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SERVICE DATE

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SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

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

[Decision No. 47][2]

Decided: September 9, 1996

This decision addresses certain details respecting the trackage rights awarded to The Texas Mexican Railway Company (Tex Mex) in Decision No. 44.

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[1] Proceedings pending before the Interstate Commerce Commission (ICC) on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11102 and 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

[2] This decision embraces Finance Docket No. 32760 (Sub-No. 13), Responsive Application--The Texas Mexican Railway Company, and Finance Docket No. 32760 (Sub-No. 14), Application for Terminal Trackage Rights Over Lines of The Houston Belt & Terminal Railway Company--The Texas Mexican Railway Company.

BACKGROUND

Decision No. 44. In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company)[3] and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company),[4] subject to various conditions. Among other things, we granted Tex Mex the trackage rights sought in its Sub-No. 13 responsive application and in its Sub-No. 14 terminal trackage rights application, subject to the restriction that all freight handled by Tex Mex pursuant to such trackage rights must have a prior or subsequent movement on Tex Mex's Laredo-Robstown-Corpus Christi line. See Decision No. 44, slip op. at 30-33 (relief requested by Tex Mex), at 147-51 (relief granted to Tex Mex), at 228 (our findings), and at 232-33 (ordering paragraphs 26 and 27). With respect to the precise details of the Sub-Nos. 13 and 14 trackage rights, we directed the interested parties to submit, by August 22, 1996, either agreed-upon terms or separate proposals. See Decision No. 44, slip op. at 232-33 (ordering paragraphs 26 and 27).[5]

Pleadings Submitted. UP/SP, Tex Mex, and HB&T have now submitted six pleadings: one by UP/SP and Tex Mex jointly (designated "UP/SP-271/TM-42", but hereinafter referred to for convenience as "UP/SP-271"); three by Tex Mex separately (designated TM-40, TM-41, and TM-45); one by UP/SP separately (designated UP/SP-272); and one by HB&T separately (not designated, but hereinafter referred to for convenience as HB&T-1). BNSF[6] has submitted a reply (designated BN/SF-64) to the TM-41 and UP/SP-272 submissions.[7]

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[3] Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) are referred to collectively as UP.

[4] Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) are referred to collectively as SP.

[5] With respect to the Sub-No. 13 trackage rights, the interested parties are Tex Mex and UP/SP. With respect to the Sub-No. 14 trackage rights, the interested parties are Tex Mex and the Houston Belt & Terminal Railway Company (HB&T).

[6] Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) are referred to collectively as BNSF.

[7] Two errata pleadings have also been submitted: one by UP/SP and Tex Mex jointly (designated "UP/SP-273/TM-43"); and one by UP/SP separately (designated UP/SP-274).

Sub-No. 13 Trackage Rights. With respect to the Sub-No. 13 trackage rights, Tex Mex and UP/SP have reached agreement as to many of the terms that will govern Tex Mex's operations. See UP/SP-271, Attachment A.[8] With respect to seven matters, however, Tex Mex and UP/SP have not reached agreement, and they have therefore submitted separate proposals respecting these matters. See UP/SP-271 at 2-3 (description of the seven matters), TM-41 (Tex Mex's proposals with respect thereto), and UP/SP-272 at 2-21 (UP/SP's proposals with respect thereto).

Sub-No. 14 Trackage Rights. With respect to the Sub-No. 14 trackage rights, Tex Mex and HB&T have not reached agreement as to any terms, although only two matters (routes and compensation) appear to be in dispute. Tex Mex has submitted its proposals respecting in particular these two matters, and respecting in general all the terms that would be included in an agreement. See TM-40. UP/SP, speaking on behalf of HB&T, has submitted its proposals respecting only the two particular matters. See UP/SP-272 at 22-23.[9] HB&T, speaking on its own behalf, claims that the Sub-No. 14 parties (Tex Mex and HB&T) have not actually had any discussions respecting any matters except the two particular matters addressed by Tex Mex and UP/SP. See HB&T-1.

Preliminary Matter: Administrative Reconsideration or Judicial Review. Both Tex Mex and UP/SP have emphasized that the partial "agreement" they have reached with respect to the Sub-No. 13 trackage rights does not necessarily represent concurrence with our prior decision, and we therefore understand that both or either may seek administrative reconsideration or judicial review of the relevant portions of Decision No. 44. See TM-40 at 1 n.1; TM-41 at 3 n.2; UP/SP-272 at 2 n.2.[10]

Preliminary Matter: BNSF Concurrence. In Decision No. 44, we imposed various conditions to our approval of the primary application, including, among other things, the terms of the BNSF agreement. Decision No. 44, slip op. at 12 and at 231 (ordering paragraph 6).[11] Section 14 of the BNSF agreement provides, among other things, that UP and SP shall not, without the written consent of BNSF, "enter into agreements with other parties which would grant rights to other parties granted to BNSF or inconsistent with those granted to BNSF under this Agreement which would substantially impair the overall economic value of rights to BNSF under this Agreement." UP/SP indicates that BNSF, relying on Section 14, has asserted that any "agreement"

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[8] Attachment A consists of a 12-page body (the trackage rights terms) and three appendices: Exhibit A (a map of Tex Mex's trackage rights route); Exhibit B (general conditions); and Attachment 1 (dispatching protocols). Exhibit A, however, was not submitted with the UP/SP-271 version of Attachment A, because the route of the Tex Mex trackage rights is one of the matters still in dispute. Exhibit B and Attachment 1 were submitted with the UP/SP-271 version of Attachment A.

[9] HB&T is owned in equal shares by UP/SP and BNSF. See TM-40 at 8 n.4. UP/SP's 50% ownership interest in HB&T is held by MPRR. See UP/SP-22 at 63.

[10] Petitions for administrative reconsideration were due on September 3, 1996. Tex Mex filed, on that date, a petition to reopen (in essence, a petition for administrative reconsideration of) Decision No. 44.

[11] The contents of the BNSF agreement are described in Decision No. 44, slip op. at 12 n.15.

implementing the Tex Mex trackage rights requires BNSF's written consent, which, BNSF has suggested, will be forthcoming only on terms acceptable to BNSF. UP/SP adds, however, that, in its view, BNSF is wrong respecting the scope of Section 14; in UP/SP's view, any "agreement" it is compelled to enter into with Tex Mex is not an "agreement" for purposes of Section 14. UP/SP-272 at 2 n.2. The trackage rights granted to Tex Mex in Decision No. 44 constitute a condition imposed on the merger, and those rights are not contingent upon BNSF's approval.

DISCUSSION AND CONCLUSIONS

IN GENERAL. In its applications filed in the Sub-Nos. 13 and 14 dockets, Tex Mex sought: (i) trackage rights over UP/SP lines from Robstown and Corpus Christi to Houston, and on to a connection with The Kansas City Southern Railway Company (KCS) at Beaumont; and (ii) related terminal trackage rights on HB&T. Tex Mex clearly indicated that the trackage rights it sought: (a) were intended to allow Tex Mex both to transport overhead traffic and to serve all local shippers currently capable of receiving service from both UP and SP, directly or through reciprocal switching; and (b) would include full rights to interchange traffic at Houston (with UP/SP, BNSF, HB&T, and PTRA)[12] and at Beaumont (with UP/SP, BNSF, and KCS). See Decision No. 44, slip op. at 32.

In Decision No. 44, we granted Tex Mex the trackage rights sought in its Sub-No. 13 responsive application and in its Sub-No. 14 terminal trackage rights application, restricted in both instances to the transportation of freight having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. We referred to our action in the Sub-No. 13 docket as a "partial grant" of the Tex Mex responsive application, see Decision No. 44, slip op. at 149; and our action in the Sub-No. 14 docket should similarly be referred to as a partial grant of the Tex Mex terminal trackage rights application.

Relief Granted: Main Line Trackage Rights. Tex Mex requested and we granted trackage rights over: (1) the UP line between Robstown and Placedo; (2) the UP line between Corpus Christi and Odem, via Savage Lane to Viola Yard; (3) the SP line between Placedo and Victoria; (4) the SP line between Victoria and Flatonia; (5) the SP line between Flatonia and West Junction; (6) the UP line from Gulf Coast Junction through Settegast Junction (referred to on some maps as "HBT Junction") to Amelia;[13] and (7) the joint UP/SP line from Amelia to Beaumont, and the connection with KCS at the Neches River Draw Bridge in Beaumont. See Decision No. 44, slip op. at 32.

Relief Granted: Houston Trackage Rights On SP. Tex Mex requested and we granted trackage rights in Houston over: (1) the SP line from West Junction through Bellaire Junction to

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[12] The Port Terminal Railway Association is referred to as PTRA.

[13] With respect to item (6), we note that Tex Mex actually requested trackage rights over either (a) the UP line from Gulf Coast Junction through Settegast Junction to Amelia (the "UP main line option"), or (b) the SP line from Tower 87 to Amelia (the "SP main line option"); and we also note that Tex Mex further requested that UP/SP be required to elect which option it would prefer Tex Mex to operate. See Decision No. 44, slip op. at 32. UP/SP has elected the UP main line option. See UP/SP-272 at 4 n.3; see also UP/SP-272, V.S. King at 2 n.2 and at 7 n.5.

Eureka at SP MP 5.37 (Chaney Junction); (2) the SP line from SP MP 5.37 to SP MP 360.7 near Tower 26 via the Houston Passenger station;[14] (3) the SP line from SP MP 5.37 to SP MP 360.7 near Tower 26 via the Hardy Street Yard; (4) the SP line from SP MP 360.7 near Tower 26 to the connection with HB&T at Quitman Street near SP MP 1.5; and (5) the SP line from West Junction to the connection with PTRA at Katy Neck (GH&H Junction), by way of Pierce Junction. See Decision No. 44, slip op. at 33.[15]

Relief Granted: Houston Trackage Rights On HB&T. Tex Mex requested and we granted trackage rights in Houston over: (1) the HB&T line from the Quitman Street connection with SP to the Gulf Coast Junction connection with UP;[16] and (2) the HB&T line from its connection with SP at T&NO Junction (Tower 81) to

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[14] UP/SP claims that the item (2) line segment "does not connect with the remainder of Tex Mex's proposed route." UP/SP-272 at 7 n.5. We note: that the line segments described in items (2) and (3) both run from SP MP 5.37 to SP MP 360.7 near Tower 26; that the line segment described in item (2) runs via the Houston Passenger station, whereas the line segment described in item (3) runs via the Hardy Street Yard; and that visual inspection of the maps provided by the parties appears to indicate that the item (2) line segment does indeed connect with the remainder of Tex Mex's proposed route. UP/SP may be referencing a physical obstruction not revealed by our maps, perhaps including a physical layout that makes it impossible for trains passing the Houston Passenger station to travel north in the direction of Quitman Street. See UP/SP-272, V.S. King at 10 n.7 (suggestion that track configuration would not allow the Houston Passenger station line to be used in conjunction with a route over UP's Houston-Beaumont line). UP/SP and Tex Mex may wish to consider this matter further.

[15] With respect to the items shown in the body as items (4) and (5), Tex Mex actually requested: (4) if the UP main line option is elected, the SP line from SP MP 360.7 near Tower 26 to the connection with HB&T at Quitman Street near SP MP 1.5; (5) if the SP main line option is elected, the SP line from Tower 26 through Tower 87 to the SP main line to Amelia; and (6) the SP line from West Junction to the connection with PTRA at Katy Neck (GH&H Junction), by way of Pierce Junction. Because UP/SP has elected the UP main line option, we have rephrased item (4), deleted the original item (5), and renumbered item (6) as item (5).

[16] With respect to item (1), we note that Tex Mex actually requested the item (1) trackage rights "if the UP main line option is elected." Because UP/SP has elected the UP main line option, we have rephrased item (1) to eliminate the contingency.

its connection with UP at Settegast Junction.[17] See Decision No. 44, slip op. at 33.

Relief Granted: Houston Terminal Facilities. Tex Mex requested and we granted the right to use the following yards and other terminal facilities: (1) SP's Glidden Yard; (2) interchanges with PTRA at the North Yard, Manchester Yard, and Pasadena Yard; and (3) interchanges with HB&T at HB&T's New South Yard. See Decision No. 44, slip op. at 33.

ROUTES THROUGH HOUSTON. The trackage rights granted to Tex Mex include trackage rights over SP's Flatonia-Houston line (west of Houston) and over UP's Houston-Beaumont line (east of Houston). SP's Flatonia-Houston line enters the Houston terminal area from the west at the point known as West Junction, at which point it splits into two lines. One of the two lines runs north to Bellaire Junction and Eureka; the other line runs east to and beyond T&NO Junction. UP's Houston-Beaumont line begins, in the Houston area, at the point known as Gulf Coast Junction (where it connects with HB&T) and then runs northeast to the point known as Settegast Junction.

There appear to be three routes that Tex Mex might use to operate between West Junction (just west of Houston) and either Gulf Coast Junction or Settegast Junction (just north of Houston): the SP route, the West Belt route, and the East Belt route. The SP route begins at West Junction and runs over SP's line via Bellaire Junction to SP MP 5.37 (Chaney Junction); then, runs over SP's line from Chaney Junction to SP MP 360.7 near Tower 26;[18] then, runs over SP's line from SP MP 360.7 near Tower 26 to the connection with HB&T at Quitman Street near

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[17] UP/SP suggests, with respect to item (2), that our grant of trackage rights over the HB&T line between T&NO Junction (Tower 81) and Settegast Junction is "unworkable because it is missing a critical segment of UP-owned trackage through Settegast Yard, over which Tex Mex did not request rights." UP/SP-272 at 5-6. UP/SP indicates that the missing segment, which lies between SP Tower 87 and Settegast Junction and which runs through Settegast Yard, is actually owned by UP, "not HB&T as Tex Mex mistakenly indicated in its Responsive Application." UP/SP-272 at 6 n.4. UP/SP notes that, at one time, HB&T had leased trackage through Settegast Yard between SP Tower 87 and Settegast Junction; but, UP/SP adds, that lease has since terminated, and this trackage is now entirely UP's. UP/SP-272, V.S. King at 5 n.3. We reject UP/SP's suggestion that the item (2) trackage rights are unworkable for lack of a critical segment. The referenced segment is owned either by HB&T or by UP/SP. If it is owned by HB&T (as Tex Mex believed), it is properly included in the Sub-No. 14 trackage rights; and if it is owned by UP/SP (as UP/SP now claims), it will be regarded as having been included in the Sub-No. 13 trackage rights. UP/SP, having received adequate notice that the lines over which Tex Mex sought trackage rights included the referenced segment, cannot avail itself of a pleading rule designed to protect parties that have not received adequate notice of the relief sought against them.

[18] Between Chaney Junction and SP MP 360.7 near Tower 26, the SP route, as previously noted, consists of two separate but parallel segments, one running by the Houston Passenger station and the other running by the Hardy Street Yard. UP/SP, as also previously noted, has suggested that the segment that runs by the Houston Passenger Station does not connect with the remainder of Tex Mex's proposed route.

SP MP 1.5; and, then, runs over the HB&T line from the Quitman Street connection with SP to the Gulf Coast Junction connection with UP. The West Belt route begins at West Junction and runs over SP's line to T&NO Junction (Tower 81); and, then, runs over the HB&T line from T&NO Junction (Tower 81) past the Congress Street Yard, and continues on past the HB&T/SP Quitman Street connection to the Gulf Coast Junction connection with UP. The East Belt route begins at West Junction and runs over SP's line to T&NO Junction (Tower 81); then, runs over the HB&T line from T&NO Junction (Tower 81) to a point between the Old South Yard and the New South Yard (the point is known as East Belt Junction) at which an HB&T line breaks off to the east/northeast; and, then, runs over this HB&T line past North Yard and Settegast Yard to the Settegast Junction connection with UP.[19] The SP and West Belt routes overlap in part; the West Belt and East Belt routes likewise overlap in part; but the SP and East Belt routes do not overlap at all.

In Decision No. 44, we granted Tex Mex trackage rights over two of these routes--the SP route and the East Belt route. See Decision No. 44, slip op. at 147-51 (discussion of our rationale for granting Tex Mex the trackage rights it had sought, subject only to the restriction respecting traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line). We did not discuss, in Decision No. 44, the relative merits of the SP and East Belt routes (either vis-à-vis each other or vis-à-vis the West Belt route), and we similarly did not discuss the merits of granting Tex Mex two routes, as opposed to one route, through Houston. We did not discuss these matters because UP/SP had given no indication that either the SP route or the East Belt route would present any difficulties, and because UP/SP had similarly given no indication that it would in any way be burdened if Tex Mex were given two Houston routes as opposed to only one. See UP/SP-230 at 300-307 (narrative discussion of UP/SP's opposition to the trackage rights sought by Tex Mex; but no mention of any problems with either the SP route or the East Belt route). See also UP/SP-231, Part B, Tab 17 at 93-135 (extensive discussion by UP/SP's witness Richard B. Peterson of perceived flaws in the Tex Mex trackage rights; but, again, no mention of any problems with either the SP route or the East Belt route). Indeed, UP/SP's witness R. Bradley King explicitly stated that UP/SP had no operational or service objections to the trackage rights sought by Tex Mex:

> To take some examples in this case, although we see absolutely no reason why Tex Mex should be given trackage rights over SP from Robstown to Beaumont (or anywhere else), and we believe Tex Mex would provide very inferior service compared to BN/Santa Fe, **we have no operational or service objection to the trackage rights Tex Mex proposes.**

UP/SP-232, Tab A at 26 (emphasis added). See also UP/SP-232, Tab A at 16 (Mr. King indicated that the trackage rights sought by Tex Mex might run counter to Tex Mex's own interests, but would not adversely impact UP/SP: "Operationally, UP and SP could accommodate Tex Mex's choice of routes, although the UP/SP line between Houston and Flatonia is quite busy. However, this

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[19] As previously noted, UP/SP now claims that the segment of the East Belt route that lies between SP Tower 87 and Settegast Junction is actually owned by UP and not by HB&T.

route would slow Tex Mex trains by many hours compared to the BN/Santa Fe route.").

UP/SP's New Arguments. UP/SP, having had an opportunity to make a "careful evaluation" of the routes sought by Tex Mex in this proceeding, see UP/SP-272, V.S. King at 3, has now discovered that it does indeed have "operational or service" objections respecting Tex Mex's choice of routes through Houston.[20]

The East Belt Route: Perceived Flaws. UP/SP insists that operation by Tex Mex over the East Belt route would be in no one's best interests, not even Tex Mex's.

First, UP/SP contends that the East Belt route is significantly congested and has critical operating bottlenecks that would impair Tex Mex's operations, and that adding Tex Mex's trains to this route will make these problems worse for all of the other Houston railroads, resulting in excessive delay and inefficiency. The East Belt route, UP/SP claims, handles considerably more traffic than the West Belt route, primarily because the East Belt route receives heavy use for switching and transfer moves. UP/SP indicates, by way of example, that in June 1996 the East Belt carried 32% more trains than the West Belt (628 trains vs. 476 trains). And, UP/SP adds, the East Belt route is operationally inferior to the West Belt route in several respects: the East Belt route has three interlocking towers (Towers 85, 86, and 87); a portion of the East Belt route is reduced to single-track over the San Jacinto River; and Tower 87 is located at an at-grade crossing of the double-track portion of the East Belt route and a double-track portion of SP's Houston-Beaumont mainline (this crossing is directly in the center of SP's Englewood Yard and is at the south leads of UP's Settegast Yard).

Second, UP/SP notes that the East Belt route runs through the middle of UP's Settegast Yard. Settegast Yard, UP/SP claims, is designed as a classification yard only; it works around the clock with its 29 switch engine shifts handling almost 700,000 cars per year; and it originates between 15 and 20 through freights, locals, and transfer jobs per day. There are, UP/SP insists, no mainline or "through" tracks in Settegast Yard, and it would be virtually impossible to maintain efficient yard operations if Tex Mex were allowed to move trains through the yard. Movement of a train through Settegast Yard, UP/SP claims, would require that up to 15 switches be aligned; and this, UP/SP adds, would be a time consuming process because these switches would have to be set and reset manually. Disruption of the yard for even an hour to allow a Tex Mex train to pass through the yard, UP/SP warns, would disrupt switching operations and delay cars for both local and out-of-town customers. UP/SP suggests that these delays could be mitigated only with the construction of (1) a new connection sufficiently east of Settegast Junction to avoid conflict with the north switch leads at Settegast Yard and (2) a lengthy bypass track around the east side of Settegast Yard that could be devoted to through movements. And, UP/SP warns, at the present time, given the existing congestion in this area (including difficulty getting onto UP's mainline at Settegast Junction and the serious bottleneck at SP's Tower 87), Tex Mex trains would typically require 4 hours to operate over

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[20] These new objections are advanced on behalf of both UP/SP and HB&T. See HB&T-1 at 1 (HB&T has authorized UP/SP to address two issues on HB&T's behalf; one such issue concerns Tex Mex's Houston routes).

the 11.8-mile East Belt segment between T&NO Junction and Settegast Junction.[21]

Third, UP/SP claims that the East Belt route does not allow efficient connection with HB&T. UP/SP claims that HB&T's Congress Street Yard (which is located adjacent to the West Belt route, and which is not reachable from the East Belt route) is an underutilized yard with sufficient available capacity, and is the only yard where HB&T could efficiently handle Tex Mex's interchange and local business. UP/SP insists that all other HB&T yards potentially suitable for use in handling Tex Mex traffic, including New South Yard, are already being fully utilized for classification of inbound trains and blocking of outbound trains, and are not available to provide support for interchange. UP/SP therefore envisions that, except for trains that Tex Mex may agree to interchange directly to other railroads at mutually-agreed points in Houston, Tex Mex will pick up and deliver its Houston-interchange and local traffic at HB&T's Congress Street Yard.

Fourth, UP/SP claims that the East Belt route does not allow efficient connection with PTRA. UP/SP insists that the operation envisioned by Tex Mex (pick-up and delivery of cars at PTRA's North Yard by Tex Mex through trains) is inconsistent with the operations of all other Houston railroads (which pick up and deliver cars at PTRA's North Yard via either a switch move, a dedicated yard transfer, or an entire train). The operation envisioned by Tex Mex, UP/SP warns, would require the Tex Mex through train to stop on the East Belt route between Towers 86 and 87, which would force HB&T to stop switching at Basin Yard and at PTRA's lead at the north end of North Yard, and would block UP's "Houston North Shore" line to Baytown. And, UP/SP adds, if a Tex Mex train were to exceed a mile in length, it would also block Tower 86 and extend to Bridge Junction (single main), thereby completely stopping all through train operations on the East Belt route. The railroads in Houston, UP/SP contends, long ago recognized that operations such as this would cause unacceptable inefficiencies and delays, and, for this reason, no railroad stops its through trains on the East Belt route to pick up or set out PTRA cars as Tex Mex proposes to do. UP/SP insists that, if Tex Mex wants to interchange directly with PTRA at North Yard, it should establish a yard operation in Houston and put on the required transfer job. This, UP/SP adds, would be consistent with the operations of other railroads and would avoid the unreasonable delay caused by stopping through trains on the East Belt route (thereby blocking its use by all railroads) for the purpose of picking up or setting out cars.

The SP Route: Perceived Flaws. As to the SP route, UP/SP claims that use of this route would not allow Tex Mex to achieve

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[21] UP/SP notes that, at the present time, UP runs through trains through Settegast Yard only in the rare instances in which no other alternative is available. UP/SP adds that, at the present time, UP routinely uses what it calls the Gulf Coast Junction-Settegast Junction bypass route to avoid operating through Settegast Yard. This bypass route appears to run: (1) over HB&T (via Pierce Yard), from a point in the vicinity of SP Tower 87 to Gulf Coast Junction; and (2) over UP, from Gulf Coast Junction to Settegast Junction. Tex Mex has not been awarded, and UP/SP apparently has not offered, trackage rights over the first segment; but Tex Mex has been awarded trackage rights over the second segment (this is a portion of the UP main line option). UP/SP and Tex Mex might wish to consider this matter further.

its connections at Houston and would pose other problems as well. The SP route, UP/SP claims, includes a single-track segment between Chaney Junction and Hardy Street, which is the primary line used by SP for all of its movements in all directions through Houston; and it is not uncommon for trains to be held out on the double track portion of this line when Englewood Yard is congested. UP/SP concedes that the other main track would appear to be available for use, but notes that the entire line between West Junction and Englewood Yard is dispatched according to "current of traffic" rules, and therefore claims that any Tex Mex movements would incur significant delays either waiting behind SP trains or moving at restricted speed against the current of traffic.

Two Routes vs. One. UP/SP has also suggested that it should not be required to provide Tex Mex with two separate routes through Houston. Tex Mex, UP/SP insists, simply has no need for two routes, and UP/SP adds that neither UP nor BNSF has two separate routes today. UP/SP also contends that it would be especially inappropriate and disruptive if Tex Mex were able to dictate on a train-by-train basis which of the routes it would use, thereby creating uncertainty for all carriers' Houston-area operations. The inconsistent routing of Tex Mex trains via two different routes, UP/SP fears, would prevent the dispatching railroad (UP/SP) from developing a consistent transportation plan that would allow the efficient routing of all trains through Houston. It would also, UP/SP adds, negatively affect UP/SP's ability to do capacity planning.

The West Belt Route: UP/SP's Proposed Solution. UP/SP has proposed that Tex Mex utilize, in lieu of the SP and East Belt routes sought by Tex Mex and awarded in Decision No. 44, the West Belt route not sought by Tex Mex and not awarded in Decision No. 44. The West Belt route, UP/SP claims, is entirely double-tracked and CTC-controlled,[22] it avoids Settegast Yard altogether, and it makes use of through tracks that traverse no bottlenecks comparable to the congestion at Tower 87 and Englewood Yard or the single-track operation over the San Jacinto River bridge. The West Belt route, UP/SP adds, will enable Tex Mex to conduct its operations without disrupting the operations conducted by other railroads, and will allow Tex Mex to achieve all of its operating objectives: (1) efficient movement of through trains, with minimal delay and congestion and in a manner consistent with the operations of other railroads; (2) efficient connection with HB&T and PTRA; and (3) efficient use of HB&T services to perform switching and interchange with other carriers. The West Belt route, UP/SP adds, is strongly favored by HB&T; it is the very route used by UP for movements through Houston; it is BNSF's primary route through Houston; and it is far superior for Tex Mex's purposes to either the SP route or the East Belt route. Tex Mex trains using the West Belt route, UP/SP claims, would require only 1 to 2 hours to operate over the 10-mile West Belt segment between T&NO Junction and Gulf Coast Junction, as compared to the 4 hours that would typically be required to operate over the 11.8-mile East Belt segment between T&NO Junction and Settegast Junction.

UP/SP adds that the West Belt route would allow Tex Mex trains to set out and pick up all of Tex Mex's Houston-area traffic (including that interchanged with HB&T and PTRA) at one point: HB&T's Congress Street Yard. Performing pick-ups and set-outs at HB&T's Congress Street Yard, UP/SP insists, would not interfere with mainline operations, whereas performing pick-ups

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[22] CTC is the acronym for Centralized Traffic Control.

and set-outs at PTRA's North Yard would most certainly interfere with mainline operations. UP/SP claims that HB&T would perform efficient moves for Tex Mex between Congress Street Yard and North Yard (as well as between Congress Street Yard and other interchange points and HB&T-served industries); UP/SP also claims that HB&T has offered to move Tex Mex cars between Congress Street Yard and North Yard for $100 per car (round trip); and UP/SP further claims that this rate would only marginally cover HB&T's cost. UP/SP adds that it envisions that Tex Mex would also be allowed to operate full trains or dedicated switch or transfer moves directly to/from North Yard (or other points, as PTRA might permit) over terminal trackage rights on HB&T between Congress Street Yard (or T&NO Junction) and North Yard.

UP/SP claims that Tex Mex and HB&T operations would be most efficient if Tex Mex were to use the West Belt route and HB&T's Congress Street Yard, rather than the routes awarded in Decision No. 44. UP/SP adds that Tex Mex itself has acknowledged the superiority of the West Belt route and, at one point, even indicated its acceptance of HB&T's $100 per car offer, but that Tex Mex has since sought to tie its acceptance of the West Belt route to UP/SP's acquiescence in terms for Tex Mex's use of HB&T's services that would allegedly be non-compensatory and that would place Tex Mex at a distinct competitive advantage to UP/SP. UP/SP suggests that this aspect of Tex Mex's negotiating strategy may reflect the influence of KCS. See UP/SP-272 at 6; UP/SP-272, V.S. King at 10 n.6.[23]

Bypass Construction: UP/SP's Alternative Solution. UP/SP adds that, if Tex Mex insists on using the East Belt route awarded in Decision No. 44, Tex Mex must be required to pay for the construction of a bypass track that will avoid the need to operate through the middle of Settegast Yard.[24]

Tex Mex's Response to UP/SP's New Arguments. Tex Mex indicates that it would prefer to keep the SP and East Belt routes that it sought in the Sub-Nos. 13 and 14 dockets and that we awarded in Decision No. 44. Tex Mex notes that it explained in its Sub-Nos. 13 and 14 applications that these routes were sought *both* to give Tex Mex effective connections to HB&T and to PTRA and to various yards *and* to provide an alternative route through Houston in the event of congestion. The West Belt route now proposed by UP/SP, Tex Mex insists, is not acceptable, mainly because it would seriously impair the operational and economic effectiveness of Tex Mex's important right to interchange traffic with PTRA, especially at North Yard.

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[23] See Decision No. 44, slip op. at 31 n.41 (the corporate parent of KCS holds a 49% interest in Tex Mex). Tex Mex acknowledges that, during the course of its negotiations with UP/SP, it consulted with KCS' corporate parent and relied on the "substantial expertise" of KCS. Tex Mex adds, however, that neither KCS nor KCS' corporate parent controls Tex Mex, and Tex Mex insists that KCS did not have "the decisive voice" in determining Tex Mex's position on any issue. See TM-45 at 4 n.3.

[24] Although UP/SP has suggested that the Settegast Yard problem could be mitigated only with construction of *both* a new connection east of Settegast Junction *and* a bypass track around Settegast Yard, see UP/SP-272, V.S. King at 5 n.4, UP/SP has apparently asked that Tex Mex be required to pay for the bypass track only, see UP/SP-272 at 7 (see also UP/SP-272, V.S. King at 6-7).

Tex Mex also asks that we make clear that UP/SP has no right to carry out its threat to bar Tex Mex from traversing Settegast Yard until Tex Mex constructs another track around the yard. UP/SP, Tex Mex insists, would have no basis whatever for imposing any such effectively prohibitive condition, but is required to make its facilities available to Tex Mex on the same terms and conditions that govern its availability to UP/SP.

Our Analysis. In Decision No. 44, we allowed the interested parties (Tex Mex and UP/SP, with respect to the Sub-No. 13 trackage rights; Tex Mex and HB&T, with respect to the Sub-No. 14 trackage rights) an opportunity to reach agreements with respect to the precise details of the trackage rights awarded to Tex Mex, and we directed that, if agreements could not be reached, the parties should submit separate proposals respecting such precise details. See Decision No. 44, slip op. at 150-51. We envisioned that, if agreements could not be reached, the parties would submit separate proposals respecting the precise details of the trackage rights we had awarded, but not that UP/SP would submit a pleading that constitutes in essence a petition for reconsideration with respect to this aspect of Decision No. 44, nor that UP/SP would rely upon new evidence that not only could have been presented in its April 29th rebuttal submission but that is plainly inconsistent with the evidence that was presented in its April 29th rebuttal submission. We therefore wish to clarify that, unless and until the parties mutually agree otherwise (or unless and until Decision No. 44 is changed on administrative reconsideration or judicial review, or in the exercise of the continuing jurisdiction referenced in the next paragraph), UP/SP and HB&T must allow Tex Mex to implement the specific trackage rights awarded in Decision No. 44.[25]

We are not rejecting out of hand, however, the concerns raised by UP/SP respecting Tex Mex's operations through and in the Houston terminal area. UP/SP may be right in that Tex Mex's operations over the East Belt route may have the potential to impose burdens upon UP/SP, HB&T, and their shippers that outweigh the beneficial, remedial effects of our partial grant of the Tex Mex applications. We believe, however, that, even aside from the oversight condition imposed in Decision No. 44, the continuing jurisdiction explicitly provided by 49 U.S.C. 11351 and implicitly provided by 49 U.S.C. 11103 will enable us to correct any problems created by Tex Mex's operations through and in the Houston terminal area; and all concerned should understand that we are prepared to exercise that continuing jurisdiction if necessary and as appropriate.

We hope that Tex Mex, UP/SP, and HB&T will reach mutually acceptable agreements making further action on our part unnecessary, and we offer the following additional guidance respecting the Tex Mex trackage rights awarded in Decision No. 44.

(1) We granted Tex Mex trackage rights over the SP route and over the East Belt route for the reasons mentioned by Tex Mex: (a) to allow Tex Mex effective connections to HB&T, to PTRA, and to various yards; and (b) to provide an alternative route through Houston in the event of congestion. Tex Mex has the right to insist that any realignment of its Houston routes provide both effective connections and an alternative route.

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[25] We note that, because UP/SP has elected the UP main line option, the specific trackage rights awarded in Decision No. 44 no longer include the SP main line option.

(2) We are not persuaded by the argument that there cannot possibly be any justification for providing Tex Mex two routes through Houston as opposed to only one. The congestion that exists in the Houston terminal area, congestion that is not always shared equally by each of the available routes, provides ample justification for a bypass route.

(3) We can see the benefits of both sides of the argument whether Tex Mex should be allowed to pick and choose among its routes on a train-by-train basis. On the one hand, we agree that Tex Mex's choice of routes should not be on a purely random basis because an entirely arbitrary approach would provide no benefits to Tex Mex and could have an adverse impact on UP/SP's (and/or HB&T's) ability to develop a consistent transportation plan and to do capacity planning. On the other hand, congestion problems or traffic mixes may effectively require Tex Mex to pick and choose among its routes on a train-by-train basis. Moreover, actual experience may demonstrate that, as a practical matter, "pick and choose" presents no real problem at all.

(4) We are not persuaded by UP/SP's arguments respecting the SP route. UP/SP is contending, in essence, that the SP route is already congested and that it would prefer to keep that route for itself alone. Neither contention provides any justification for keeping Tex Mex's trains off the SP route.

(5) We readily concede, however, that we are troubled by the arguments that have been presented respecting the East Belt route. Tex Mex's only specific argument for insisting upon the East Belt route is that this route provides better access (better from the operational and economic perspectives) to PTRA's North Yard. This argument, while valid, must be weighed against UP/SP's arguments respecting the problems that will be created by Tex Mex's use of the East Belt route. Tex Mex, as previously noted, has a right to insist upon an "effective" connection to PTRA, but this right must be harmonized with the rights of other carriers to conduct "effective" operations in the Houston terminal area. We will not allow Tex Mex to remain on the East Belt route if its operations on that route impose burdens upon UP/SP and HB&T out of proportion to the remedial benefits (to the public) of our partial grant of the Tex Mex applications.

(6) With respect to Settegast Yard, UP/SP claims that it will be virtually impossible to maintain efficient yard operations if Tex Mex is allowed to move trains through the yard, and UP/SP therefore contends that, if Tex Mex insists on using the East Belt route, Tex Mex must be required to pay for the construction of a bypass track. We are leaving the question open as to whether Tex Mex should be required to pay for a bypass, because we do not have a sufficient evidentiary record upon which to render judgment. We note, in this connection, that UP/SP has acknowledged that, on occasion, it has run through trains of its own through Settegast Yard, though UP/SP has added that it has done so only "very rarely," see UP/SP-272, V.S. King at 6. What "very rarely" means in this context is not clear. If, by way of illustration, running a train through Settegast Yard causes the major disruption claimed by UP/SP, and if Tex Mex has three such trains per day whereas UP has only one such train per year, a requirement that Tex Mex pay for a bypass might well be justified. If, however, Tex Mex has three such trains per day and UP has two such trains per day, the situation would be entirely different. And, in any event, the parties should first

consider the possible availability of the previously referenced Gulf Coast Junction-Settegast Junction bypass route.[26]

(7) With respect to North Yard, we are troubled by UP/SP's claims that the operation envisioned by Tex Mex: (a) is inconsistent with the operations of all other Houston railroads; and (b) will cause major disruptions on the East Belt route. The mere fact of inconsistency is not, in and of itself, a problem; the disruption is the problem. The inconsistency is relevant, however, if, as UP/SP claims, the reason that other railroads do not conduct such operations is because they have recognized that such operations will inevitably produce major disruptions.

(8) We emphasize that the guidance we have provided in the preceding seven paragraphs does not in any way invalidate the clarification entered earlier in this decision; that is, unless and until the parties mutually agree otherwise (or unless and until Decision No. 44 is changed on administrative reconsideration or judicial review, or in the exercise of our continuing jurisdiction), UP/SP and HB&T must allow Tex Mex to implement the specific trackage rights awarded in Decision No. 44.

(9) We encourage UP/SP, HB&T, and Tex Mex to make every effort to resolve in mutually beneficial negotiations all disputed matters respecting the Houston terminal area routes open to Tex Mex. These matters can best be resolved by reasonable negotiators who are familiar with the details of daily rail operations in Houston. And, as we noted in Decision No. 44, we encourage all concerned to submit to arbitration any matters that cannot be resolved by negotiation. See Decision No. 44, slip op. at 156.

THE LAREDO-ROBSTOWN-CORPUS CHRISTI RESTRICTION. The Sub-Nos. 13 and 14 trackage rights granted to Tex Mex in Decision No. 44 are subject to one restriction: that all freight handled by Tex Mex pursuant to such trackage rights must have a prior or subsequent movement on Tex Mex's Laredo-Robstown-Corpus Christi line. See Decision No. 44, slip op. at 147-51. UP/SP, attempting to reconstruct our partial grant of Tex Mex's applications, has proposed that Tex Mex's trackage rights be limited to freight "that moves over Tex Mex's Laredo-Robstown-Corpus Christi Line to/from (i) Laredo or (ii) points on Tex Mex's Laredo-Robstown-Corpus Christi Line not currently served by MP or SP." UP/SP-272 at 8. The limitation proposed by UP/SP would effectively prevent Tex Mex from using its trackage rights to handle freight moving from/to shippers or port facilities in Corpus Christi.[27]

Our Analysis. We again reject UP/SP's "petition for reconsideration" approach (premised, this time, upon an

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[26] Tex Mex has argued, and as respects Tex Mex's through trains we agree, that UP/SP must make Settegast Yard available to Tex Mex on the same terms and conditions that govern its availability to UP/SP. The problem with this approach, however, is that, if Settegast Yard is not available to UP/SP's through trains, it will not be available to Tex Mex's through trains either.

[27] BNSF, taking a position much akin to UP/SP's, contends that we could not have intended to award Tex Mex trackage rights that would allow Tex Mex to carry freight between Houston/Beaumont and the Port of Corpus Christi. BN/SF-64 at 6-8.

allegation of material error) to our directive that the parties, if unable to reach agreement with respect to the precise details of the trackage rights awarded to Tex Mex, should submit separate proposals respecting such precise details. See Decision No. 44, slip op. at 150. We adhere to our rationale for granting Tex Mex the trackage rights sought in its Sub-Nos. 13 and 14 applications, subject only to the restriction respecting traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. See Decision No. 44, slip op. at 147-51. We therefore reject the more restrictive limitation proposed by UP/SP, and we direct UP/SP to accept the formulation proposed by Tex Mex, see TM-41 at 11 ("provided that all freight handled by Tex Mex pursuant to such rights must have a prior or subsequent movement on Tex Mex's Laredo-Robstown-Corpus Christi line").

LOCAL SHIPPERS. In its applications filed in the Sub-Nos. 13 and 14 dockets, Tex Mex clearly indicated that the trackage rights it sought were intended to allow Tex Mex both to transport overhead traffic and to serve all local shippers currently capable of receiving service from both UP and SP, directly or through reciprocal switching. See Decision No. 44, slip op. at 32. In granting Tex Mex the trackage rights it sought (subject only to the restriction respecting traffic having a prior or subsequent movement on Tex Mex's own line), we did not explicitly state that Tex Mex would be allowed to serve 2-to-1 shippers at points on the trackage rights lines; but we did indicate that the only restriction we were imposing on the trackage rights sought by Tex Mex was the prior/subsequent restriction. See Decision No. 44, slip op. at 147-51.

UP/SP has proposed that Tex Mex's trackage rights over UP/SP be overhead rights only, without the ability to switch or serve any shippers on the UP/SP lines. UP/SP concedes that Tex Mex sought local shipper access in its Sub-No. 13 responsive application, but UP/SP notes that it vigorously opposed such access and that we gave Tex Mex only a "partial grant" of its responsive application without explicitly addressing this issue. UP/SP contends: that all 2-to-1 shippers at points on the Tex Mex trackage rights lines will be served by both BNSF and UP/SP;[28] that access by Tex Mex to such shippers would be unjustified, in that such access would interject a third carrier where there have previously been only two; and that such access would also create operational headaches (e.g., requiring switching by or to three carriers rather than two) and dilute the traffic available to BNSF and UP/SP, thereby degrading the level of service that can be provided to these shippers.[29]

Our Analysis. We adhere to our rationale for granting Tex Mex the trackage rights sought in its Sub-Nos. 13 and 14 applications, subject only to the restriction respecting traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. See Decision No. 44, slip op. at 147-51. Our "partial grant" was made "partial" only by the prior/subsequent restriction; aside from that restriction, we intended to grant Tex Mex all of the trackage rights it had sought, including access to 2-to-1 shippers. UP/SP's analysis

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[28] UP/SP indicates that the 2-to-1 points on the Tex Mex trackage rights lines are Sinton, Victoria, Sugar Land, and Amelia.

[29] BNSF, taking a position much akin to UP/SP's, contends that there is no rational basis for awarding Tex Mex access to the 2-to-1 points between Corpus Christi and Beaumont. BN/SF-64 at 3-6.

overlooks that we granted Tex Mex its trackage rights *both* to preserve a competitive routing at Laredo *and* to preserve the essential services now provided by Tex Mex. See Decision No. 44, slip op. at 148. The operational and traffic dilution problems mentioned by UP/SP are not frivolous, but these problems must be balanced against our purposes in granting Tex Mex its trackage rights; and the balance, in our judgment, weighs in favor of allowing Tex Mex access to the 2-to-1 shippers. We therefore direct UP/SP to accept the formulation proposed by Tex Mex, see TM-41 at 12 ("User shall have the right to serve all shippers currently capable of receiving service from both MP and SP, directly or through reciprocal switch"). We think it appropriate to add, however, that in adopting this formulation we have in mind that Tex Mex will have access only to "2-to-1" shippers, by which we mean shippers that prior to the merger had access to UP and to SP and to no other railroad.[30]

COMPENSATION. We indicated in Decision No. 44 that, if we were required to prescribe compensation terms with respect to the Sub-No. 13 trackage rights, we would look to the terms and conditions in the BNSF agreement as well as to the principles announced in St. Louis Southwestern Ry. Co. Compensation--Trackage Rights, 1 I.C.C.2d 776 (1984), 4 I.C.C.2d 668 (1988), 5 I.C.C.2d 525 (1989), 8 I.C.C.2d 80 (1991), and 8 I.C.C.2d 213 (1991), aff'd without opinion, 978 F.2d 745 (D.C. Cir. 1992), cert. denied, 508 U.S. 951 (1993) (the SSW Compensation cases). See Decision No. 44, slip op. at 150. We further indicated in Decision No. 44 that, if we were required to prescribe compensation terms with respect to the Sub-No. 14 trackage rights, we would apply the principles for compensation in condemnation proceedings as required by 49 U.S.C. 11103(a) (third sentence). See Decision No. 44, slip op. at 150-51.

UP/SP's Approach: Sub-No. 13. UP/SP has proposed that Tex Mex compensate UP/SP for use of its Sub-No. 13 trackage rights at a flat rate of 3.84 mills per gross ton-mile (GTM) for all equipment. This rate, UP/SP insists, is consistent with the SSW Compensation approach. Indeed, UP/SP adds, its 3.84 mills proposal is quite generous because (so UP/SP claims) we indicated in Decision No. 44 that a rate of 3.84 mills per GTM was the absolute minimum that the SSW Compensation capitalized earnings method would yield. See Decision No. 44, slip op. at 141-42. UP/SP contends that 3.84 mills is actually a good deal below the absolute minimum, both because the 3.84 mills calculation was based solely on the less expensive SP properties rather than on a mix of SP and UP properties such as Tex Mex will operate over and also because that calculation relied on historical Uniform Railroad Costing System (URCS) costs that understate the actual maintenance expenses UP/SP will incur on the SP lines.

UP/SP acknowledges that a rate of 3.84 mills per GTM is higher than the rates provided for in the BNSF agreement (3.0 mills per GTM for unit trains; 3.1 mills per GTM for other traffic). UP/SP contends, however, that the rates provided for in the BNSF agreement are not the rates that we would have imposed under SSW Compensation. See Decision No. 44, slip op. at

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[30] As UP/SP notes, the formulation proposed by Tex Mex might be interpreted as allowing Tex Mex access to shippers currently open to three carriers (UP, SP, and a third carrier). We wish to clarify that, except for shippers located on HB&T and PTRA (to which Tex Mex will have access via HB&T and PTRA, respectively), the only shippers on the trackage rights lines open to Tex Mex will be 2-to-1 shippers. See UP/SP-272 at 12 n.16.

140 (we indicated that the rates provided for in the BNSF agreement were lower than the rates we would have set under SSW Compensation). UP/SP notes that there were compelling reasons why it voluntarily agreed with BNSF on compensation at a lower level than it would have agreed to outside the context of this particular contract with BNSF and lower than the level that we would have prescribed under SSW Compensation. UP/SP argues that this is so because the BNSF agreement was not merely a one-way grant of rights to BNSF, but involved an exchange of rights beneficial to both parties.

UP/SP insists that the compensation paid by Tex Mex and BNSF need not be the same in order to fulfill the purpose of the grant to Tex Mex. The 3.84 mills rate, UP/SP maintains, is only marginally higher than the rate that BNSF will pay, and will allow Tex Mex to retain enough traffic to/from Laredo to remain an effective competitor there, given Tex Mex's new ability to connect with KCS at Beaumont and with HB&T and PTRA in Houston (and given also that BNSF and Tex Mex will interchange substantial volumes of traffic for movement via Laredo).

Tex Mex's Approach: Sub-No. 13. Tex Mex has proposed that we apply to its Sub-No. 13 trackage rights the rates provided for in the BNSF agreement: 3.0 mills per GTM for unit-train traffic and 3.1 mills per GTM for intermodal and carload traffic with annual adjustments based on 70% of the changes in the unadjusted Rail Cost Adjustment Factor (RCAF).

The SSW Compensation principles, Tex Mex insists, require the imposition of compensation terms that approximate fair market value, and Tex Mex claims that there can be no better evidence of fair market value than the compensation for very similar trackage rights that was recently negotiated at arm's-length by railroads of equal bargaining power in the BNSF agreement. Tex Mex suggests that the fact that a capitalized earnings methodology might produce a rate of 3.84 mills should not be a decisive consideration. The capitalized earnihgs method, Tex Mex argues, is merely one type of evidence of fair market value that can be used in the absence of any better evidence.

Tex Mex adds that the rates provided for in the BNSF agreement may in fact be greater than the rates the market would set for the Tex Mex trackage rights. The BNSF trackage rights, Tex Mex notes, include the right to serve all new facilities, including transload facilities, that are located hereafter at any points on the lines over which BNSF will operate. The Tex Mex route from Robstown to Houston and Beaumont, Tex Mex adds, is substantially more circuitous than BNSF's route between those points. And Tex Mex also adds that, according to UP/SP's own evidence, the Tex Mex route is substantially inferior to the BNSF route in terms of track condition and signalling. Tex Mex therefore concludes that a rate of 3.1 and 3.0 mills for the rights obtained by Tex Mex is more than reasonable from UP/SP's standpoint.

Tex Mex further contends that it would be competitively disadvantaged vis-à-vis BNSF if its trackage rights payments were significantly higher than BNSF's. And, Tex Mex adds, given the extremely thin margin projected for Tex Mex's income with its restricted trackage rights, there is some question whether Tex Mex could in fact cover its expenses at the higher fee.

UP/SP's Approach: Sub-No. 14. UP/SP, speaking on behalf of HB&T, indicates that there has not been sufficient time to perform an appraisal of the underlying value of HB&T's property, as would be required by the 49 U.S.C. 11103(a) condemnation

approach. UP/SP therefore suggests that, once we have determined the route to be used by Tex Mex in Houston, we establish a schedule to receive evidence on the reconstruction cost new less depreciation value of the pertinent assets, which, according to UP/SP, is the key variable that drives the level of compensation under condemnation principles. UP/SP suggests 30 days for initial evidentiary submissions and an additional 30 days for replies. Anticipating that Tex Mex's trackage rights operations will commence prior to our resolution of the Sub-No. 14 compensation terms, UP/SP suggests that HB&T should receive interest on arrearages at the railroad cost of capital.[31]

Tex Mex's Approach: Sub-No. 14. Tex Mex has proposed that we apply to its Sub-No. 14 trackage rights the 3.0/3.1 mills rates provided for in the BNSF agreement. The principles for compensation terms in condemnation proceedings, Tex Mex maintains, require that compensation should be set at the level to which two parties, negotiating at arm's-length, would agree, putting the owner in a position as good as, but no better than, the position it was in before the condemnation. Here, Tex Mex notes, the two co-owners of HB&T (UP/SP and BNSF) have submitted, in rates provided for in the BNSF agreement, the best evidence of the proper level of compensation for the Sub-No. 14 trackage rights.[32]

Our Analysis. As explained below, we will impose a flat rate of 3.84 mills per GTM for all equipment as trackage rights compensation to be paid by Tex Mex to UP/SP (in Sub-No. 13) and to HB&T (in Sub-No. 14), with annual adjustments based on 70% of the unadjusted RCAF.

In Sub-No. 13, Tex Mex has argued that principles in the SSW Compensation cases would lead to our imposition of the compensation terms agreed to by UP/SP and BNSF, because these best approximate the fair market value of trackage rights over UP/SP's track. This is incorrect. UP/SP has explained that the compensation terms agreed to with BNSF, which we have found to be lower than what we would impose under SSW Compensation, were a component of a far broader arrangement through which UP/SP received other rights in return.[33] While these other rights

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[31] HB&T adds that the 3.0/3.1 mills rates provided for in the BNSF agreement should not be applied to the Sub-No. 14 trackage rights. Those rates are inappropriate, HB&T insists, because whereas UP/SP's lines are for the most part rural mainlines, HB&T's lines are in the nature of a costly urban interlocking plant. See HB&T-1 at 1 n.1.

[32] As respects future adjustments, Tex Mex has apparently either proposed or indicated that it would accept either: quarterly adjustments reflecting changes in the RCAF, adjusted for changes in productivity, see TM-40 at 6; or annual adjustments reflecting changes in the RCAF, adjusted for changes in productivity, see TM-40, Draft Trackage Rights Agreement at iv-v; or annual adjustments reflecting changes in UP/SP's system average URCS costs for the categories of maintenance and operating costs covered by the trackage rights fees, see TM-40 at 6.

[33] Among the benefits UP/SP received from BNSF as components of this arrangement were: (1) trackage rights between Chemult and Bend; (2) trackage rights between Mojave and Barstow; (3) a proportional rate agreement for traffic moving over the Portland gateway; (4) improved access to the ports of Seattle, (continued...)

were not necessary to satisfy our concerns over merger-related competitive harm, they are generally procompetitive and confer significant value to UP/SP. In contrast, no ancillary rights to UP/SP are included in the Tex Mex trackage rights we imposed in Decision No. 44.

We have already found the compensation terms proposed by UP/SP (in Sub-No. 13), a flat rate of 3.84 mills per GTM for all equipment, to be no higher than the compensation terms we would impose under our favored SSW Compensation standard, the capitalized earnings method. See Decision No. 44, slip op. at 141-42. We will impose this as the compensation amount here, with annual adjustments based on 70% of the unadjusted RCAF. This annual adjustment has been agreed to by UP/SP and BNSF, and Tex Mex has stated its willingness to be bound by this adjustment as well.

In Sub-No. 14, we believe that the principles of SSW Compensation would also satisfy the principles for compensation in condemnation proceedings. The capitalized earnings method, however, does not appear to lend itself directly to a determination of fair market value of terminal trackage rights over a belt railroad such as HB&T. UP/SP has suggested that an alternative, fallback SSW Compensation method, reconstruction cost new less depreciation, should be used. While this might be appropriate if HB&T were, like KCS at Beaumont and Shreveport, a true "innocent third party" upon which we had imposed terminal trackage rights,[34] that is not the case here. HB&T's two owners are UP/SP and BNSF, and it is being represented here by UP/SP. Further, HB&T did not choose to contest Tex Mex's Sub-No. 14 application during the pendency of the UP/SP proceeding, and we note that the Sub-No. 14 trackage rights represent only about 5% of the total trackage rights (by mileage) we have granted to Tex Mex. In these circumstances we will impose the same compensation terms and annual adjustments in the Sub-No. 14 proceeding that we have imposed above in the Sub-No. 13 proceeding.

We do not share Tex Mex's concern that it will not be an effective competitor at the fee we are imposing here. As we explained in Decision No. 44:

> The "below the wheel" variable costs included in the trackage rights fees relate only to the expense of ownership and maintenance of running track and structures. These costs account, on average, for only about 17% of the total variable costs of western railroads.

Decision No. 44, slip op. at 144 n.174. Moreover, we expect that shipments using the Tex Mex trackage rights will move a considerable portion of their total distance on Tex Mex itself and/or on KCS, its connection at Beaumont. The trackage rights compensation terms applicable to the Sub-Nos. 13 and 14 trackage rights will not be relevant for those portions of the movements.

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[33](...continued)
Portland, and Superior; and (5) new connections between UP/SP and BNSF in Illinois to permit more efficient access to UP/SP's facilities in Chicago. See Decision No. 44, slip op. at 17, and UP/SP-272 at 16.

[34] See Decision No. 44, slip op. at 167-70.

Thus, the compensation terms we are imposing here should permit Tex Mex to remedy any potential merger-related competitive harm at Laredo, as we intended when we granted its Sub-Nos. 13 and 14 applications.

ADDITIONAL TRACKAGE AND RELATED FACILITIES. Tex Mex and UP/SP have agreed that Tex Mex may be required by UP/SP to construct additional trackage if such trackage is necessary to implement the Sub-No. 13 trackage rights; and Tex Mex and UP/SP have further agreed that, at least initially, the cost and expense of such construction shall be borne solely by Tex Mex. See UP/SP-271, Attachment A, Sections 2(c) and 2(d). Tex Mex and UP/SP have also agreed that Tex Mex may be required by UP/SP to pay for the construction of additional connections and sidings or siding extensions if such facilities are necessary to implement the Sub-No. 13 trackage rights; and Tex Mex and UP/SP have further agreed that, at least initially, the cost and expense of such payment shall be borne solely by Tex Mex. See UP/SP-271, Attachment A, Section 5(a). Tex Mex and UP/SP, however, have not agreed on all aspects of the dispute resolution mechanism that will come into play in those instances in which Tex Mex disputes UP/SP's necessity determination.

UP/SP's Approach. UP/SP has proposed language to the effect that UP/SP may require Tex Mex to construct additional trackage or to pay for the cost of construction of additional facilities if, in either instance, such construction is necessary "in the reasonable judgment" of UP/SP. See UP/SP-271, Attachment A, Sections 2(c), 2(d), and 5(a). UP/SP adds, however, that it understands that any dispute that might arise as to whether UP/SP had correctly determined that such construction was necessary would be arbitrable under Section 6 of the General Conditions set out in Exhibit B. See UP/SP-271, Attachment A, Exhibit B, Section 6. In essence, UP/SP would prefer to construct first and to arbitrate any disputes later; and UP/SP acknowledges that, if its judgment respecting construction is later determined by an arbitrator to have been incorrect, the arbitrator could require UP/SP to bear the costs of the construction. The approach favored by Tex Mex, UP/SP insists, would allow Tex Mex to delay (pending arbitration) construction that was, in UP/SP's judgment, necessary to allow Tex Mex to operate over UP/SP's lines without causing undue interference to existing operations.

Tex Mex's Approach. Tex Mex has proposed language to the effect that, in any instance, if Tex Mex and UP/SP do not agree that construction is necessary, the dispute shall be submitted to binding arbitration in accordance with Section 6 of the General Conditions, and no such construction shall occur until it is either agreed to by the parties or determined by an arbitrator to be necessary. See UP/SP-271, Attachment A, Sections 2(c), 2(d), and 5(a). Tex Mex's approach differs from UP/SP's in two respects.

First, Tex Mex objects to the formulation that such construction be necessary "in the reasonable judgment" of UP/SP. This formulation, of course, is not objectionable in and of itself, but only in connection with the arbitration proceeding that will occur if Tex Mex disputes UP/SP's necessity determination. Tex Mex insists that, if the matter goes to arbitration, the arbitrator should be asked to decide whether the construction is necessary, not whether UP/SP's determination of necessity was or was not reasonable. The "reasonable judgment" standard, Tex Mex suggests, is inappropriate because it gives the benefit of any doubt to UP/SP.

Second, Tex Mex contends that, if there is a disagreement about a particular project, construction should not go forward until the issue of its necessity has been determined by arbitration. Construction of new connections and lines, Tex Mex claims, could seriously disrupt Tex Mex's operations while construction is underway, and Tex Mex fears that UP/SP could use the power to institute unnecessary projects to harm Tex Mex competitively.

Our Analysis. We find some merit in both of the dispute resolution mechanisms proposed by UP/SP and Tex Mex. The "construct first and arbitrate later" approach favored by UP/SP, on the one hand, would facilitate UP/SP's operations by allowing for immediate construction of additional trackage or facilities made necessary by Tex Mex's Sub-No. 13 operations. The "arbitrate first and construct later" approach favored by Tex Mex, on the other hand, would protect Tex Mex's operations from the disruption caused by construction of trackage or facilities that were not really required by Tex Mex's Sub-No. 13 operations.

We also find some problems with each of these dispute resolution mechanisms. The "construct first and arbitrate later" approach favored by UP/SP, on the one hand, could cause a needless disruption of ongoing Tex Mex operations, if in fact the additional trackage or facilities were not really required by Tex Mex's Sub-No. 13 operations. The "arbitrate first and construct later" approach favored by Tex Mex, on the other hand, might result in the delay of construction that really was required by Tex Mex's Sub-No. 13 operations.

On balance, we believe that the "construct first and arbitrate later" approach favored by UP/SP is the better of the two approaches, and we therefore direct the parties to adopt it.

But we also think that Tex Mex's objection to the "reasonable judgment" formulation is valid. If in any particular instance Tex Mex disputes UP/SP's necessity determination, the arbitrator should be asked to decide whether the construction was necessary, not whether UP/SP's determination of necessity was or was not reasonable; and UP/SP's determination of necessity should not create any sort of presumption that the construction was in fact necessary. Because the "construct first and arbitrate later" language heretofore proposed by UP/SP does not reflect these views, we direct the parties to incorporate language that does.

LABOR PROTECTION. The Sub-No. 13 trackage rights are subject to the labor protective conditions set out in Norfolk and Western Ry. Co.--Trackage Rights--BN, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Ry., Inc.--Lease and Operate, 360 I.C.C. 653, 664 (1980) (Norfolk and Western). See Decision No. 44, slip op. at 172 n.220 and at 237 (ordering paragraph 60).[35]

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[35] See also Decision No. 44, slip op. at 228 (first full paragraph), which provides a correct but incomplete description of the labor protection imposed in the Sub-No. 13 docket. We noted there that "any rail employees of Tex Mex" affected by the Sub-No. 13 trackage rights would be protected by the Norfolk and Western conditions, and this is correct; but we neglected to note that any rail employees of either UP or SP affected by the Sub-No. 13 trackage rights would likewise be protected by the Norfolk and Western conditions. We think it appropriate to add,

(continued...)

UP/SP has proposed that Tex Mex be required to reimburse UP/SP for any labor protection payment UP/SP may become obligated to make as a result of Tex Mex's exercise of the Sub-No. 13 trackage rights. Any such labor protection payment, UP/SP contends, should be regarded as an out-of-pocket cost occasioned by Tex Mex's operations.

Our Analysis. We find that UP/SP should be responsible for its own labor protection obligations, and we therefore reject its proposal that Tex Mex be required to cover UP/SP's labor protection payments. UP/SP may be correct that reimbursement provisions are standard in free-market trackage rights agreements; but those agreements are negotiated on a voluntary basis, and cost-shifting is no doubt one item among many that are subject to the give-and-take of negotiations. We view with skepticism UP/SP's assertion, see UP/SP-272 at 18, that reimbursement provisions are also standard in agreements governing the terms of rights imposed by this agency (or its predecessor) in merger cases. The one relevant reimbursement provision cited by UP/SP, see UP/SP-272 at 18 n.23, does indeed involve rights imposed by the ICC; but such rights, much like the BNSF rights imposed in Decision No. 44, were in fact negotiated on a voluntary basis.

DISPATCHING PROTOCOLS. Tex Mex and UP/SP have agreed that Tex Mex and UP/SP trains operating on "joint trackage" are to be given equal dispatch without any discrimination in promptness, quality of service, or efficiency. See UP/SP-271, Attachment A, Attachment 1, Protocol No. 2. Tex Mex and UP/SP have also agreed to set up a Joint Service Committee, which shall be responsible for establishing rules and standards as appropriate to ensure equitable and non-discriminatory treatment, appropriate maintenance, and efficient joint use of the joint trackage. See UP/SP-271, Attachment A, Exhibit B, Section 2.5. Tex Mex and UP/SP have even agreed that appropriate Tex Mex officials will be admitted "at any time to dispatching facilities and personnel responsible for dispatching the Joint Trackage to review the handling of trains on the Joint Trackage." See UP/SP-271, Attachment A, Attachment 1, Protocol No. 10.

Tex Mex insists, however, that UP/SP should also be required *both* to provide Tex Mex with an office in UP/SP's Harriman Dispatching Center *and* to pay Tex Mex "an amount equal to the reasonable and conventional salary of one supervisory employee to be placed by Tex Mex" at UP/SP's Harriman Dispatching Center. See UP/SP-271, Attachment A, Attachment 1, Protocol No. 10. See also TM-41 at 19-20. Tex Mex notes, in support of its proposal, that UP/SP has agreed to a similar arrangement with BNSF.

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[35] (...continued)
however, that, although Norfolk and Western protection is available to UP/SP employees affected by the Sub-No. 13 trackage rights, that protection has little practical significance. The UP/SP merger authorization itself is subject to the labor protective conditions set out in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock). All rail employees of either UP or SP affected by the Sub-No. 13 trackage rights will also be covered by the New York Dock conditions imposed on the merger. As noted in Decision No. 44, the benefits provided by the Norfolk and Western conditions are identical to the benefits provided by the New York Dock conditions; the two sets of conditions differ only in matters of procedure. See Decision No. 44, slip op. at 172.

Our Analysis. We reject Tex Mex's office/salary proposal. BNSF will be operating, on any given day, dozens of trains on over 6,000 miles of UP/SP lines (this includes both BNSF's existing trackage rights on UP and SP as well as those provided for in the BNSF agreement). In this setting, and in the interest of a settlement, UP/SP agreed to an office/salary arrangement that will allow a BNSF employee to be present at UP/SP's Harriman Dispatching Center to monitor the dispatching of BNSF trains. Tex Mex, however, is likely to operate, on UP/SP lines, only a few trains per day, and these will be operated over only a few hundred miles of lines in a geographically confined area. Tex Mex should have no difficulty monitoring performance of these trains and, if necessary, auditing UP/SP's dispatching of them,[36] without the need for a Tex Mex employee to be permanently stationed at the Harriman Dispatching Center at UP/SP's expense.

SUB-NO. 14 TERMS. Aside from the disputes (discussed above) respecting routes and compensation, Tex Mex and HB&T apparently have not really engaged in any meaningful discussions respecting the terms of the Sub-No. 14 trackage rights. Compare TM-40 at 7-8 with HB&T-1 at 2. Tex Mex, however, has now submitted a complete Draft Trackage Rights Agreement (attached to TM-40) and has asked us to adopt it. HB&T, which has not submitted a draft of its own, claims that it first saw the Tex Mex draft as an attachment to TM-40; and HB&T asks that we require that the Sub-No. 14 trackage rights be governed by whatever general provisions are to govern the Sub-No. 13 trackage rights, subject to the right of the parties to agree to further adaptations. Under these circumstances, we believe that both parties have been acting in good faith, and that the Sub-No. 14 negotiations have been put into a holding pattern behind the Sub-No. 13 negotiations. Accordingly, we think it best simply to direct Tex Mex and HB&T to enter into meaningful negotiations respecting the Sub-No. 14 trackage rights.

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

It is ordered:

1. Except insofar as they mutually agree otherwise, Tex Mex and UP/SP shall enter into a trackage rights agreement respecting the Sub-No. 13 trackage rights consistent with our discussion set forth in this decision.

2. Even if certain details respecting the Sub-No. 13 trackage rights are not resolved prior to September 11, 1996, the Sub-No. 13 trackage rights will nevertheless become effective on that date.

3. Except insofar as they mutually agree otherwise, Tex Mex and HB&T shall enter into a trackage rights agreement respecting the Sub-No. 14 trackage rights consistent with our discussion set forth in this decision.

4. Even if certain details respecting the Sub-No. 14 trackage rights are not resolved prior to September 11, 1996, the Sub-No. 14 trackage rights will nevertheless become effective on that date.

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[36] UP/SP indicates that computerized records of UP/SP's dispatching are capable of being retrieved in the event of a dispute over a particular dispatching episode. See UP/SP-272 at 21 n.25.

5. Unless and until the parties mutually agree otherwise (or unless and until Decision No. 44 is changed on administrative reconsideration or judicial review, or in the exercise of our continuing jurisdiction), UP/SP and HB&T must allow Tex Mex to implement the specific trackage rights awarded in Decision No. 44.

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

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams

Vernon A. Williams
Secretary

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SEP 10 1996

SURFACE TRANSPORTATION BOARD[1]

CERTIFICATE AND DECISION

Docket No. AB-8 (Sub-No. 39)

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY--
DISCONTINUANCE--MALTA-CANON CITY LINE IN LAKE,
CHAFFEE, AND FREMONT COUNTIES, CO

Docket No. AB-12 (Sub-No. 188)[2]

SOUTHERN PACIFIC TRANSPORTATION COMPANY--ABANDONMENT--
MALTA-CANON CITY LINE IN LAKE,
CHAFFEE, AND FREMONT COUNTIES, CO

[Decision No. 48]

Decided: September 4, 1996

In Decision No. 44 (Finance Docket No. 32760), served on August 12, 1996, and Federal Register notice (61 FR 41828) published on August 12, 1996, the Board authorized the Southern Pacific Transportation Company (SP) and The Denver and Rio Grande Western Railroad Company to discontinue operations on a line of railroad extending from milepost 271.0, near Malta, to milepost 162.0, near Cañon City, a distance of 109 miles in Lake, Chaffee, and Fremont Counties, CO. SP's request to abandon the line was denied.

The August 12 decision provided for the filing of offers of financial assistance by August 22, 1996, to allow rail service to continue. Because there were no offers of financial assistance, an appropriate certificate and decision must be entered.

It is certified: The present and future public convenience and necessity permit the discontinuance of service over the described line of railroad, subject to (a) the employee protective conditions in Oregon Short Line R. Co. - Abandonment - Goshen, 360 I.C.C. 91 (1979); and (b) the 14 general mitigation conditions specified in Appendix G of the August 12 decision.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to former 49 U.S.C. 10903. Therefore, this decision applies the law in effect prior to the ICCTA.

[2] These proceedings are embraced in Finance Docket No. 32760, 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.

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SURFACE TRANSPORTATION BOARD[1]

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB-3 (Sub-No. 130)

MISSOURI PACIFIC RAILROAD COMPANY--ABANDONMENT--
TOWNER-NA JUNCTION LINE IN KIOWA, CROWLEY AND
PUEBLO COUNTIES, CO

Docket No. AB-8 (Sub-No. 38)[2]

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY--
DISCONTINUANCE OF TRACKAGE RIGHTS--
TOWNER-NA JUNCTION LINE IN KIOWA, CROWLEY AND
PUEBLO COUNTIES, CO

[Decision No. 49]

Decided: September 4, 1996

In Decision No. 44 (Finance Docket No. 32760), served on August 12, 1996, and Federal Register notice (61 FR 41823) published on August 12, 1996, the Board authorized Missouri Pacific Railroad Company (MPRR) to abandon, and The Denver and Rio Grande Western Railroad Company to discontinue its overhead trackage rights over, MPRR's Towner-NA Junction Line, which extends between MP 869.4, near NA (North Avondale) Junction, CO, and MP 747.0, near Towner, CO, a distance of approximately 122.4 miles in Pueblo, Crowley, and Kiowa Counties, CO.

The August 12 decision provided for the filing of offers of financial assistance by August 22, 1996, to allow rail service to continue. It also stated that statements under the National Trails System Act, 16 U.S.C. 1247(d), respecting the Towner-NA Junction Line were filed by Rails to Trails Conservancy (RTC) and by the State of Colorado, acting by and through its Parks and Recreation Department. For Colorado abandonments, applicants in Finance Docket No. 32760 had stated they were willing to negotiate trail use with the State or any of its designees. They are also willing to negotiate with other parties requesting trail use for Colorado abandonments so long as the State of Colorado is

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to former 49 U.S.C. 10903. Therefore, this decision applies the law in effect prior to the ICCTA.

[2] These proceedings are embraced in Finance Docket No. 32760, 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.

agreeable.[3] MPRR also submitted a letter in this proceeding indicating its willingness to negotiate trail use with the State of Colorado and its designees.

Because there were no offers of financial assistance and applicants are willing to negotiate an interim trail use agreement, an appropriate decision and certificate of interim trail use or abandonment (CITU) will be issued in response to the State of Colorado's request and also in response to RTC's request to the extent MPRR is willing to negotiate with it. The parties may negotiate a trail use agreement during the 180-day period following the effective date of this decision. If the parties reach a mutually acceptable final agreement, further Board approval is not necessary. If no agreement is reached within the 180-day period, MPRR, contingent on the other conditions imposed previously in this proceeding or in this decision, may then fully abandon the line. See 49 CFR 1152.29(c)(1).

It is certified: The present and future public convenience and necessity permit the abandonment and discontinuance of service over the described line of railroad, subject to (a) the employee protective conditions in Oregon Short Line R. Co. - Abandonment - Goshen, 360 I.C.C. 91 (1979); (b) the 14 general and 2 specific mitigation conditions specified in Appendix G of the August 12 decision; and (c) the directives for implementing interim trail use/rail banking set forth below.

It is ordered:

1. Subject to the conditions set forth above, the railroads may consummate abandonment and discontinuance on the line consistent with interim trail use/rail banking after the effective date of this certificate and decision.

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

3. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

4. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this CITU and request that it be vacated on a specified date.

5. If an agreement for interim trail use/rail banking is reached by the 180th day after the effective date of this CITU, interim trail use may be implemented. If no agreement is reached by that time, MPRR may fully abandon the line, provided any conditions imposed have been met.

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[3] Applicants also state that, for non-Colorado lines proposed for abandonment, they are willing to negotiate trail use with any or all of the parties that have made requests.

6. This CITU will be effective 30 days from the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary

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SURFACE TRANSPORTATION BOARD[1]

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB-3 (Sub-No. 131)

MISSOURI PACIFIC RAILROAD COMPANY--ABANDONMENT--
HOPE-BRIDGEPORT LINE IN DICKINSON AND
SALINE COUNTIES, KS

Docket No. AB-8 (Sub-No. 37)[2]

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY--
DISCONTINUANCE OF TRACKAGE RIGHTS--
HOPE-BRIDGEPORT LINE IN DICKINSON AND
SALINE COUNTIES, KS

[Decision No. 50]

Decided: September 4, 1996

In Decision No. 44 (Finance Docket No. 32760), served on August 12, 1996, and Federal Register notice (61 FR 41823) published on August 12, 1996, the Board authorized Missouri Pacific Railroad Company (MPRR) to abandon, and The Denver and Rio Grande Western Railroad Company to discontinue its overhead trackage rights on, a line of railroad extending from milepost 459.20, near Hope, to milepost 491.20, near Bridgeport, a distance of approximately 31.24 miles (milepost 478.05 - milepost 478.81) in Dickinson and Saline Counties, KS.

The August 12 decision provided for the filing of offers of financial assistance by August 22, 1996, to allow rail service to continue. It also stated that statements under the National Trails System Act, 16 U.S.C. 1247(d), respecting the line were filed by Rails to Trails Conservancy (RTC) and by the Serenata Farms Equestrian Therapy Foundation (SFETF). Applicants in Finance Docket No. 32760 state that, for non-Colorado lines proposed for abandonment, they are willing to negotiate trail use with any or all of the parties that have made requests.

Because there were no offers of financial assistance and applicants are willing to negotiate an interim trail use agreement, an appropriate decision and certificate of interim

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to former 49 U.S.C. 10903. Therefore, this decision applies the law in effect prior to the ICCTA.

[2] These proceedings are embraced in Finance Docket No. 32760, 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.

trail use or abandonment (CITU) will be issued in response to the requests of RTC and SFETF. The parties may negotiate a trail use agreement during the 180-day period following the effective date of this decision. If the parties reach a mutually acceptable final agreement, further Board approval is not necessary. If no agreement is reached within the 180-day period, MPRR, contingent on the other conditions imposed previously in this proceeding or in this decision, may then fully abandon the line. See 49 CFR 1152.29(c)(1).

It is certified: The present and future public convenience and necessity permit the abandonment and discontinuance of service over the described line of railroad, subject to (a) the employee protective conditions in Oregon Short Line R. Co. - Abandonment - Goshen, 360 I.C.C. 91 (1979); (b) the 14 general mitigation conditions specified in Appendix G of the August 12 decision; and (c) the directives for implementing interim trail use/rail banking set forth below.

It is ordered:

1. Subject to the conditions set forth above, the railroads may consummate abandonment and discontinuance on the line consistent with interim trail use/rail banking after the effective date of this certificate and decision.

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

3. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

4. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this CITU and request that it be vacated on a specified date.

5. If an agreement for interim trail use/rail banking is reached by the 180th day after the effective date of this CITU, interim trail use may be implemented. If no agreement is reached by that time, the MPRR may fully abandon the described line, provided any conditions imposed have been met.

6. This CITU will be effective 30 days from the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Vernon A. Williams
Secretary

SERVICE LIST FOR: 12-Sep-1996 ICC AB 3 131 MISSOURI PACIFIC RAILROAD COMPANY--A

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This decision will be included in the bound volumes of printed reports at a later date.

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SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

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

[Decision No. 52]

Decided: September 9, 1996

This decision concerns the conditions respecting the City Public Service Board of San Antonio (CPSB) that we imposed in Decision No. 44.

Decision No. 44. In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company)[2] and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company),[3] subject to various conditions. Among other things, we imposed certain conditions respecting CPSB. See Decision No. 44, slip op. at 56-58 (relief requested by CPSB) and at 185-86 (relief granted to CPSB). With respect to the precise details of the CPSB conditions, we directed UP/SP, CPSB, and BNSF[4] to submit, by August 22, 1996, either agreed-upon terms or separate proposals. See Decision No. 44, slip op. at 233 (ordering paragraph 30).[5]

Pleadings Submitted. UP/SP, CPSB, and BNSF have now submitted several pleadings: one by UP/SP and CPSB jointly (designated "UP/SP-273/CPSB-9", but hereinafter referred to for convenience as "UP/SP-273"); one by BNSF separately (designated

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[1] Proceedings pending before the Interstate Commerce Commission (ICC) on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

[2] Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) are referred to collectively as UP.

[3] Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) are referred to collectively as SP.

[4] UP and SP are referred to collectively as UP/SP. Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) are referred to collectively as BNSF.

[5] The submission deadline was subsequently extended to August 30, 1996. See Decision No. 45 (served August 23, 1996) and Decision No. 46 (served August 26, 1996).

BN/SF-63); one by UP/SP separately (designated UP/SP-276); and one by CPSB separately (designated CPSB-11).[6]

DISCUSSION AND CONCLUSIONS

Amendments Related to CPSB Conditions. CPSB's two coal-burning plants at Elmendorf, TX, are served by a single rail line (SP's Elmendorf Line) that runs approximately 12 miles between a UP-SP junction known as "SP Junction (Tower 112)" and Elmendorf. See Decision No. 44, slip op. at 56. In Decision No. 44, we imposed two conditions respecting CPSB's Elmendorf plants. See Decision No. 44, slip op. at 185-86. In Paragraph (i), we indicated that we would hold UP/SP to its representation that the BNSF agreement[7] would be amended to clarify that Elmendorf is a covered point. We noted that Section 4a of the BNSF agreement, as amended by Section 3a of the second supplemental agreement dated June 27, 1996, already provided that BNSF could operate on SP's Elmendorf Line between MP 0 and MP 12.6 for the sole purpose of serving the CPSB plants at Elmendorf;[8] but we further noted that we were unable to ascertain whether BNSF had also received trackage rights over the appropriate UP line between San Antonio and Ajax. In Paragraph (iii), we indicated that we would impose a condition that would have the effect of allowing BNSF to operate over SP's Elmendorf Line, at CPSB's option, pursuant to trackage rights derived from an existing CPSB-SP trackage rights agreement.[9]

Section 4a of the BNSF agreement dated September 25, 1995, as amended by the supplemental agreement dated November 18, 1995, and as further amended by the second supplemental agreement dated June 27, 1996, provides, among other things, that BNSF shall receive trackage rights on UP's line between San Antonio and Ajax.[10] Section 4a of the BNSF agreement dated September 25, 1995, as amended by the second supplemental agreement dated June 27, 1996, further provides that BNSF shall receive trackage rights over SP's Elmendorf Line. Because UP has two lines between San Antonio and Craig Junction (a point west/southwest of

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[6] We will grant: UP/SP's unopposed UP/SP-276 motion for leave to file UP/SP-276; and CPSB's unopposed CPSB-10 motion for leave to file CPSB-11.

[7] The contents of the BNSF agreement are described in Decision No. 44, slip op. at 12 n.15.

[8] MP 0 is located at SP Junction (Tower 112). MP 12.6 is located at Elmendorf.

[9] As a practical matter, the conditions we imposed in Decision No. 44 will allow BNSF to operate via trackage rights over UP/SP lines from connections with BNSF's own lines to CPSB's Elmendorf plants. From the connections with BNSF's own lines to SP Junction (Tower 112), the trackage rights will be those provided for in the BNSF agreement. But, over the Elmendorf Line--i.e., from SP Junction (Tower 112) to CPSB's Elmendorf plants--the trackage rights will be those provided for *both* in the BNSF agreement *and* in the existing CPSB-SP trackage rights agreement. BNSF, that is to say, will be able to operate over the Elmendorf Line using *either* the trackage rights provided for in the BNSF agreement *or* (at CPSB's option) the trackage rights provided for in the CPSB-SP trackage rights agreement.

[10] Ajax appears to be located at or immediately adjacent to San Marcos.

Ajax),[11] and the maps provided by UP/SP suggested *both* that BNSF was to receive trackage rights over only one of these lines[12] *and* that SP Junction (Tower 112) was located on the line over which BNSF would not be receiving trackage rights,[13] we noted in Decision No. 44 that we were unable to ascertain whether BNSF had received trackage rights over the appropriate line between San Antonio and Ajax.

UP/SP and CPSB have now agreed on amendments to the BNSF agreement that, in their opinion, satisfy the CPSB conditions imposed in Decision No. 44. See UP/SP-273, Exhibit A at 1. The amendments include: an amendment to Section 4a to the effect that BNSF will receive trackage rights between Craig Junction and SP Junction (Tower 112) via Track No. 2, as an alternative route, "for the sole purpose" of handling CPSB traffic via SP Junction (Tower 112), but provided that "such rights do not include the right to serve new industries or transloading facilities on this line"; an amendment to Section 4a to the effect that BNSF will receive trackage rights over SP's line between SP Junction (Tower 112) and Elmendorf; various conforming amendments; and an amendment to Section 91 to the effect that BNSF shall also have the right, at CPSB's option, to operate over the Elmendorf Line using the trackage rights provided for in the CPSB-SP trackage rights agreement.

UP/SP and CPSB have also agreed on corresponding amendments to the related "Sealy, Texas to Waco and Eagle Pass, Texas" trackage rights agreement (hereinafter referred to as the Sealy TRA) dated June 1, 1996. See UP/SP-273, Exhibit A at 2.[14]

We accept CPSB's judgment that the amendments agreed to by UP/SP and CPSB (both the amendments to the BNSF agreement and the corresponding amendments to the Sealy TRA) satisfy the CPSB conditions imposed in Decision No. 44.[15]

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[11] We will refer to the two lines as Track No. 1 and Track No. 2. Track No. 1 is the western line; it runs through Adams; it was and is operated by MPRR; and it is sometimes referred to as the MPRR line. Track No. 2 is the eastern line; it runs through Fratt; it is now operated by MPRR but was formerly operated by the Missouri-Kansas-Texas Railroad Company (MKT); and it is sometimes referred to as the MKT line.

[12] The maps suggested that BNSF was to receive trackage rights over Track No. 1 only.

[13] SP Junction (Tower 112) is located on, or immediately adjacent to, Track No. 2.

[14] The Sealy TRA was filed in this proceeding on June 28, 1996, as one of numerous attachments to UP/SP-266.

[15] The Sealy TRA, as initially drafted, did not include the segment of track that runs between: (i) SP Tower 105, which is located in San Antonio adjacent to Track No. 1; and (ii) SP Junction (Tower 112), which is located in San Antonio at the junction of the Elmendorf Line and Track No. 2. See the Sealy TRA, pp. 1-2 (the material following the colon in the final subparagraph of the first "whereas" clause). Without this segment, BNSF could not have provided service to CPSB because Track No. 1 (over which BNSF received trackage rights) does not have a direct connection with the Elmendorf Line. The inadvertent omission of this segment has now been corrected. See UP/SP-273, Exhibit A at 2 (the second amendment).

Certain Restrictions. BNSF concedes, in essence, that the amendments agreed to by UP/SP and CPSB satisfy the CPSB conditions we imposed in Decision No. 44. BNSF notes, however, that the amendments to the BNSF agreement agreed to by UP/SP and CPSB include a restriction to the effect that BNSF, although it can operate over Track No. 2, cannot serve "new industries or transloading facilities" on that line. BNSF insists that this restriction (hereinafter referred to as the Track No. 2 facilities restriction) is inconsistent with the condition we imposed in Decision No. 44 that requires that BNSF be granted the right to serve new facilities (including transload facilities) on all UP/SP lines over which BNSF receives trackage rights in the BNSF agreement. See Decision No. 44, slip op. at 145-46.[16]

BNSF, CPSB, and UP/SP all agree that, for various operational reasons, the Track No. 2 routing (which happens to be the routing currently used by UP) is preferable to the Track No. 1 routing as respects traffic moving to CPSB's Elmendorf facilities. These parties, however, differ in their assessments of just how preferable the Track No. 2 routing really is.

BNSF contends that the Track No. 2 routing is absolutely essential. The Track No. 1 routing, BNSF claims, requires complex switching, multiple railroad clearances, and the backing of trains several miles on mainlines through an urban area of San Antonio. These Track No. 1 operational problems, BNSF adds, prompted UP and CPSB to develop a Track No. 2 routing that would enable UP to deliver unit coal trains to Elmendorf. The Track No. 2 routing, BNSF contends, is the only viable routing to Elmendorf.

CPSB agrees with BNSF's assessment of the relative merits of the Track No. 1 routing vis-à-vis the Track No. 2 routing. See CPSB-11 at 3. UP, CPSB argues, had extensive operating problems in moving CPSB coal trains via the Track No. 1 routing, and, CPSB claims, it was these problems that led UP to develop the Track No. 2 routing (and, CPSB adds, UP developed the Track No. 2 routing with substantial financial assistance from CPSB). The Track No. 2 routing, CPSB notes, is now used by UP to deliver virtually all of CPSB's unit train coal traffic to Elmendorf, although an occasional empty train may still use the Track No. 1 routing.

UP/SP concedes that the Track No. 2 routing is operationally preferable to the Track No. 1 routing as the Track No. 1 routing is presently configured, see UP/SP-276, V.S. Searle at 2-3, but maintains that the Track No. 1 routing is nevertheless a viable routing for Elmendorf traffic. UP/SP notes: that the Track No. 1 routing was in fact used by UP to deliver unit coal trains to Elmendorf from the time UP won the CPSB contract in 1985 until it obtained trackage rights over the Track No. 2 routing (then owned by MKT) in 1987; and that the original terms of the Sealy TRA dated June 1, 1996, anticipated that BNSF would use the Track No. 1 routing to serve Elmendorf.[17] UP/SP adds that, merely as a courtesy to CPSB, it agreed to allow BNSF to

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[16] BNSF indicates that it agrees with all of the other amendments agreed to by UP/SP and CPSB. See BN/SF-63 at 3 n.4.

[17] As noted above, however, the lines included in the original terms of the Sealy TRA did not include the line between Tower 105 and SP Junction (Tower 112) that connects Track No. 1 with the Elmendorf Line.

use the Track No. 2 routing purely for operating convenience, as a second, alternative route to reach CPSB's Elmendorf facilities.

BNSF and UP/SP differ in their views as to the action we should take with respect to the Track No. 2 facilities restriction agreed to by UP/SP and CPSB.[18]

BNSF argues that, because the Track No. 2 facilities restriction is inconsistent with the Decision No. 44 facilities condition, the Track No. 2 facilities restriction must be eliminated. The Track No. 2 routing is (in BNSF's view) the only viable routing, which necessarily means (again, in BNSF's view) that the trackage rights we granted to BNSF must run via the Track No. 2 routing. There is, BNSF insists, no reason why it should not receive (and there is similarly no reason why shippers along the Track No. 2 routing should not benefit from) the right to serve new facilities (including transload facilities) that accompanies all other trackage rights provided for in the BNSF agreement.[19]

UP/SP, which contends that BNSF has been granted access over two viable routes to reach CPSB's Elmendorf facilities, argues that BNSF's claim that it should be entitled to serve new industries and new transloading facilities on both routes is a case of pure overreaching. The Decision No. 44 facilities condition, UP/SP contends, is designed to preserve competition, and has no relevance to a facilities restriction on an alternative routing that has been provided for operating convenience only.

Our Analysis. We think that the amendments agreed to by UP/SP and CPSB should be allowed to take effect on September 11, 1996 (the effective date of Decision No. 44). These amendments are acceptable to UP/SP and CPSB, of course, and, aside from the Track No. 2 facilities restriction, these amendments are likewise acceptable to BNSF. We will therefore direct BNSF to accept these amendments, although its acceptance will not be taken to compromise its continuing objection to the Track No. 2 facilities restriction.

We will reserve judgment on the Track No. 2 facilities restriction to which UP/SP has agreed but to which BNSF has objected. We think that this issue would be better examined in the context of the UP/SP-275 petition for clarification filed August 29, 1996, which asks, among other things, that we clarify that the Decision No. 44 facilities condition does not apply to certain UP lines, including the line referred to herein as Track No. 2. See UP/SP-275 at 6-7. We think it would be best to defer judgment on the Track No. 2 facilities restriction pending our consideration of the replies to the UP/SP-275 petition (replies are due no later than September 23, 1996). Given the lead time involved in providing service to new facilities (including transload facilities), the brief delay we envision in reaching a decision with respect to the Track No. 2 facilities

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[18] CPSB indicates that it has no objection to the relief sought by BNSF.

[19] BNSF adds that, in Paragraph (ii) of our discussion of the relief sought by CPSB, we specifically noted that one of the conditions "we have imposed in this decision confirms that BNSF will be allowed to serve all new facilities (not including expansions of or additions to existing facilities) located along the SP (and UP) lines over which BNSF receives trackage rights." See Decision No. 44, slip op. at 185.

restriction should not impose serious burdens either on BNSF or on any shipper.

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

It is ordered:

1. UP/SP-276 and CPSB-11 are accepted for filing and made part of the record in this proceeding.

2. BNSF is directed to accept the UP/SP-273 amendments agreed to by UP/SP and CPSB. Such acceptance will be without prejudice to BNSF's right to continue to object to the Track No. 2 facilities restriction.

3. UP/SP, CPSB, and BNSF may at any time vary, upon agreement of all three parties, the UP/SP-273 amendments agreed to by UP/SP and CPSB.

4. Except insofar as UP/SP, CPSB, and BNSF mutually agree otherwise, the CPSB conditions imposed in Decision No. 44 and reflected in the UP/SP-273 amendments agreed to by UP/SP and CPSB will become effective on September 11, 1996.

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

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

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SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

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

[Decision No. 57][2]

Decided: November 19, 1996

In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company)[3] and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company),[4] subject to various conditions. Common control was consummated on September 11, 1996, when SPR was merged with and

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[1] Proceedings pending before the Interstate Commerce Commission (ICC) on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

[2] This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; Finance Docket No. 32760 (Sub-No. 12), Responsive Application--Entergy Services, Inc., Arkansas Power & Light Company, and Gulf States Utility Company; and Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company.

[3] Union Pacific Corporation is referred to as UPC. Union Pacific Railroad Company and Missouri Pacific Railroad Company are referred to collectively as UP.

[4] Southern Pacific Rail Corporation is referred to as SPR. Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company are referred to collectively as SP.

into UP Holding Company, Inc., a direct wholly owned subsidiary of UPC. See UP/SP-277 at 1.[5]

Among the conditions we imposed in Decision No. 44 was the *contract modification condition*, which required that, immediately upon consummation of the merger, UP/SP must modify any contracts with shippers at all 2-to-1 points incorporated within the BNSF agreement to allow BNSF access to at least 50% of the volume. See Decision No. 44, slip op. at 106 (third paragraph) and 146 (the "opening contracts at 2-to-1 points" requirement).[6]

Petitions seeking clarification of Decision No. 44 with respect to the contract modification condition have been filed by: BNSF;[7] Geneva Steel Company (GSC);[8] the Railroad Commission of Texas (RCT);[9] the Lower Colorado River Authority and the City of Austin, TX (referred to collectively as LCRA/Austin);[10] and Entergy Services, Inc. (ESI) and its affiliates Arkansas Power & Light Company (AP&L) and Gulf States Utilities Company (GSU).[11] Replies have been filed by:[12] UP/SP;[13] GSC;[14] LCRA/Austin;[15] Dow Chemical Company (Dow);[16] the Chemical Manufacturers Association (CMA);[17] The National Industrial Transportation League (NITL);[18] The Society of the Plastics Industry, Inc. (SPI);[19] The Western Coal Traffic League (WCTL);[20] the Glass

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[5] UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

[6] Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) are referred to collectively as BNSF. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

[7] BN/SF-65.

[8] GS-3 and -4.

[9] RCT-8.

[10] LCRA-4 and -5.

[11] ESI-27. ESI, AP&L, and GSU are referred to collectively as Entergy. AP&L's and GSU's names have recently been changed. See Decision No. 44, slip op. at 54 n.67.

[12] We have also received a number of letters supporting the BN/SF-65 petition.

[13] UP/SP-280 and -288.

[14] GS-6.

[15] LCRA-6.

[16] DOW-29.

[17] CMA-14.

[18] NITL-21.

[19] SPI-26.

[20] WCTL-25.

Producers Transportation Council (GPTC);[21] Quantum Chemical Corporation (QCC);[22] United States Gypsum Company (USG);[23] Champion International Corporation (CIC); and Kennecott Utah Copper Corporation (KUC).[24] Additional replies have been filed by:[25] GSC;[26] BNSF;[27] and UP/SP.[28]

DISCUSSION AND CONCLUSIONS

APPLICABLE STANDARDS. A prior decision may be clarified in any instance in which there appears to be a need for a more complete explanation of the action taken therein. See, e.g., FRVR Corporation--Exemption Acquisition And Operation--Certain Lines of Chicago And North Western Transportation Company--Petition For Clarification, Finance Docket No. 31205 (ICC served Jan. 29, 1988) (clarifying jurisdiction and other matters); St. Louis Southwestern Ry. Co. Compensation--Trackage Rights, 8 I.C.C.2d 80 (1991) (clarifying four technical issues not explicitly considered in the prior decisions in that proceeding). A decision clarifying a prior decision is, in many respects, the functional equivalent of a declaratory order.

ACTION TAKEN. We are granting in part and denying in part the various petitions, and we are clarifying the contract modification condition to the extent, and in the manner, indicated below.

BROAD-BASED CONDITIONS. In Decision No. 44 we imposed "a number of broad-based conditions that augment the BNSF agreement to help ensure that the BNSF trackage rights will allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP." Decision No. 44, slip op. at 145. Because the petitions filed by BNSF, GSC, RCT, LCRA/Austin, and Entergy concern one of these broad-based conditions, we will first briefly discuss the concerns that prompted these conditions.

Prior to the recent consummation of the UP/SP merger, three Class I railroads operated throughout the Western United States: UP, SP, and BNSF. Their operations, however, were not uniform in geographical scope. All three operated at some points and in some corridors; at other points and in other corridors, only two operated; and, at still other points and in still other

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[21] GPTC-2 (although styled a "request for clarification and comments" it is essentially a reply to the BN/SF-65 petition).

[22] QCC-7.

[23] USG-4.

[24] KENN-22.

[25] That we may decide in a fully informed manner the matters raised by the clarification petitions, we have accepted for filing the additional replies filed by GSC, BNSF, and UP/SP. We have also accepted the TFI-3 reply filed by The Fertilizer Institute (TFI), wherein TFI supports the positions taken by NITL and certain other parties.

[26] GS-7, -8, and -9.

[27] BNSF's "Progress Report and Operating Plan" filed October 1, 1996 (hereinafter referred to as BNSF-PR#1) at 16.

[28] UP/SP-286.

corridors, only one operated. Opponents of the merger argued that an unconditioned merger was certain to have an anticompetitive effect at all points and in all corridors that, as a consequence of the merger, would experience *either* a 3-to-2 reduction in competitive rail options *or* a 2-to-1 reduction in competitive rail options.

With respect to the 3-to-2 problem, applicants countered with the argument that, throughout the Western United States, UP/SP vs. BNSF competition following the merger would be stronger and more intense, and certainly no weaker and no less intense, than the three-way competition that existed prior to the merger. By and large we agreed with this argument. See, e.g., Decision No. 44, slip op. at 119: "We have examined in detail the nature of the 3-to-2 traffic at issue, and have determined that it presents little potential for significant, merger-related competitive harm."

This disposed of the 3-to-2 problem, but it did not dispose of the 2-to-1 problem; with a 2-to-1 reduction in competitive rail options, post-merger rail vs. rail competition would not only not be stronger, it would be nonexistent. On September 25, 1995, only 7 weeks after the UP/SP merger had first been announced and a full 2 months prior to the actual filing of their application, applicants, in an attempt to craft a solution to the 2-to-1 problem, entered into a settlement with BNSF that purported to resolve the 2-to-1 problem that an unconditioned merger would otherwise have created. The BNSF agreement, applicants insisted, would allow BNSF to replicate the rail vs. rail competition that would otherwise be lost with the merger of SP into UP. The BNSF agreement, which has since been broadened in several important respects, was in the view of applicants, and remains today, the main vehicle for resolving all aspects of the 2-to-1 problem.

Many opponents of the merger, however, argued that the BNSF agreement was insufficient even with respect to the 2-to-1 shippers actually covered by the BNSF agreement. These opponents argued that allowing BNSF to carry only the traffic of these shippers could not really solve even this narrow version of the 2-to-1 problem because the 2-to-1 traffic base, in and of itself, was simply too small to enable BNSF to achieve a critical mass for efficient operations; and, to make matters worse, only a portion of this 2-to-1 traffic base would actually be available to BNSF in the immediate future because, opponents claimed, a good deal of 2-to-1 traffic had been locked up by UP and SP in long-term contracts. See, e.g., Decision No. 44, slip op. at 41 (arguments of SPI).

In the CMA agreement,[29] applicants made certain commitments that went part of the way towards curing this and other deficiencies that certain opponents of the merger had identified in the BNSF agreement. Of particular relevance for present purposes is CMA Paragraph 3, which provided that, effective upon consummation of the merger, UP/SP would modify any contracts with shippers at 2-to-1 points in Texas and Louisiana so that at least 50% of the volume would be open to BNSF. CMA Paragraph 3, however, was clearly an incomplete solution to the problem it purported to solve. In Decision No. 44, therefore, we expanded CMA Paragraph 3 by requiring that it be extended to shippers at all 2-to-1 points incorporated within the BNSF agreement, not

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[29] See Decision No. 44, slip op. at 18 (description of the CMA agreement); UP/SP-219 (CMA agreement is an attachment); and UP/SP-230 (same).

just 2-to-1 points in Texas and Louisiana. Decision No. 44, slip op. at 145-46.

GENERAL OBSERVATIONS. We think it appropriate to make a few general observations with respect to the workings of the contract modification condition.

(1) Our contract modification condition responded to the argument that, because UP and SP had locked up so much 2-to-1 traffic in long-term contracts, an insufficient amount of the 2-to-1 traffic supposedly open to BNSF under the BNSF agreement would actually be available to BNSF in the short run. The contract modification condition provides, in essence, that at least 50% of the volume under contract at the 2-to-1 points will be open to BNSF immediately, so that BNSF will be able to compete now for at least 50% of that 2-to-1 traffic.

(2) The contract modification condition opens up traffic to BNSF, but does not guarantee that BNSF will actually receive that traffic. The condition merely allows a 2-to-1 shipper to put up for bidding traffic that had previously been committed by contract either to UP or to SP. The shipper need not tender any traffic to BNSF, and is free to reject the contract modification condition in its entirety. And the shipper is free to allow UP/SP to bid against BNSF in an effort to retain any traffic subject to the contract modification condition.

(3) The contract modification condition provides that UP/SP must release its contractual rights with respect to at least 50% of the volume under contract, but we never envisioned that this condition would allow BNSF automatically to win 50% of the 2-to-1 traffic that was, on the merger effective date, under contract either to UP or to SP. The contract modification condition provides, in essence, that, for half of the volume under contract, the competition provided for in the BNSF agreement will begin earlier than anticipated. We expect that UP/SP will compete for the 50% of the traffic that is opened up to BNSF, and we have no reason to believe that UP/SP will lose every time. In the long run (i.e., after all relevant contracts in effect prior to the merger have expired), however, BNSF could win 50% or even more of the traffic at the 2-to-1 points. The entire premise of the BNSF agreement, after all, is that BNSF will be able to provide, with its trackage rights, an effective competitive presence on the trackage rights lines.

(4) Thus, the argument made by BNSF and RCT, and supported by others--that the only way to ensure access by BNSF to at least 50% of the volume under contract at the 2-to-1 points is to provide BNSF access to 100% of the volume under contract at such points--is essentially irrelevant. Proponents of the 100% interpretation argue, and correctly so, that the contract modification condition was intended to allow BNSF to achieve, sooner rather than later, sufficient traffic density on the trackage rights lines; and the 100% interpretation, the proponents also correctly note, would serve this primary purpose by expanding the traffic base immediately available to BNSF. The proponents have neglected to observe, however, that the 50% limitation was intended to serve a secondary purpose: it puts a cap upon the amount of traffic that UP/SP runs the risk of losing immediately upon consummation of the merger. The contract modification condition balances two objectives, and not only the one cited by the proponents of the 100% interpretation.

Allowing shippers the unilateral option of opening up 100% of applicants' contracts at 2-to-1 points would be an overly-intrusive remedy, one not justified by the problem this condition

was intended to address. In Decision No. 44, slip op. at 133, we noted the statement of BNSF's counsel at oral argument that "BN/Santa Fe is willing, able, and anxious to compete for this traffic to which it will gain access under those rights." BNSF's counsel went on to say that the traffic densities were sufficient to permit the building of trains to provide quality service. Now that we have given BNSF access to substantial additional traffic that it did not have access to when it made those statements, we question why BNSF now suggests that it needs to open up even more contract volumes to compete effectively. In any event, the relief that BNSF seeks goes well beyond "clarification."

(5) The contract modification condition was not imposed to rectify competitive problems faced by 2-to-1 shippers who are parties to long-term contracts. Rather, that provision amounts to somewhat of a windfall for any shipper whose traffic it covers. That shipper, by definition, is a 2-to-1 shipper; that shipper's traffic has been committed, again by definition, either to UP or to SP under a contract that was formed when two-carrier competition was available. The modification condition allows shippers to opt out of contracts to obtain a better arrangement with BNSF.

2-TO-1 STATUS. We are denying the petitions filed by LCRA/Austin and Entergy insofar as these parties seek a declaration that they are entitled to 2-to-1 status for the purposes of the contract modification condition.

LCRA/Austin. LCRA/Austin was not, immediately prior to the consummation of the merger, a 2-to-1 shipper for purposes of the contract modification condition at its Fayette Power Project coal-fired station at Halsted, TX. It was served by UP and by UP only; it had access to UP and to UP only; it had no access to SP. Although at a future date its Halsted-West Point trackage rights would have become effective and it would, at that future date, have become a 2-to-1 shipper,[30] it was not a 2-to-1 shipper immediately prior to the consummation of the merger or indeed at any time prior to the consummation of the merger. We had in mind, when we imposed the contract modification condition, that this condition would apply to those shippers that had 2-to-1 status immediately prior to the consummation of the merger. We realize, of course, that this condition could conceivably be applied in a broader fashion, but we think that the imposition of a fixed cutoff date is preferable. And we think it appropriate to note that, in taking this approach, we are not depriving any shipper of any right to which it is entitled; rather, we are merely denying a few shippers the windfall that a more elastic approach would have allowed.

LCRA/Austin insists, however, that applicants must be held to their representation, made during the course of the merger proceeding, that LCRA/Austin was to be regarded as a 2-to-1 shipper. We agree that applicants must honor the representations they made during the course of the merger proceeding. See Decision No. 44, slip op. at 12 n.14. Their representation vis-à-vis LCRA/Austin, however, must be taken in the context in

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[30] As noted in Decision No. 44, slip op. at 63, LCRA/Austin, when it entered into its present contract with UP, also entered into a separate trackage rights agreement (TRA) with UP's Missouri-Kansas-Texas Railroad Company predecessor that provided future access over 18 miles of track between Halsted (the location of the Fayette Power Project) and West Point (the location of a nearby SP-UP junction). The TRA trackage rights were to have become effective at a future date.

which it was made. The BNSF agreement was the main vehicle for resolving the 2-to-1 problem; applicants realized that an unconditioned merger would effectively nullify LCRA/Austin's future TRA trackage rights; and they therefore agreed to preserve those trackage rights by treating LCRA/Austin as one of the many 2-to-1 shippers that would gain access to BNSF under the terms of the BNSF agreement. This is the representation that applicants made and this, therefore, is the representation to which they will be held. Applicants, however, *never* represented that LCRA/Austin would be treated as a 2-to-1 shipper for the purposes of CMA Paragraph 3.

LCRA/Austin contends that its lack of immediate pre-merger access to SP should not determine its 2-to-1 status for the purposes of the contract modification condition. LCRA/Austin concedes that it lacked the pre-merger ability to tender its traffic to SP, but notes that the contract modification condition applies, by definition, only to shippers that lacked the pre-merger ability to tender traffic to one or the other of the applicants; and LCRA/Austin insists that it is, in this respect, no different than any other shipper that seeks to invoke the contract modification condition. This argument is not persuasive. There *is* a difference between LCRA/Austin, on the one hand, and a pre-merger 2-to-1 shipper, on the other hand: LCRA/Austin's inability to tender freight to SP had two independent causes (its long-term contract with UP and the lack of access by SP); a pre-merger 2-to-1 shipper's inability to tender freight to one or the other of the applicants had only one cause (its long-term contract with the other applicant).

LCRA/Austin further contends that 2-to-1 status would allow it to tender freight to BNSF sooner that it otherwise could, and would therefore serve the contract modification condition's primary purpose of enabling BNSF to achieve, sooner rather than later, sufficient traffic density on the trackage rights line. We think it appropriate to note, however, that every shipper seeking a declaration of 2-to-1 status could make exactly the same argument, and, for this reason, we have conducted our analysis of 2-to-1 status separate and apart from the considerations of increased traffic density that justify the contract modification condition itself. LCRA/Austin was not a 2-to-1 shipper immediately prior to the consummation of the merger, and it will therefore not be regarded as a 2-to-1 shipper for the purposes of the contract modification condition.[31]

Entergy. Entergy (at White Bluff)[32] was not, immediately

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[31] The LCRA/Austin facility is located in Texas, and therefore comes with the geographical coverage of *both* the Decision No. 44 contract modification condition *and* CMA Paragraph 3. To avoid any confusion, we wish to make it clear that, in denying the LCRA/Austin petition for a declaration of 2-to-1 status for the purposes of the Decision No. 44 contract modification condition, we are also denying this petition insofar as it seeks a declaration of 2-to-1 status for the purposes of CMA Paragraph 3. We recognize the difference in geographical scope (our contract modification condition applies across the entire UP/SP system, whereas CMA Paragraph 3 applies only in Texas and Louisiana), but we think it best that there be, aside from that one difference, a uniform application of our contract modification condition and CMA Paragraph 3.

[32] In Decision No. 44, we granted the build-out relief sought by Entergy vis-à-vis White Bluff by requiring that the (continued...)

prior to the consummation of the merger, a 2-to-1 shipper for the purposes of the contract modification condition. It was served by UP and by UP only; it had access to UP and to UP only; it had no access to SP. Because Entergy (at White Bluff) was not a 2-to-1 shipper immediately prior to the consummation of the merger, it will not be regarded as a 2-to-1 shipper for the purposes of the contract modification condition.

Entergy's various arguments do not persuade us otherwise. (1) Entergy argues that it had, prior to the merger, a feasible build-out to SP, which, had it ever been constructed, would have made Entergy a 2-to-1 shipper. Feasible or not,[33] the important thing, for present purposes, is that the build-out line was not constructed prior to the merger consummation date. Entergy might or might not have become a 2-to-1 shipper at some future date, but it was not a 2-to-1 shipper immediately prior to the consummation of the merger.[34] (2) Entergy argues that Pine Bluff, the point on the SP line to which the build-out line would connect, is a 2-to-1 point. This is true but inconsequential. The key to 2-to-1 status for purposes of the contract modification condition is the status of the shipper, not the status of the point to which the shipper's build-out line might be constructed. (3) Entergy argues that, had the merger not been conditioned, a shipper that was captive to UP but that had a feasible build-out to SP (or vice versa) would have suffered a merger-related loss of competition conceptually similar to the loss of competition suffered by a shipper that was served, prior to the merger, by both UP and SP. This argument, though not entirely wrong, glosses over a real difference between the two shippers. Had the merger not been conditioned, the shipper served by both UP and SP would have lost one of two present competitive options, whereas the build-out shipper would have lost only its build-out potential. The costs of construction, not to mention the delays that all construction necessarily entails, are such that a build-out line must be built before it can provide a competitive option that will match the competition provided by an existing line. (4) Entergy argues that 2-to-1 status would allow it to tender freight to BNSF sooner than it otherwise could, and would therefore increase the tonnage available for movement by BNSF during the early years of operations on the trackage rights lines. This, of course, is true, but, as we noted in connection with the similar argument made by LCRA/Austin, our analysis of 2-to-1 status stands separate and apart from the considerations of increased traffic density that provide the premise for the contract modification condition.

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[32] (...continued)
BNSF agreement be amended to allow BNSF to transport coal trains to and from White Bluff via the White Bluff-Pine Bluff build-out line, if and when that line is ever constructed by any entity other than UP/SP. See Decision No. 44, slip op. at 54-56, 154, and 185.

[33] In the build-in/build-out context, "the only test of feasibility is whether the line is actually constructed." Decision No. 44, slip op. at 146.

[34] We need not decide what Entergy's status might have been had the proposed White Bluff-Pine Bluff build-out line been under construction on the merger consummation date. There is no indication that this build-out line has ever progressed beyond relatively preliminary planning stages.

IMPLEMENTATION GUIDELINES. We have prepared a series of guidelines to govern the implementation of the contract modification condition. These guidelines reflect what we think are the best aspects of the implementation proposals advocated by BNSF, GSC, RCT, LCRA/Austin, Entergy, UP/SP, Dow, CMA, NITL, SPI, WCTL, GPTC, QCC, USG, CIC, and KUC.

Guideline #1: General Rule. The contract modification condition applies to every contract entered into prior to the consummation of the merger by a 2-to-1 shipper, on the one hand, and either UP or SP, on the other hand, provided only that such contract (i) was negotiated under the auspices either of old 49 U.S.C. 10713 or of new 49 U.S.C. 10709, and (ii) was in effect at the time the merger was consummated. A 2-to-1 shipper may tender to BNSF, and BNSF may transport, up to 50% of the volume covered by any contract to which the contract modification condition applies; and a shipper's obligation to ship traffic via UP/SP is waived to the extent that traffic is tendered to BNSF under the auspices of the contract modification condition.

We agree with NITL that the traffic to which the contract modification condition applies includes, but is not limited to, traffic that has been exempted from regulation either under old 49 U.S.C. 10505 or under new 49 U.S.C. 10502.

Guideline #2: Contract-By-Contract Basis. The contract modification condition is to be applied on a contract-by-contract basis.[35]

Most parties agree that application on a contract-by-contract basis is the preferable approach, mainly because any other approach might allow either UP/SP or the shippers to "game" the system. UP/SP, if allowed to aggregate contracts in any manner, could release the least profitable contracts or those movements for which BNSF would be a relatively ineffective competitor; any shipper, if allowed to pick and choose among its own multiple contracts in the manner suggested by QCC and KUC, could put up for bidding the contract(s) that would generate the most intensive competitive bidding between UP/SP and BNSF. The contract-by-contract approach, we think, is more straightforward and less susceptible to abuse.

Because most (if not all) contracts involve but a single shipper, the "contract-by-contract" approach that we are adopting amounts to the same thing as the "shipper-by-shipper, contract-by-contract" approach that several parties have advocated. If any relevant contracts involve multiple shippers, the contract modification condition should be applied to such contracts on a shipper-by-shipper, contract-by-contract basis. Under this approach, each such contract will be treated as if it were two or more contracts (one per shipper); and the contract modification condition will then be applied, on a contract-by-contract basis, to each of the deemed contracts.

Guideline #3: Volume Determinations. The "50% of volume" determination is to be made by reference to the particular contract subject to the contract modification condition. If a particular contract defines "volume" in terms of tonnage, then tonnage is the appropriate definition for purposes of that particular contract; and, if a particular contract defines

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[35] We are therefore granting in part the following petitions insofar as they advocate the contract-by-contract basis: BN/SF-65 (third alternative clarification request); and ESI-27 (second clarification request).

"volume" in terms of carloads, revenues, or other measures, then carloads, revenues, or the other measures would be the appropriate definition for purposes of that particular contract.[36]

The only variation to this rule would occur in those situations in which the contract defines "volume" as a certain percentage less than 100% of the shipper's freight (e.g., 85% of the shipper's freight). In these situations, "50% of volume" will be understood to mean 50% of the shipper's freight, however that is defined in the contract. This approach might allow BNSF to bid on more than 50% of the volume actually under contract; but we have protected UP/SP's interests in this situation by allowing it to exercise a contract termination option. See Guideline #9.

Guideline #4: Shipper Selection. A shipper using the contract modification condition may select, on a contract-by-contract basis, the portion (not greater than 50%) of its traffic that is open to BNSF.[37]

Application of the contract modification condition on a contract-by-contract basis necessarily requires a selection, either by the shipper or by UP/SP, of the movements that will be open to competition by BNSF. Interested parties other than UP/SP have generally argued that it is the shipper that should do the selecting. UP/SP itself has disavowed any unilateral selection right of its own, and has indicated that, although it hopes to resolve selection matters on a shipper-by-shipper basis, it will not in any event insist on imposing its preferences on the shipper. We think that UP/SP's disavowal can only be read as an endorsement of a shipper selection right.

Guideline #5: Shipper Timing Right. A shipper using the contract modification condition may do so at any time prior to the expiration of a contract to which the contract modification condition applies.[38]

All parties that have addressed this question, including UP/SP, have agreed that a shipper should be allowed to assert its rights under the contract modification condition throughout the entire course of a contract that was in effect on the merger consummation date.

Guideline #6: Provisions Continue To Apply. If a shipper uses the contract modification condition and tenders to BNSF freight covered by a UP/SP contract, all terms of the contract continue to apply except as otherwise provided for in Guideline #1 (a shipper's obligation to ship traffic via UP/SP is waived to the extent that traffic is tendered to BNSF under the

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[36] We are therefore granting in part the following petitions insofar as they advocate the rule provided for in Guideline #3: RCT-8 (first clarification request); and LCRA-4/-5 (second clarification request).

[37] We are therefore granting in part the following petitions insofar as they advocate the shipper selection right provided for in Guideline #4: BN/SF-65 (third alternative clarification request); and GS-3/-4 (second clarification request).

[38] We are therefore granting in part the following petition insofar as it advocates the shipper timing right provided for in Guideline #5: GS-3/-4 (third clarification request).

auspices of the contract modification condition), Guideline #7 (volume incentives must be prorated), and Guideline #9 (UP/SP may exercise a contract termination option).

Guideline #7: Incentives Prorated. If a shipper uses the contract modification condition and tenders to BNSF freight covered by a UP/SP contract, all volume incentives (whether formulated as discounts or as penalties) provided for by the UP/SP contract must be, at the shipper's option, prorated to 50% volumes.[39]

If left intact, volume incentives, formulated either as discounts for shipping more freight or as penalties for shipping less, might effectively prevent any shipper from invoking its rights under the contract modification condition. The outcome, of course, would depend on the size of the volume incentives: the greater the incentive vis-à-vis the underlying rate, the less likely it would be that BNSF could ever underbid UP/SP on traffic supposedly opened up to immediate competition. The most practical solution to this problem, we think, is simply to require that the incentives be prorated. We realize that this might leave UP/SP with a contract that neither UP nor SP would ever have entered into, but we have protected UP/SP's interests in this situation by allowing it to exercise a contract termination option. See Guideline #9.

For purposes of Guideline #7, a contractual provision that requires a shipper to pay a flat rate for transporting up to a certain number of cars per year, whether it actually ships that number of cars or any lesser number, is to be regarded as a volume incentive provision, and a per car rate is to be determined by dividing the flat rate (e.g., $100,000 per year) by the maximum number of cars specified in the contract (e.g., 100 cars). Unless UP/SP and the shipper mutually agree otherwise, Guideline #7 will be understood to require that, if (i) the shipper uses the contract modification condition and tenders to BNSF freight covered by the UP/SP contract, and (ii) UP/SP does not exercise the contract termination option provided for in Guideline #9, then (iii) any remaining cars tendered to UP/SP under the contract must be transported at the per car rate determined in the manner indicated in the preceding sentence.

Guideline #8: Competitive Tactics. UP/SP and a shipper may, by mutual agreement, modify any term of any contract subject to the contract modification condition; and a shipper may waive, in whole or in part, its rights under the contract modification condition.[40]

The contract modification condition provides BNSF with an opportunity, not a guarantee. It has an opportunity to bid for traffic prior to the expiration date of the applicable contract, but it has no guarantee that it will receive that traffic. We are sensitive, of course, to BNSF's claim that UP/SP, by spreading concessions across 100% of the traffic, will always be

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[39] We are therefore granting in part the following petitions insofar as they advocate the rule provided for in Guideline #7: BN/SF-65 (first alternative clarification request); GS-3/-4 (first clarification request); and LCRA-4/-5 (third clarification request).

[40] We are therefore denying the following petition insofar as it advocates a rule inconsistent with the rule provided for in Guideline #8: BN/SF-65 (second alternative clarification request).

able to underbid BNSF, which will be able to spread concessions across only 50% of the traffic; but we think that the problem is overstated. The 2-to-1 traffic at issue is, by definition, competitive traffic, that was acquired either by UP or by SP in competitive bidding against the other. This is not traffic that was formerly captive to one railroad or the other but that is now open to competitive bidding for the first time; this is traffic that has been open to competitive bidding all along. And, in any event, the competitive bidding that BNSF purports to fear can only benefit the affected shippers.

Guideline #9: Contract Termination Option. If a shipper uses the contract modification condition and tenders to BNSF freight covered by a UP/SP contract, UP/SP may, at its option, release the entire volume under the contract.[41]

This contract termination option is, we think, essential to the protection of UP/SP's own interests, given the way we have structured the contract modification condition. Guideline #4 provides that a shipper has the right to select, on a contract-by-contract basis, the portion (not greater than 50%) of its traffic that is open to BNSF; Guideline #5 provides a similar right with respect to timing; and Guidelines #6 and #7, taken together, provide, in essence, that all contractual provisions that burden UP/SP continue to apply, but that volume incentive provisions that burden the shipper must be, at the shipper's option, prorated. UP/SP could easily be left with a fractured loss-generating half-contract that neither UP nor SP would ever have negotiated.

The contract modification condition was intended to allow BNSF to access, sooner rather than later, a substantial volume of traffic at the 2-to-1 points previously open only to UP and SP. We had in mind that UP/SP would be required to release for immediate competition 50% of the traffic that UP and SP had locked up in contracts. We never intended that UP/SP would be required to haul the other 50% of that traffic at a loss.

The contract termination right provided for in Guideline #9 is intended to be exercisable by UP/SP at its option. We therefore will not entertain petitions asking us to review whether, in any particular instance, an exercise of the contract termination option would be, or was, justified by the economics of the relevant contract.

Guideline #10: Request For Advice. A 2-to-1 shipper contemplating use of the contract modification condition with respect to a particular UP/SP contract may formally request that UP/SP advise what action UP/SP will take if the shipper tenders to BNSF certain traffic covered by the UP/SP contract. The request must clearly indicate the contract at issue, the particular traffic that the shipper intends to tender to BNSF, and the time at which such traffic will first be tendered. Upon receipt of such a request, UP/SP must immediately advise the shipper that, if the shipper tenders the traffic as indicated in the request, UP/SP either will or will not exercise its contract termination option. If the shipper thereafter tenders the traffic as indicated, UP/SP will be bound by the advice it has given unless UP/SP and the shipper mutually agree otherwise.

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[41] We are therefore denying in part the following petition insofar as it advocates a rule inconsistent with the rule provided for in Guideline #9: GS-3/-4 (first clarification request).

The advice requirement described in Guideline #10 is necessitated by the contract termination option described in Guideline #9. A shipper tendering freight to BNSF under the auspices of the contract modification condition should have a right to know, in advance, whether the tender will trigger exercise by UP/SP of the contract termination option. That shipper should not have to guess at UP/SP's likely reaction.

Guideline #10 is patterned upon a recently issued regulation respecting disclosures required by new 49 U.S.C. 11101. See 49 CFR 1300.2, as promulgated in Disclosure, Publication and Notice of Change of Rates and Other Service Terms for Rail Common Carriage, STB Ex Parte No. 528, 61 FR 35139, 35140 (July 5, 1996), 1 S.T.B. 153, 164 (1996). We expect that, if a shipper makes a formal request for advice, UP/SP will provide that advice "immediately." As indicated in 49 CFR 1300.2 in this context that means, in most situations, that the advice must be sent within hours, or at least by the next business day.

NOTIFICATION. UP/SP has indicated that it has identified, to the best of its ability, all shippers with outstanding contracts at 2-to-1 points, and has advised those shippers in writing that they are covered by the contract modification condition and that UP/SP stands ready to release to immediate competition by BNSF 50% of their traffic which would otherwise be subject to the contract. See UP/SP-280, V.S. Shattuck at 1-2 (two letters were sent to each shipper; the first letter was sent on September 6th; the second letter, containing a list of all affected contracts, was sent on September 19th).

We are now directing UP/SP to provide written notification to all such shippers, no later than 10 days from the date of service of this decision, that the contract modification condition has been clarified to the extent, and in the manner, indicated in this decision. UP/SP may, if it so chooses, comply with this notification requirement by providing each such shipper with a copy of this decision.[42]

Without this notification requirement a shipper using the contract modification condition might only learn after having done so that this allowed UP/SP to release the entire volume under the relevant contract. Notification resolves this problem by giving the shipper a choice: *either* accept the contract modification condition in its entirety, in which case the shipper will have accepted, among other things, the UP/SP contract termination option, *or* reject the contract modification condition in its entirety.

REVIEW OF DISPUTES. The contract modification condition, even as clarified in this decision, may pose potential implementation issues that will have to be resolved on a shipper-by-shipper, contract-by-contract basis. We think that

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[42] This notification requirement applies only with respect to those shippers that, in UP/SP's opinion, have contracts to which the contract modification condition is applicable. We realize, of course, that, with respect to certain shippers and certain points, BNSF has asserted 2-to-1 status and UP/SP has denied the assertion. See BNSF-PR#1 at 12 n.6 and 13 n.8. The notification requirement imposed herein does not now apply to shippers whose 2-to-1 status is disputed by UP/SP. We note, however, that UP/SP will be expected to provide the notification described herein to any such shipper at such time as UP/SP concedes, or we conclude, that such shipper has, for the purposes of the contract modification condition, 2-to-1 status.

the parties might be best advised to submit such disputes to arbitration, see Decision No. 44, slip op. at 156, but we realize that various parties might prefer to submit such disputes to the Board. As SPI has requested, we now affirm our willingness to resolve such disputes if they are brought before us.

SPI, which has noted that such disputes may be complicated by the confidentiality provisions contained in existing contracts, has also asked us to affirm that we will provide, at the request of a shipper, an *in camera* review. An *in camera* procedure, as we understand the term, usually entails an ex parte presentation of documents to a judge "in chambers." The procedure, admittedly, has not been entirely unheard of in the cases handled by administrative law judges (ALJs) for this agency and for its ICC predecessor. This procedure, however, requires an ALJ, and we are reluctant to assign an ALJ to this proceeding simply for the purpose of conducting *in camera* reviews of documents assertedly relevant to disputes arising under the contract modification condition. Any necessary confidentiality can be adequately provided under the auspices of the protective order heretofore entered in this proceeding. See Decision No. 2 (served September 1, 1995) (the protective order is attached thereto).

SPI, which has argued that prompt disposition of disputes arising under the contract modification condition is likely to be necessary inasmuch as the commercial window of opportunity often is short, has also asked us to address these matters on an expedited basis. We will attempt to process as quickly as possible any petitions raising issues that call for prompt resolution. At least part of any delay in issuing a decision in connection with a dispute arising under the contract modification condition may reflect the 20-day time period allowed for filing replies to petitions. SPI and other interested parties may therefore wish to consider filing a petition proposing a specified expedited procedure to be applicable to disputes arising under the contract modification condition.

MATTERS NOT ADDRESSED. BNSF has suggested: that there is some uncertainty as to whether certain shippers are 2-to-1 shippers, see BNSF-PR#1 at 12 n.6; see also BNSF-PR#1, V.S. Brown at 8 (the only shipper named by BNSF is Intermod Industries at Stockton, CA); and that there is likewise some uncertainty as to whether Lake Charles, Westlake, and West Lake Charles are 2-to-1 points, see BNSF-PR#1 at 13 n.8. With respect to the shippers, BNSF indicates that it will ask us to resolve the uncertainty if agreement cannot be reached with UP/SP, see BNSF-PR#1 at 12 n.6. With respect to Lake Charles, Westlake, and West Lake Charles, BNSF asks that we clarify their 2-to-1 status, see BNSF-PR#1 at 13 n.8 (BNSF apparently contends that, at these points, a 3-to-2 or 2-to-2 situation is the functional equivalent of a 2-to-1 situation for the purposes of the contract modification condition). We will not address, in this decision, either the matter of the 2-to-1 shippers or the matter of Lake Charles, Westlake, and West Lake Charles, which were included in footnotes in a lengthy pleading the title of which gives no indication that it contains a clarification request. Nothing said in this decision is intended to prejudge those issues.

ALLEGATIONS RESOLVED. *Allegations and Responses.* (1) BNSF claims that there is at least one identifiable situation in which (i) a shipper whose traffic is important to BNSF's density will have no practical ability to benefit from BNSF competition if the contract modification condition is given a narrow reading, but (ii) UP/SP indicated, in its April 29, 1996, rebuttal submission, that, even without the contract modification condition, this

shipper's business would be open to BNSF competition. See BN/SF-65 at 2, 7 n.2, and 12-14. (2) GSC claims that the record compiled in this proceeding prior to the release of Decision No. 44 contains "possible misimpressions" concerning certain contracts involving 2-to-1 points. GS-3 at 9 n.4; GS-4, Exhibit 2B, Page 1. (3) UP/SP denies the allegations made by BNSF and GSC respecting contractual commitments at 2-to-1 points.[43]

Our Analysis. We accept UP/SP's denial as respects the particular matter addressed both by BNSF and by GSC because we have concluded, for the reason given by UP/SP, see UP/SP-280 at 14-15, that the challenged statement was factually accurate. See also UP/SP-280 at 16 n.9 (we agree with the thought expressed in that footnote). We realize that UP/SP has not provided a complete response to the allegation made by GSC, see GS-3 at 9 n.4; see also GS-4, Exhibit 2B, Page 1 (third paragraph) (discussing the particular matter to which UP/SP has not responded), but we have concluded that a complete response, although it would have been appropriate, is not necessary. GSC has not alleged, with respect to the matter discussed at GS-4, Exhibit 2B, Page 1 (third paragraph), that any particular statement was factually inaccurate; rather, GSC has alleged, in essence, that the particular UP/SP witness's testimony, taken in its entirety, might have created a misimpression as to a certain matter; and we have concluded that, given the context, the allegation is far too vague to pursue any further. We think it appropriate to add that GSC has not cited, and we have been unable to find, *any* statement in the referenced testimony of the particular UP/SP witness that even names the entity discussed at GS-4, Exhibit 2B, Page 1 (third paragraph).

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

It is ordered:

1. The GPTC-1 petition for leave to intervene for the purpose of submitting the GPTC-2 pleading is granted.

2. The UP/SP-286 motion for leave to file the reply attached thereto is granted.

3. The TFI-2 motion for leave to file the TFI-3 reply is granted.

4. Decision No. 44 is clarified to the extent, and in the manner, indicated in this decision.

5. UP/SP shall provide written notification to all 2-to-1 shippers, no later than 10 days from the date of service of this decision, that the contract modification condition has been clarified to the extent, and in the manner, indicated in this decision.

6. The BN/SF-65, GS-3/-4, RCT-8, LCRA-4/-5, and ESI-27 petitions are granted in part and denied in part, as indicated in this decision.

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[43] Because this matter involves information designated as "Highly Confidential" and submitted pursuant to the protective order in this proceeding, we will attempt in our discussion and resolution of this matter to avoid disclosing any of that information.

7. This decision shall be effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

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SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

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

[Decision No. 58][2]

Decided: November 15, 1996

In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company)[3] and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company),[4] subject to various conditions. Common control was consummated on September 11, 1996.[5] See UP/SP-277 at 1.

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[1] Proceedings before the Interstate Commerce Commission (ICC) that remained pending on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

[2] This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; and Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company.

[3] Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) are referred to collectively as UP.

[4] Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) are referred to collectively as SP.

[5] Southern Pacific Rail Corporation (SPR) was merged with and into UP Holding Company, Inc., a direct wholly owned subsidiary of Union Pacific Corporation (UPC). UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

The *Dow/Beaumont condition*, one of a number of conditions we imposed, requires that UP/SP grant trackage rights to a carrier to be named by Dow Chemical Company (Dow), subject to our approval, over UP's line from Texas City to Houston, TX, and over UP's or SP's line from Houston to connections with KCS[6] and BNSF[7] at Beaumont, TX, with the right to connect to the proposed Freeport-Texas City build-out line near Texas City to serve Dow at Freeport and any other shippers located on the build-out line. See Decision No. 44, slip op. at 64-66 and 188.

We address here the matters discussed by Dow in its DOW-27 petition for reconsideration filed September 3, 1996, and by UP/SP in its UP/SP-281 reply filed September 23, 1996.

BACKGROUND

The DOW-27 Petition. Prior to the UP/SP merger, Dow's chemical/plastics production facility at Freeport, TX, was rail-served exclusively by UP (via a 10-mile branch line that connects with the UP mainline at Angleton, TX), but had build-out/build-in options to both BNSF and SP, both of which operate rail lines near Texas City, TX. The BNSF option survived the merger; the SP option did not. To replace whatever competition may have been lost, we imposed the Dow/Beaumont condition.

The relief Dow had sought, however, was far broader than the relief we granted. Dow's *primary request* for relief sought trackage rights both for BNSF from Angleton to Texas City and for an SP substitute from Angleton to Houston, New Orleans, LA, and Memphis, TN. Decision No. 44, slip op. at 65. We denied this relief because, by moving the build-out point much closer to Dow, it would have greatly improved, and not merely preserved, the pre-merger status quo. Id. at 188. Dow's *alternative request* for relief sought trackage rights for an SP substitute (other than BNSF) from Texas City to Houston, New Orleans, and Memphis. Id. at 66. This kept the build-out point for the SP substitute near Texas City, but overreached by asking that the SP substitute be given trackage rights to New Orleans and Memphis. The preservation of Dow's SP build-out option, we indicated, required only trackage rights from the build-out point to a connection with an independent Class I carrier. We therefore imposed only the Dow/Beaumont condition. Id. at 188.

Dow now argues that the only carrier Dow will be able to choose will be KCS and the only Beaumont connection that carrier will have will likewise be KCS. Dow notes that BNSF can serve Dow via a Freeport-Texas City build-out without the trackage rights we granted for Dow; and that BNSF has shown little interest in its own build-out option.

Dow argues that a KCS connection at Beaumont will be inadequate because KCS' route structure is inferior to SP's. It notes that KCS does not directly reach the Chicago gateway; that KCS gets from Beaumont to the New Orleans gateway only very circuitously; that KCS terminates only a very small percentage of

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[6] The Kansas City Southern Railway Company is referred to as KCS.

[7] Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) are referred to collectively as BNSF. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement, which we also imposed as a condition in Decision No. 44).

Dow's traffic; and that the additional lengths of haul and traffic volumes available to KCS as a result of a build-out would be less than those that were available pre-merger to SP.

Dow asks that we modify the Dow/Beaumont condition to preserve Dow's pre-merger SP build-out option. Dow offers two proposals. Dow would prefer that we grant trackage rights from Houston to New Orleans and Memphis. Alternatively, it asks that we extend the trackage rights remedy to include *both* connections at Beaumont with KCS and BNSF *and* connections at Baton Rouge, LA, with KCS and Illinois Central Railroad Company (IC). The Baton Rouge extension, Dow contends, will enhance Dow's ability to replace the SP build-out option by giving Dow access to IC; it will allow Dow's New Orleans gateway traffic to move over direct routes from Baton Rouge to New Orleans via KCS or IC; and it will preserve Dow's single-line access to Chicago, which is reached by IC but not by KCS. Dow adds that, because SP could have offered direct service to both New Orleans and Chicago, the addition of Baton Rouge as a connection point will improve the build-out carrier's incentive to construct the Freeport-Texas City build-out line.

The UP/SP-281 Reply. UP/SP urges denial of Dow's petition because the Dow/Beaumont condition we imposed provided Dow with more than was necessary to preserve Dow's pre-merger competitive position. UP/SP adds that Dow, in suggesting that BNSF is not a potential build-out partner and that the SP substitute will not have a route structure comparable to SP's, has ignored the new routes that BNSF obtained under the BNSF agreement.

DISCUSSION AND CONCLUSIONS

A proceeding may be reopened, and reconsideration may be granted, upon a showing of material error, new evidence, or substantially changed circumstances. 49 CFR 1115.3(b) (1995). See also Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Nov. 27, 1995) (Decision No. 43, slip op. at 2). Dow has neither presented new evidence nor alleged substantially changed circumstances; its petition therefore rests upon an assertion of material error. We did not err as claimed by Dow, and we are therefore denying its petition.

Dow, which argues that the Dow/Beaumont condition we imposed in Decision No. 44 does not effectively preserve its pre-merger SP build-out option, makes two proposals, each of which overreaches. As we indicated in Decision No. 44, "[t]he preservation of Dow's SP build-out option requires only that trackage rights run from the build-out point to a connection with an independent Class I carrier." Decision No. 44, slip op. at 188. We have already preserved Dow's SP build-out option by requiring that UP/SP grant trackage rights to a carrier to be named by Dow, subject to our approval, from Texas City to Houston and on to connections at Beaumont with KCS and BNSF, with the right to connect to the build-out line near Texas City. Because Beaumont is the nearest connection with an independent Class I carrier, Beaumont is the point to which the trackage rights should run. We are not persuaded otherwise by the various arguments advanced by Dow.

(1) Dow argues that, although the Dow/Beaumont condition we imposed indicates that the trackage rights carrier will be chosen by Dow, in reality the only carrier Dow will be able to choose will be KCS. This is not true. The condition we imposed permits

Dow, either alone or in conjunction with other shippers located on the build-out line: (i) to choose KCS to operate over the build-out line and on to Beaumont; (ii) to make arrangements with an existing shortline railroad to operate over the build-out line and on to Beaumont; or (iii) to create a new shortline railroad to operate over the build-out line and on to Beaumont.

(2) Dow argues that the only realistic Beaumont connection that carrier will have will be KCS. This is incorrect. Dow's various arguments rest upon the notion that its two pre-merger build-out options (to BNSF and to SP) were entirely unrelated and independent; they were not. If the build-out line ever reaches the SP substitute near Texas City, it will first have to cross the BNSF line slightly south/southwest of Texas City; there is, as far as we can tell, no build-out route that can reach the SP line without also reaching the BNSF line. See DOW-11, Tab B, Tab WLG-7 (a map).[8] If BNSF thereby obtains direct access to the build-out line, BNSF will prefer to use that connection near Texas City, rather than access at Beaumont. In either event, Dow will have a good BNSF connection.

(3) Dow acknowledges that BNSF can serve Dow via a Freeport-Texas City build-out without the trackage rights provided for by the Dow/Beaumont condition, but argues that BNSF has shown little interest in its own build-out option. We doubt that BNSF would have been less likely than an independent SP to build the build-out line. We can see no objective reason to believe that the pre-merger SP would have been any more inclined than was BNSF to build the line. Decisions to build a line of this nature tend to reflect hard financial calculations, and, in this instance, the financial calculations would appear to be much the same both for the pre-merger SP and for BNSF.

(4) Dow argues that a KCS connection at Beaumont will not effectively replace its pre-merger SP build-out option. We disagree. KCS can effectively replace the competitive alternative represented by the pre-merger SP build-out option, because it has either single-line or joint-line access to a sufficient range of destinations. Although KCS can only serve many destinations including New Orleans that were open to the pre-merger SP on a joint-line basis with BNSF, BNSF can reach these destinations on a single-line basis. BNSF is certain to play a role in connection with much of the traffic originating on the build-out line, either near Texas City (if it has direct access to the build-out line) or at Beaumont (if it does not).

(5) Finally, Dow argues that allowing it to name a trackage rights carrier all the way to Baton Rouge will enhance Dow's ability to replace the SP build-out option and give the build-out carrier additional incentive to construct the build-out line. But the extensive trackage rights remedy that Dow seeks here is not necessary to maintain the competitive status quo. Both before and after the merger, Dow was served by a single rail carrier. The merger resulted in a loss to it of one of two equally feasible build-out options, neither of which had ever been built. To the extent that a potential SP build-out option provided leverage beyond that supplied by the BNSF build-out option, that leverage was restored by our condition, and no more is required.

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[8] We are referencing this map, which was submitted under seal, because our observation respecting the build-out route respects a matter that should be obvious on any highly detailed local map.

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

It is ordered:

1. The DOW-27 petition is denied.

2. This decision shall be effective on November 20, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

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Records: 497

STB FD 32760 11-20-96 C-59 21100

21100
EB

SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

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

[Decision No. 59]

Decided: November 15, 1996

In Decision No. 44 (served August 12, 1996), we approved common control of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company, referred to collectively as UP) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, referred to collectively as SP), subject to various conditions. Common control was consummated on September 11, 1996, when Southern Pacific Rail Corporation was merged with and into UP Holding Company, Inc., a direct wholly owned subsidiary of Union Pacific Corporation.

By petition filed September 4, 1996, Mr. Scott Manatt, arguing that common control is not in the public interest, urges that we reconsider our approval thereof. By reply (UP/SP-279) filed September 23, 1996, UP/SP, arguing that Mr. Manatt has identified no material error in Decision No. 44, urges the denial of his petition.

We are denying the petition filed by Mr. Manatt. We believe that, subject to the many conditions we have imposed, UP/SP common control is consistent with the public interest. See 49 U.S.C. 11344(c). Nothing in Mr. Manatt's petition suggests otherwise.

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

It is ordered:

1. The petition filed by Mr. Manatt is denied.

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[1] Proceedings before the Interstate Commerce Commission (ICC) that remained pending on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

2. This decision shall be effective on November 20, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

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SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

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

[Decision No. 60][2]

Decided: November 15, 1996

In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company)[3] and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company),[4] subject to various conditions. Common control was consummated on September 11, 1996.[5]

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[1] Proceedings pending before the Interstate Commerce Commission (ICC) on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

[2] This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; and Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company.

[3] Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) are referred to collectively as UP.

[4] Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) are referred to collectively as SP.

[5] Southern Pacific Rail Corporation (SPR) was merged with and into UP Holding Company, Inc., a direct wholly owned subsidiary of Union Pacific Corporation (UPC). See UP/SP-277

(continued...)

In this decision, we address the matters discussed: (i) by Mr. Charles W. Downey in his CWD-3 petition to reopen filed September 3, 1996; and (ii) by UP/SP in its UP/SP-282 reply filed September 23, 1996.

BACKGROUND

We noted, in Decision No. 44, that the settlement agreements entered into by UP/SP included one entered into with Gateway Western Railway Company (GWWR). Decision No. 44, slip op. at 9 & n.8. We also noted that Mr. Downey, a general chairman of the United Transportation Union (UTU) for lines of GWWR and SPCSL, had argued: that the agreement entered into with GWWR would alter the work arrangements applicable to GWWR and SPCSL operations, and impair the rights of persons employed by GWWR and SPCSL in the Chicago-St. Louis territory of the former Chicago, Missouri & Western Railway Company (CMW); and that fairness to employees of both GWWR and SPCSL required that an implementing agreement be arrived at for the GWWR agreement prior to consummation of the UP/SP merger, and that the GWWR agreement be subject to the full reach of the New York Dock conditions.[6] Decision No. 44, slip op. at 88. In denying Mr. Downey's requests, we explained: that the arrangements provided for in the GWWR agreement did not require our approval, which necessarily meant that there was no basis for imposing labor protection with respect to GWWR employees; and that the New York Dock conditions we had imposed upon the UP/SP merger itself would adequately protect SPCSL employees from any merger-related adverse impacts. Decision No. 44, slip op. at 175.

The CWD-3 Petition. Mr. Downey advances two arguments in his CWD-3 petition.[7]

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[5](...continued)
at 1. UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

[6] New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock).

[7] Mr. Downey also contends that the Board's Secretary has denied him access to the transcript of the oral argument we held on July 1, 1996, and has advised him that the transcript can be purchased from the reporter. He maintains that this practice is contrary to the availability mandated by the Administrative Procedure Act and has prejudiced him in the preparation of his petition. CWD-3 at 3 n.3. Mr. Downey, however, has not been denied access to the oral argument paper transcript. In fact, the Secretary's Office has allowed Mr. Downey's counsel, Mr. Gordon MacDougall, to inspect the paper transcript. As we explained in Expedited Procedures For Processing Rail Rate Reasonableness, Exemption And Revocation Proceedings, STB Ex Parte No. 527 (STB served Nov. 15, 1996), slip op. at 4,

> the Board's contract with the court reporter prohibits the copying of the draft or final paper transcript. . . . The individual can inspect, but not copy, the transcript at the Board; alternatively, the individual can purchase the transcript from the court reporter. Finally, individuals may obtain for free a copy of the microfilm version of the transcript when it becomes available.

(continued...)

(1) Mr. Downey contends that *all* employees affected by the transaction, including those employed by carriers that entered into settlement agreements with applicants, should be protected. CWD-3 at 2. Mr. Downey concedes that the GWWR agreement, standing alone, may be non-jurisdictional; he notes, however, that the GWWR agreement was intended to facilitate the UP/SP merger, and that accordingly we should impose the New York Dock conditions to protect any employees affected by the settlement between UP/SP and GWWR.

(2) Mr. Downey contends that our approval of the merger rests partially upon our "finding" that railroad competition has thrived despite the mergers of the past decade and a half, "with the average rate per ton declining more than 37% from 1981 through 1993." CWD-3 at 2, citing Decision No. 44, slip op. at 104 & n.99, 119, and 245. Mr. Downey argues that the 1995 staff study we cited in Decision No. 44[8] has never been formally "announced" either by the ICC or by the Board. Furthermore, Mr. Downey insists that rail rates have not declined over the past decade and a half. Mr. Downey argues that rail rates have increased 44% between 1980 and 1991. Mr. Downey therefore urges that we find the 1995 staff study to be invalid and that we disclaim reliance upon declining rail rates.

The UP/SP-282 Reply. UP/SP insists that Mr. Downey has offered no basis for imposing either mandatory or discretionary labor protective conditions on the GWWR agreement. The fact that the GWWR agreement might have "facilitated" the UP/SP merger, UP/SP contends, is not enough; our merger jurisdiction does not extend to a settlement that merely "facilitates" a merger; and this particular settlement, UP/SP adds, does not come within our pooling jurisdiction (see 49 U.S.C. 11342). The general rule, UP/SP notes, is that labor protection is not provided to employees of a non-applicant carrier. UP/SP concedes that an exception to this rule applies where the non-applicant employees qualify as "joint employees" of an applicant carrier and a non-applicant carrier, which they argue is not the situation here. With respect to Mr. Downey's claim that rail rates have increased over the past decade and a half, UP/SP contends, first, that our rejection of Mr. Downey's request for labor protection had nothing at all to do with that issue. And UP/SP insists

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[7](...continued)
The transcript referred to by Mr. Downey is the "raw" version, not the final official transcript. When the Board receives the final official transcript from the reporter, that document will be placed in the public docket and be available on microfilm. See also 49 CFR 1001.1 (1995) (transcripts and other files and records in the custody of the Secretary are available to the public and may be inspected at our Washington office upon reasonable request during business hours); 49 CFR 1002.1(h) (1995) (transcript of testimony and of oral argument, or extracts therefrom, may be purchased by the public from the official reporter); 49 CFR 1113.17(d) (1995) (free copies of the transcript will not be furnished to any party to any proceeding); and Expedited Procedures For Processing Rail Rate Reasonableness, Exemption And Revocation Proceedings, STB Ex Parte No. 527 (STB served Oct. 1, 1996), slip op. at 2 n.3.

[8] ICC, Office of Economic and Environmental Analysis, Rail Rates Continue Multi-Year Decline, 1995 (herein referred to as the 1995 staff study). See Decision No. 44, slip op. at 104 n.99. See also CWD-3, Appendix 1 (a copy of this 2-page study).

that, in any event, our finding that rail rates have fallen since 1980 is correct and is confirmed by all reliable studies. See UP/SP-282 at 5-8.[9]

DISCUSSION AND CONCLUSIONS

Applicable Standards. A proceeding may be reopened, and reconsideration granted, upon a showing of material error, new evidence, or substantially changed circumstances. 49 CFR 1115.3(b) (1995). See also Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Nov. 27, 1995) (Decision No. 43, slip op. at 2). Mr. Downey has neither presented new evidence nor alleged substantially changed circumstances; and his petition therefore rests upon an assertion of material error. We did not err as claimed by Mr. Downey, and we are therefore denying his CWD-3 petition.

Protective Conditions. We addressed this aspect of Mr. Downey's argument in our prior decision. See Decision No. 44, slip op. at 175 (footnote omitted): "The arrangements provided for in the GWWR agreement are non-jurisdictional, which necessarily means that there is no basis for imposing labor protection with respect to GWWR employees; and the New York Dock conditions will adequately protect SPCSL employees from any merger-related adverse impacts." See also Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133, Decision No. 25 (ICC served Mar. 7, 1995) (UP/CNW) (slip op. at 96) ("Protection for employees of carriers other than the primary applicants is unwarranted, because labor protective conditions are designed to protect only employees of railroads participating in transactions."). See also Rio Grande Industries, et al.--Control--SPT Co., et al., 4 I.C.C.2d 834, 955 (1988) (DRGW/SP) ("Labor protection conditions are designed to protect only employees of railroads participating in transactions.").

We are not persuaded by the various arguments advanced by Mr. Downey in support of an extension of labor protection to GWWR employees.

(i) Mr. Downey notes that the UP/SP merger itself requires our approval (i.e., is "jurisdictional"), and he insists that the GWWR agreement has facilitated the UP/SP merger. We may assume,

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[9] We will deny Mr. Downey's CWD-4 motion to strike portions of the UP/SP-282 reply. Mr. Downey contends that UP/SP has mischaracterized his arguments, but this contention, whether true or false, is of no consequence because our denial of the CWD-3 petition does not turn upon the alleged mischaracterizations; rather, we are denying the CWD-3 petition because the arrangements provided for in the GWWR agreement are non-jurisdictional, and because the employees of GWWR are employees of a non-applicant carrier. Mr. Downey further contends that a 1994 Association of American Railroads (AAR) study cited by UP/SP rests primarily upon an earlier version of our own discredited (in Mr. Downey's view) 1995 staff study; and, Mr. Downey adds, the 1994 AAR study is not only "new evidence," it is new evidence that was privately produced and is largely unavailable. Our denial of the CWD-3 petition, however, does not turn upon the merits and availability, or lack thereof, of the AAR study.

for present purposes, that the GWWR agreement did facilitate the merger. The fact remains, however, that the arrangements provided for in the GWWR agreement are still non-jurisdictional. We cannot assert jurisdiction over a settlement merely because it satisfies the concerns of a carrier that might otherwise have been a merger opponent.

(ii) Mr. Downey cites various cases, including Kansas City Southern Industries, Inc., The Kansas City Southern Railway Company and K&M Newco, Inc.--Control--MidSouth Corporation, MidSouth Rail Corporation, MidLouisiana Rail Corporation, SouthRail Corporation and TexRail Corporation, Finance Docket No. 32167 (ICC served May 4, 1994) (KCS/MidSouth), for the proposition that employees of a non-applicant carrier can receive labor protection in certain situations. This, however, "has typically involved a situation where the non-applicant employees became joint or common employees of the applicant and non-applicant carriers." KCS/MidSouth, slip op. at 3 (footnote omitted). See also DRGW/SP, 4 I.C.C.2d at 956-57 (certain employees were "joint employees" of an applicant carrier and two non-applicant carriers). There is, however, no evidence of record in the present proceeding that GWWR employees are "joint or common employees" of GWWR and SPCSL.

(iii) Mr. Downey cites Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 618 (1982) (UP/MP/WP) for the proposition that, where a settlement agreement is involved, labor protective conditions may be imposed in favor of employees of a non-applicant carrier. The UP/MP/WP settlement agreement referenced by Mr. Downey, however, involved a pooling arrangement, which was subject to ICC jurisdiction under 49 U.S.C. 11342. "Because the pooling arrangement [was] intended as a substitute for the trackage rights originally sought," the applicants voluntarily accepted the labor protective conditions applicable to trackage rights. UP/MP/WP, 366 I.C.C. at 618. In the present case, however, the arrangements provided for in the GWWR agreement are not subject to our jurisdiction, under either 49 U.S.C. 11342 or 49 U.S.C. 11343.

Rate Studies. Mr. Downey has, at best, offered only a tenuous nexus between the relief he seeks and our use of the most recent in a series of ICC studies of rail freight rates. He states:

> The Board's use of the "Rate Decline" report for February 1995 impacts the tenor of Decision 44 in all its phases, including employee conditions and oversight to commence October 1.

CWD-3 at 7. Nonetheless, we will address his arguments with respect to our use of this study.

ICC staff had prepared five studies showing a continuing decline in rail rates since passage of the Staggers Rail Act of 1980, as measured by inflation-adjusted revenue per ton.[10] Each

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[10] The average rate was calculated using a "Tornqvist" index. Rate changes for nine (inclusive) rail commodity groups were aggregated by weighting each by its annual share of rail revenue. The underlying data came from the annual railroad Freight Commodity Statistics.

was issued with a press release and noted in the ICC's annual reports to Congress and in ICC Congressional testimony.[11]

A sixth ICC staff study (the 1995 staff study) found that the average rail rate per ton had declined more than 37% on an inflation adjusted basis from its peak in 1981 through 1993, as compared to the 33% decline through 1991 found in the next most recent study. While not accompanied by a press release, this study was made available to any party who inquired about its availability, and was referenced approvingly by the United States Department of Transportation in its brief. See DOT-4 at 23. In Decision No. 44, it is referred to twice (at 104 and 119) to show that rail rates have continued to decline since 1980 even as the number of Class I railroads has decreased, primarily through numerous mergers, from 26 to 10.

Mr. Downey's concern that it is somehow improper to adjust rail revenues using the GDP implicit price deflator is misplaced, and his cite of the use by the Federal Energy Regulatory Commission (FERC) of another deflator in an entirely different context is misleading. See CWD-3 at 7. In fact, using data from electric utilities regulated by FERC, and applying, as the ICC did, implicit GDP price deflators to adjust for the effects of inflation, the Energy Information Administration of the United States Department of Energy (DOE) found that "the average transportation cost for contract coal shipped by railroads fell by 19 percent, from $11.08 per ton in 1988 to $8.93 in 1993," and that, due to increases in lengths of haul, "the average rate per ton-mile (i.e., the average rate per ton, per mile shipped) fell by 28 percent between 1988 and 1993."[12]

Finally, the data Mr. Downey presents in an attempt to discredit an AAR rate study referenced by applicants[13] (to corroborate our assessment that rail rates have declined) only emphasizes how conservative the series of ICC studies was in measuring the competitive gains to rail shippers since enactment of the Staggers Rail Act of 1980. Mr. Downey notes that the average rail length of haul increased by almost one-third from 1980 to 1994 (from 615.8 to 816.8 miles) and that rail rates often taper with distance. Mr. Downey asserts that this means the AAR study is flawed, because it tracks rail revenues per ton-mile over time. He believes that a part of the decrease it measures must be related to the distance taper. But the ICC studies are based on a scientifically weighted index of rail revenues per ton, and these indices have actually understated the post-Staggers decline in rail rates to the extent they have not taken into account the increase in rail revenues per ton brought about by increases in the average length of haul. This effect can be seen in the DOE study noted above because it provided measures of both revenue per ton and per ton-mile.

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[11] As noted by applicants, these ICC studies have been accepted and/or corroborated, in whole or for important rail commodities such as coal and grain, by the Association of American Railroads, the Energy Information Administration of the United States Department of Energy, the United States General Accounting Office, and the Economic Research Service of the United States Department of Agriculture. See UP/SP-282 at 5-8.

[12] Energy Policy Act Transportation Rate Study: Interim Report on Coal Transportation, October 1995, at ix.

[13] The 1994 AAR study, Railroad Freight Rates Since Deregulation, is discussed by applicants in UP/SP-282 at 5, and by Mr. Downey in CWD-4 at 3-4.

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

It is ordered:

1. The CWD-4 motion to strike is denied.

2. The CWD-3 petition is denied.

3. This decision shall be effective on November 20, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

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SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

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

[Decision No. 60][2]

Decided: November 15, 1996

In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company)[3] and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company),[4] subject to various conditions. Common control was consummated on September 11, 1996.[5]

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[1] Proceedings pending before the Interstate Commerce Commission (ICC) on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

[2] This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; and Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company.

[3] Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) are referred to collectively as UP.

[4] Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) are referred to collectively as SP.

[5] Southern Pacific Rail Corporation (SPR) was merged with and into UP Holding Company, Inc., a direct wholly owned subsidiary of Union Pacific Corporation (UPC). See UP/SP-277

(continued...)

In this decision, we address the matters discussed: (i) by Mr. Charles W. Downey in his CWD-3 petition to reopen filed September 3, 1996; and (ii) by UP/SP in its UP/SP-282 reply filed September 23, 1996.

BACKGROUND

We noted, in Decision No. 44, that the settlement agreements entered into by UP/SP included one entered into with Gateway Western Railway Company (GWWR). Decision No. 44, slip op. at 9 & n.8. We also noted that Mr. Downey, a general chairman of the United Transportation Union (UTU) for lines of GWWR and SPCSL, had argued: that the agreement entered into with GWWR would alter the work arrangements applicable to GWWR and SPCSL operations, and impair the rights of persons employed by GWWR and SPCSL in the Chicago-St. Louis territory of the former Chicago, Missouri & Western Railway Company (CMW); and that fairness to employees of both GWWR and SPCSL required that an implementing agreement be arrived at for the GWWR agreement prior to consummation of the UP/SP merger, and that the GWWR agreement be subject to the full reach of the New York Dock conditions.[6] Decision No. 44, slip op. at 88. In denying Mr. Downey's requests, we explained: that the arrangements provided for in the GWWR agreement did not require our approval, which necessarily meant that there was no basis for imposing labor protection with respect to GWWR employees; and that the New York Dock conditions we had imposed upon the UP/SP merger itself would adequately protect SPCSL employees from any merger-related adverse impacts. Decision No. 44, slip op. at 175.

The CWD-3 Petition. Mr. Downey advances two arguments in his CWD-3 petition.[7]

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[5](...continued)
at 1. UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

[6] New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock).

[7] Mr. Downey also contends that the Board's Secretary has denied him access to the transcript of the oral argument we held on July 1, 1996, and has advised him that the transcript can be purchased from the reporter. He maintains that this practice is contrary to the availability mandated by the Administrative Procedure Act and has prejudiced him in the preparation of his petition. CWD-3 at 3 n.3. Mr. Downey, however, has not been denied access to the oral argument paper transcript. In fact, the Secretary's Office has allowed Mr. Downey's counsel, Mr. Gordon MacDougall, to inspect the paper transcript. As we explained in Expedited Procedures For Processing Rail Rate Reasonableness, Exemption And Revocation Proceedings, STB Ex Parte No. 527 (STB served Nov. 15, 1996), slip op. at 4,

> the Board's contract with the court reporter prohibits the copying of the draft or final paper transcript. . . . The individual can inspect, but not copy, the transcript at the Board; alternatively, the individual can purchase the transcript from the court reporter. Finally, individuals may obtain for free a copy of the microfilm version of the transcript when it becomes available.

(continued...)

(1) Mr. Downey contends that all employees affected by the transaction, including those employed by carriers that entered into settlement agreements with applicants, should be protected. CWD-3 at 2. Mr. Downey concedes that the GWWR agreement, standing alone, may be non-jurisdictional; he notes, however, that the GWWR agreement was intended to facilitate the UP/SP merger, and that accordingly we should impose the New York Dock conditions to protect any employees affected by the settlement between UP/SP and GWWR.

(2) Mr. Downey contends that our approval of the merger rests partially upon our "finding" that railroad competition has thrived despite the mergers of the past decade and a half, "with the average rate per ton declining more than 37% from 1981 through 1993." CWD-3 at 2, citing Decision No. 44, slip op. at 104 & n.99, 119, and 245. Mr. Downey argues that the 1995 staff study we cited in Decision No. 44[8] has never been formally "announced" either by the ICC or by the Board. Furthermore, Mr. Downey insists that rail rates have not declined over the past decade and a half. Mr. Downey argues that rail rates have increased 44% between 1980 and 1991. Mr. Downey therefore urges that we find the 1995 staff study to be invalid and that we disclaim reliance upon declining rail rates.

The UP/SP-282 Reply. UP/SP insists that Mr. Downey has offered no basis for imposing either mandatory or discretionary labor protective conditions on the GWWR agreement. The fact that the GWWR agreement might have "facilitated" the UP/SP merger, UP/SP contends, is not enough; our merger jurisdiction does not extend to a settlement that merely "facilitates" a merger; and this particular settlement, UP/SP adds, does not come within our pooling jurisdiction (see 49 U.S.C. 11342). The general rule, UP/SP notes, is that labor protection is not provided to employees of a non-applicant carrier. UP/SP concedes that an exception to this rule applies where the non-applicant employees qualify as "joint employees" of an applicant carrier and a non-applicant carrier, which they argue is not the situation here. With respect to Mr. Downey's claim that rail rates have increased over the past decade and a half, UP/SP contends, first, that our rejection of Mr. Downey's request for labor protection had nothing at all to do with that issue. And UP/SP insists

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[7](...continued)
The transcript referred to by Mr. Downey is the "raw" version, not the final official transcript. When the Board receives the final official transcript from the reporter, that document will be placed in the public docket and be available on microfilm. See also 49 CFR 1001.1 (1995) (transcripts and other files and records in the custody of the Secretary are available to the public and may be inspected at our Washington office upon reasonable request during business hours); 49 CFR 1002.1(h) (1995) (transcript of testimony and of oral argument, or extracts therefrom, may be purchased by the public from the official reporter); 49 CFR 1113.17(d) (1995) (free copies of the transcript will not be furnished to any party to any proceeding); and Expedited Procedures For Processing Rail Rate Reasonableness, Exemption And Revocation Proceedings, STB Ex Parte No. 527 (STB served Oct. 1, 1996), slip op. at 2 n.3.

[8] ICC, Office of Economic and Environmental Analysis, Rail Rates Continue Multi-Year Decline, 1995 (herein referred to as the 1995 staff study). See Decision No. 44, slip op. at 104 n.99. See also CWD-3, Appendix 1 (a copy of this 2-page study).

that, in any event, our finding that rail rates have fallen since 1980 is correct and is confirmed by all reliable studies. See UP/SP-282 at 5-8.[9]

DISCUSSION AND CONCLUSIONS

Applicable Standards. A proceeding may be reopened, and reconsideration granted, upon a showing of material error, new evidence, or substantially changed circumstances. 49 CFR 1115.3(b) (1995). See also Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Nov. 27, 1995) (Decision No. 43, slip op. at 2). Mr. Downey has neither presented new evidence nor alleged substantially changed circumstances; and his petition therefore rests upon an assertion of material error. We did not err as claimed by Mr. Downey, and we are therefore denying his CWD-3 petition.

Protective Conditions. We addressed this aspect of Mr. Downey's argument in our prior decision. See Decision No. 44, slip op. at 175 (footnote omitted): "The arrangements provided for in the GWWR agreement are non-jurisdictional, which necessarily means that there is no basis for imposing labor protection with respect to GWWR employees; and the New York Dock conditions will adequately protect SPCSL employees from any merger-related adverse impacts." See also Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133, Decision No. 25 (ICC served Mar. 7, 1995) (UP/CNW) (slip op. at 96) ("Protection for employees of carriers other than the primary applicants is unwarranted, because labor protective conditions are designed to protect only employees of railroads participating in transactions."). See also Rio Grande Industries, et al.--Control--SPT Co., et al., 4 I.C.C.2d 834, 955 (1988) (DRGW/SP) ("Labor protection conditions are designed to protect only employees of railroads participating in transactions.").

We are not persuaded by the various arguments advanced by Mr. Downey in support of an extension of labor protection to GWWR employees.

(i) Mr. Downey notes that the UP/SP merger itself requires our approval (i.e., is "jurisdictional"), and he insists that the GWWR agreement has facilitated the UP/SP merger. We may assume,

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[9] We will deny Mr. Downey's CWD-4 motion to strike portions of the UP/SP-282 reply. Mr. Downey contends that UP/SP has mischaracterized his arguments, but this contention, whether true or false, is of no consequence because our denial of the CWD-3 petition does not turn upon the alleged mischaracterizations; rather, we are denying the CWD-3 petition because the arrangements provided for in the GWWR agreement are non-jurisdictional, and because the employees of GWWR are employees of a non-applicant carrier. Mr. Downey further contends that a 1994 Association of American Railroads (AAR) study cited by UP/SP rests primarily upon an earlier version of our own discredited (in Mr. Downey's view) 1995 staff study; and, Mr. Downey adds, the 1994 AAR study is not only "new evidence," it is new evidence that was privately produced and is largely unavailable. Our denial of the CWD-3 petition, however, does not turn upon the merits and availability, or lack thereof, of the AAR study.

for present purposes, that the GWWR agreement did facilitate the merger. The fact remains, however, that the arrangements provided for in the GWWR agreement are still non-jurisdictional. We cannot assert jurisdiction over a settlement merely because it satisfies the concerns of a carrier that might otherwise have been a merger opponent.

(ii) Mr. Downey cites various cases, including Kansas City Southern Industries, Inc., The Kansas City Southern Railway Company and K&M Newco, Inc.--Control--MidSouth Corporation, MidSouth Rail Corporation, MidLouisiana Rail Corporation, SouthRail Corporation and TennRail Corporation, Finance Docket No. 32167 (ICC served May 4, 1994) (KCS/MidSouth), for the proposition that employees of a non-applicant carrier can receive labor protection in certain situations. This, however, "has typically involved a situation where the non-applicant employees became joint or common employees of the applicant and non-applicant carriers." KCS/MidSouth, slip op. at 3 (footnote omitted). See also DRGW/SP, 4 I.C.C.2d at 956-57 (certain employees were "joint employees" of an applicant carrier and two non-applicant carriers). There is, however, no evidence of record in the present proceeding that GWWR employees are "joint or common employees" of GWWR and SPCSL.

(iii) Mr. Downey cites Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 618 (1982) (UP/MP/WP) for the proposition that, where a settlement agreement is involved, labor protective conditions may be imposed in favor of employees of a non-applicant carrier. The UP/MP/WP settlement agreement referenced by Mr. Downey, however, involved a pooling arrangement, which was subject to ICC jurisdiction under 49 U.S.C. 11342. "Because the pooling arrangement [was] intended as a substitute for the trackage rights originally sought," the applicants voluntarily accepted the labor protective conditions applicable to trackage rights. UP/MP/WP, 366 I.C.C. at 618. In the present case, however, the arrangements provided for in the GWWR agreement are not subject to our jurisdiction, under either 49 U.S.C. 11342 or 49 U.S.C. 11343.

Rate Studies. Mr. Downey has, at best, offered only a tenuous nexus between the relief he seeks and our use of the most recent in a series of ICC studies of rail freight rates. He states:

> The Board's use of the "Rate Decline" report for February 1995 impacts the tenor of Decision 44 in all its phases, including employee conditions and oversight to commence October 1.

CWD-3 at 7. Nonetheless, we will address his arguments with respect to our use of this study.

ICC staff had prepared five studies showing a continuing decline in rail rates since passage of the Staggers Rail Act of 1980, as measured by inflation-adjusted revenue per ton.[10] Each

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[10] The average rate was calculated using a "Tornqvist" index. Rate changes for nine (inclusive) rail commodity groups were aggregated by weighting each by its annual share of rail revenue. The underlying data came from the annual railroad Freight Commodity Statistics.

was issued with a press release and noted in the ICC's annual reports to Congress and in ICC Congressional testimony.[11]

A sixth ICC staff study (the 1995 staff study) found that the average rail rate per ton had declined more than 37% on an inflation adjusted basis from its peak in 1981 through 1993, as compared to the 33% decline through 1991 found in the next most recent study. While not accompanied by a press release, this study was made available to any party who inquired about its availability, and was referenced approvingly by the United States Department of Transportation in its brief. See DOT-4 at 23. In Decision No. 44, it is referred to twice (at 104 and 119) to show that rail rates have continued to decline since 1980 even as the number of Class I railroads has decreased, primarily through numerous mergers, from 26 to 10.

Mr. Downey's concern that it is somehow improper to adjust rail revenues using the GDP implicit price deflator is misplaced, and his cite of the use by the Federal Energy Regulatory Commission (FERC) of another deflator in an entirely different context is misleading. See CWD-3 at 7. In fact, using data from electric utilities regulated by FERC, and applying, as the ICC did, implicit GDP price deflators to adjust for the effects of inflation, the Energy Information Administration of the United States Department of Energy (DOE) found that "the average transportation cost for contract coal shipped by railroads fell by 19 percent, from $11.08 per ton in 1988 to $8.93 in 1993," and that, due to increases in lengths of haul, "the average rate per ton-mile (i.e., the average rate per ton, per mile shipped) fell by 28 percent between 1988 and 1993."[12]

Finally, the data Mr. Downey presents in an attempt to discredit an AAR rate study referenced by applicants[13] (to corroborate our assessment that rail rates have declined) only emphasizes how conservative the series of ICC studies was in measuring the competitive gains to rail shippers since enactment of the Staggers Rail Act of 1980. Mr. Downey notes that the average rail length of haul increased by almost one-third from 1980 to 1994 (from 615.8 to 816.8 miles) and that rail rates often taper with distance. Mr. Downey asserts that this means the AAR study is flawed, because it tracks rail revenues per ton-mile over time. He believes that a part of the decrease it measures must be related to the distance taper. But the ICC studies are based on a scientifically weighted index of rail revenues per ton, and these indices have actually understated the post-Staggers decline in rail rates to the extent they have not taken into account the increase in rail revenues per ton brought about by increases in the average length of haul. This effect can be seen in the DOE study noted above because it provided measures of both revenue per ton and per ton-mile.

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[11] As noted by applicants, these ICC studies have been accepted and/or corroborated, in whole or for important rail commodities such as coal and grain, by the Association of American Railroads, the Energy Information Administration of the United States Department of Energy, the United States General Accounting Office, and the Economic Research Service of the United States Department of Agriculture. See UP/SP-282 at 5-8.

[12] Energy Policy Act Transportation Rate Study: Interim Report on Coal Transportation, October 1995, at ix.

[13] The 1994 AAR study, Railroad Freight Rates Since Deregulation, is discussed by applicants in UP/SP-282 at 5, and by Mr. Downey in CWD-4 at 3-4.

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

It is ordered:

1. The CWD-4 motion to strike is denied.

2. The CWD-3 petition is denied.

3. This decision shall be effective on November 20, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

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