and the Houston Belt & Terminal Railway Company (HBT) via trackage rights over UP's Corpus Christi/Robstown-Beaumont, TX line, subject to the restriction that all Tex Mex traffic using these trackage rights have a prior or subsequent movement over Tex Mex's line between Corpus Christi and the Mexican border at Laredo, TX. Decision No. 44, at 148-50. To help alleviate the service emergency, we provided that this restriction be temporarily lifted. BNSF already had unrestricted access to Houston over its own lines and, via the trackage rights condition, several of UP's.

denied requests for further emergency relief.⁹

During the service order proceeding, certain shipper, carrier, and governmental interests claimed that the service crisis was caused by inadequate competition that resulted from UP's control of too much of the rail plant in the Houston area — a direct consequence, they claimed, of our approval of the UP/SP merger — and they asked us to remedy the crisis by permanently restructuring the ownership and operation of UP's rail lines and facilities in and around Houston among UP and its competitors. We rejected those requests, finding that proposals to transfer line ownership or broadly permit other rail carriers access to the UP network would likely work not to resolve the immediate crisis, but to exacerbate it, and were therefore inconsistent with our limited authority under section 11123. We also concluded, in any event, that the service crisis was caused not by inadequate competition resulting from the merger, but, more than anything, from an aging Houston infrastructure that was inefficiently configured, lacking in capacity, and — particularly in the case of former SP lines and facilities — in disrepair or inadequate to cope with unanticipated surges in demand.¹⁰

We provided, however, that permanent restructuring proposals could be presented in the UP oversight process, and, on March 31, 1998, we instituted a proceeding to consider requests for further conditions to the UP/SP merger for the Houston/Gulf Coast region.¹¹ On July 8, 1998, various parties filed requests that we accepted for consideration.¹² UP's opposition to the requested conditions and its supporting evidence, other opposition evidence, and comments by the U.S. Department of Transportation (DOT) were filed on September 18, 1998, and rebuttal evidence was

⁹ STB Service Order No. 1518 (Sub-No. 1), Joint Petition For A Further Service Order (STB served July 31, 1998). In denying relief, we found that numerous service indicators — including train speed, transit time, car inventory, blocked sidings, and terminal dwell times — had improved substantially to levels that, had they existed a year earlier, would have precluded our finding of an emergency and our imposition of the additional transportation options in Service Order 1518. *Id.* at 5-6.

¹⁰ Service Order 1518, Feb. 17, 1998 Decision, at 2-7; Feb. 25, 1998 Decision, at 4-5.

¹¹ We originally instituted this proceeding in Finance Docket No. 32760 (Sub-No. 21), Decision No. 12, 63 FR 16628 (Apr. 3, 1998). However, by decision served May 19, 1998, 63 FR 28444 (May 22, 1998), we re-designated the proceeding as Finance Docket No. 32760 (Sub-No. 26) (Houston/Gulf Coast Oversight), rather than (Sub-No. 21), and re-designated Decision No. 12 in Sub-No. 21 as Decision No. 1 in Sub-No. 26.

¹² Houston/Gulf Coast Oversight, Decision No. 6 (STB served Aug. 4, 1998), 63 FR 42482 (Aug. 7, 1998).

filed on October 16, 1998.¹³ Numerous letters and statements, supporting and opposing the requested conditions, have also been filed by shipper interests, state and local government representatives, and members of Congress. The Board held oral argument on this matter on December 15, 1998.

DISPOSITION OF THE REQUESTS FOR CONDITIONS

We will impose a "clear route through Houston" condition to enhance efficiency and facilitate the smooth movement of traffic through the Houston Terminal, a condition that was sought by both BNSF and the Consensus Plan Parties. We believe that the Joint Dispatching Center in Spring, Texas, has the authority to exercise discretion in choosing the most efficient routing for traffic moving through the Houston Terminal. To ensure, however, that the Joint Center staff do not feel constrained from making decisions necessary to efficient operations in the Houston Terminal due to trackage rights or other operational limitations, we are imposing a condition directing the Joint Center carrier-participants to authorize the Joint Director to use the best judgment in selecting alternative routings for train operations by UP, BNSF, and Tex Mex through the terminal, particularly when customary routings are unavailable or congested.

We will also grant Capital Metro Transit Authority's (CMTA) request to alter the BNSF trackage rights and interchange granted in the merger proceeding to connect with CMTA's operator Longhorn Railroad (Longhorn). BNSF's expanded trackage rights will be between Round Rock and McNeil so that BNSF can interchange with Longhorn at McNeil, instead of at Elgin, with BNSF and Longhorn making any necessary investments to make the service at McNeil practicable without interfering with existing main line operations.

We are also imposing a reporting condition that will require UP to outline in a separate section of its annual report that starts our annual general oversight of the merger how it is carrying out its infrastructure plan for the Houston/Gulf Coast region as set forth in its report of May 1, 1998.

There are also a number of situations, such as BNSF's request for trackage rights over UP's Harlingen-Brownsville line, or the issue of PTRC membership, where parties are working to reach privately negotiated solutions. In these situations, we will not impose conditions at this time. Other

¹³ Several papers were filed regarding certain Consensus Plan rebuttal evidence, which concerned significant "2-to-1" traffic issues. The Consensus Plan Parties, *inter alia*, used first-half 1998 traffic tapes that became available on July 15, 1998, a week after its July 8th opening filing. The tapes are relevant and the Consensus Plan Parties could properly use them, but the evidence based on them is new, and UP should have the opportunity to respond to it. Therefore, we accept UP's response. We also accept the Consensus Plan's sur-rebuttal to the UP letter, and we will also include in the record UP's further letter (of November 24), and the Consensus Plan's still further letter (of December 2).

situations in which potential disputes could arise are not ripe for our resolution at this time. For example, BNSF has asked that we make permanent its temporary overhead trackage rights on UP's Caldwell-Flatonia-San Antonio and Caldwell-Flatonia-Placedo lines, and it has requested a general "go-with-the-flow" condition, out of a concern over the types of operational changes that UP may make in the future, such as changes to its directional running program. We will not intervene at this time because UP has committed to give BNSF advance notice of its operational changes and to make all necessary accommodations to preserve the competitive presence that we expected BNSF to provide when we adopted the conditions. Additionally, BNSF has requested a "neutral switching supervision" condition on UP's Baytown and Cedar Bayou branches, but we believe that the private parties should attempt themselves to work out switching issues before bringing them to us for resolution. Finally, we note that BNSF has sought trackage rights over UP's San Antonio-Laredo line to resolve what is really a divisions dispute with Tex Mex; we will not grant those trackage rights, which could be devastating to Tex Mex, although we are prepared to prescribe divisions if, after negotiation, the parties cannot do so.

We must, however, deny all other requested relief, including the central elements of the Consensus Plan: the modification of the current Tex Mex trackage rights condition that would permit that carrier access to certain Houston traffic without restriction, and, most significantly, the establishment of so-called "neutral switching" operations over UP track in a broadly defined area of the Houston Terminal. Notwithstanding the service crisis, the record establishes that BNSF, through the Board's trackage rights condition, has effectively replaced SP for "2-to-1" shippers in the Houston area that lost SP service as a result of the merger. The record also establishes that BNSF has effectively replaced SP for Mexico traffic moving via Tex Mex through the border crossing at Laredo, and that any losses Tex Mex may have incurred during the service crisis on Mexico traffic using its UP trackage rights — rights that were designed to address the potential loss of competition at Laredo, not Houston — are not likely to recur and otherwise do not threaten any essential services it provides. As a result, modification of a merger condition limiting Tex Mex's access at Houston is not justified.

Further, the proposed neutral-switching condition would effectively add two additional new rail service options for many "1-to-1" shippers in Houston, particularly chemical and plastics shippers along the Houston ship channel. We previously determined that these shippers were not competitively harmed as a result of the merger, and the service crisis did not uncover additional or previously unaddressed competitive harm that would warrant the dramatic "open access" to UP's facilities in Houston that this condition would accomplish. If there was one factor that contributed most to the service crisis, it was that the crisis developed prior to the merger's implementation in Texas while UP and SP, though commonly managed by UP, were still operating separately. Those circumstances initially compromised UP's ability to quickly and effectively respond. Once UP did combine its Texas operations with those of SP — and in light of SP's decline, that was a prime factor underlying our approval of the UP/SP merger — the record supports the conclusion that the carrier's full implementation of the merger — rather than exacerbating the service crisis by placing control of

too much of the Gulf Coast area rail plant in UP's hands — led to its solution.

Even if some measure of competitive harm could be established, however, the Consensus Plan remedies would, at this juncture, be disproportionate to it. Throughout the service crisis, we were guided by the principle that UP's previous record of service suggested that it could manage its resources and operate its own business to solve this crisis better than the government, and we therefore directed relief that would support — not undermine — UP's own efforts, and its initiatives with other carriers in the region, to end the emergency. This approach worked, and the service crisis ended, although not without difficulty, mistakes along the way, or cost either to the Texas economy or to UP, which incurred over \$1 billion in additional costs, lost significant traffic, and suffered losses in the hundreds of millions of dollars.¹⁴

Absent clear evidence of competitive harm at this time, and absent a basis for concluding that proposed conditions would work better than the increasingly successful operations in Houston that are now in place, we believe we should proceed in similar fashion in this proceeding. Thus, for example, even if the Consensus Plan's requested "neutral dispatching" condition might be considered to be one way to ensure UP's fair, non-discriminatory treatment of BNSF and Tex Mex trains through Houston, it would clearly not be the only way. The record describes the success and neutrality of the Spring Dispatching Center, and discloses no basis for us to disturb the ongoing UP-BNSF joint dispatching operations. UP continues to offer Tex Mex and its corporate affiliate KCS the opportunity to be equal partners in the Houston dispatching operations, on terms equal to those of BNSF, and, as such, we see no reason to consider at this time — let alone impose — a neutral dispatching condition for Houston prior to KCS/Tex Mex's acceptance of that offer and their good-faith effort to participate in those operations.

The Board recognizes the damage caused by the now-ended rail service crisis, and we understand and share the desire of Houston area interests to avoid any similar crisis in the future. We

¹⁴ In examining requests for further emergency service relief, we were mindful of these losses and the risks that continuing government intervention could have on UP, particularly on its ability to generate sufficient earnings from its rail operations to make needed infrastructure investments required for the merged UP/SP network, including the deteriorating former SP lines and facilities. As a result, we did not, as suggested by some at the time, issue a new service order until UP had returned service to levels existing prior to the emergency. It was quite clear by that time that service in Houston — while not yet at optimum levels — was significantly improved, and, with performance indicators consistently pointing upward for many weeks, we determined that further relief under section 11123 was not appropriate. Instead, we concluded that it would be more advantageous for UP and the shipping public to permit UP to continue unhampered with its successful service recovery efforts, restore its traffic and revenue base, and complete the implementation of the merger and, with it, the full measure of its predicted public benefits.

should note that, in a decision served today in STB Ex Parte No. 628, Expedited Relief for Service Inadequacies, we have adopted new rules at 49 CFR 1146 and 1147 establishing procedures for individual shippers to obtain alternative rail service upon serious service failures of their incumbent carriers. We also should note that our oversight of the UP/SP merger, including our reservation of jurisdiction to impose further conditions in the Houston/Gulf Coast area and elsewhere, will continue for almost three years, and we intend to use it as a vehicle to review UP's Texas operations.

The service crisis in Houston, however, was not a result of competitive failings, and, in the end, UP's implementation of the merger in Texas — as difficult as it was — had more to do with resolving the crisis, than prolonging it. Thus, much of the relief sought by the Consensus Plan proponents, and by certain individual shippers, has not been shown to be justified at this time.

DISCUSSION

In considering new conditions for the Houston/Gulf Coast area, we stated that we would examine whether there is "any relationship between any market power gained by UP/SP through the merger and the failure of service that occurred in the region, and, if so, whether additional remedial conditions would be appropriate."¹⁵ UP and the Consensus Plan Parties quarrel over what this means, but our examination of this "relationship" was not intended as an isolated or independent test that would supplant our existing criteria for obtaining conditions. Rather, it was simply meant to put into context what even the Consensus Plan Parties concede is our "entire focus" here: whether the conditions that we imposed on the UP/SP merger are effectively addressing, for the Houston/Gulf Coast region, the harm we determined an unconditioned merger would produce. CMA-4 at 19-22, CMA-5, RVS Grimm/Plastow at 2-4.¹⁶

That focus remains particularly appropriate, because the overriding public benefits of the UP/SP merger are substantial — most notably UP's absorption of SP's entire weakened system and the promise to shippers throughout the West of a second strong, efficient rail system as a competitor to BNSF. Even though our focus here is on the Houston area in the aftermath of a damaging service breakdown, this significant public benefit must not be compromised without a clear demonstration that our current conditions for that region are ineffective, that further conditions would work, and that they are narrowly tailored to address merger-created harm.

I. THE CONSENSUS PLAN. The Consensus Plan parties — The Chemical Manufacturers Association (CMA), RCT, the Society of the Plastics Industry (SPI), The Texas Chemical Council, KCS, and Tex Mex — jointly request several new conditions. Most significantly,

¹⁵ Houston/Gulf Coast Oversight, Decision No. 6 at 6; see also Decision No. 1 at 5-6.

¹⁶ For convenience, unless otherwise indicated, "CMA" refers to pleadings filed jointly by the Consensus Plan proponents, *infra*.

these parties, with support from Houston area business and governmental interests, seek a condition that would establish what they describe as neutral switching and dispatching operations by the Port Terminal Railroad Association (PTRA) throughout the Houston area over: (1) all industries and trackage formerly served by the Houston Belt & Terminal Railway Company (HBT);¹⁷ (2) all industries and trackage of PTRA; and (3) a broad area embracing industries and trackage stretching from Houston to Galveston, particularly numerous "1-to-1" plastics and chemical shippers south and east of Houston on the Strang/Bayport Loop and along the Houston ship channel that are served solely by UP and were solely served by either UP or SP before the merger.¹⁸ Effecting this plan would require UP to broadly afford trackage rights to PTRA over UP tracks and necessary yards within the described neutral switching area. It would also require UP to afford terminal trackage rights to all other railroads serving Houston, so that PTRA could dispatch trains over the Terminal's "most efficient routes."¹⁹ Although the Consensus Plan Parties state that UP would continue to own its property, and indeed be responsible for it, in practical terms the Consensus Plan would displace UP from the Houston Terminal in favor of PTRA.

Together with the request that we permanently lift the restriction that limits Tex Mex's use of its UP trackage rights through Houston to traffic having a prior or subsequent movement over its Laredo-Corpus Christi line, the Consensus Plan's proposal for a neutral switching condition would, through PTRA's operations, provide three rail service options — UP, BNSF, and Tex Mex — for all Houston shippers within the neutral switching area, including "3-to-2" and "1-to-1" shippers that we

¹⁷ Switching operations in the core of the Houston terminal area had historically been provided by HBT, created in 1905 and owned jointly by the numerous line-haul carriers then operating in Houston. Following the UP/SP merger, UP and BNSF, HBT's sole remaining owners, determined that they could provide switching services more efficiently and at reduced cost to the shippers by doing it themselves, and, through a series of trackage rights exemptions consummated on October 31, 1997, they assumed that role. In a decision reported today in Finance Docket No. 33461, Southern Pac. Transp. Co.--Trackage Rights Exemption--Houston Belt & Term. R.R. (STB served Dec. 21, 1998), we have denied a joint petition by KCS and Tex Mex to revoke these exemptions, as well as their joint complaint challenging those transactions.

¹⁸ This area would include all shippers currently located on what was formerly SP's Galveston Subdivision between Harrisburg Jct. and Galveston, including those at Sinco, Pasadena, Deer Park, Strang, LaPorte, the Clinton Branch, the Bayport Loop and the Bayport area, including Barbours Cut and the Navigation Lead; all shippers at Galveston located on both the former SP and the former UP routes between Houston and Galveston; and the former SP yard at Strang and the UP yard at Galveston. CMA-2 at 7-8, 40-42, Houston/Gulf Coast Oversight, Decision No. 6, at 8.

¹⁹ To successfully effect the neutral switching and dispatching operations, the Consensus Plan Parties also request a variety of specific conditions that we discuss later in the decision.

previously determined had not been competitively harmed as a result of the merger. The Consensus Plan Parties claim that this extraordinary result is required because, by its elimination of independently operated and dispatched rail service through UP's "complete control" of Houston area rail plant, the merger deprived Houston rail shippers during the service crisis of a viable rail alternative and thereby exposed merger-created harm that the BNSF trackage rights and other conditions do not effectively address. CMA-4 at 20, 24. For many reasons, we disagree.

**A. Despite The Service Crisis, The Merger Conditions Are Working For The
Houston/Gulf Coast Region In The Manner Intended**

Most significantly, the record discloses that our conditions — particularly BNSF's trackage rights — are effectively working in the Houston region. The Consensus Plan Parties' principal evidence to the contrary is its market share analysis of "2-to-1" shippers in the Houston area, submitted on rebuttal.²⁰ Its study, drawing on all shippers previously identified by UP as "2-to-1" shippers in the Houston Business Economic Area (BEA) and matching those shippers with UP's and BNSF's 100 percent traffic tapes for the first half of 1998 — a period that embraced some of the most difficult months of the crisis — is used to buttress its claim that UP maintained a 91-percent

²⁰ In the Consensus Plan Parties' initial evidentiary submission, and in UP's response, the parties submitted extensive waybill and 100 percent traffic files extending from 1994 to the first half of 1998. These data were aggregated and disaggregated in a variety of ways, and various claims were made regarding which carriers, time periods, and geographic areas should be compared. Because, in mergers, we examine whether competition is diminished for any shipper, we have consistently determined that the most appropriate universe to measure merger-related changes in competition is the most shipper site-specific data available (typically, "3-to-2", 2-to-1", and "1-to-1" carrier points), because each category will likely experience different competitive consequences. As DOT pointed out in its comments criticizing the Consensus Plan Parties' original "single" market approach to Houston:

Shippers that were captive to UP or SP before the merger would not be expected to benefit from competition, and therefore it would not be surprising if the post-merger UP share of such traffic remains at 100 percent. A determination of effective competition, therefore, cannot be based simply on shares of [all] traffic in and out of Houston, for example, as some have argued. CMA-2, V.S. Grimm & Plaistow, at 6-8.

DOT Comments, Sept. 18, 1998, at 5.

market share for "2-to-1" traffic originating or terminating in the Houston BEA during that period.²¹ These results, the Consensus Plan Parties claim, conclusively establish that BNSF has not effectively replaced an independently operated and dispatched SP for "2-to-1" shippers in and around Houston.

It appears that the Consensus Plan Parties' study seriously understates BNSF's share of available traffic terminating at Houston-area "2-to-1" points. In the main merger proceeding, BNSF and LCRA explained that UP's contract covers 95 percent of Powder River Basin coal shipments to LCRA's facility at Halsted.²² Based on the tonnage data submitted in the Consensus Plan Parties' study, it thus appears to us that BNSF — by delivering 9 percent of LCRA's coal shipments — had already carried in the first six months of 1998 nearly all of the LCRA traffic that would be available to it for the year, and that all of UP's coal shipments to LCRA included in the study were necessarily under UP's existing contract and not available to BNSF. Thus, after subtracting out UP's tonnage, BNSF is carrying more than a third of all traffic terminating at Houston area "2-to-1" points that was open to competition between UP and BNSF, not 9 percent as asserted by the Consensus Plan Parties.

In any event, we have consistently maintained throughout this merger proceeding that the "decisive criterion" to judge the effectiveness of the BNSF trackage rights condition "is the effect BNSF's presence in the market has on rates offered by UPSP," not whether BNSF approaches SP's pre-merger market share. UP/SP Oversight I, *supra* note 6, at 5. As DOT (Comments at 5):

Competition between carriers may be judged most effectively when it forces them to adjust rates and/or provide better service in response to each other's actions in the market. It need not result in two competitors each getting approximately 50 percent of the traffic. Competition may be intense, yet one carrier may get almost all of the business; for instance, if all the traffic of a shipper is offered for bid by contract.

²¹ CMA-4 at 29-30, CMA-5, RVS Grimm/Plaistow at 7-8, CMA-8, Confidential Figures 3, 8, and 9. We have also reviewed the workpapers supporting the Consensus Plan Parties' analysis, and we find that, with the exception of Mobil, all of these facilities are properly included in the analysis.

UP contests the inclusion of the Lower Colorado River Authority (LCRA) at Halsted, TX as a "2-to-1" point. This traffic comprises 78 percent of "2-to-1" Houston BEA terminating traffic included in the study. UP states that LCRA traffic is not subject to the Board's "2-to-1" contract reopener condition and, due to an existing contract, the vast majority of this traffic has not yet become available to BNSF. Although the Consensus Plan Parties believe all of the LCRA traffic should be included in the study, they claim that its inclusion or exclusion would not appreciably change UP and BNSF's respective market shares (90/10 percent) for the study's remaining terminating traffic. We have included LCRA traffic, but, as explained below, only that small component that was actually available to BNSF.

²² UP/SP Merger, Decision No. 73 (STB served Aug. 14, 1997). See BN/SF-80, LCRA-11, VS Kuehn at 4.

(footnote omitted). . . [Thus,] the effectiveness of competition is best determined by customers with access to more than one railroad — for example, are competing railroads soliciting their business and do the service proposals lead to counter proposals from the carrier currently providing the service?

Here, our review of the confidential evidence in the Consensus Plan Parties' study indicates that, of the "2-to-1" shippers that moved traffic into and out of Houston during the first half of 1998, five shippers tendered to UP approximately 98 percent of the originating "2-to-1" traffic in the Houston BEA, and seven shippers tendered approximately 97 percent of the "2-to-1" terminating traffic.²³ UP has shown, however, that it has vigorously competed with BNSF to retain the business of these shippers, and that it has done so only because it has provided them with rate reductions and other benefits in response to that competition.²⁴

The Consensus Plan Parties counter that this result does not diminish the fact that BNSF's market share for this traffic (which they consider to be 9 percent) — in contrast to SP's pre-merger share of 32 percent — more broadly establishes that "neither BNSF nor any other railroad can effectively compete against UP when it has to operate via trackage rights and UP controls the dispatching and switching," nor does it explain why shippers "would choose gridlock."²⁵ But as noted, their market share evidence is flawed, and, in any event, their arguments cannot overcome the fact that rate benefits have resulted from BNSF's competitive presence for the shippers that move practically all of Houston's "2-to-1" traffic. Certainly UP would not have had to offer these competitive benefits if it did not believe that BNSF was a viable service alternative.²⁶

²³ CMA-8, Confidential Figures 8, 9.

²⁴ UP/SP-356 at 32, citing UP/SP 344 and 345. See also UP Letter of October 27, 1998, at 2, citing UP/SP-345, Confidential Appendix C, pages C1, C2, C4, and C5.

²⁵ Consensus Plan Parties' letter of December 2, 1998, at 2-3. Of course, as the entire region was affected by the service crisis, the services provided by BNSF and Tex Mex were also subpar. Thus, shippers did not really "choose gridlock" when they remained with UP.

²⁶ At oral argument, KCS disputed UP's evidence that it provided lower rates, urging that such evidence "means nothing" absent UP's showing that its competitive rates were actually lower than SP's pre-merger rates. Transcript of Oral Argument, December 15, 1998 (Transcript) at 183. However, SP's pre-merger rates — which had to be at least one of the factors associated with the carrier's downward spiral — were largely unremunerative and thus simply not relevant here. Indeed, in the underlying merger proceeding, there was substantial evidence that SP cut rates to attract new business, but that the strategy was unsuccessful because many shippers were unwilling to

We have long defined harm that warrants merger conditions as that conferring on merging parties "sufficient market power to raise rates or reduce service (or both), and to do so profitably, relative to premerger levels," and in considering such conditions, "it is not our duty to ensure preconsolidation levels of traffic or the survival of competitors." Decision No. 44, at 100, 101. Here, the record establishes that responsive rate benefits — not rate harm — resulted for Houston's "2-to-1" shippers from the BNSF trackage rights condition. That the "2-to-1" traffic moved primarily by UP, not BNSF, does not counter that fact (and would not counter it even if it were correct) that BNSF has not yet "successfully" approached SP's pre-merger market share of Houston's "2-to-1" traffic. CMA-10 at 11. Under our most important indicator — the trackage rights' effect on UP's rates — BNSF has proven itself an effective competitive presence for precisely those Houston area shippers at which the trackage rights condition was directed: those that lost competitive rail service as a result of the merger.²⁷

Contrary to the Consensus Plan Parties' contentions, Tex Mex's trackage rights over UP's Robstown/Corpus Christi-Beaumont line likewise remain effective in addressing the discrete merger-

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

²⁷ This result is not surprising, because the record more broadly indicates that the service crisis did not reinforce or give UP "effective monopoly control" of the \$2.8 billion rail transportation market in Houston. CMA-4, at 3. Breaking down its traffic in the Houston BEA for the first half of 1998 between traffic to and from facilities exclusively served by UP, and traffic to and from facilities served by UP and one or more other railroads, UP demonstrates that, of all rail traffic originating or terminating in the Houston BEA during that period, only about one-third (30 percent) was exclusive to UP. In contrast, roughly one-third (37 percent) moved, despite the service crisis, over other railroads, and another third (33 percent) moved by UP, but was open to competition with other railroads. UP/SP-356 at 48-49, UP/SP-357, VS Barber at 31-32, VS Peterson at 21-22.

It is also consistent with BNSF's evidence that, despite the service crisis, it continues to effectively replace SP at competitive service points in the Houston area. BNSF points out that its loaded units to and from Houston increased 19 percent for the first seven months of 1998 over the same period of 1997, from 156,759 to 186,951 units; tonnages increased 36 percent, despite a major loss of competitive automobile traffic; and its share of all rail cars shipped and received by PTRAs industries open to reciprocal switching by BNSF, Tex Mex, and UP stood in July of this year at 63 percent of all PTRAs cars shipped that month, up from 41 percent for July of 1997. BNSF-9 at 6-8, VS Rickershauser at 3-4, 6.

related harm they were designed to remedy. That condition — designed to ensure that the merger would not erode Tex Mex's traffic base or undermine its ability to continue to provide a competitive alternative to UP's route to the Laredo gateway for traffic to and from Mexico — was expressly restricted to traffic having a prior or subsequent movement over Tex Mex's Corpus Christi-Laredo line, and was:

not directed at mitigating any supposed competitive harm arising at Houston . . .
There is no nexus between the potential difficulty we discerned with regard to Laredo . . . and the Houston transportation market.²⁸

Nonetheless, the Consensus Plan Parties argue that, as a result of the service crisis, unless Tex Mex is permitted to freely originate and terminate traffic at Houston without restriction, the carrier will be financially incapable of providing a significant competitive alternative to UP for traffic through Laredo because it lacks access to a sufficient amount of traffic and revenue. CMA-2, at 14-18, VS Plaistow at 7-10, TM-7/KCS-7, at 19-20, VS Plaistow at 126-28, CMA-4, at 45-53. That claim is belied by the parties' own evidence. The Consensus Plan Parties' "base case" study, reflecting the implementation of the merger conditions and other known changes since the end of 1996 (excluding the temporary conditions we imposed in Service Order 1518), reveals that — even without traffic obtained using its UP trackage rights — BNSF has more than replaced SP as an interline partner for Tex Mex (14,397 BNSF carloads gained against a loss of 8,242 carloads of SP traffic), and the parties concede that Tex Mex's additional revenue from BNSF interchange traffic and other sources "more than offsets the revenue reduction from lost carloads of SP interchanged traffic" due to the merger. CMA-2, VS Plaistow at 8-9.²⁹

²⁸ UP/SP Merger, Decision No. 62, at 7-8 (STB served Nov. 27, 1996) (Decision No. 62). See also Decision No. 44, at 148-50; UP/SP Oversight I, at 14-15. Tex Mex's system is comprised of its 157-mile line between Corpus Christi and Laredo. Prior to the merger, traffic moving to Mexico could reach Laredo over UP's route via San Antonio or an SP-Tex Mex route via Corpus Christi. Post-merger, BNSF replaced SP as Tex Mex's independent interline partner. When considering the merger, however, we were concerned that BNSF would not be able to retain all of the Mexican traffic previously carried by SP, and that it might also prefer its new merger-enhanced single-line movement into the border crossing at Eagle Pass over its interline service with Tex Mex through Laredo. To protect against those possibilities that might, we determined, endanger essential services that it provides to more than 30 shippers located on its line and/or damage its ability to maintain an effective competitive alternative to UP for Laredo traffic, we also granted Tex Mex restricted trackage rights over UP.

²⁹ In fact, its study indicates that, since the merger, Tex Mex's revenues have increased by almost \$9 million over 1996 levels to over \$28 million, or by more than more than 44 percent. CMA-2,

The Consensus Plan Parties argue, however, that despite these significant traffic and revenue increases, unexpected cost increases due to service-crisis congestion on UP caused Tex Mex to suffer a net loss of \$1.2 million in 1997 that, if recurrent, could jeopardize its ability to function as the effective service alternative to UP for Laredo traffic that the Board envisioned. CMA-4, at 49-50. Clearly, the service crisis adversely affected the costs of all carriers in the region, certainly none more than UP, but there is no basis to believe that costs borne by Tex Mex were disproportionate or — now that the service crisis is over — that they were other than transitory.³⁰

Moreover, Tex Mex has prospects to obtain additional traffic the Consensus Plan Parties claim it needs without having unrestricted access to UP's (and BNSF's) Houston traffic. Its UP trackage rights through Houston to Beaumont, and its interchange with its affiliate, KCS, have greatly enhanced Tex Mex's opportunities as part of the developing "NAFTA Railway," an informal network of the Canadian National Railway (CN) and Illinois Central Railroad (IC) systems — whose proposed merger is before the Board — KCS, and (through its UP trackage rights) Tex Mex. This is particularly so after KCS' formation with CN and IC of a 15-year marketing alliance to aggressively pursue NAFTA traffic. If the CN/IC merger is approved, and if the alliance remains in place, neither of which we prejudge here, Tex Mex stands to gain substantial additional revenue annually for traffic to and from Mexico.³¹

Thus, there is no basis for finding that Tex Mex's current restricted trackage rights over UP have been ineffective in addressing the potential loss of competition at Laredo for which they were designed. Traffic over Tex Mex's Corpus Christi-Laredo line has increased substantially and any essential services it provides, despite some service-crisis related losses, have not been shown to be threatened.

In summary, the competitive conditions imposed by the Board in its approval of the UP/SP merger are working as intended. The trackage rights granted to BNSF are providing the intended

VS Plaistow at 8; see also UP-356 at 134-35; Transcript at 33 (Tex Mex does "project improved revenues for the future").

³⁰ The Consensus Plan Parties effectively concede that the 1997 net loss is an aberration by the use in their study of "normalized" costs, a method that assumes that any period of escalated costs were temporary. CMA-2, VS Plaistow at 8-9.

³¹ UP/SP-356 at 147, citing Finance Docket No. 33556, Canadian Nat'l Ry.--Control--Illinois Central Corp., CN/IC-7, VS Woodward & Rogers at 4, 11 (Appendix A). The Consensus Plan Parties argue that this potential traffic increase is irrelevant to this proceeding, but as noted, even without it, now that the service emergency is over, Tex Mex should be fully able to continue to provide its essential services to its local shippers, and to be an effective competitive alternative to UP at Laredo.

competition to UP for the 2-to-1 shippers, and the Tex Mex condition is working to ensure that that railroad can provide its essential services.

**B. The Service Crisis Did Not Disclose Other Merger-Produced Harm That
Warrants The Conditions Sought**

Although our merger conditions are working as intended, the Consensus Plan Parties claim that the proposed neutral switching and dispatching condition is warranted because the lack of independently operated and dispatched rail service exacerbated the "effects of the service crisis" and is leading to permanently reduced service levels and infrastructure investment for the region that requires breaking UP's control of switching and dispatching. CMA-4 at 21, 71-94. We disagree.

First, the Consensus Plan Parties' claim of UP's discrimination against Tex Mex trains during the service crisis — a direct result, they say, of UP's control of Houston's rail infrastructure — is overstated, unproven, and highly implausible.³² It is possible that, in isolated instances, a UP train was given preference over a Tex Mex train that could have moved first. But as UP points out, Houston Terminal dispatchers handle roughly 150 trains per day in a complicated terminal area and, in carrying out their duties, must perform over 2,300 actions in a 24-hour period, roughly one every 40 seconds. UP-356 at 53, UP-358, VS Slinkard at 2-3. In circumstances that thus realistically preclude "intentional delays to any railroad's trains," the Consensus Plan Parties ultimately provided relatively few claims of favoritism, and most of these involved severe delays from service-crisis congestion that equally affected the trains of all carriers, not just Tex Mex, or situations where, as is proper, Tex Mex trains were held to permit others with clear track ahead to proceed first. VS Slinkard at 3, UP-356 at 201-08. It is the nature of dispatching decision-making that some dispute and delay will occur when multiple trains are moving over track. However, no serious indications or patterns of dispatching discrimination in the Houston area have been established.³³

The Consensus Plan Parties also argue that UP spent less money in 1998 for infrastructure

³² We note that BNSF and UP have both suggested that the complexity of the Houston Terminal makes it virtually impossible to discriminate intentionally when serving local shippers offering traffic destined to various carriers, even if it is UP providing the switching service.

³³ In fact, a 31-day UP study between mid-August and mid-September of this year using electronic scanners that UP and BNSF recently installed on jointly used track broadly discloses that Tex Mex's trackage rights trains over UP lines have faster transit times than UP's own trains. UP-356 at 53-56, UP-358, VS Wilmoth at 2-5.

improvements in the Houston/Gulf Coast area than it did in areas where it faces greater competition, and that, because of its market power in Houston, UP will significantly withdraw from its five-year \$1.4 billion infrastructure plan for the Houston/Gulf Coast area.³⁴ We certainly cannot conclude that any of the improvements that UP made this year in the Houston terminal area and elsewhere in the region that added capacity and increased efficiency — especially those urgently required on the former SP — are insubstantial or insignificant.³⁵ Nor can we find any indication that, due to a lack of competition, UP is diverting investment resources away from Houston to other projects or otherwise not currently investing in the region at adequate levels. Again, UP's investments in Houston infrastructure have been substantial, particularly in light of UP's unexpected expenditure of over \$1.1 billion to deal with the service crisis.³⁶

There is no question that long-term spending on maintaining and adding to rail infrastructure in the Houston/Gulf Coast area is important. We expect UP to honor the investment undertaking outlined in its May 1, 1998 infrastructure plan, and, as a result of this proceeding, we are requiring the carrier to separately outline in its next July report that triggers our annual general oversight process how that is being carried out.³⁷ UP's need in 1997 and 1998, however, to end service-crisis

³⁴ The Consensus Plan Parties state that UP either has spent (or has authorized to spend) in 1998 only \$116.9 million of the \$1.4 billion promised, while simultaneously proceeding with other investments like its \$400 million improvement project in the Central Corridor, where it faces substantial competition from BNSF. CMA-2 at 86-91, CMA-4, VS Grimm/Plastow at 14-19. At oral argument, UP indicated that it will come close to meeting its \$170 million goal for Houston area spending this year, and that most of the bigger dollar projects in its infrastructure plan for the Houston/Gulf Coast region are slated for the "out years" of the plan. Given the distractions and financial setbacks that UP faced over the past year, we find that the carrier did an acceptable job of meeting its Houston area infrastructure investment commitments.

³⁵ During the year, UP constructed new connections at Tower 87, an important junction connecting Englewood and Settegast Yards, added track and made other physical improvements at Englewood, installed the sands of new ties on track between Englewood and the former SP lines serving chemical and plastics traffic in the Strang/Bayport Loop, and has authorized over \$11 million to add capacity at the Strang Yard. UP-356 at 171-72, UP-358, VS Handley at 3, 26. UP also has just added 17 miles of new line capacity near New Braunfels, TX on the Austin Subdivision, a heavily used line.

³⁶ In fact, the Central Corridor project cited by the Consensus Plan Parties (CMA-4 at 89), which should help all users of the UP system, was one of the most significant in UP's original plan to carry out the merger, well before there was any service crisis.

³⁷ In this regard, we note that the Port of Houston and the Houston Partnership have expressed a strong interest in building up the Houston area rail infrastructure. We expect UP to consult with

congestion and reestablish fluid operations in Houston and throughout its system was immediate and critical, requiring a great commitment of its financial resources, and there is no basis for us to find that UP's level of investment in 1998 in the Houston/Gulf Coast region, so close to the service crisis period, has been inadequate or otherwise indicative of any merger-produced market power that will depress its investment in the region.³⁸

Lastly, the record also does not establish that, as a result of UP's supposed control of Houston infrastructure, shippers will likely face "a permanently degraded quality of railroad service," despite the Consensus Plan's claim that service, even after the crisis, does not approach pre-merger SP levels or those UP predicted would occur as a result of the merger.³⁹ We have serious questions as to the reliability of the Consensus Plan's evidence of SP's performance,⁴⁰ but even if a few pockets of SP traffic prior to the merger were moving well — in comparison to the rest of SP's system where it was clear, as we found in approving the merger, that "poor service quality" was the rule (Decision No. 44, at 272) — it is unlikely that such service could have been sustained due to SP's increasing "inability to generate sufficient capital to provide quality service." Decision No. 44, at 104, also 113-16. As a result, any comparison of current UP service to a small sample of pre-merger SP service is not a reliable one.

these parties with respect to infrastructure improvements as part of their focus on developing the Port and on economic development.

³⁸ Further, there is no indication that UP's market presence has depressed BNSF's level investment in the Houston/Gulf Coast area, or that it has left UP, as some shipper interests have claimed, "the only substantial source of investment funds in the region." NITL-4 at 10-11. BNSF points out that, since the merger, it "has made a significant capital contribution" in the area "and plans to continue doing so," pointing to projects such as upgrading HBT's Old South and New South Yards, constructing an interchange yard on the Baytown Branch, underwriting its share of construction and setup expenses for the joint dispatching center at Spring, and rehabilitating the SP line between Iowa Junction and New Orleans that is critical to fluid operations between Houston and New Orleans. BNSF-9 at 3, VS Rickershauser at 10-12.

³⁹ CMA-2, VS Thomas at 120-141, Exhibit D, CMA-4 at 71-82, CMA-5, RVS Thomas at 41-46, Exhibits A and E.

⁴⁰ Even if we were to accept as a representative sample the Consensus Plan's data — from less than five shippers, representing 25-30 percent of plastics production capacity — the data could not reliably be used to make service comparisons over time, as the number of shippers and the mix of shipments and routes used in the Consensus Plan's study to measure transit times for the pre-merger periods of 1995 and 1996 differ from the mix of shippers, shipments, and routes for the post-merger periods of 1997 and 1998.

What is clear and not seriously questioned is that the merger has been implemented, the service crisis has ended, and fluid operations over UP have resumed. As reflected in UP's operational monitoring reports, all key UP service indicators — train speed, transit time, car inventory, blocked sidings, and terminal dwell times — are at highly improved levels, even above those that we found during the summer, when we determined not to provide further emergency service relief.⁴¹ While, for some, UP service in the Houston/Gulf Coast region may not yet be optimal, there is simply no reliable indication on this record that it will not continue to improve and, ultimately, match UP's original, pre-merger expectations.

We can only conclude that the service crisis, as lengthy and harmful as it was, did not reflect merger-produced competitive harm in the Houston region, but rather was the result of a combination of factors such as an expanding economy and weather with the difficulties and mistakes stemming from UP's staged implementation of the UP/SP merger before and after the onset of the crisis.⁴² Other stresses during 1997, including derailments and accidents on both UP and SP that led to the Federal Railroad Administration's extensive investigation of the accidents, and the backup of Mexico-bound traffic destined for Laredo that ultimately forced UP to declare an embargo of the Laredo gateway, also played a major role. Until UP implemented the merger, which involved designing and installing a new computerized information and management control system, designing and implementing new train operating systems, and consolidating under one set of rules the various employee functions involved in the running of the railroad, it could not put into effect the new operational changes such as "directional running," which played a major role in easing the service crisis.

Indeed, the record clearly indicates that the service crisis ended with the merger's

⁴¹ See Operational Monitoring Report for two-week period ending December 4, 1998. For example, system train speed is now over 16 miles-per-hour (MPH), and reached 16.7 MPH the last seven days of the period, the highest since the service crisis began and approaching UP's January 1997 baseline of 17.9 MPH; UP's system car inventory has declined to 324,000, the lowest since the crisis and approaching UP's 314,000 car baseline (its Texas and Louisiana car inventory of 99,000 is some 11,000 fewer than the high of September 1997, UP-358, VS Duffy at 10); car terminal dwell time has declined to less than 36 hours, approaching UP's January 1997 baseline of 33.6 hours; coal cycle times are now 6.4 days, approaching UP's January 1997 baseline of 6.1 days; and the percentage of on-time arrivals has reached its highest level since May 1997.

⁴² UP was implementing the merger in four stages: first, the Central Corridor region roughly between Salt Lake City and Topeka; next, Kansas City east and south to Dallas-Ft. Worth; next, the South Central Corridor from Nevada (through Texas) to Avondale, LA; and lastly, the West Coast. Due to the necessity for implementing agreements with rail labor, and for phasing in computerized information and management control system, implementation of the merger in Texas did not begin until the fall of 1997.

implementation. UP-356 at 70-74, UP-358, VS Duffy at 19-20. Once it obtained labor implementing agreements that permitted UP and SP operations to be combined, cut over fully to UP's new computer system, implemented directional running and other operational improvements such as the joint ownership with BNSF of the Houston-New Orleans line and the joint BNSF/UP dispatching center at Spring, TX, UP was in a position to restore normal operations in Houston and elsewhere, and begin to realize the merger's benefits. As noted, the weekly performance reports that we required under our "Service in the West" proceeding and our emergency service order, as well as our current bi-weekly reporting since, have reflected the results of those efforts.⁴³ The service crisis was a difficult lesson in merger implementation, but it has now ended, largely through UP's own efforts and resources and the dedication of its employees, and we find that it was not a merger-produced competitive crisis that requires new conditions to the UP/SP merger, but rather an operational crisis that has now been solved.⁴⁴

C. Even If Some Harm Had Been Established, The Consensus Plan's Neutral Switching and Dispatching Remedies Are Disproportionate, and Their Effects Too Unpredictable

Even if some limited degree of competitive harm had been established — and it has not — the Consensus Plan's neutral switching and dispatching remedies would, at this point, be exceedingly disproportionate to such harm and too unpredictable in their effects in comparison to UP's now-successful operations in the region. For example, the Consensus Plan would displace dispatching by UP (and BNSF) in favor of PTR. But the Consolidated Dispatching Center at Spring, TX, established jointly by UP and BNSF during the midst of the service crisis, is currently providing neutral dispatching in Houston. It is, as we had hoped it would be, covering an increasing number of lines. Thus, as both UP and BNSF each point out, there would be no benefit gained by shifting dispatching to PTR. UP-356 at 197-200, BNSF-9 at 14-15, VS Hord at 3-5. Notwithstanding their claim that "neutral" discrimination-free dispatching can only be assured when it is administered by a party not hired by those whose trains are being dispatched (CMA-2 at 47-50), it may be that during the pendency of this proceeding, Tex Mex and KCS had an incentive not to join Spring, as it

⁴³ In addition, UP made a major management change, decentralizing its operations into three regions, including the Southern Region headquartered at Spring.

⁴⁴ UP's lack of market power is ultimately demonstrated by its inability to exploit the service crisis in Houston or elsewhere. Instead, during 1997 and the first half of 1998, the carrier incurred \$1.1 billion in additional costs to address this crisis while losing traffic and revenue to BNSF and even Tex Mex, resulting in net losses totaling \$230 million for the three quarters ending in June of this year, a number which is even more striking when compared to UP's significant profits in prior years. UP/SP-356 at 83, UP/SP-357, VS Peterson at 32, UP/SP-358, VS Hausman at 6-8.

would have taken away one of the arguments they have used in their attempt to displace some of UP's services and facilities. We can only urge Tex Mex and KCS now to accept the offers of UP and BNSF to be equal partners in the Spring operations, UP-356 at 209-212, BNSF-9 at 5.

Even if Tex Mex and KCS were not to join the Spring Center, we can see no basis on which to conclude that the dispatching operations at Spring are used to discriminate against any carrier. The Spring operations are not managed by UP's dispatcher, but by a director jointly hired by UP and BNSF using existing dispatching protocols that treat all trains of the same class equally and provide effective dispute-resolution procedures. UP-356 at 209-211, BNSF-9 at 14-15 and n.12. As both BNSF and UP made clear at oral argument, the Spring director — not UP or BNSF — has authority to resolve all dispatching disputes, so that the concept of neutrality "is embodied in the directorship." Transcript at 75, also 165-66.⁴⁵ We simply find no basis at this time to even consider a condition that would work to dismantle what has been a fair and extremely effective undertaking, and that remains open to KCS and Tex Mex's participation on an equal basis.

The Consensus Plan Parties also propose "neutral" switching operations in the Houston terminal area by PTR A. But PTR A can already provide switching on its own lines, and as we are not opening up access to all of the Houston area, then the only other switching ever available to PTR A would be on the former HBT track. It is not clear whether the Consensus Plan Parties would continue to support such a small extension of PTR A's switching operations. Additionally, PTR A has its own resource limitations, and it would need dispatchers and dispatching equipment, locomotives, and crews to deal with expanded switching operations. Even in its current operations, PTR A already tends to export congestion back to UP and BNSF, which an expansion of PTR A's operations could aggravate. For those reasons, and because expanded PTR A operations give no indication of being more efficient, and may be more costly for shippers than UP's (and BNSF's) current operations,⁴⁶ we

⁴⁵ KCS' claim at oral argument that the Spring director would be neutral only "by giving Tex Mex a say in who the director is" is, in our judgment, simply a convenient excuse after Tex Mex's repeated refusals to join the center as an equal partner, and disingenuous after it conceded that the Spring director has "the authority to resolve disputes." Transcript at 194.

⁴⁶ Regarding on a more theoretical level the broad neutral switching area contemplated by the Consensus Plan, we note, as we noted previously in rejecting RCT's request for neutral switching operations in Houston in the service order proceeding, that railroads generally establish neutral switching operations in a terminal area "to guarantee operational efficiency and safety — not for competitive reasons, or to establish any sort of neutrality." Service Order 1518, Feb. 17 Decision, at 10. Operational efficiency and safety are of particular concern in a terminal with capacity concerns like Houston. In cities with neutral switching, the switches are often conducted on "belts" running around the outskirts of the city that are fed by tracks from the industries to the belt. Absent an overhaul of the existing infrastructure, however, neutral switching in Houston would involve switches that would be conducted to a large extent on tracks and yards in the city's core. This area,

will not impose a neutral switching condition.

**D. The Other Remedies That The Consensus Plan Seeks
Are Being Effected Privately. Or Are Not Justified**

To successfully effect their proposed neutral switching and dispatching operations, the Consensus Plan Parties also request conditions that would require: (1) UP and BNSF to acknowledge Tex Mex's full voting membership on the PTRa board and restore the Port of Houston Authority as a full voting member of that board; (2) UP to sell to Tex Mex its unused Rosenberg-Victoria line and grant two miles of related trackage rights; (3) UP to sell or lease to Tex Mex an existing rail yard in Houston, preferably the Booth Yard; (4) UP to permit Tex Mex/KCS' construction of portions of a second rail line along UP's Lafayette Subdivision right-of-way that it would then swap for a substantially larger portion of UP's Beaumont Subdivision line; and (5) UP and BNSF to respectively grant trackage rights to Tex Mex over the UP's "Algoa" line between Placedo and Algoa, TX, and over the BNSF line between Algoa and T&NO Jct., rights that were provided temporarily to Tex Mex in Service Order 1518. See Houston/Gulf Coast Oversight, Decision No. 6, at 7-10.

through which much of the rail traffic in and out of Houston — particularly that of "1-to-1" chemical and plastics shippers along either side of the Houston ship channel east and south of Houston that the Consensus Plan seeks to reach by PTRa — must move is an especially cramped and complex configuration of tracks and yards without grade crossings that, even in more "normal" circumstances, often requires traffic-delaying switching operations on mainline track. UP-358, VS Handley at 2-4. Thus, as we explained in Service Order 1518, at 11:

RCT's proposal to give substantial UP/SP properties to PTRa would not produce a switching arrangement that would give line-haul carriers access to shippers in a way that relieves the burden on Houston's already limited railroad capacity. Rather, RCT's proposal would simply give to PTRa UP/SP's lines serving Houston's industries, so that PTRa could then handle the same traffic that UP/SP currently handles, using the same lines that over which UP/SP currently operates, into the same congested Houston infrastructure that UP/SP currently uses. The main difference between the RTC plan and UP/SP's current plan is that RCT's approach would require an additional, and we believe, unnecessary interface for most Houston shipments. As we have noted, turning single-carrier operations into multiple-carrier operations would not promote improved service.

The first two requests appear to be moving in a positive direction and do not appear to require our intervention.⁴⁷ Both parties seem to acknowledge that the Rosenberg-Victoria line transaction is moving forward. And the testimony at the oral argument indicated that the PTRAs membership issue is also progressing, and that we need not intervene at this time. We are pleased that the parties have been able to make progress privately on these issues.

The other requests are simply without merit. It is not surprising that TexMex wants UP yards in Houston, and we can understand why the Consensus Plan Parties might expect us to give Tex Mex (or PTRAs) a UP yard if the open access proposal were adopted, or if Tex Mex obtained substantial new traffic, UP lost control of its traffic, and UP's need for its yards diminished. But as we are not adopting the Consensus Plan, UP will need all the infrastructure it already has, if not more. If we give its yards to other railroads, it will need to acquire new yards for itself. If Tex Mex needs new yards, now or in the future, we do not see why it should not create its own yard space.

It is also not surprising that Tex Mex/KCS would want us to order UP to transfer the Beaumont Subdivision to them in exchange for portions of double track on the Lafayette Subdivision. Even if Tex Mex/KCS gave UP trackage rights over the Beaumont Subdivision and lived up to their commitment to let UP continue to be the exclusive railroad serving existing "1-to-1" shippers (with, of course, Tex Mex/KCS having access to new shippers), the Beaumont Subdivision is far superior to the so-called double-track that Tex Mex/KCS would build for UP.⁴⁸ UP tells us that there is not now a capacity problem on that portion of its system, even with Tex Mex operating there through trackage rights. If Tex Mex/KCS believe that there is one, or if one develops in the future because of increased Tex Mex/KCS traffic, then Tex Mex/KCS should build a new line or joint with UP in adding capacity to the existing route. Again, the Consensus Plan Parties have shown no reason to take away UP's property against UP's will, and for a project whose benefits are highly questionable.

Finally, Tex Mex wants us to order UP and BNSF respectively to grant trackage rights to Tex Mex over the UP's "Algoa" line between Placedo and Algoa, TX, and over the BNSF line between Algoa and T&NO Jct. These rights were provided temporarily to Tex Mex in the service order proceeding, to replace the Placedo-Flatonia-Algoa route over which it vigorously sought, and obtained, trackage rights in the merger proceeding. But although joint UP/BNSF rights that Tex Mex seeks are shorter than the UP rights that Tex Mex obtained in the merger, there is no basis on which we can find that they are necessary to fulfill any of our merger conditions. For that reason, and

⁴⁷ Notwithstanding Tex Mex's suggestion that it would curtail investment if its current trackage rights restriction is not removed, the Board encourages parties to move forward with other transactions such as this one that ensures the retention of needed rail infrastructure.

⁴⁸ We note that Tex Mex/KCS have not volunteered to operate over their new double-track segment and leave UP in control of the Beaumont Subdivision.

because such rights could degrade service if UP restores bi-directional operations on the line, as it plans to do, Tex Mex's request will be denied.

II. BNSF CONDITIONS. Trackage Rights. BNSF seeks various trackage rights that, it states, are meant only to "fine-tune" those that UP and BNSF negotiated as part of the BNSF settlement agreement that we imposed as a condition to the merger. At the oral argument (Transcript at 66-67), BNSF stated that, while it wanted to be even more of a competitive presence in Houston, it is, and will continue to be, a vigorous competitor, and that "competition is working." Thus, through its trackage rights requests, BNSF generally seeks to address changes in UP operations that were largely prompted by efforts to resolve the service crisis. Because of those changes, BNSF argues that the effectiveness of some of its original trackage rights have been diminished.

Certain of BNSF's proposed conditions — those that would make permanent its temporary overhead trackage rights on UP's Caldwell-Flatonia-San Antonio and Caldwell-Flatonia-Placedo lines — are responsive to potential changes in UP's directional running. UP is planning for directional running on the Caldwell-Flatonia-San Antonio route in order to reduce traffic on the San Marcos route, where BNSF has permanent trackage rights. In addition, UP plans to resume bi-directional running on the Caldwell-Flatonia-Placedo route, which will require BNSF to resume operations over the Brownsville Subdivision and its own Algoa line through Rosenberg.

UP, however, has represented that it would not make those changes in its operations if it could not do so without adversely affecting existing service. And given UP's representations, which we take seriously, we do not see any reason to act at this time to address potential future disputes.⁴⁹ As UP makes adjustments to its operations, we expect it to adjust, as appropriate — and without Board intervention — any existing BNSF's trackage rights from the settlement agreement that may be affected. If UP fails to do so, BNSF may seek the Board's intervention as it is needed.⁵⁰

We will likewise not rule on BNSF's request for temporary trackage rights over both the UP line and the former SP line between Harlingen and Brownsville, TX and for the Brownsville & Rio Grande International Railroad (BRGI) to act as BNSF's agent for such service. UP does not object to most of the trackage rights that BNSF seeks, but it expresses concern with BNSF's use of BRGI, because of the possibility that, as a third carrier at Brownsville, BRGI will unduly complicate cross-

⁴⁹ At the oral argument, BNSF essentially conceded that these issues are not ripe at this time (Transcript at 54-56).

⁵⁰ For the same reasons, we decline to act upon BNSF's proposed "go-with-the-flow" condition for expanded trackage rights on any UP line that UP may, in the future, convert to directional running. We again would expect UP to work with BNSF to ensure that any changes in UP service do not undercut BNSF's ability to perform the competitive service that it was granted as part of the UP/SP merger approval.

border operations. UP-356 at 111-12. At oral argument, however, both BNSF and UP indicated movement toward resolution (Transcript at 77, 162-63), and we will not rule upon this matter now. If it remains unresolved, we can address it at a later date.

BNSF also seeks current overhead trackage rights on UP's Taylor-Milano line. It appears that the primary rationale for this request is the establishment of a shorter route for BNSF to Beaumont. In addition to the fact that the Taylor-Milano line is directionally operated, there appears to be no overriding necessity for those rights because, other than to assert that the Taylor-Smithville-Sealy line is congested, BNSF has not shown that the rights we granted it to operate over that line have been ineffective or that it needs a substitute route to enable it to effectively provide the services contemplated by the Board.

Finally, BNSF requests overhead trackage rights on UP's San Antonio-Laredo line. As indicated earlier, BNSF replaced SP as Tex Mex's interline partner via Robstown/Corpus Christi to provide the competition to UP at the Laredo gateway that SP-Tex Mex had provided. BNSF-Tex Mex interline traffic is now almost double that of SP, achieving our objective of preserving a strong competitive alternative to UP. However, BNSF complains that it is no longer able to take full advantage of its access to Laredo via Tex Mex, claiming that KCS' influence over Tex Mex has made it difficult for BNSF and Tex Mex to reach a satisfactory division of revenues.

We will not grant BNSF overhead rights on the San Antonio-Laredo line. In addition to jeopardizing Tex Mex's essential services by abruptly shifting most of its traffic, BNSF's proposed condition would add substantial levels of traffic to an already heavily utilized UP line, and in light of the significant increase in traffic on the BNSF-Tex Mex route, we do not find the condition justified. Moreover, none of the developments complained of by BNSF has caused any diminution of competition relative to the pre-merger period. Therefore, there is no basis for BNSF's request for a direct access to Laredo that SP never had. Regarding the matter of divisions, if BNSF cannot reach an agreement with Tex Mex on a satisfactory division of revenues, it may invoke the Board's jurisdiction to prescribe those divisions.⁵¹

Neutral Switching Supervision. BNSF also requests "neutral switching supervision" on the UP's Baytown and Cedar Bayou Branches east of Houston, on the ground that UP's handling of its shipments in haulage service has been unacceptable and subject to undue delays. Its complaints, however, are not fully developed and substantiated, and we see no justification, at this time, for imposing this kind of condition.

We should note, however, that switching differences are inevitable for carriers that work

⁵¹ At the oral argument, BNSF asked us to postpone consideration of this issue pending its negotiations with the other interested parties. The other parties, however, indicated that they are not engaged in such negotiations, and in fact UP and Tex Mex urged us to decide this issue now.

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

Clear Route. Finally, BNSF proposes that the Board award it the unrestricted right to use any route through Houston — a so-called “clear route” condition. Numerous other parties, including the Consensus Plan sponsors, have also supported this concept. Proposals have ranged from suggestions that certain railroads should have an exclusive unencumbered route through Houston on which to move their traffic, to more modest proposals that would seek to improve the overall efficiency of the Houston terminal for all carrier users. At oral argument, there was almost universal agreement that the primary objective at Houston should be the efficient operation of the terminal. We agree. We believe that we can help produce efficiencies in the Houston Terminal by ensuring that trains are routed over the most efficient routes, even routes over track over which the carrier has no operating rights.

In our view, the best vehicle for achieving that objective is the joint UP/BNSF dispatching center at Spring, Texas.⁵² Presently, the Spring Center, which we view as an excellent example of how proper dialogue can result in innovative solutions to complex problems, only houses the Joint Director and the UP and BNSF dispatchers and corridor managers. The Spring Center, however, is equipped to house dispatcher/managers for all carriers serving the Houston area, and, as indicated previously, in the interest of further improving the efficiency of Houston operations, carriers such as Tex Mex and KCS have been repeatedly invited to join.

The Spring Center has contributed greatly to the improved efficiency of the Houston Terminal. Participants at the oral argument, however, expressed concern that the staff at Spring Center feels constrained at times from maximizing efficiency because of trackage rights or other operational conditions that may serve to limit a carrier's choice of routings. However, while trackage rights may be — and, in our view, should be — a real constraint to carrier-specified exclusive routings through Houston, it was generally agreed at the oral argument that such rights should not constrain the joint dispatching center from exercising its best judgement in routing trains. Good judgment, in our view, means that the joint dispatching center staff should be free to make choices for operations within the terminal that ensure the most efficient movement of trains moving through the terminal irrespective of line ownership. Accordingly, we impose a condition directing the carrier-participants of the Spring Center to ensure that the Joint Director has the authority to make such

⁵² The Board continues to believe that joint dispatching activities are an effective private-sector way to ensure neutrality and efficiency in train operations. As the Board indicated in its decision in the general UP/SP merger oversight proceeding, we continue to urge full utilization of the joint dispatching concept.

choices in routing traffic. This exercise of discretion assures not only the execution of the "clear route" concept; the joint center also affords the real neutrality that several parties have sought in this proceeding.

In this regard, while much has been said about discriminatory dispatching in Houston, it is important to note that such allegations are made mostly by carriers not participating in the joint dispatching center. We believe that the operations, and the efficiency of the Houston terminal, can be improved by the participation in the Spring Center of all carriers utilizing the terminal and the areas governed by the Center. We urge carriers such as Tex Mex and KCS to join the Spring Center in the interest of the efficiency of operations they seek.

III. OTHER CONDITIONS. A. Other Railroads. Requests for conditions were also filed by the Houston and Gulf Coast Railroad (HGC), a shortline that operates in the Wharton area, and Capital Metro Transit Authority (CMTA), which owns a line in the Austin area that is operated by the Longhorn Railroad (Longhorn). We will address each in turn.

HGC. HGC seeks a variety of conditions: mandatory upgrade of UP's Rosenberg-to-Wharton track; trackage rights from Bay City to Algoa and from Rosenberg to Houston; access to Imperial Holly, a "2-1" shipper at Sugar Land; use of various UP yards and facilities; forced sale to HGC of lines between Houston and Galveston, along with forced interchange with HGC in Houston; and forced use by UP of HGC's facilities for storage-in-transit (SIT). HGC argues that its operations were adversely affected by the service problems, but that UP did not adequately utilize the assistance it offered to ameliorate the crisis. UP opposes the conditions that HGC has sought.

HGC's extensive conditions cannot be granted in this proceeding, as there has been no showing that they would address any merger-related competitive problems, or that they are necessary to avert a future service crisis. However, capacity has been an issue in the rail industry in general, and in Texas in particular, and as HGC may provide the carriers operating in Texas with potential additional capacity, we urge them to consider utilizing this resource. In this regard, we note that, at the oral argument, UP stated that it was willing to enter into discussions with HGC to find better ways to work together.⁵³ We expect UP to honor its commitment, and we strongly suggest that the other Class I carriers operating in Texas also enter into discussions with HGC to develop mutually beneficial arrangements.

CMTA. As noted, CMTA owns a short line of railroad near the Austin Subdivision. At

⁵³ In particular, UP stated (Transcript at 162) that it would work with the carrier "and find positive win-win ways of doing business. We have a need for SIT capacity. We're building SIT capacity. Shippers have a need for SIT capacity, and they ought to be interested in exploiting his property and his capabilities. So if [HGC] thought we were shutting the door to discussions, that wasn't the intent and that won't be the way we'll behave."

McNeil, TX, UP interchanges with Longhorn, CMTA's operator, which carries aggregates to Houston. Before the merger, SP also interchanged with CMTA's operator at Giddings, TX. Although SP's service at Giddings was sporadic at best, and indeed the line was out of service for some time, in the merger decision we considered the situation for CMTA to be a "2-to-1," and therefore required UP to permit BNSF step in and fill SP's shoes through trackage rights. Because CMTA, through its operator, did not want to interchange at Giddings, and because UP did not object to it, CMTA, through its operator, was ultimately permitted to interchange with BNSF at Elgin, TX.⁵⁴

Asserting that it was severely disabled by the service crisis; that UP has caused further economic harm by abusing its market power and offering reduced rates for aggregates shipments moving over another route by the Georgetown Railroad; and that BNSF does not provide enough service at the interchange at Elgin to make Longhorn's operations profitable, CMTA now asks for a Longhorn interchange with BNSF at McNeil, and that BNSF be given approximately 4 miles of additional trackage rights to effect the interchange. CMTA argues that, without this change, Longhorn will go out of business. BNSF supports CMTA's request, arguing that the Elgin interchange is "severely capacity constrained and hemmed in by its location in the center of Elgin, making any planned expansion to improve capacity difficult and limited. This proposal would overcome the service handicaps CMTA and Longhorn have raised concerning continued use of the Elgin interchange and permit Longhorn customers more effective access to BNSF." BNSF-9, VS Rickershauser at 12-13.

UP opposes this operational change. It notes that the service difficulties that hampered CMTA have ended, and that BNSF in fact interchanges substantial traffic with Longhorn at Elgin, which, it claims, is an adequate interchange point capable of supporting profitable service. It also expresses the view that the real reason CMTA requests the change is to relieve itself of certain of its line maintenance obligations, and to facilitate future passenger service in the area. Finally, UP expresses concern that an interchange between BNSF and Longhorn at McNeil could cause significant operating problems unless additional interchange trackage were laid.

We recognize, as UP points out, that SP never served McNeil. We also reject as unsubstantiated CMTA's assertions of market power abuse on UP's part. Finally, we understand UP's concern that the change that CMTA wants could pose problems if it were to contribute to congestion on the Austin Subdivision. Nevertheless, CMTA indicates that the short-line service that Longhorn provides is important and about to fail, and that, through a modest condition change, we can give it a chance to succeed. Given our concern for the viability of short lines and the sometimes vulnerable shippers they serve, the modest nature of the change requested, and BNSF's position that the change will address existing capacity constraints at Elgin without creating other service problems over the Austin Subdivision, we will grant CMTA's request. BNSF will be given expanded trackage

⁵⁴ UP did strenuously object to a BNSF interchange at McNeil.

rights between Round Rock and McNeil so that it can interchange with Longhorn at McNeil, instead of at Elgin. Of course, we expect BNSF and Longhorn to make any necessary investments to make the service at McNeil practicable without interfering with existing main line operations. Additionally, we will monitor this situation closely, and, if it turns out that the change materially interferes with existing service over the Austin Subdivision, we will revisit it and consider eliminating the BNSF/McNeil interchange and returning the interchange to Elgin.

B. Individual Shippers. Requests for new conditions were also filed by four individual shippers: The Dow Chemical Company (Dow); Formosa Plastics Corporation, U.S.A. (Formosa); E.I. DuPont de Nemours and Company (DuPont); and Central Power and Light Company (CPL). Dow, Formosa, and CPL were all served by a single railroad before the merger, and all continue to be served by a single railroad (UP) after the merger; yet, each has asked the Board to permit access by BNSF. DuPont was served by two carriers before the merger, and continues to be served by two carriers after the merger; yet DuPont has asked the Board to permit access by Tex Mex. Each of these requests will be denied.

Dow and Formosa. The situations of Dow and Formosa are similar to those of some of the parties — Cemex USA Management, Inc., and Entergy Services, Inc. — whose requests for conditions were denied in the General Oversight decision served contemporaneously with this decision. Each is rail-served only by UP; each has a plant, however, that is near tracks over which, as part of the merger, BNSF was awarded overhead trackage rights. Thus, each asks that BNSF be granted local trackage rights to serve its plant.

Dow takes the position that the merger consolidated too much of the Houston infrastructure in a single carrier, thereby foreclosing any other options once the service crisis began. According to Dow, BNSF's reliance on the UP infrastructure precluded it from serving as a safety valve, while the limitations imposed on BNSF's access to "2-to-1" shippers discouraged BNSF from making substantial infrastructure investments of its own. Notwithstanding the fact that the UP periodic operational reporting shows consistent and substantial service improvements, Dow asserts that service involving its Freeport facility remains poor. Moreover, Dow expresses a concern that, even if service has improved, it could deteriorate again.

Formosa, like Dow, asserts that its service has not substantially improved, and, in fact, in some respects, is worse than ever. Formosa argues that, even though it was exclusively served before and after the merger, the merger enhanced UP's market power, which caused service in general, and service to it in particular, to deteriorate.

Thus, the positions of Dow and Formosa essentially mirror that of the Consensus Plan. Nevertheless, each states that we can provide meaningful relief without taking all of the steps recommended by the Consensus Plan Parties: according to Dow, by giving BNSF rights to serve Dow's Freeport facility, and according to Formosa, by giving BNSF rights to serve its facility, we

would be providing the safety valve that was missing before, for at least certain traffic; thus, in the event of future service problems, at least Dow's traffic and Formosa's traffic would be able to move, which would ease the burdens on UP and thereby provide substantial relief for other shippers. Both Dow and Formosa indicate that, if they obtained access to BNSF, they would contribute to infrastructure investments, which would ease the financial burdens on UP and ultimately produce added infrastructure investment.⁵⁵ To be particularly helpful, Dow suggests that we also permit a buildout to and connection with the UP mainline between Chocolate Bayou and Angleton. This, Dow says, will particularly encourage BNSF to invest in its infrastructure. Dow concedes that a grant of this relief could result in a loss of traffic and revenues by UP, but it characterizes such a development as a plus for UP, which, it states, will no longer need to invest as much in Dow's facility, and so instead it will be able to use those funds elsewhere.⁵⁶

DuPont. DuPont's LaPorte plant, which is not on PTR A or the HBT, was served by SP prior to the merger, and was accessible to UP and BNSF via reciprocal switching. After the merger, it became a UP-served point, with reciprocal switching by UP to only BNSF. Thus, in effect, DuPont was a 3-to-2 point. In the merger decision, the Board granted Tex Mex some access to 3-to-2 shippers on PTR A and HBT, but otherwise it limited Tex Mex's service to "2-to-1" shippers. DuPont argues that this arrangement is not satisfactory, and that neutral switching is a necessity for efficient and effective competition: although BNSF has authority to serve DuPont, DuPont states that it is in essence singly served by UP, because of the inadequacy of UP's switching. DuPont admits (Rebuttal in Support of Request for new Remedial Conditions by DuPont de Nemours and Company at 6) that it simply wants more competition from any railroad serving Houston, regardless of whether there is or ever again will be a service emergency.

CPL. CPL operates a power plant at Coletto Creek, TX, that was served only by SP before the merger, and that has been served only by UP since the merger. In connection with the merger, BNSF obtained trackage rights through Placedo, TX, a point approximately 14 miles from Victoria. CPL's business suffered during the service crisis, and, according to CPL, is still not as good as it used to be. CPL is concerned that it could deteriorate once UP pulls out two extra trainsets it has been using. UP, however, refuses to guarantee specific levels of service, and so CPL has concluded that it

⁵⁵ At the oral argument, UP pointed out that, in addition to the rate reductions Dow had already received from the Board's imposition of a buildout condition, it would certainly be in Dow's interest to make a \$20 million investment in exchange for \$60 million in additional rate cuts that would be derived by opening up Dow's traffic to BNSF.

⁵⁶ Dow recognizes UP's commitment to invest \$1.4 billion in the Houston/Gulf Coast infrastructure over 5 years, but it opines that "UP certainly cannot bear and should not bear alone" such a commitment. Reply to UP's Opposition to Dow's Request for Additional Conditions at 7. Rather, Dow's view is that UP ought to share the infrastructure burden with other shippers and carriers, and the only way it can do that is by also sharing its revenue-producing traffic with others.

can only be assured of adequate service if it has access to another carrier. It states that its request is about service rather than open access. It states that, contrary to UP's claims, BNSF can handle some of the coal traffic without interfering with UP's operations, particularly if its trackage rights are modified slightly.

Discussion of Individual Shipper Requests. Each of the individual shippers suggests that its request is narrow and limited, and that it does not equate to open access. Yet, as we have found with regard to the Consensus Plan, without a showing of merger-related competitive harm, and without a showing that the relief sought is narrowly tailored to remedy that harm, then forcing additional access is tantamount to open access. Dow and Formosa are, as they say, only two "1-to-1" shippers, and yet there are numerous other shippers whose circumstances are indistinguishable from those of Dow and Formosa. DuPont, as it notes, is just one "3-to-2" shipper that is asking for new service by Tex Mex, and yet there are numerous other shippers whose circumstances are indistinguishable from those of DuPont. And CPL is the only utility company whose request for relief is being addressed in this proceeding, and yet there are numerous utility companies throughout the West whose circumstances are just like those of CPL. If we grant the requests of these parties, we see no principled basis on which we could not award comparable relief to all of the similarly situated shippers.

Of course, we could award some relief upon a showing of merger-related harm. Yet, none of the shipper petitioners has made any such showing. CPL and the other shipper petitioners have alleged harm from the service emergency, but as we have noted, the emergency is over, largely as a result of the merger implementation. Additionally, the shipper petitioners have challenged the essential findings of the merger decision that "1-to-1" and "3-to-2" shippers would not be injured by the merger; they have challenged the basic premise of the merger that conditions would be imposed not simply on the ground that more competition is beneficial to the shipping public, but rather only to remedy identifiable competitive harm; and they have asserted or at least suggested that infrastructure investment would be advanced overall if a carrier's monopoly (or, in DuPont's case, duopoly) traffic were opened up to more competition. Because we find that the infrastructure argument has not been proven here, and because we find that the harm standard has not been met, we see no basis on which to distinguish these petitioners from any other shipper, and thus, if we were to grant their requests, we would essentially be embracing open access for all shippers.

All four of these shippers also premise their requests for relief on the service crisis. As we have noted, however, the service crisis is over.⁵⁷ Transit times for all shippers, including these shippers, have improved substantially and are continuing to improve. Apart from the operational difficulties that UP asserts are associated with these requests, we find that the service crisis is simply not a basis for awarding permanent multi-carrier access. The shippers express concern that service problems could recur, and CPL in particular is disturbed that UP will not guarantee particular levels

⁵⁷ Dow and Formosa claim that their service continues to be exceptionally poor. UP, in response, alludes to the substantial improvements that have been occurring for several months.

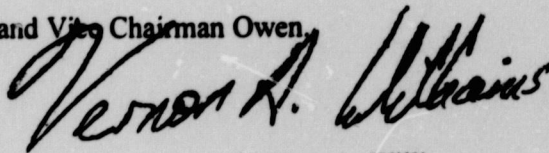
of service. However, if service problems develop in the future, relief will be available under our Ex Parte No. 628 procedures. But broad relief such as that sought here is simply not warranted.

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

It is ordered:

1. As explained in this decision, the parties shall implement the concept of a clear route through Houston.
2. CMTA's request to modify the trackage rights used by BNSF and to change the interchange used by Longhorn from Elgin to McNeil is granted.
3. UP shall include an infrastructure report in its annual oversight filings.
4. UP shall work with BNSF and other carriers that have trackage rights over its lines when it makes operational changes.
5. The private parties shall make good faith efforts to resolve the various other issues addressed in this decision.
6. Except as otherwise indicated, all requests for relief discussed in this decision, including but not limited to the requests of the Consensus Plan and the individual parties seeking relief, are denied.
7. This decision is effective immediately.

By the Board, Chairman Morgan and Vice Chairman Owen,



Vernon A. Williams
Secretary

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SASKATOON SK S7K 7G3 CD

Records: 222

STB FD 32760 (Sub 29) 12-7-98 C 29839

29839
SEC

SERVICE DATE - LATE RELEASE DECEMBER 7, 1998

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32760 (Sub-No. 26)¹

29

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

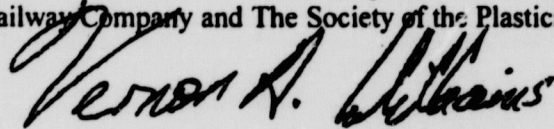
[HOUSTON/GULF COAST OVERSIGHT]

Decision No. 9

December 7, 1998

NOTICE TO THE PARTIES:

In decision No. 8 served Late Release December 7, 1998, the parties identified in Appendix A as delivering rebuttal argument were listed as The Texas Mexican Railway Company and The Society of the Plastics Industry, Inc. Appendix A should have shown the parties delivering rebuttal argument as The Kansas City Southern Railway Company and The Society of the Plastics Industry, Inc. Attached is a corrected Appendix A.



Vernon A. Williams
Secretary

¹This decision embraces: (1) Finance Docket No. 32760 (Sub-No. 27), Texas Mexican Railway Company & Kansas City Southern Railway--Construction Exemption--Rail Line Between Rosenberg and Victoria, TX; (2) Finance Docket No. 32760 (Sub-No. 28), Burlington Northern and Santa Fe Railway Company--Terminal Trackage Rights--Texas Mexican Railway Company; (3) Finance Docket No. 32760 (Sub-No. 29), Burlington Northern and Santa Fe Railway Company--Application for Additional Remedial Conditions Regarding Houston/Gulf Coast Area; Finance Docket No. 32760 (Sub-No. 30), Texas Mexican Railway Company, et al.--Request F of Consensus Plan; Finance Docket No. 32760 (Sub-No. 31), Houston & Gulf Coast R Application for Trackage Rights and Forced Line Sales; Finance Docket No. 32760 (Sub-No. 32), Capital Metropolitan Transportation Authority--Responsive Application--Interchange R

APPENDIX A

LIST OF PARTICIPANTS

A. Proponents of Conditions

1. Sponsors of the "Consensus Plan":

The Chemical Manufacturers Association	8 minutes
The Texas Mexican Railway Company	8 minutes
The Railroad Commission of Texas	4 minutes

- | | |
|---|------------|
| 2. The Burlington Northern and Santa Fe Railway Company | 15 minutes |
| 3. Capital Metropolitan Transportation Authority | 5 minutes |
| 4. Houston and Gulf Coast Railroad | 5 minutes |
| 5. Central Power & Light Company | 5 minutes |
| 6. The Dow Chemical Company | 5 minutes |
| 7. E. I. du Pont de Nemours and Company | 5 minutes |
| 8. Formosa Plastics Corporation, U.S.A. | 5 minutes |

B. Responses to Proponents of Conditions

- | | |
|--------------------------------------|------------|
| 1. Union Pacific Railroad Company | 30 minutes |
| 2. The Texas Mexican Railway Company | 5 minutes |

C. Rebuttal

The Kansas City Southern Railway Company and The Society of the Plastics Industry, Inc.	10 minutes
--	------------

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Records: 271

STB FD 32760 (Sub 29) 12-7-98 C 29829

29829
SEC

SERVICE DATE - LATE RELEASE DECEMBER 7, 1998

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32760 (Sub-No. 26)¹

29

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

[HOUSTON/GULF COAST OVERSIGHT]

Decision No. 8

Decided: December 7, 1998

The oral argument in this proceeding has been scheduled for December 15, 1998, at 10:00 a.m., in the Surface Transportation Board Hearing Room (Suite 760) at 1925 K Street, N.W., Washington, D.C. Attached hereto as Appendix A is the list of participants that have been authorized by the Board to appear and present oral argument. The list of participants is limited, in line with the Board's decision setting the oral argument, to parties that have affirmatively sought specific conditions for themselves, and to the Union Pacific Railroad Company (UP). Thus, Texas Farm Bureau and the American Farm Bureau, which have not participated in the proceeding at all, will not be granted oral argument time.² Similarly, the Brownsville & Rio Grande International

¹This decision embraces: (1) Finance Docket No. 32760 (Sub-No. 27), Texas Mexican Railway Company & Kansas City Southern Railway--Construction Exemption--Rail Line Between Rosenberg and Victoria, TX; (2) Finance Docket No. 32760 (Sub-No. 28), Burlington Northern and Santa Fe Railway Company--Terminal Trackage Rights--Texas Mexican Railway Company; (3) Finance Docket No. 32760 (Sub-No. 29), Burlington Northern and Santa Fe Railway Company--Application for Additional Remedial Conditions Regarding Houston/Gulf Coast Area; Finance Docket No. 32760 (Sub-No. 30), Texas Mexican Railway Company, et al.--Request For Adoption of Consensus Plan; Finance Docket No. 32760 (Sub-No. 31), Houston & Gulf Coast Railroad--Application for Trackage Rights and Forced Line Sales; Finance Docket No. 32760 (Sub-No. 32), Capital Metropolitan Transportation Authority--Responsive Application--Interchange Rights.

² Texas Farm Bureau states that it wishes to "present oral testimony." The record in the proceeding, however, has been closed for several weeks, and this oral argument is not a hearing

Railroad (BRGI), which participated in the proceeding but did not affirmatively seek conditions, will not be granted oral argument time.³ Each of these interests, however, may file summaries of the arguments they would have presented, limited to 10 double-spaced pages, provided they comply with the procedures established below for summaries by participants.

As with past oral arguments and hearings, the Board requests that all persons attending the oral argument use the building's entrance located on 20th Street between K and L Streets. For security reasons, upon entering the 20th Street entrance, all persons should be prepared to produce photo identification (such as a driver's license), pass through a metal detector, and submit to an inspection of all briefcases, handbags and any other bags.

To effectively conduct the oral argument, the Board must limit access to the hearing room. The Board will provide an overflow room (the Brick Room) on the first floor of the building with a closed-circuit telecast of the entire proceeding.

Each participant will be allotted two admission badges. The participant badges may be picked up from the Office of the Secretary, Room 700, beginning December 10, 1998, and also will be available at the 20th Street entrance on the day of the hearing. The balance of the seating in the hearing room will be open to the public on a first come, first served basis. Public admission badges will be available at the Board's 20th Street entrance beginning at 9:00 a.m. on December 15, 1998, the day of the argument. The admission badges will be disbursed one per person. Upon clearing security at the 20th Street entrance, the holders of admission badges for the hearing room will be escorted to the seventh floor hearing room. Only holders of hearing room or media badges will be admitted to the seventh floor hearing room. The doors to the hearing room will open at 9:00 a.m. The Board's Hearing Room does comply with the Americans With Disabilities Act, and persons needing such accommodations should contact the Office of the Secretary at (202) 565-1650 by noon, December 14, 1998.

The public will be admitted to the overflow room for the hearing, and 50 seats will be available for the proceeding. No admission badge will be required to view the oral argument in the overflow room. Board staff will begin admission to the overflow room at 9:00 a.m. for the oral

designed to elicit new testimony. Rather, the oral argument was requested by certain parties, and set by the Board, so that parties that filed evidence and argument explicitly seeking or opposing conditions could discuss with Board members the issues that they raised.

³ BRGI provided statements in support of certain of the conditions sought by The Burlington Northern and Santa Fe Railway Company (BNSF). Hundreds of interests, however, provided statements in support of, or in opposition to, the various requests for conditions. Concluding that it would be unfeasible to allow each of those interests argument time, the Board in its order setting up the oral argument limited argument time to parties that affirmatively sought conditions, and to UP. BNSF, of course, is clearly capable of addressing the conditions that it has sought, and that BRGI supports.

argument. The oral argument will be video-taped, and the Board will make arrangements to have the tapes duplicated, at cost, if there is a public demand for copies of the tapes.

Participants may submit summaries of their arguments, limited to 10 double-spaced pages, in advance. Participants submitting such summaries should submit an original, 25 paper copies and one copy on diskette. The diskettes must be 3.5-inch IBM-compatible floppies or compact discs, with one statement per diskette. Textual material must be in, or convertible into, WordPerfect 7.0. Spreadsheets must be in, or convertible into, Lotus 1-2-3 Version 7. Each diskette must be clearly labeled as to the document, party, and computer language utilized. Summaries must be filed by noon on December 14, 1998. Participants must serve a copy of their summaries upon the other participants listed in Appendix A. The summaries will be posted on the Board's website (www.dot.stb.gov) on the day of the oral argument, after processing by Board staff.

Participants planning to use visual aids, such as maps, are advised to inform the Office of the Secretary at (202) 565-1650, no later than close of business on Friday, December 11, 1998.

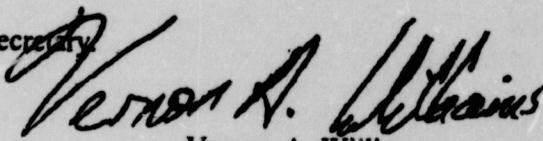
Participants are limited to projector-adaptable visual displays or handouts. The Board will provide space for any handouts participants wish to bring to the oral argument for dissemination to the public. Board staff will be available in the Board's Hearing Room, Suite 760, from 2:00 p.m. to 4:00 p.m. to demonstrate the Board's projection system.

Comments or questions concerning this decision should be directed to Bettye Uzzle, the Information Officer for the Office of the Secretary at 202/565-1650.

It is ordered:

1. Admittance to the Surface Transportation Board proceedings on December 15, 1998, will be upon the conditions set forth above.
2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary


Vernon A. Williams
Secretary

APPENDIX A

LIST OF PARTICIPANTS

A. Proponents of Conditions

1 Sponsors of the "Consensus Plan":

The Chemical Manufacturers Association	8 minutes
The Texas Mexican Railway Company	8 minutes
The Railroad Commission of Texas	4 minutes

- | | |
|---|------------|
| 2. The Burlington Northern and Santa Fe Railway Company | 15 minutes |
| 3. Capital Metropolitan Transportation Authority | 5 minutes |
| 4. Houston and Gulf Coast Railroad | 5 minutes |
| 5. Central Power & Light Company | 5 minutes |
| 6. The Dow Chemical Company | 5 minutes |
| 7. E. I. du Pont de Nemours and Company | 5 minutes |
| 8. Formosa Plastics Corporation, U.S.A. | 5 minutes |

B. Responses to Proponents of Conditions

- | | |
|--------------------------------------|------------|
| 1. Union Pacific Railroad Company | 30 minutes |
| 2. The Texas Mexican Railway Company | 5 minutes |

C. Rebuttal

The Texas Mexican Railway Company and The Society of the Plastics Industry, Inc.	10 minutes
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Records: 271

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EB

SERVICE DATE - NOVEMBER 23, 1998

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32760 (Sub-No. 26)¹

29

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

[HOUSTON/GULF COAST OVERSIGHT]

Decision No. 7

Decided: November 20, 1998

In a petition filed October 23, 1998, The Chemical Manufacturers Association, The Society of Plastics, The Texas Chemical Council, The Railroad Commission of Texas, The Texas Mexican Railway Company, and The Kansas City Southern Railway Company (collectively, the "Consensus Parties") have asked us to conduct oral argument in the Sub-No. 26 proceeding. The Consensus Parties state that oral argument is appropriate because the proceeding, which involves requests for permanent railroad restructuring in the Houston/Gulf Coast region, raises issues that are important and complex. In support of their request, the Consensus Parties note that oral argument is typically held in merger proceedings, and they point out that this proceeding was initiated in connection with

¹ This decision embraces: (1) Finance Docket No. 32760 (Sub-No. 27), Texas Mexican Railway Company & Kansas City Southern Railway--Construction Exemption--Rail Line Between Rosenberg and Victoria, TX; (2) Finance Docket No. 32760 (Sub-No. 28), Burlington Northern and Santa Fe Railway Company--Terminal Trackage Rights--Texas Mexican Railway Company; (3) Finance Docket No. 32760 (Sub-No. 29), Burlington Northern and Santa Fe Railway Company--Application for Additional Remedial Conditions Regarding Houston/Gulf Coast Area; Finance Docket No. 32760 (Sub-No. 30), Texas Mexican Railway Company, et al.--Request For Adoption of Consensus Plan; Finance Docket No. 32760 (Sub-No. 31), Houston & Gulf Coast Railroad--Application for Trackage Rights and Forced Line Sales; Finance Docket No. 32760 (Sub-No. 32), Capital Metropolitan Transportation Authority--Responsive Application--Interchange Rights.

our oversight of the merger of the Union Pacific and Southern Pacific rail systems (referred to as "UP").

In its reply to the petition, UP questions the timing of the request for oral argument, which was not filed until many months after the proceeding was initiated and the procedural schedule established, and indeed was not even filed until after the record was closed. UP indicates that it is eager to have the matters at issue resolved, and it expresses concern that oral argument not delay a decision. However, UP states that it does not object to oral argument, should the Board find it useful.

We recognize the complexity and importance of the issues in this proceeding. However, we do not believe that oral argument is necessary to decide this proceeding. We have received thousands of pages of written evidence and argument in this proceeding and in the related proceedings. We have carefully reviewed the record, and we believe that we can resolve the issues based on it.

Nevertheless, in order to give the Consensus Parties and the other parties seeking new conditions in these related proceedings every opportunity to distill the record or to address particular issues in more detail, we will grant the request for oral argument. Oral argument will be held on December 15, 1998. The Consensus Parties will have 30 minutes to present their argument. If it chooses to participate, the Burlington Northern/Santa Fe Railway Company (BNSF) will have 15 minutes to present its argument. Other parties that have affirmatively sought specific conditions for themselves, should they choose to participate, will have 5 minutes each to present their arguments. UP will have 30 minutes to respond to the arguments of all of the parties. We will not accept pre-argument briefs, but summaries of the arguments, not exceeding 10 typewritten pages, may be filed

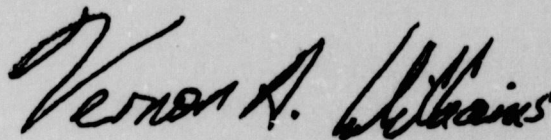
by 2:00 p.m. Friday, December 11, 1998, by all parties that are given argument time.

Parties that have affirmatively sought specific conditions for themselves and that wish to participate in the oral argument should notify us in writing by December 2, 1998, of their intent. Immediately thereafter, we will issue a further order setting out the specifics of the oral argument.

It is ordered:

1. The request for oral argument is granted, as described above.
2. Parties that have sought specific conditions and that wish to participate in the oral argument should notify us in writing by December 2, 1998, of their intent.
3. This order is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

A handwritten signature in dark ink, appearing to read "Vernon A. Williams". The signature is fluid and cursive, with the first name "Vernon" being the most prominent.

Vernon A. Williams

Secretary

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Records: 218

STB FD-32760 (SUB29) 8-4-98 C ID-29481

29481

SERVICE DATE - AUGUST 4, 1998

EB

FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

[STB Finance Docket No. 32760 (Sub-No. 26)]¹

29

Union Pacific Corporation, Union Pacific Railroad Company,
and Missouri Pacific Railroad Company--Control and Merger--

Southern Pacific Rail Corporation, Southern Pacific

Transportation Company, St. Louis Southwestern Railway

Company, SPCSL Corp., and The Denver and Rio Grande

Western Railroad Company

[HOUSTON/GULF COAST OVERSIGHT]

AGENCY: Surface Transportation Board

ACTION: Decision No. 6; Notice of Acceptance of Requests for Additional Conditions to
the UP/SP Merger for the Houston, Texas/Gulf Coast Area.

SUMMARY: The Board is accepting for consideration requests for additional conditions to
the UP/SP merger for the Houston/Gulf Coast region, filed July 8, 1998: (1) jointly by the

¹ This decision embraces the following: (1) Finance Docket No. 32760 (Sub-No. 27), Texas Mexican Railway Company & Kansas City Southern Railway--Construction Exemption--Rail Line Between Rosenberg and Victoria, TX; (2) Finance Docket No. 32760 (Sub-No. 28), Burlington Northern and Santa Fe Railway Company--Terminal Trackage Rights--Texas Mexican Railway Company; (3) Finance Docket No. 32760 (Sub-No. 29), Burlington Northern and Santa Fe Railway Company--Application for Additional Remedial Conditions Regarding Houston/Gulf Coast Area; Finance Docket No. 32760 (Sub-No. 30), Texas Mexican Railway Company, et al.--Request For Adoption of Consensus Plan; Finance Docket No. 32760 (Sub-No. 31), Houston & Gulf Coast Railroad--Application for Trackage Rights and Forced Line Sales; Finance Docket No. 32760 (Sub-No. 32), Capital Metropolitan Transportation Authority--Responsive Application--Interchange Rights.

Texas Mexican Railway Company (Tex Mex), Kansas City Southern Railway Company (KCS), and certain shipper and governmental interests; (2) by the Burlington Northern and Santa Fe Railway Company (BNSF); and (3) by certain individual shippers. Certain requested conditions will be transferred for consideration to the Board's general oversight proceeding for the UP/SP merger that began July 1, 1998, in Finance Docket No. 32760 (Sub-No. 21).

DATES: Notices of intent to participate in the Houston/Gulf Coast oversight proceeding are due August 28, 1998. All comments, evidence, and argument opposing the requested new conditions are due September 18, 1998. Rebuttal in support of the requested conditions is due October 16, 1998.

ADDRESSES: An original plus 25 copies of all documents, referring both to STB Finance Docket No. 32760 (Sub-No. 26) and, if applicable, the sub-number additionally assigned to a particular request for conditions, must be sent to the Office of the Secretary, Case Control Unit, ATTN: STB Finance Docket No. 32760 (Sub-No. 26), Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.

In addition, one copy of all documents in this proceeding must be sent to UP's representative, Arvid E. Roach II, Esq., Covington & Burling, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044, and to Administrative Law Judge Stephen Grossman, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, D.C. 20426.

Electronic Submissions. In addition to an original and 25 copies of all paper documents filed with the Board, the parties shall also submit, on 3.5 inch IBM-compatible

diskettes or compact discs, copies all textual materials, electronic workpapers, data bases and spreadsheets used to develop quantitative evidence. Textual material must be in, or convertible by and into, WordPerfect 7.0. Electronic spreadsheets must be in, or convertible by and into, Lotus 1-2-3 97 Edition, Excel Version 7.0, or Quattro Pro Version 7.0.

The data contained on the diskettes or compact discs submitted to the Board may be submitted under seal (to the extent that the corresponding paper copies are submitted under seal), and materials submitted under seal will be for the exclusive use of Board employees reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by such computer data is necessary for efficient review of these materials by the Board and its staff. The electronic submission requirements set forth in this decision supersede, for the purposes of this proceeding, the otherwise applicable electronic submission requirements set forth in our regulations. See 49 CFR 1104.3(a), as amended in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527, 61 FR 52710, 711 (Oct. 8, 1996), 61 FR 58490, 58491 (Nov. 15, 1996).² FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1600. [TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: By decision served August 12, 1996, the Board approved the common control and merger of the rail carriers controlled by Union Pacific Corporation and those controlled by Southern Pacific Rail Corporation (collectively UP/SP),

² A copy of each diskette or compact disc submitted to the Board should be provided to any other party upon request.

subject to various conditions.³ Common control was consummated on September 11, 1996. We imposed a 5-year oversight condition to examine whether the conditions we imposed “effectively addressed the competitive issues they were intended to address,” and we retained jurisdiction to impose additional remedial conditions if those already imposed proved insufficient. UP/SP Merger at 13. In our initial oversight proceeding, we determined that, while it was still too early to tell, there was no evidence at that time that the merger, with the conditions that the Board had imposed, had produced any adverse competitive consequences.⁴ We indicated, however, that our oversight would be ongoing, and that we would continue vigilant monitoring.⁵

Last summer, UP/SP experienced serious service difficulties caused by, among other things, severely congested UP/SP lines in and around Houston that, in turn, affected rail service throughout the western United States, and the Board issued a series of decisions under its emergency service order authority under 49 U.S.C. 11123, effective until August 2, 1998, to address those difficulties.⁶ In those decisions, we rejected proposals offered by certain shipper, carrier, and governmental interests that would have addressed the emergency by requiring UP/SP to permanently afford access to certain of its lines in and around

³ Union Pacific Corp.--Control and Merger--Southern Pacific Rail Corp., Finance Docket No. 32760 (UP/SP Merger), Decision No. 44 (STB served Aug. 12, 1996).

⁴ Union Pacific Corp.--Control and Merger--Southern Pacific Rail Corp., Finance Docket No. 32760 (Sub-No. 21), Decision No. 10 (STB served Oct. 27, 1997) (UP/SP Oversight).

⁵ Id. at 2-3.

⁶ STB Service Order No. 1518, Joint Petition for Service Order (Service Order No. 1518) (STB served Oct. 31 and Dec. 4, 1997, and Feb. 17 and 25, 1998).

Houston to other rail carriers, and to divest other lines. We determined that one of the primary reasons for the service crisis was the inadequate infrastructure in the region, and that proposals to transfer line ownership and/or broadly permit other rail carriers access to the merged UP/SP network would likely work not to end the immediate crisis, but exacerbate it. As a result, and mindful that our emergency service order authority under section 11123 is temporary (up to 270 days), we adopted only those measures designed to free up traffic in and around Houston without further aggravating congestion in the area or creating additional service disruptions.⁷

The Board provided, however, that interested persons could present longer-term restructuring proposals of the kind suggested above in the UP/SP merger oversight process.⁸ Based on a joint request for such relief filed on February 12, 1998, by Tex Mex/KCS, and one filed March 6, 1998, by the Greater Houston Partnership, the Board, on March 31, 1998, instituted a discrete oversight proceeding to consider requests for additional conditions to the UP/SP merger for the Houston/Gulf Coast region.⁹ We stated that we would examine

⁷ Id., Feb. 17, 1998 Decision, at 5-7; Feb. 25, 1998 Decision, at 4-5. We also ordered UP/SP to submit detailed infrastructure plans for the region, and, on May 1, 1998, the carrier outlined its plan to invest \$1.4 billion in rail infrastructure in the Houston/Gulf Coast area over the next five years, including more than \$600 million in new rail capacity. See Union Pacific's Report on Houston and Gulf Coast Infrastructure, at 1-2, filed May 1, 1998, in Ex Parte No. 573, Rail Service in the Western United States, STB Service Order No. 1518, Joint Petition for Service Order.

⁸ Id., Feb. 17, 1998 Decision, at 8; see also Feb. 25, 1998 Decision, at 4.

⁹ The Board instituted this proceeding in Finance Docket No. 32760 (Sub-No. 21), Decision No. 12, published in the Federal Register on April 3, 1998 (63 FR 16628). By decision served May 19, 1998, the Board corrected the March 31 decision by designating the docket number as Finance Docket No. 32760 (Sub-No. 26) (Houston/Gulf Coast Oversight), rather than (Sub-No. 21), and designating Decision No. 12 in Sub-No. 21 as

whether there is any relationship between any market power gained by UP/SP through the merger and the failure of service that occurred in the region, and, if so, whether additional remedial conditions would be appropriate. We also provided that we would grant requested conditions that would substantially change UP/SP's existing configuration and operations in the region only upon the type of evidence required for inconsistent applications in merger proceedings. Houston/Gulf Coast Oversight, Decision No. 1, at 6.

All interested persons were directed to file their requests for additional conditions, along with all supporting evidence, by June 8, 1998. Pursuant to a joint motion by KCS/Tex Mex and others, we extended that date until July 8, 1998.¹⁰

SUMMARY OF REQUESTS

As indicated in Decision No. 1, we are confining our consideration in this proceeding to requests for new conditions that would reconfigure the existing UP/SP network in the Houston/Gulf Coast region. Requests for conditions that would affect the UP/SP network outside of this region, or requests for other kinds of conditions more broadly applicable to the merger as a whole, will be considered instead in the "general" oversight proceeding, Finance Docket No. 32760 (Sub-No. 21), that began on July 1, 1998.¹¹ The requests that

Decision No. 1 in Sub-No. 26. The annual "general" oversight proceeding conducted in the Sub-No. 21 proceeding, which began July 1, 1998 upon the filing by UP/SP and BNSF of their quarterly merger progress reports, will continue as planned. See UP/SP Oversight, Decision No. 10, at 18-19.

¹⁰ Finance Docket No. 32760 (Sub-No. 26), Decision No. 5 (STB served June 1, 1998).

¹¹ Thus, we will consider in the Sub-No. 21 proceeding, not this proceeding, the request by the Western Coal Traffic League for an accounting condition that would require UP to separately account for all costs and charges arising as a consequence of the

we will consider in this proceeding are summarized below.

THE "CONSENSUS PLAN" (Finance Docket No. 32760 (Sub-No. 30))

The "consensus plan" has been offered by Tex Mex/KCS, the Chemical Manufacturers Association, the Railroad Commission of Texas, the Society of the Plastics Industry, Inc., and the Texas Chemical Council. These parties ask us to:

(1) Impose permanently provisions of Service Order No. 1518 that:

(a) lifted the restriction on trackage rights that Tex Mex received in the UP/SP merger over UP/SP's Corpus Christi/Robstown--Beaumont, TX line;¹² and

(b) afforded trackage rights to Tex Mex over the UP's "Algoa route" between Placedo and Algoa, TX and over the BNSF between Algoa and T&NO Jct.;

(2) Restore "neutral switching" in Houston, said to be lost when UP/SP and BNSF dissolved the HBT, that would encompass all of the industries and trackage that were formerly served by the HBT, and all industries and trackage of the PTRA, and, if PTRA is designated as the neutral switching provider, grant it trackage rights over former HBT trackage and the use of appropriate yards.

inefficiencies caused by the UP/SP merger.

¹² As a condition to our approval of the UP/SP merger, we granted Tex Mex access to Houston area shippers switched by the Port Terminal Railroad Association (PTRA) and the Houston Belt & Terminal Railway Company (HBT) to trackage rights over UP/SP's Corpus Christi/Robstown--Beaumont line, subject to the restriction that all Tex Mex traffic using these trackage rights must have a prior or subsequent movement over Tex Mex' Laredo-Corpus Christi line. UP/SP Merger, Decision No. 44, at 150. In Service Order No. 1518, we suspended that restriction and directed UP to release these shippers from their contracts so that those desiring to do so could route traffic over Tex Mex and BNSF, in lieu of UP/SP.

(3) Expand the neutral switching area to include:

(a) all shippers currently located on the former SP Galveston Subdivision between Harrisburg Jct. and Galveston, including those at Sinco, Pasadena, Deer Park, Strang, LaPorte, the Clinton Branch, the Bayport Loop and the Bayport area, including Barbours Cut and the Navigation Lead; and

(b) all shippers at Galveston located on both the former SP and the former UP routes between Houston and Galveston, and require that the neutral switching company be granted trackage rights between Houston and Galveston over both routes, with rights to serve all industries located along the two lines and access to the former SP and UP yards at Strang and Galveston.

(4) Establish neutral dispatching within the neutral switching area, to be located, managed and administered by the PTRRA, and require that all railroads serving Houston be granted terminal trackage rights by the owning carrier over all tracks within the neutral switching and dispatching area, so that the neutral dispatcher could route trains over the most efficient route.

(5) Require UP/SP and BNSF to acknowledge Tex Mex's full voting membership on the PTRRA board and to restore the Port of Houston Authority as a full voting member of the PTRRA board;

(6) Require UP/SP to sell to Tex Mex its line between Milepost 0.0 at Rosenberg and Milepost 87.8 at Victoria, TX. Tex Mex would re-construct this line and, when completed, grant UP/SP and BNSF trackage rights between Rosenberg and Victoria to facilitate UP's

directional traffic on the Brownsville Subdivision.¹³ Grant Tex Mex related trackage rights over the two miles on the south end of this line between Milepost 87.8 and the point of connection at UP/SP's Port LaVaca branch at Victoria;

(7) Require UP to sell or lease an existing yard in Houston (preferably the Booth Yard) to the Tex Mex. Tex Mex would sub-lease to UP a portion of the yard to hold up to 300 empty storage cars until Tex Mex can complete construction of the line between Rosenberg and Victoria and build a storage yard between Rosenberg and El Campo. Upon completion of the new storage yard, Tex Mex would cancel its sub-lease with UP and offer to lease to UP track space at the new storage yard for the same number of empty storage cars and to upgrade Booth Yard by reconstructing the south end of the yard; and

(8) Require UP to allow Tex Mex/KCS to construct a new rail line on UP's right-of-way adjacent to UP's Lafayette Subdivision between Dawes and Langham Road, Beaumont, TX. Upon completion of this new rail line, Tex Mex/KCS would deed it to UP in exchange for a deed to the UP's Beaumont Subdivision between Settegast Jct., Houston, and Langham Road, Beaumont. Tex Mex would dispatch this line from Houston and grant BNSF and UP trackage rights over this line, and would retain trackage rights over the Lafayette

¹³ We note that, in its initial proposal, filed March 30, 1998 (Sub-No. 27), Tex Mex requested an exemption from 49 U.S.C. 10901 to reconstruct the Rosenberg-Victoria line. In the Consensus Plan, the parties now believe that construction authority under section 10901, or an exemption from having to obtain our authorization, is not required, based on UP's representations that it never exercised its abandonment authority over any part of the line. Therefore, as a line still within the Board's jurisdiction, Tex Mex asserts that it requires only a Board order requiring UP to sell it the line.

Subdivision between Houston and Beaumont.¹⁴

BNSF (Finance Docket No. 32760 (Sub-No. 29))

In this proposal, the Board is asked to:

(1) Grant BNSF permanent bidirectional overhead trackage rights on UP's Caldwell-Flatonia-San Antonio and Caldwell-Flatonia-Placedo lines to give BNSF long-term operational flexibility to avoid congested UP lines between Temple and San Antonio, TX and between Algoa and Corpus Christi, TX;

(2) Grant BNSF trackage rights over both the UP line and the SP line between Harlingen and Brownsville, TX (until UP constructs a connection between the UP and SP lines at Brownsville to complete a rail bypass project) and allow the Brownsville & Rio Grande International Railroad (BRGI) to act as BNSF's agent for such service, so that BNSF may begin effective and competitive trackage rights service to both Brownsville and the Transportacion Ferroviaria Mexicana (TFM) connection at Matamoros, and to alleviate problems in the Brownsville area resulting from the incomplete rail bypass project;

(3) Grant BNSF overhead trackage rights on the UP Taylor-Milano line, so that BNSF may avoid congestion on the UP lines between Temple and Taylor, and Taylor and Sealy, and to provide a less circuitous routing;

(4) Order neutral switching supervision on the former SP Baytown and Cedar

¹⁴ Shell Oil Company endorses most of the recommendations of the consensus group. However, it does not support compelling UP to sell to Tex Mex the Rosenberg-Victoria line or the Booth Yard, nor forcing the carrier to allow Tex Mex/KCS to construct a new rail line adjacent to the UP Lafayette Subdivision in Beaumont. Instead, Shell asks us to facilitate these changes by asking the parties to agree to them, with arbitration in the event no agreement can be reached.

Bayou Branches and on the former SP Sabine and Chaison Branches serving the Beaumont-Port Arthur, TX area, to correct UP's inadequate local switch service via haulage and reciprocal switch between BNSF and its customers. The neutral switching supervisor would be selected by the parties unless they were unable to agree, in which case the switching supervisor would be selected by an arbitrator;

(5) Order PTRAs operation of the UP Clinton Branch in Houston, in order to eliminate delays caused by UP to BNSF's trains providing service to the Houston Public Elevator;

(6) Grant BNSF overhead trackage rights giving it the option to join the directional operations over any UP line, or lines in corridors where BNSF has trackage rights over one, but not both, lines involved in the UP directional flows, specifically including the Fort Worth--Dallas line (via Arlington), so that BNSF could provide more efficient competitive operations;

(7) Grant BNSF trackage rights on additional UP lines for BNSF to operate over any available clear routes through the terminal, as determined and managed by the Spring Consolidated Dispatching Center (SCDC), including the SP route between West Junction and Tower 26 via Chaney Junction, so that BNSF can avoid congestion in the Houston terminal area;

(8) Order the coordinated dispatching of operations over the UP and SP routes between Houston and Longview, TX, and Houston and Shreveport, LA, by the SCDC, to alleviate congestion in the corridor and to improve coordination of BNSF and UP trains arriving and departing the Houston area on UP lines north of Houston; and

(9) Grant overhead trackage rights on UP's San Antonio-Laredo line to avoid the adverse impact of (a) unnecessary routing of traffic through Houston, UP's south Texas congestion and service problems, and UP's alleged favoritism of its own business, and (b) the unforeseen changes in market structuring, including the influence of KCS on Tex Mex's ability to work with BNSF at Laredo, and the unexpected lack of direct competition in the privatized Mexican rail system.

BNSF (Finance Docket No. 32760 (Sub-No. 28))

In a related proposal, BNSF has filed an application asking the Board to grant it terminal trackage rights that would permit it:

(a) to use a segment of Tex Mex track between MP 0.00 at the International Bridge at Laredo, TX and the vicinity of MP 0.50, including over the International Bridge at Laredo; and

(b) equal access to use the International Bridge for interchange purposes through establishment of defined operational windows for BNSF's use.

The Board will accept and consider the Consensus Plan and BNSF proposals.

SHIPPER-REQUESTED CONDITIONS

Various Houston area and other Texas shippers have filed requests, with supporting evidence, for new conditions to the merger that would have discrete application to them.

Shippers making these requests are E.I. DuPont de Nemours and Company,¹⁵ Dow Chemical

¹⁵ DuPont asks that we impose conditions that would remove the prohibition against PTRAs serving DuPont's LaPorte, TX, plant; require UP and PTRAs to work out a service plan for the LaPorte plant; and require UP to restore DuPont's unrestricted reciprocal switching options. DuPont more generally requests that we remove the restriction against

Company,¹⁶ Formosa Plastics Corporation, U.S.A.,¹⁷ and Central Power & Light Company.¹⁸

The Greater Houston Partnership (GHP) also adopted a resolution with recommendations to promote competitive rail service in Houston similar to many of the requested conditions made by BNSF and the Consensus Plan, particularly that for neutral switching.¹⁹

reciprocal switching for intrastate transportation, and authorize Tex Mex to serve Houston customers served by HBT's successors, PTR, and all other industries open to reciprocal switching on the UP.

¹⁶ Dow requests a condition that would grant permanent haulage rights to BNSF on the Freeport Industrial Spur between the UP mainline at Angleton, TX, and Dow's chemicals and plastics production complex at Freeport, TX, with (a) the right for Dow and/or BNSF to construct a storage and gathering yard to interconnect with the UP line near Angleton, or another point to be determined later, and (b) the requirement that UP efficiently interchange Dow's traffic with BNSF at that interconnection, at haulage rates and terms to be established pursuant to the UP/BNSF Settlement Agreement under the UP/SP Merger. Dow also requests a condition granting BNSF authority to build out from Freeport to an interconnection with the UP mainline between Chocolate Bayou and Angleton, TX, at an undetermined point.

¹⁷ Formosa requests a condition that would permit BNSF, which has trackage rights on UP's line between Alcoa and Corpus Christi, TX, to switch with Formosa and serve the shipper's Point Comfort plant.

¹⁸ Central Power & Light requests a condition that would permit BNSF to use 16 miles of UP track beginning in Victoria, TX, to deliver unit coal trains to its power plant at Coleto Creek, TX.

¹⁹ GHP specifically asks the Board to: (1) consider making permanent the temporary trackage rights already granted railroads serving the Houston-Gulf Coast region; (2) make the Port of Houston and all long haul railroads serving Houston full and equal voting members of the PTR board; (3) provide a mechanism for all railroads serving Houston to buy trackage rights over trackage owned by the Port of Houston and operated by PTR, trackage formerly owned by the HBT prior to its dissolution, and additional trackage; (4) order the reconstitution of PTR as a neutral dispatching, switching and car movement operator, to encompass all of the trackage described in (3); (5) encourage UP/SP to agree with other carriers to sell or lease abandoned and underutilized rights of way and switching yards, and mediate negotiations for sales and leases; and (6) order PTR to develop a regional master plan of added facilities and operations needed to provide system capacity in excess of demand for the foreseeable future.

The Board will accept and consider all of these proposals. We also note that the National Industrial Transportation League (NITL), while not making any specific requests, argues that there is a clear need for additional conditions to the merger in the Houston/Gulf Coast region, and asks that the Board particularly consider proposals that would establish neutral switching in Houston, make permanent the emergency service order authority granted to Tex Mex, provide increased overhead trackage rights in the region, and encourage increased infrastructure.

CAPITAL METROPOLITAN TRANSPORTATION AUTHORITY (Finance Docket No. 32760 (Sub-No. 32))

Capital Metro, a regional transit authority that owns a 162-mile line that traverses Austin, TX between Giddings and Llano, TX, requests, with supporting evidence, a condition granting BNSF trackage rights over 4.4 miles of UP/SP tracks between Round Rock and McNeil, TX, and interchange rights at McNeil with Capital Metro's operator, the Central of Tennessee Railway & Navigation Company, Inc. d/b/a the Longhorn Railway Company (Longhorn). The Board will accept and consider this request. In the UP/SP merger, the Board determined that Capital Metro could interchange freight traffic with BNSF at Giddings, at the east end of the line, or Elgin, toward the center of the line, but it denied Capital Metro's requested condition that BNSF be permitted to interchange with Longhorn at McNeil, the line's westernmost interchange point. UP/SP Merger, Decision No. 44, at 182. Capital Metro is seeking the "McNeil" condition anew, because BNSF no longer runs through trains through Elgin, the interchange point Capital Metro selected, due to UP/SP congestion south of Elgin, and Giddings is only a theoretical interchange.

KENNETH B. COTTON (Finance Docket No. 32760 (Sub-No. 31))

On August 3, 1998, Kenneth B. Cotton, a small businessman on behalf of the Houston and Gulf Coast Railroad (H&GC), asks the Board to accept a late-filed application for new conditions. Mr. Cotton requests the following:

(1) Grant H&GC trackage rights on UP between Wharton, TX and Rosenberg, TX, and allow interchange with BNSF at Rosenberg;

(2) If the Wharton-Rosenberg and Wharton-Victoria segments of UP's Rosenberg-Victoria line are sold to Tex Mex, grant H&GC trackage rights from Victoria-Rosenberg over Tex Mex, with switching rights between Victoria and Rosenberg, and with interchange rights at Victoria with Tex Mex, BNSF, and UP;

(3) Grant H&GC trackage rights on UP between Rosenberg and Houston via West Junction, with access to PTR, New South, Englewood, and Settegast Yards;

(4) Grant H&GC trackage rights on UP between Bay City, TX, and Alcoa, TX, with interchange rights with BNSF at Alcoa;

(5) Require UP to sell H&GC track from Congress Yard in Houston to M.P. 233.0 in Galveston, TX, including rights over the lift bridge at Galveston, and to interchange with H&GC all Galveston-bound grain trains at Congress Yard or Rosenberg. H&GC also requests access to the Texas City Terminal Railway at Texas City, TX; and

(6) Require UP to sell the former SP Galveston Subdivision line between M.P. 38.8 to M.P. 55.6, with trackage rights over the lift bridge at Galveston.

Although Mr. Cotton filed no evidence in support of H&GC's requests, he has asserted that a grant of the conditions he has requested would benefit freight shippers and

competition in the Houston area. We will accept and consider his late-filed application.²⁰

Finally, we note that several persons have filed letters supporting one or more of the requested conditions summarized above; others have submitted letters, without supporting evidence, that request other conditions. These letters will be placed in the docket, but any requested conditions made in them different than those outlined above will not be considered.

As set forth previously in Decision Nos. 1 and 5, notices of intent to participate are due August 28, 1998. All comments, evidence, and argument opposing the requests for new conditions to the merger for the Houston/Gulf Coast region are due September 18, 1998, along with comments by the U.S. Department of Justice and the U.S. Department of Transportation. Rebuttal evidence and argument in support of requests for new conditions are due October 16, 1998.

All discovery matters in this proceeding have been assigned to Administrative Law Judge Stephen Grossman, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426 [202-219-2538, FAX (202) 219-3289].²¹

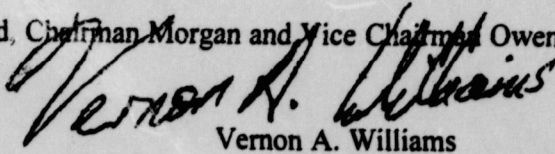
This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

²⁰ In contrast, we will not accept or consider requested conditions by the Texas Electric Rail Lines, which does not appear to offer freight service, for the forced sale, or forced rehabilitation and reactivation, of several vaguely and inadequately described UP/SP lines in Texas.

²¹ Houston/Gulf Coast Oversight, Finance Docket No. 32760 (Sub-No. 26), Decision No. 2 (STB served May 19, 1998).

Decided: August 3, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

A handwritten signature in dark ink, appearing to read "Vernon A. Williams", is written over the printed name.

Vernon A. Williams
Secretary

PROCEDURAL SCHEDULE

- August 28, 1998 Notice of intent to participate in proceeding due.
- September 18, 1998 All comments, evidence, and argument opposing requests for new remedial conditions to the merger due. Comments by U.S. Department of Justice and U.S. Department of Transportation due.
- October 16, 1998 Rebuttal evidence and argument in support of requests for new conditions due.

The necessity of briefing, oral argument, and voting conference will be determined after the Board's review of the pleadings.

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Records: 54

STB FD 32760 (Sub 29) 1-4-99 C 29911

29911
SEC

SERVICE DATE - JANUARY 4, 1999

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SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32760 (Sub-No. 26)¹

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

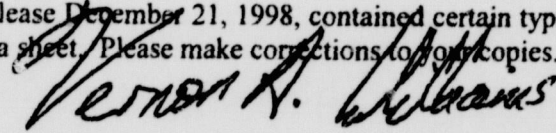
[HOUSTON/GULF COAST OVERSIGHT]

Decision No. 11

December 31, 1998

NOTICE TO THE PARTIES:

Decision No. 10 served Late Release December 21, 1998, contained certain typographical errors, as reflected on the attached Errata sheet. Please make corrections to your copies.



Vernon A. Williams
Secretary

¹This decision embraces: (1) Finance Docket No. 32760 (Sub-No. 27), Texas Mexican Railway Company & Kansas City Southern Railway--Construction Exemption--Rail Line Between Rosenberg and Victoria, TX; (2) Finance Docket No. 32760 (Sub-No. 28), Burlington Northern and Santa Fe Railway Company--Terminal Trackage Rights--Texas Mexican Railway Company; (3) Finance Docket No. 32760 (Sub-No. 29), Burlington Northern and Santa Fe Railway Company--Application for Additional Remedial Conditions Regarding Houston/Gulf Coast Area; Finance Docket No. 32760 (Sub-No. 30), Texas Mexican Railway Company, et al.--Request For Adoption of Consensus Plan; Finance Docket No. 32760 (Sub-No. 31), Houston & Gulf Coast Railroad--Application for Trackage Rights and Forced Line Sales; Finance Docket No. 32760 (Sub-No. 32), Capital Metropolitan Transportation Authority--Responsive Application--Interchange Rights.

ERRATA SHEET

1. Page 2, line 2 of the third paragraph, insert a comma after "harm"; line 4 of the last paragraph, change "economies" to "economics".
2. Page 11, line 3 of the first full paragraph, delete the comma after "crisis".
3. Page 13, line 3, insert "the" before "Houston area".
3. Page 14, line 4 of the second full paragraph, insert "explained" after "As DOT".
4. Page 16, line 7, change "that fact" to "the allegation".
5. Page 17, line 6 of footnote 28, change "Mexican" to "Mexico".
6. Page 21, line 1 of footnote 38, insert "of" at the end of the line.
7. Page 26, line 9 of the third paragraph, change "joint" to "join".
8. Page 32, line 6 of the first full paragraph, change "two carriers before the merger" to "three carriers before the merger".

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HON BILL G CARTER
P O BOX 2910
AUSTIN TX 78768-2910 US

HON TOM CRADDICK
P O BOX 2910
AUSTIN TX 78768-2910 US

RICHARD NUGENT
SANTA'S BEST
2902 MUNICIPAL DR
LUBBOCK TX 79403 US

MANFRED SCHIEFER
M SCHIEFER TRADING CO
PO BOX 1065
LUBBOCK TX 79408 US

DAVID M PERKINS
ANGELINA & NECHES RIVER RAILROAD COMPANY
P.O. BOX 1328
2225 SPENCER STREET
LUFKIN TX 79502 US

HON ROY ROMER
GOVERNOR
136 STATE CAPITOL
DENVER CO 80203 US

HON GARY L MCPHERSON
ROOM 271 STATE CAPITOL
DENVER CO 80203 US

SAM CASSIDY
1776 LINCOLN ST SUITE 1200
DENVER CO 80203-1029 US

L G SCHARTON
ROCKY MOUNTAIN STEEL MILLS
P O BOX 316
PUEBLO CO 81002 US

GREG E WALCHER
CLUB 20
P O BOX 550
GRAND JUNCTION CO 81502-0550 US

HON MAC MCGRAW
3526 ESSEX RD
CHEYENNE WY 82001 US

HON. JIM GERINGER
GOVERNOR
STATE CAPITOL BUILDING
CHEYENNE WY 82002 US

HON PEGGY L ROUNDS
213 STATE CAPITOL
CHEYENNE WY 82002 US

HON ELI D BEBOUT
213 STATE CAPITOL
CHEYENNE WY 82002 US

HON HARRY B TIPTON
213 STATE CAPITOL
CHEYENNE WY 82002 US

HON VINCENT V PICARD
213 STATE CAPITOL
CHEYENNE WY 82002 US

HON TONY ROSS
213 STATE CAPITOL
CHEYENNE WY 82008 US

HON TOM RARDIN
213 STATE CAPITOL
CHEYENNE WY 82008 US

HON JACK STEINBRECH
213 STATE CAPITOL
CHEYENNE WY 82008 US

HON BILL STAFFORD
213 STATE CAPITOL
CHEYENNE WY 82008 US

HON RODNEY ANDERSON
WYOMING STATE LEGISLATURE
PO BOX 338
PINE BLUFFS WY 82082 US

ARTLIN ZEIGER
P O BOX 6
RAWLINS WY 82301 US

MARGARET BROWN
P O BOX 2377
RAWLINS WY 82301 US

HON MARLENE SIMONS
WYOMING STATE LEGISLATURE
5480 HWY 14 WINDY ACRES
BEULAH WY 82712 US

JOHN ANSELM
1630 ELK STREET
ROCK SPRINGS WY 82901 US

MAYOR PAUL S OBLOCK
212 D STREET
ROCK SPRINGS WY 82901 US

LARRY K HILL
P O BOX 398
1897 DEWAR DRIVE
ROCK SPRINGS WY 82902-0398 US

J KENT JUST
858 BLUE LAKES BLVD N
TWIN FALLS ID 83301 US

SUSIE EDWARDS
P O BOX 518
111 WEST B
SHOSHONE ID 83352 US

ROBERT S KOENIG
5250 SOUTH COMMERCE DRIVE SUITE 200
SALT LAKE CITY UT 84107 US

MAYOR DEEDEE CORRADINI
451 SOUTH STATE STREET ROOM 306
SALT LAKE CITY UT 84111 US

BRENT OVERSON
2001 S STATE STREET SUITE N2100
SALT LAKE CITY UT 84190-1000 US

HON ROMAN M MAES III
402 GRAHAM AVENUE
SANTA FE NM 87501 US

JOHN P HOOLE
CITY OF BOULDER
401 CALIFORNIA AV
BOULDER CITY NV 89005 US

THOMAS G IERLAN
MCGRANN PAPER WEST INC
4501 MICHELL ST SUITE B
N LAS VEGAS NV 89031 US

KEE SOO PAHK
HYUNDAI INTERMODAL INC
879 WEST 190TH ST 7TH FLOOR
GARDENA CA 90248-4228 US

RICHARD FRICK, MANAGER AUTOMOBILE LOGISTICS
AMERICAN HONDA MOTOR CO., INC.
1919 TORRANCE BOULEVARD
TORRANCE CA 90501-2746 US

JEFFREY NEU
HUGO NEU-PROLER COMPANY
PO BOX 3100
901 NEW DOCK STREET
TERMINAL ISLAND CA 90731 US

ANN T GOODALE
ANCON TRANSPORTATION
POBOX 908
WILMINGTON CA 90748 US

LUKE M PIETROK
P O BOX 325
RANCHO CUCAMONGA CA 91739-0325 US

JAMES R. RISSE
CA PORTLAND CEMENT CO
2025 E FINANCIAL WAY
GLENORA CA 91741 US

MICHAEL ORTEGA
1501 NATIONAL AVENUE STE 200
SAN DIEGO CA 92113-1029 US

MAYOR JOHN H E ROMBOUTS
115 SOUTH ROBINSON STREET
TEHACHAPI CA 93561 US

DOUGLAS K GUERRERO
P O BOX 5252
6601 KOLL CENTER PARKWAY
PLEASANTON CA 94566 US

KARYN BOJANOWER
370 8TH AVENUE
OAKLAND CA 94606 US

JEFF LUNDEGARD
2151 PROFFESIONAL DRIVE SUITE 200
ROSEVILLE CA 95661 US

MAYOR CLAUDIA GAMAR
311 VERNON STREET #208
ROSEVILLE CA 95678 US

MAYOR IVAN YOUNG
5915 DUNSMUIR AVENUE
DUNSMUIR CA 96025 US

MAYOR RON FLORIAN
11570 DOWNER PASS ROAD
TRUCKEE CA 96161-4947 US

MAYOR VERA KATZ
1221 SW 4TH AVENUE SUITE 340
PORTLAND OR 97204-1095 US

HON BOB MONTGOMERY
STATE CAPITOL H-480
SALEM OR 97310 US

HON MARYLIN SHANNON
S-215 STATE CAPITOL
SALEM OR 97310 US

HON RICHARD DEVLIN
365 STATE CAPITOL
SALEM OR 97310 US

HON EUGENE A PRINCE
P O BOX 40482
102 INSTITUTIONS BUILDING
OLYMPIA WA 98504-0482 US

RICK LACROIX
POTASH CORP
122 - 1ST AV SOUTH STE 500
SASKATOON SK S7K 7G3 CD

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