issue in the case and was not a collateral acquisition taking place as part of a larger intramodal transaction; i.e. there was a substantive change. The court held that the fact that Congress had passed legislation providing for different procedures for consideration of exemption petitions in matters related to motor carriers of property did not mean that Congress intended to repeal or override more specific provisions relating to rail-motor acquisitions. RCCC v. U.S. at 1329. Therefore, the court stated, the Commission could not bypass the more specific requirements for a rail carrier's acquisition of trucking companies. Id.

Applicants intend to file a petition for exemption under section 10505 for motor carrier acquisitions that are incidental to the UP/SP common control transaction. We do not believe that the RCCC v. U.S. decision even addresses the applicability of section 11344(c) in this context, and, further, we do not believe that the decision precludes us from determining that section 11344(c) is inapplicable in certain situations.

Similarly, we do not believe that the waiver will hinder our ability to make any of the findings, with regard to the overall transaction, that are required by 49 U.S.C. 11344(b)(1)(A),(D) and (E). The information that applicants would have to provide with regard to the motor carrier subsidiaries in the absence of the waiver would not significantly aid our evaluation of the primary transaction at issue (the transaction resulting in the common control of UP and SP) and how that transaction would effect the adequacy of transportation to the public, how it would effect the interest of carrier employees affected by the proposed transaction, and whether it would have an adverse effect on competition in the affected region. We believe that the information applicants will have to file, with the waiver in effect, will be sufficient for our purposes.[10]

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[9](...continued)
of this title; and

(B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

[10] 49 CFR 1180.6 requires all applicants to file "supporting information." This includes the following: (1) a description of the proposed transaction; (2) a discussion of the public interest justifications supporting the application; (3) any other supporting or descriptive statements applicants deem material; (4) an opinion of applicants' counsel that the transaction meets the requirements of the law; (5) a list of the State(s) in which any part of the property of each applicant carrier is situated; (6) a map indicating the line(s) of applicant carriers in their relations to each other; (7) an explanation of the transaction; and (8) environmental data. In a major transaction, 49 CFR 1180.6 also requires applicants to file the following: (1) Form 10-Ks; (2) Form S-14s; (3) any changes in ownership, control, or officers not indicated in the applicants most recent annual report Form R-1; (4) annual reports; (5) a discussion of any other issues relevant to the transaction; (6) a corporate chart indicating all relationships between applicant carriers and all affiliates and subsidiaries and also companies controlling applicant carriers directly, indirectly or through another entity; and (7) information about direct or indirect intercorporate or financial relationships at the time the application in filed, not disclosed elsewhere in the application.

(continued...)

Even though the motor carrier subsidiaries are significant entities in and of themselves, the fact is that the primary focus of our evaluation will be on the effect on the public interest of the common control of UP and SP. We will, of course, consider the ramifications of the common control of the motor carrier subsidiaries as well; however, the vast majority of the information excluded by the waiver would not aid us in our analysis of the overall transaction.

As stated, we believe that applicants will have to file information sufficient for our purposes, and that the waiver does not change that fact. Therefore, we are also unpersuaded by IBT's third argument, that the waiver is not supported by sufficient record evidence. In our view, information received into the record thus far, combined with our knowledge based on past experience, justifies the granting of the waiver.

Discovery. In our view, concerned parties in this proceeding will be able to obtain ample information through discovery. Parties will not be limited to interrogatories and requests for admissions. We stated in the appendix to Decision No. 6, served October 19, 1995, that, upon each evidentiary filing, the filing party will place all documents relevant to the filing (other than documents that are privileged or otherwise protected from discovery) in a depository open to all parties. The filing party also will make its witnesses available for discovery depositions. Further, we believe that interested parties will be able to obtain relevant information regarding the motor carrier subsidiaries through written discovery. Interested parties can seek information regarding the motor carriers from applicants. If applicants fail to respond, the parties can file a motion to compel with the Administrative Law Judge and make their arguments regarding the relevance of the information they seek.

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

It is ordered:

1. IBT's petition to reopen Decision No. 3 is denied.

(...continued)

49 CFR 1180.7 requires applicants to submit analyses of the impacts of the proposed transaction on intermodal and intramodal competition for freight surface transportation in the regions affected by the transaction and on the provision of essential services by applicants and other carriers. 49 CFR 1180.8 requires applicants to submit an operating plan detailing proposed operational changes that will result from the transaction. 49 CFR 1180.9 requires applicants to submit certain financial information.

It appears that, if applicants filed all of this information with regard to their motor carrier subsidiaries, much of it would be irrelevant in our 49 U.S.C. 11344(b) analysis. It further appears that, inasmuch as some of the requirements (such as the corporate chart requirement) implicate the motor carrier subsidiaries, applicants will be required to submit the relevant information even with the waiver in effect.

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

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

Vernon A. Williams
Secretary

(SEAL)

STB FD-32760 12-27-95 C-9

SERVICE DATE
DEC 2 7 1995

3392

INTERSTATE COMMERCE COMMISSION

[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

AGENCY: Interstate Commerce Commission

ACTION: Decision No. 9; Notice of Acceptance of Application.[1]

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[1] This designation embraces the following: (1) 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; (2) 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; (3) Finance Docket No. 32760 (Sub-No. 3), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Alton & Southern Railway Company; (4) Finance Docket No. 32760 (Sub-No. 4), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Central California Traction Company; (5) Finance Docket No. 32760 (Sub-No. 5), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Ogden Union Railway & Depot Company; (6) Finance Docket No. 32760 (Sub-No. 6), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Terminal Railroad Company; (7) Finance Docket No. 32760 (Sub-No. 7), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Traction Company; (8) Finance Docket No. 32760 (Sub-No. 8), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Overnite Transportation Company, Southern Pacific Motor Trucking Company, and Pacific Motor Transport Company; (9) Finance Docket No. 32760 (Sub-No. 9), Burlington Northern Railroad Company and The Atchison, Topeka and Santa

(continued...)

SUMMARY: The Commission is accepting for consideration the application filed November 30, 1995,[2] by Union Pacific

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[1](...continued)
Fe Railway Company--Terminal Trackage Rights--Kansas City Southern Railway Company; (10) Docket No. AB-3 (Sub-No. 129X), Missouri Pacific Railroad Company--Abandonment Exemption--Gurdon-Camden Line In Clark, Nevada, and Ouachita Counties, AR; (11) Docket No. AB-3 (Sub-No. 130), Missouri Pacific Railroad Company--Abandonment--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO, and Docket No. AB-8 (Sub-No. 38), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO; (12) Docket No. AB-3 (Sub-No. 131), Missouri Pacific Railroad Company--Abandonment--Hope-Bridgeport Line In Dickinson and Saline Counties, KS, and Docket No. AB-8 (Sub-No. 37), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Hope-Bridgeport Line In Dickinson and Saline Counties, KS; (13) Docket No. AB-3 (Sub-No. 132X), Missouri Pacific Railroad Company--Abandonment Exemption--Whitewater-Newton Line In Butler and Harvey Counties, KS; (14) Docket No. AB-3 (Sub-No. 133X), Missouri Pacific Railroad Company--Abandonment Exemption--Iowa Junction-Manchester Line In Jefferson Davis and Calcasieu Parishes, LA; (15) Docket No. AB-3 (Sub-No. 134X), Missouri Pacific Railroad Company--Abandonment Exemption--Troup-Whitehouse Line In Smith County, TX; (16) Docket No. AB-8 (Sub-No. 36X), The Denver and Rio Grande Western Railroad Company--Discontinuance Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO, and Docket No. AB-12 (Sub-No. 189X), Southern Pacific Transportation Company--Abandonment Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO; (17) Docket No. AB-8 (Sub-No. 39), The Denver and Rio Grande Western Railroad Company--Discontinuance--Malta-Cañon City Line In Lake, Chaffee and Fremont Counties, CO, and Docket No. AB-12 (Sub-No. 188), Southern Pacific Transportation Company--Abandonment--Malta-Cañon City Line In Lake, Chafee, and Fremont Counties, CO; (18) Docket No. AB-12 (Sub-No. 184X), Southern Pacific Transportation Company--Abandonment Exemption--Wendel-Alturas Line In Modoc and Lassen Counties, CA; (19) Docket No. AB-12 (Sub-No. 185X), Southern Pacific Transportation Company--Abandonment Exemption--Suman-Bryan Line In Brazos and Robertson Counties, TX; (20) Docket No. AB-12 (Sub-No. 187X), Southern Pacific Transportation Company--Abandonment Exemption--Seabrook-San Leon Line In Galveston and Harris Counties, TX; (21) Docket No. AB-33 (Sub-No. 93X), Union Pacific Railroad Company--Abandonment Exemption--Whittier Junction-Colima Junction Line In Los Angeles County, CA; (22) Docket No. AB-33 (Sub-No. 94X), Union Pacific Railroad Company--Abandonment Exemption--Magnolia Tower-Melrose Line In Alameda County, CA; (23) Docket No. AB-33 (Sub-No. 96), Union Pacific Railroad Company--Abandonment--Barr-Girard Line In Menard, Sangamon, and Macoupin Counties, IL; (24) Docket No. AB-33 (Sub-No. 97X), Union Pacific Railroad Company--Abandonment Exemption--DeCamp-Edwardsville Line In Madison County, IL; (25) Docket No. AB-33 (Sub-No. 98X), Union Pacific Railroad Company--Abandonment Exemption--Edwardsville-Madison Line In Madison County, IL; (26) Docket No. AB-33 (Sub-No. 99X), Union Pacific Railroad Company--Abandonment Exemption--Little Mountain Jct.-Little Mountain Line In Box Elder and Weber Counties, UT.

[2] We are also accepting for consideration applicants' supplement to the primary application, filed on or about December 21, 1995.

Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW)[3] (collectively applicants), seeking Commission approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC.[4] Applicants are directed to provide certain additional information.

DATES: The effective date of this decision is December 27, 1995. Parties must file notification of intent to participate in this proceeding by January 16, 1996. Descriptions of inconsistent and responsive applications, and petitions for waiver or clarification regarding those applications, must be filed by January 29, 1996. Inconsistent and responsive applications, written comments, including comments of the United States Department of Justice (DOJ) and the United States Department of Transportation (USDOT), protests, requests for conditions, and any other opposition evidence and argument must be filed by March 29, 1996. For further information, see the attached procedural schedule.[5]

ADDRESSES: An original and 20 copies of all documents must refer to Finance Docket No. 32760 and be sent to the Office of the Secretary, Case Control Branch, Attn: Finance Docket No. 32760, Interstate Commerce Commission, 1201 Constitution Avenue, N.W., Washington, DC 20423.[6]

In addition, one copy of all documents in this proceeding must be sent to each of applicants' representatives: (1) Arvid E. Roach II, Esq., Covington & Burling, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, DC 20044; and (2) Paul A. Cunningham, Esq., Harkins Cunningham, 1300 Nineteenth Street, N.W., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Julia Farr, (202) 927-5352. [TDD for the hearing impaired: (202) 927-5721.]

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[3] UPC, UPRR, and MPRR are referred to collectively as Union Pacific. UPRR and MPRR are referred to collectively as UP. SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as Southern Pacific. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP.

[4] SPT is a wholly owned subsidiary of SPR. SPCSL and DRGW are wholly owned subsidiaries of SPT. SPT owns 99.9% of SSW.

[5] We adopted the procedural schedule set forth below in Decision No. 6, served October 19, 1995. There have been minor adjustments to dates falling on Saturdays, Sundays, or legal holidays.

[6] Legislation to sunset the Commission on December 31, 1995, and to transfer remaining functions is now under consideration in Congress. Until further notice, parties submitting pleadings should continue to use the current name and address.

SUPPLEMENTARY INFORMATION: On November 30, 1995, pursuant to 49 U.S.C. 11343-45 and our rules at 49 CFR 1180.4, applicants filed an application for approval of: (1) the acquisition of control of SPR by Acquisition; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC. Applicants also filed several related applications, petitions for exemption, and notices of exemption.[7]

Applicants filed a notice of exemption for settlement-related trackage rights pursuant to an agreement they reached with Burlington Northern Railroad Company and The Atchison, Topeka, and Santa Fe Railway Company (collectively, BN/Santa Fe) [Finance Docket No. 32760 (Sub-No. 1)].[8] The trackage rights are to be effective when and if applicants receive and exercise the control authority requested in Finance Docket No. 32760.

Applicants and BN/Santa Fe filed a petition for exemption from regulation under 49 U.S.C. 10505 for the acquisition and operation of trackage in the states of California, Texas, and Louisiana [Finance Docket No. 32760 (Sub-No. 2)]. This petition is also filed pursuant to the settlement agreements applicants reached with BN/Santa Fe.

Applicants seek exemption from regulation under 49 U.S.C. 10505 for the merged entity to control the Alton & Southern Railway Company [Finance Docket No. 32760 (Sub-No. 3)], Central California Traction Company [Finance Docket No. 32760 (Sub-No. 4)], The Ogden Union Railway & Depot Company [Finance Docket No. 32760 (Sub-No. 5)], Portland Terminal Railroad Company [Finance Docket No. 32760 (Sub-No. 6)], and Portland Traction Company [Finance Docket No. 32760 (Sub-No. 7)]. Applicants also seek exemption from regulation under section 10505 for the merged entity to control the following motor carriers: Overnite Transportation Company, Southern Pacific Motor Trucking Company, and Pacific Motor Transport Company [Finance Docket No. 32760 (Sub-No. 8)].

Applicants and BN/Santa Fe also filed an application for terminal rights requesting that we enter an order under 49 U.S.C. 11103 permitting BN/Santa Fe to use two segments of Kansas City Southern Railway Company terminal trackage in Shreveport, LA, and Beaumont, TX [Finance Docket No. 32760 (Sub-No. 9)]. Applicants and BN/Santa Fe allege that BN/Santa Fe's use of these tracks is necessary for BN/Santa Fe to promote stronger rail competition to a merged UP/SP system in the Houston-Memphis and Houston-New Orleans corridors, pursuant to the settlement agreements.

Various applicants seek exemption from regulation under 49 U.S.C. 10505 for abandonments related to the primary application. MPPP seeks exemption for two related abandonments [Docket No. AB-3 (Sub-Nos. 129X and 133X); SPT for two related abandonments [Docket No. AB-12 (Sub-Nos. 184X and 185X)], and UPRR for one related abandonment [Docket No. AB-33 (Sub-No. 98X)]. DRGW and SPT filed a

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[7] Under 49 CFR 1180.4(c)(2)(vi), all directly related applications, petitions, and notices of exemption must be filed concurrently with the primary control and merger application.

[8] Applicants originally reached an agreement with BN/Santa Fe on September 25, 1995. They reached a supplemental agreement on November 18, 1995, which governs the grants of trackage rights.

merger-related petition for exemption from regulation under section 10505 to abandon and discontinue service on another line [Docket No. AB-8 (Sub-No. 36X) and Docket No. AB-12 (Sub-No. 189X)].

MPRR filed notices of exemption pursuant to 49 CFR 1152, Subpart F, for two abandonments related to the primary application [Docket No. AB-3 (Sub-Nos. 132X and 134X); SPT filed a notice for one related abandonment [Docket No. AB-12 (Sub-No. 187X)]; and UPRR filed notices for four related abandonments [Docket No. AB-33 (Sub-Nos. 93X, 94X, 97X, and 99X)].

MPRR and DRGW filed two applications for abandonment and discontinuance of trackage rights pursuant to 49 CFR 1152.22 [Docket No. AB-3 (Sub-No. 130) and Docket No. AB-8 (Sub-No. 38)], [Docket No. AB-3 (Sub-No. 131) and Docket No. AB-8 (Sub-No. 37)].

DRGW and SPT filed an application pursuant to 49 CFR 1152.22 to permit discontinuance of operations on and abandonment of a portion of railroad [Docket No. AB-8 (Sub-No. 39) and Docket No. AB-12 (Sub-No. 188)]. UPRR filed an application pursuant to 49 CFR 1152.22 to permit abandonment of and discontinuance of service on a railroad line [Docket No. AB-33 (Sub-No. 96)].

According to applicants, the proposed transaction involves the acquisition and exercise of control of SPR and its subsidiaries, including those which are carriers by rail, by UPC and its wholly owned subsidiaries, UPRR and MPRR.[9] Applicants submitted an operating plan detailing how they will consolidate UP and SP rail operations upon consummation of the transaction. UPC, Acquisition, UPRR, and SPR are parties to an Agreement and Plan of Merger dated August 3, 1995 (the Merger Agreement).[10] Applicants state that the Merger Agreement calls for Acquisition to acquire all of the common stock of SPR, and for SPR to be merged

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[9] SPT, and its majority owned railroad subsidiaries--SPCSL, DRGW, and SSW--are an integrated, single system railroad. As such, the acquisition of control of SPR by UPRR involves the control of a single carrier within the meaning of 49 U.S.C. 11343. See Robert W. Bethge & Raymond K. Wilson--Control Exemption--Canal Cartage Co., Finance Docket No. MC-F-19525 (ICC served Nov. 29, 1989); Burlington Northern, Inc.--Control and Merger--St. Louis-San Francisco Ry., 366 I.C.C. 862, aff'd sub nom. Brotherhood of Ry. & Airline Clerks v. Burlington Northern Inc., 722 F.2d 380 (8th Cir. 1983); Katy Indus., Inc.--Control--Missouri-Kansas-Texas R.R., 331 I.C.C. 405, 410-411 (1967); Kansas City Southern Indus. Inc.--Control--Kansas City S. Ry., 317 I.C.C. 1, 4 (1962); Woods Indus., Inc.--Control-- United Transports, Inc., 85 M.C.C. 672, 675 (1960); Louisville & Jeffersonville B. & R. Co. Merger, 295 I.C.C. 11, 17-18 (1955), aff'd sub nom. Alleghany Corp. v. Breswick & Co., 353 U.S. 151 (1957).

[10] Applicants state that, at a special meeting of stockholders expected to be held in December 1995, SPR stockholders will consider the merger pursuant to the Merger Agreement.

with and into UPRR. The separate corporate existence of SPR will cease and UPRR will be the surviving corporation.[11]

Pursuant to the Merger Agreement, Acquisition made a tender offer on August 9, 1995, for up to 25% of SPR common stock at $25.00 per share in cash. On September 7, 1995, the tender offer was completed for 39,034,471 shares. On September 15, 1995, Acquisition purchased the shares accepted for payment under the tender offer for approximately $976 million.[12] These shares are being held in a voting trust pending approval of the merger.

According to applicants, upon satisfaction of all conditions to the merger, SPR's stockholders will have the right to submit a request specifying the number of shares that they desire to have converted into (a) .4065 shares of the common stock of UPC per share, and (b) the right to receive $25.00 per share in cash, without interest. The aggregate number of shares to be converted into cash consideration at the time of the merger, together with shares tendered in the tender offer, will be equal as nearly as possible to 40% of all shares outstanding as of the date immediately prior to the date on which the merger becomes effective, applicants state. To the extent that SPR stockholders elect in the aggregate to receive either cash consideration or stock consideration in excess of such proportions, the Merger Agreement requires the cash or stock component to be prorated in order to achieve the specified proportions. Applicants request that, pursuant to Schwabacher v. United States, 334 U.S. 192 (1948), we determine that the agreed-upon terms for the purchase of the common stock of SPR by Acquisition are fair to both the stockholders of UPC and the stockholders of SPR.[13]

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[11] As noted, applicants intend to consolidate the railroad operations of UP and SP through the merger of SPR into UPRR. However, they state that, depending upon tax, financial and other circumstances, they may effect the consolidation by other means, including, for example, the merger of SPR into MPRR or the lease of all of SP's properties to UPRR and/or MPRR. Applicants also maintain that they intend to merge SPT, SSW, SPCSL and DRGW into UPRR, although these SPR subsidiaries may retain their separate existence for some time. Further, applicants state that it is possible that, instead of the expected mergers, some or all of the entities will be merged into, or their assets leased to, MPRR, or applicants may use other means to accomplish their consolidation into the merged system.

[12] In Union Pacific Corp.--Securities Exemption (Tender Offer), Finance Docket No. 32761 (ICC served Aug. 21, 1995), we granted an exemption for the issuance of debt securities to finance the purchase price of these shares.

[13] According to applicants, SSW has a small number of minority equity holders, and the Federal Railroad Administration also holds certain SSW redeemable preference shares. At this time, applicants state, they are not requesting a fairness determination pursuant to Schwabacher with respect to the compensation that might be paid to SSW security holders in connection with a merger of SSW into UPRR or MPRR because tax and other considerations need to be resolved before applicants can determine whether such a merger will occur, and if so, on what terms. Applicants state that, if they determine to carry out such a merger, they will request a finding from us regarding the fairness of the terms or a declaratory order that no such finding is required.

Applicants allege that borrowings in connection with the purchase by Acquisition of the remaining common stock of SPR will add "modestly" to UPC's fixed charges, and state that UPC will be able to absorb these additional charges.

According to applicants, UPC will pay approximately $600 million in additional cash consideration to complete the Merger. UPC intends initially to finance such amount through (a) the issuance of public or private long-term or short-term borrowings, which may be evidenced by securities (the Debt Securities), (b) the issuance of preferred stock or UPC common stock (the Equity Securities) or, (c) the issuance of a combination of Debt Securities and Equity Securities. Applicants state that these security issuances may require authorization under 49 U.S.C. 11301. Alternatively, UPC may initially finance the additional cash consideration under the Merger with borrowings under one or more new credit or other facilities to be established with various banks or other parties and/or certain existing credit facilities (the Credit Facilities) under which the indebtedness borrowed will not be evidenced by notes or other securities subject to 49 U.S.C. 11301. If the Credit Facilities are used initially to finance such amount, borrowings thereunder will be refinanced through the issuance of Debt Securities or Equity Securities or a combination thereof, applicants state. The proceeds from the Debt Securities and/or Equity Securities may also be used to finance interest accrued on the Credit Facilities or the Debt Securities. In applicants' view, based on the amount of SPR common stock outstanding on September 30, 1995, UPC will also be required to issue approximately 38 million shares of UPC common stock[14] in order to pay the stock consideration required to complete the Merger (together with the Debt Securities and Equity Securities, the Securities).

Applicants state that, in the event of the merger of SPR, SPT, SSW, SPCSL, or DRGW into UPRR or MPRR, UPRR or MPRR will assume obligations associated with certain debt securities or obligations related to securities then outstanding of the entities, to the extent permitted or required by applicable agreements and instruments and provided such obligations are not redeemed or retired at that time.

Applicants note that, although not a carrier, UPC must "file applications under 49 U.S.C. 11301 and 11302 for those issuances of securities and assumptions of obligations which may relate to or affect the activities of carrier subsidiaries."[15] UPRR, as a carrier, is also subject to such provisions with respect to the issuance of securities and assumption of debt obligations, applicants state. To the extent Commission authorization may be required under 49 U.S.C. 11301, applicants request an exemption from such

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[14] In the Merger Agreement, SPR agrees that no more than 158,316,398 shares of SPR common stock will be outstanding at the time of the Merger. If the maximum were outstanding, this would result in the issuance of approximately 39 million shares of UPC common stock.

[15] Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 459, 640 (1982), aff'd in part & remanded in part sub nom. Southern Pacific Transportation Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

requirements for the issuance of the Securities in order to complete the merger and for the assumption of or succession to any assumed obligations pursuant to subsidiary mergers or similar transactions, pursuant to 49 U.S.C. 10505. Alternatively, applicants request that we approve such issuance of the Securities and assumption of or succession to any assumed obligations pursuant to 49 U.S.C. 11301.

According to applicants, UPRR operates approximately 13,646 miles of railroad in the Western United States, consisting of approximately 9,820 miles of main line and approximately 3,826 miles of branch line. The main lines run from the Pacific Coast ports and terminals of Seattle, WA, Portland, OR, and Oakland and Los Angeles, CA, to Chicago, IL, and Missouri River gateways including Kansas City and Omaha/Council Bluffs. Routes over main lines extend from the Pacific Northwest through the States of Washington, Oregon, Idaho, and Utah to Ogden/Salt Lake City, UT, from Northern California through Nevada and Utah to Ogden/Salt Lake City, and from Southern California through Nevada and Utah to Ogden/Salt Lake City. UPRR's double-track main line connects Omaha/Council Bluffs at the East with Ogden/Salt Lake City at the West, and runs through Nebraska, Colorado, Wyoming, and Utah.

With the recent merger of Chicago and North Western Railway Company (CNW) into UPRR, state applicants, UPRR's lines also run from Chicago, IL, to Milwaukee, WI, and then to Winona, MN, and (via trackage rights over Wisconsin Central Ltd.) Duluth/Superior, and from Duluth/Superior to Minneapolis/St. Paul (via trackage rights over BN) and then to Des Moines, IA, and Kansas City. In addition, applicants note, UPRR transports low-sulfur coal from the Southern Powder River Basin in Wyoming in unit trains. These are principally destined for electric generating plants, the majority of which are located in the Southwest and Midwest. UPRR also provides commuter service in the Chicago area under a purchase-of-service contract with Metra. A UPRR line extends from a point near Green Bay, WI, to Ishpeming and Escanaba, MI, while UPRR's Milwaukee-to-St. Louis line passes through Chicago. UPRR has a network of branch lines in Iowa and Southern Minnesota, and a line extending from Northwestern Nebraska into South Dakota and Wyoming.

MPRR operates approximately 8,361 miles of railroad in the Midwestern and the Southwestern United States, consisting of approximately 7,508 miles of main line and approximately 853 miles of branch line. MPRR's lines connect the major midwest gateways of Chicago, Omaha, St. Louis, Memphis, and Kansas City with the principal ports and the terminals of New Orleans and Lake Charles, LA, and Galveston, Houston, Beaumont, Corpus Christi, Brownsville, and Laredo, TX. MPRR also serves interior Texas points including Dallas, Fort Worth, San Antonio, Austin, Midland/Odessa, and El Paso. Its lines extend into the grain producing regions of Kansas and Nebraska and as far west as Pueblo, CO.

SPT operates approximately 11,000 miles of railroad in the Western United States, consisting of approximately 8,700 miles of main line and approximately 2,300 miles of branch line in eight states. The main lines run from Portland, to Oakland, to Los Angeles, and thence to San Antonio, Houston and New Orleans, including physical interchanges at five principal gateways to Mexico. SPT lines extend from San Antonio and Houston to Fort Worth, with operations over trackage rights from Fort Worth to Pueblo and Kansas City. The Fort Worth-Pueblo line connects with SSW at Stratford

and Dalhart, TX, and to DRGW at Pueblo. The Fort Worth-Kansas City line connects with SSW at Kansas City and Hutchinson, KS. SPT's Central Corridor main line runs from Northern California to Ogden, UT, where it connects with DRGW. SPT's principal facilities are located at Eugene, OR, Roseville, Oakland, Los Angeles, Long Beach and West Colton, CA, Tucson, AZ, and El Paso, San Antonio and Houston, TX.

SSW operates approximately 2,200 miles of railroad in the Central United States, consisting of approximately 1,700 miles of main line and approximately 500 miles of branch line in nine states. SSW's main line runs from Santa Rosa, NM, to Kansas City and St. Louis, MO. Operations between Topeka and St. Louis are over trackage rights on UP. SSW main lines extend from St. Louis south to Shreveport, LA, and Corsicana, TX. SSW's lines connect with SPT in Corsicana, Dalhart and Stratford, TX, Hutchinson and Kansas City, KS, Shreveport, LA, and Santa Rosa, NM, with DRGW at Herington, KS, and with SPCSL at Kansas City, MO and East St. Louis, IL. At East St. Louis, IL, Memphis, TN, and Kansas City, KS, SSW connects with major eastern rail carriers. SSW's principal facilities are located in Kansas City, KS, and Pine Bluff, AR.

SPCSL operates approximately 1,200 miles of main line railroad in the states of Illinois, Iowa, and Missouri, between St. Louis, Chicago, and Kansas City, KS. This mileage includes trackage rights between Kansas City and Chicago on BN/Santa Fe. SPCSL is the link to the Chicago gateway for the SP system.

DRGW operates approximately 2,300 miles of railroad in the states of Colorado, Utah, and Kansas, consisting of approximately 1,900 miles of main line and approximately 400 miles of branch line. The main line runs from Ogden, UT, in the West, where it connects with SPT, through Denver, CO, to Herington, KS, where it connects with SSW. DRGW has rights to operate from Herington to Kansas City over SSW and UP. Operations between Pueblo and Herington are over trackage rights on UP. DRGW also connects with SPT at Pueblo. DRGW's principal facilities are located at Salt Lake City, UT, and Denver, Pueblo, and Grand Junction, CO.

Applicants assert that the proposed transaction is clearly in the public interest, and that quantified public benefits will be in excess of $750 million per year. The rail mode will become more competitive against truck and water carrier[illegible] applicants state, and rail customers will penetrate new [illegible]ets, economic activity will increase, and resources will [illegible]used more efficiently. The public benefits will include new and improved routes, reductions in terminal delay, more reliable service, improved equipment utilization and availability, savings from facility consolidations and lower overheads, and increased capital investments. It is applicants' position that the UP/SP merger, together with the settlement agreement with BN/Santa Fe, will intensify rail competition in the West, and will increase source competition.

We are accepting the application for consideration because it complies with the applicable regulations, waivers, and requirements. See 49 U.S.C. 11343-45; 49 CFR Part 1180. We reserve the right to require the filing of supplemental information from applicants or any other party or individual, as necessary to complete the record in this matter. We are also accepting all related applications. We note that we will process the abandonment applications in accordance with the overall merger procedural schedule,

rather than applying the deadlines found at 49 U.S.C. 10904; it would be premature to process the abandonment applications without having ruled on the merits of the merger application, when applicants state that the abandonments are related to, and contingent upon, the proposed UP/SP consolidation.[16] Similarly, we will not publish the notices of exemption in the 20-day period called for by our regulations at 49 CFR 1152.50(d)(3). Those abandonments are likewise contingent on approval of the overall merger transaction; we will not publish the notices and they will not become effective unless and until we approve the overall merger transaction.

We are requesting additional information regarding Docket No. AB-12 (Sub-No. 185X). The description of the line at issue (milepost 117.6 to milepost 101.4 of the Suman-Bryan Line in Brazos and Robertson Counties, TX) indicates that it is used primarily for through train service. The sole shipper on the line is located at milepost 104.5. If the line can be served from either end, and the 3.1-mile segment from milepost 101.4 to milepost 104.5 maintained, the shipper could still be served. It is possible that bifurcation of the line segment may be appropriate.

We request that, within 20 days from the effective date of this decision, applicants provide traffic data and pro forma operating results for the bifurcated section (milepost 101.4 to 104.5) for the most recent 12-month period, preferably through November 1995. The data submitted should include the following: (1) traffic (carloads) transported; (2) crew consist needed; (3) number of train trips required; (4) service time required per trip; (5) number of locomotives needed to move the traffic; and (6) the opportunity costs for the segment.

We also request that applicants submit a complete set of operating timetables for each applicant carrier's operations to facilitate our review of the operating plan submitted with the application.

In Decision No. 6, served October 19, 1995, we adopted an expedited procedural schedule, and we have attached it here to give notice to all interested persons. All of the filing deadlines are in accordance with the statute and governing regulations, as modified by that schedule.[17] We

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[16] Parties commenting on or protesting an abandonment may file their submissions on March 29, 1996. The applicants may respond to those comments and protests on April 29, 1996. We will not allow parties objecting to an abandonment to file rebuttal submissions; however, all parties may file briefs in support of their positions on June 3, 1996. In the past, we have deviated from the section 10904 deadlines when circumstances have justified doing so. See Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Missouri-Kansas-Texas Railroad Company, Finance Docket No. 30800 (ICC served Mar. 30, 1987). See, e.g., Chelsea Property Owners--Abandonment--Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY, Docket No. AB-167 (Sub-No. 1094) (ICC served Nov. 24, 1989) at p.2, n.6.

[17] On November 27, 1995, Mr. Scott Manatt filed a petition to reopen and reconsider the procedural schedule (continued...)

advise applicants and all other parties to this proceeding that, for purposes of this proceeding, they must strictly comply with all requirements. If questions arise concerning an interpretation of a requirement, they may contact the Commission's Office of Proceedings at (202) 927-7513 for assistance. See 49 CFR 1180.4(c)(6)(iii).

The application and accompanying exhibits are available for inspection in the Public Docket Room, Room 1221, at the offices of the Interstate Commerce Commission in Washington, DC.

Any interested persons, including DOJ and USDOT, may file written comments, protests, requests for conditions, and inconsistent and responsive applications no later than March 29, 1996. This deadline applies to all replies, comments, and protests addressing all related petitions, notices, and applications filed with the primary application.[18] An original and 20 copies must be filed with the Secretary, Interstate Commerce Commission, Washington, DC 20423.[19]

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[17](...continued)
(Decision No. 6) and the protective order, which we entered in Decision No. 2, served September 1, 1995. Mr. Manatt also filed a "demand for notice" requesting that he receive notice of all hearings, communications, orders, and motions filed in this proceeding. He requests that copies of all pleadings filed with the Commission be delivered to his office in Corning, AR. He further seeks an opportunity to engage in meaningful discovery, and to appear live before the Commission to testify in opposition to the merger. He demands that he be placed on the mailing list of all parties opposing the merger and that he receive copies of their communications and filings. On December 1, 1995, applicants replied to Mr. Manatt's petition to reopen and reconsider the protective order and the procedural schedule, noting that he raises arguments that we have already considered and rejected. On December 14, 1995, Mr. Manatt filed a response to applicants' reply. We will not consider Mr. Manatt's reply; under our regulations, replies to replies are not permitted. 49 CFR 1104.13(c). We are denying Mr. Manatt's requests for relief, but will place his name on the service list in this proceeding, so that he will receive copies of all pleadings, Commission decisions, and decisions of the Administrative Law Judge (ALJ) governing discovery.

[18] On December 14, 1995, the International Brotherhood of Teamsters (IBT) filed a motion for an extension of time in which to file its reply to applicants' petition for exemption contained in Finance Docket No. 32760 (Sub-No. 8). Because we are allowing all parties until March 29, 1996, to file such replies, IBT's request is moot.

[19] In addition to submitting an original and 20 copies of all documents filed with the Commission, the parties are encouraged to submit all pleadings and attachments as computer data contained on a 3.5-inch floppy diskette which is formatted for WordPerfect 5.1 (or formatted so that it can be converted by WordPerfect 5.1). The computer data contained on the computer diskettes submitted are subject to the protective order attached to the Commission's Decision No. 2 served September 1, 1995, and are for the exclusive use of Commission employees working directly with review of substantive matters in this proceeding. The flexibility provided by such computer file data will facilitate expedited review by the Commission and its staff.

Written comments must be concurrently served by first class mail on the United States Secretary of Transportation (USDOT), the Attorney General of the United States (DOJ), and applicants' representatives. Written comments must also be served upon all parties of record within 10 days of service of the service list by the Commission. We plan to issue the service list shortly after parties file their notices of intent to participate.

Written comments shall include:

1. The docket number and title of the proceeding;

2. The name, address, and telephone number of the commenting party and its representative upon whom service shall be made;

3. The commenting party's position, i.e., whether it supports or opposes the proposed transaction;

4. A list of any specific protective conditions sought;

5. An analysis of the issues with particular attention to our general policy statement for the merger or control of at least two class I railroads, 49 CFR 1180.1, the statutory criteria, and antitrust policy.

Because we have determined that this proceeding constitutes a major transaction within the meaning of our rail consolidation rules, 49 CFR Part 1180, railroads intending to file inconsistent or responsive applications must submit descriptions of those applications on January 29, 1996. The description must state whether the commenting railroad intends to file an inconsistent or responsive application, petitions for inclusion, trackage rights, or any other affirmative relief requiring an application to be filed with the Commission and a general statement of what that application is expected to include. THIS WILL BE CONSIDERED A PREFILING NOTICE WITHOUT WHICH THE COMMISSION WILL NOT ENTERTAIN APPLICATIONS FOR THIS TYPE OF RELIEF.

Petitions for waiver or clarification by responsive applicants shall be filed no later than January 29, 1996. Each responsive application filed and accepted will be consolidated with the primary application in this proceeding. Responsive applications include inconsistent applications, petitions for inclusion, or any other affirmative relief that requires an application to be filed with the Commission (such as trackage rights, purchase, purchase of a portion, acquisition, extension, construction, operation, pooling, terminal operations, abandonment, etc.). Parties should contact the Office of the Secretary at 927-7428 to obtain docket numbers for their responsive applications.

Parties wishing to engage in discovery are directed to consult with Administrative Law Judge Jerome Nelson.[20] For the purposes of the present proceeding, we think it appropriate to tighten the deadlines provided by 49 CFR

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[20] ALJ Nelson held a discovery conference in this proceeding on December 1, 1995. At that conference the ALJ adopted discovery guidelines, as reflected in his order served on December 7, 1995. Parties may contact the Office of the Secretary to obtain a copy of the discovery guidelines.

1115.1(c). Accordingly, the provisions of the second sentence of 49 CFR 1115.1(c) to the contrary notwithstanding, an appeal to a decision issued by ALJ Nelson must be filed within 3 working days of the date of his decision, and any response to any such appeal must be filed within 3 working days thereafter. Likewise, any reply to any procedural motion filed with the Commission itself in the first instance must also be filed within 3 working days.

In order for us to fulfill our responsibilities under the National Environmental Policy Act and other environmental laws, inconsistent applications and responsive applications must contain certain environmental information. Anyone desiring to file an inconsistent or a responsive application involving significant operational changes or an action such as a rail line abandonment or construction under 49 CFR 1105.6(b)(4) of our environmental rules must include, with its application, a preliminary draft environmental assessment (PDEA). Generally, these types of actions require an environmental report under 49 CFR 1105.6(b)(3) which would form the basis of a subsequent environmental assessment (or environmental impact statement, if warranted). Here, for purposes of this proceeding, a PDEA is necessary at the outset.

The preparation of a PDEA should not be burdensome. Although the information would be presented in a somewhat different format, the PDEA should address essentially the same environmental issues that would have been covered by an environmental report. The PDEA, like the environmental report, should be based on consultations with the Section of Environmental Analysis (SEA) and the various agencies set forth in 49 CFR 1105.7(b). SEA will be available to provide assistance as needed. Parties should contact Elaine K. Kaiser or Phillis Johnson-Ball of SEA at (202) 927-6248 if they have any questions regarding the environmental review process or preparation of a PDEA. SEA will use the PDEA to expedite the environmental review process. If a PDEA is not submitted or is insufficient, we will not process the inconsistent or responsive application.

If an inconsistent or responsive application does not involve significant operational changes or an action such as an abandonment or construction, it generally is exempt from environmental review. The applicant must certify, however, that the proposal meets the exemption criteria under 49 CFR 1105.6(c)(2). Anyone desiring to file an inconsistent application or responsive application should consult with SEA as early as possible regarding the appropriate environmental documentation. We further note that, for purposes of this proceeding, persons will have 20 days to comment on the Environmental Assessment, which SEA expects to issue in April.

We plan to conclude the evidentiary phase of this proceeding by May 14, 1996. Briefs are due on June 3, 1996, and will be limited to 50 pages. Briefs must be filed in accordance with the requirements of 49 CFR 1104.2. The initial decision will be waived, and the determination of the merits of the application(s) will be made in the first instance by the entire Commission under 49 U.S.C. 11345.

We advise protestants that, if they seek to have the primary application denied, or seek conditions if it is approved, because they contend their ability to provide essential service and/or competition will be harmed, they must present substantial evidence in support of their

positions. See Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295 (D.C. Cir. 1983).

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

It is ordered:

1. The applications, petitions, and notices in Finance Docket No. 32760, and in all related proceedings, are accepted for consideration.

2. The parties shall comply with all provisions as stated above.

3. Applicants shall submit additional information as set forth above regarding Docket No. AB-12 (Sub-No. 185X) within 20 days of the effective date of this decision.

4. Applicants are directed to provide the Commission with a current complete set of operating timetables for both UP and SP within 20 days of the effective date of this decision.

5. Any appeal to a decision issued by the ALJ in this proceeding must be filed within 3 working days of the date of the decision, and any response to such an appeal must be filed within 3 working days of the date of filing of the appeal.

6. Replies to any procedural motion filed with the Commission must be filed within 3 working days.

7. This decision is effective on December 27, 1995.

Decided: December 21, 1995.

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

(SEAL)

Vernon A. Williams
Secretary

PROCEDURAL SCHEDULE

November 30, 1995	Primary application filed.
December 29, 1995	Commission notice of acceptance of primary application and related applications published in the Federal Register on or before this date.
January 16, 1996	Notice of intent to participate in proceeding due.
January 29, 1996	Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification due.
March 29, 1996	Inconsistent and responsive applications due. All comments, protests, requests for conditions, and any other opposition evidence and argument due. DOJ and USDOT comments due.
April 12, 1996	Notice of acceptance (if required) of inconsistent and responsive applications published in the Federal Register.
April 29, 1996	Response to inconsistent and responsive applications due. Response to comments, protests, requested conditions, and other opposition due. Rebuttal in support of primary application and related applications due.
May 14, 1996	Rebuttal in support of inconsistent and responsive applications due.
June 3, 1996	Briefs due, all parties (not to exceed 50 pages).
July 2, 1996	Oral argument (at Commission's discretion).
July 3, 1996	Voting Conference (at Commission's discretion).
August 12, 1996	Date of service of final decision.

STB FD-32760 1-26-96 C-10

LATE RELEASE

SERVICE DATE

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SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 10]

Decided: January 26, 1996

By decision served and published in the Federal Register on December 27, 1995, (Decision No. 9), the ICC accepted for consideration the application filed November 30, 1995, and modified on December 21, 1995, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW)[2] (collectively applicants), seeking Commission approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC.[3]

In Decision No. 9, the ICC also affirmed the procedural schedule set out in Decision No. 6, served on October 19, 1995. According to the schedule, parties are to file descriptions of anticipated inconsistent and responsive applications, and petitions for waiver or clarification regarding those applications, by January 29, 1996. Inconsistent and responsive applications, comments, protests, requests for conditions, and any other opposition evidence are due on March 29, 1996. The Board will issue a final decision on August 12, 1996.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), 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 Act 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 Act. 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 49 U.S.C. 11323-11325. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] UPC, UPRR, and MPRR are referred to collectively as Union Pacific. UPRR and MPRR are referred to collectively as UP. SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as Southern Pacific. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP.

[3] SPT is a wholly owned subsidiary of SPR. SPCSL and DRGW are wholly owned subsidiaries of SPT. SPT owns 99.9% of SSW.

In a motion filed on January 22, 1996, Western Shippers' Coalition (WSC) requests a 60-day extension of the January 29, 1996 deadline, and a corresponding enlargement of the remainder of the procedural schedule.[4] WSC alleges that it may join with, or support, the filing of an inconsistent or responsive application if it cannot resolve certain differences with UP/SP.

Essentially, WSC argues that the procedural schedule does not allow enough time for it to evaluate the impacts of the proposed merger and the applicants' agreement with Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (BN/Santa Fe),[5] and to determine what position WSC will take regarding the proposed merger; that it needs more time to evaluate the adverse impact on UP rail service and to assess whether UP service problems following the consummation of its merger with Chicago and NorthWestern Railroad will subside; that it needs more time for the preparation of filings, which was hindered by the period of uncertainty regarding the abolition of the ICC and the creation of the Board (because it did not know if the proceeding would enter a regulatory "black hole," or if there would be adequate staff to carry the proceeding forward) and hindered by the disruption of business caused by the January 1996 snowstorm in Washington, D.C.; and that it needs more time for WSC's consultant to analyze, and provide analysis and advice to WSC and its members, regarding the 1994 Waybill Sample data and the 1994 Uniform Railroad Costing System data, which it claims did not become available until December 1995. In summary, WSC asserts that extending the procedural schedule would allow parties adequate time to seek to resolve their differences with UP/SP privately, or, if they cannot do so, to prepare effective presentations for the Board.

On January 24, 1996, The Kansas City Southern Railway Company (KCS) filed comments in support of WSC's motion. KCS argues that the schedule is inadequate for parties to conduct discovery and prepare their opposition filings;[6] that there will be insufficient time to depose all persons that should be deposed, and to review workpapers and documents in preparation for depositions; that the document depository is unorganized and difficult to use; that the recent severe weather has hampered KCS' ability to conduct adequate discovery; that, because Congress established a 15-month procedural schedule for mergers in section 11325(b) of the Act, adding 60 days to the current schedule is consistent with congressional intent; and that the schedule will prevent the Board from being fully informed before reaching a decision on a merger of extreme size and scope.

KCS also suggests that, because section 11325(b)(2) requires that inconsistent or responsive applications be filed within 90 days of acceptance of the application (i.e., March 29, 1996), we should consider bifurcating the proceeding and extending the date for comments in opposition while maintaining the requirement that inconsistent or responsive applications be filed by March 29. According to KCS, there is no specific statutory mandate for when

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[4] Applicants replied to WSC's motion on January 25, 1996.

[5] Applicants and BN/Santa Fe arrived at a settlement agreement on September 25, 1995. Applicants are requesting that we impose the terms of the agreement as a condition to approval of the overall merger transaction.

[6] KCS provides several anecdotal examples of parties experiencing difficulty with discovery. Because of the necessity for an immediate decision on this motion, we will not repeat those examples here.

comments in opposition need to be filed. KCS concedes that it will raise with Administrative Law Judge Nelson many of the discovery issues it discusses, but notes, correctly, that only the Board may change the procedural schedule.

The Texas Mexican Railway Company (Tex Mex) also filed comments in support of WSC's motion. Tex Mex expresses concerns similar to those of KCS regarding difficulty with depositions, discovery, and preparation of opposition filings. Tex Mex also alleges that it has had difficulty processing certain waybill data provided by applicants.

Applicants filed a reply to KCS and Tex Mex on January 25, 1996.

DISCUSSION AND CONCLUSIONS

We will deny WSC's request, as supported by KCS and Tex Mex. As stated, the ICC originally adopted the procedural schedule for this proceeding on October 19, 1995. The schedule will allow us to consider all issues affecting the public interest, to address cumulative impacts and crossover effects of prior mergers as appropriate, and to consider the consequences of any and all settlement agreements applicants may reach with parties. The ICC also stated in Decision No. 6 that the uncertainty of the ICC's future did not justify a longer procedural schedule. In the final weeks of 1995, the ICC was still responsible for performing its functions efficiently; it did not consider the agency's future as an issue in setting the procedural schedule. Therefore, all parties had notice on October 19, 1995, that the agency's circumstances would not be considered justification for a longer procedural schedule.

WSC's statement that the 1994 Waybill Sample was not available until December 1995 is incorrect. The 1994 Waybill Sample Data were available from the Office of Economic and Environmental Analysis in mid-September, 1995; the 1994 Uniform Railroad Costing System data were available on magnetic tape in November 1995. WSC, Tex Mex, and any other interested parties had access to the information at that time.

We are not unsympathetic to the fact that discovery in a proceeding of this magnitude can be difficult, but we note that the procedural schedule is not "expedited" with regard to the March 29, 1996 deadline, and the procedural schedule has not caused any party to have had less time to prepare filings in opposition to the primary application than it would have under the Interstate Commerce Act[7] and under the regulations.[8]

The ICC published notice of acceptance of the application on December 27, 1995. Further, WSC, KCS, and all other interested

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[7] 49 U.S.C. 11345(b)(2) reads as follows:

> The Commission shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it and given to the Secretary of Transportation by the 90th day after publication of notice under that subsection.

[8] 49 CFR 1180.4(d)(4)(i) reads as follows:

> All responsive applications in *major* transactions shall be filed 90 days, and in *significant* transactions 60 days, after acceptance of the primary application. No responsive applications shall be permitted to *minor* transactions.

parties had notice of applicants' intent to file their application for 3 months before the filing occurred.[9] They had notice of the procedural schedule on October 19, 1995. The application itself has been available since November 30, 1995. Despite the inconvenience brought about by the recent snowstorm, we believe WSC, KCS, and all other parties, knew about the deadlines at issue far enough in advance that the storm should not have caused a significant hardship. Further, if the weather had, in fact, been the cause of significant hardship, parties could and should have notified the Board immediately upon returning to work, instead of waiting until a few days before the January 29 deadline

As to KCS's position that the new section 11325(b) provisions support an extension, we recognize that the longer procedural schedule brought about by our granting of the extension request might not be inconsistent with Congress' intent as reflected by the Act. However, we note two facts in response. First, our interpretation of the 15-month schedule set out in section 11325(b) is that it provides an outside limit on how long the Board may take to resolve a major merger proceeding, and is not necessarily an endorsement of a longer schedule. As noted above, we believe the current schedule will allow us to hear all parties' concerns and address them if it is appropriate to do so. Second, the current schedule and the March 29, 1996 deadline are consistent with both the old and new law and with our regulations, and to the extent we look to the Congressional intent expressed in section 11325(b), we see an intent to reduce significantly the time deadlines contained in the old law for building a record and deciding cases involving the proposed merger of Class I railroads. Thus, we do not see section 11325(b) as a basis for prolonging the procedural schedule.

We will deny KCS's suggestion that we extend the procedural schedule for comments but not for inconsistent and responsive applications. We believe that 90 days for parties to file written comments is generous given that both the section 11345 (old version) and the section 11325 (new version) of the statute, and our current regulations, require the filing of written comments in 45 days.

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

It is ordered:

1. The request to extend the procedural schedule by 60 days is denied.

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

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

Vernon A. Williams
Secretary

[9] Applicants filed a notice of intent to file a merger application on August 4, 1995. On September 1, 1995, the ICC served and published in the Federal Register Decision No. 1, giving notice of applicants' prefiling notification.

STB FD-32760 2-2-96 C-11

LATE RELEASE

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SERVICE DATE

FEB 2 1996

SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 11]

Decided: February 2, 1996

By decision served and published in the Federal Register on December 27, 1995 (Decision No. 9), the ICC accepted for consideration the application filed November 30, 1995, and modified on December 21, 1995, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW)[2] (collectively applicants), seeking approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC.[3]

In Decision No. 9, the ICC also confirmed the procedural schedule set out in Decision No. 6, served on October 19, 1995. According to the schedule, parties were to file descriptions of anticipated inconsistent and responsive applications, and petitions for waiver or clarification regarding those applications, by January 29, 1996. Inconsistent and responsive applications, comments, protests, requests for conditions, and any other opposition evidence are due on March 29, 1996. The Board will issue a final decision on August 12, 1996.

In a motion filed on January 22, 1996, The Western Shippers' Coalition (WSC) requested a 60-day extension of the January 29,

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), 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 Act 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 Act. 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 sections 11323-25 of the Act. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] UPC, UPRR, and MPRR are referred to collectively as Union Pacific. UPRR and MPRR are referred to collectively as UP. SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as Southern Pacific. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP.

[3] SPT is a wholly owned subsidiary of SPR. SPCSL and DRGW are wholly owned subsidiaries of SPT. SPT owns 99.9% of SSW.

1996 deadline, and a corresponding enlargement of the remainder of the procedural schedule. In Decision No. 10, served January 26, 1996, we denied WSC's request for an extension of the procedural schedule, and addressed comments by The Kansas City Southern Railway Company (KCS) and The Texas Mexican Railway Company (Tex Mex), who filed comments in support of WSC's request.

This decision addresses the comments by the United States Department of Justice (USDOJ) and other parties that have also filed in support of WSC's motion. The additional parties filing comments include: Wisconsin Power & Light Company (WP&L); The Western Coal Traffic League (WCTL); Commonwealth Edison Company (ComEd); Entergy Services, Inc., Arkansas Power & Light Company, and Gulf States Utility Company (collectively, Entergy); Wisconsin Public Service Corporation (WPS); The Society of the Plastics Industry, Inc. (SPI); State of Texas; Coalition for Competitive Rail Transportation (CCRT); and International Brotherhood of Teamsters (IBT).

USDOJ argues that unanticipated events, such as the government shutdown and the snowstorm of January 1996, have impeded discovery, raising questions about whether the schedule affords due process and allows for the development of a meaningful record. Specifically, USDOJ argues that document production has not been completed, even though the proceeding has moved into the deposition phase. USDOJ contends that, although the deposition phase is only in the initial stages, it appears that other unscheduled witnesses will need to be examined, which is not contemplated in the current schedule. Also, USDOJ notes that any additional settlement agreements that applicants may reach with parties would lead to still more depositions and document discovery. Finally, USDOJ contends that, by incorporating a provision into the Act stating that the evidentiary phase of proceedings before the Board may last a year, Congress recognized that review of complex mergers requires time. USDOJ notes that, with the requested 60-day extension, the proceeding would still be concluded within the time frame set out in the Act, and well within the statutory period of the Interstate Commerce Act, which governs this proceeding (31 months).[4]

The remaining parties submitted arguments similar to those which WSC, KCS, Tex Mex, and USDOJ propounded. Essentially, they argue that the current schedule hinders their discovery efforts and that they need the additional 60 days to consider fully the impacts of the proposed merger and the settlement agreement with Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (BN/Santa Fe).[5]

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[4] On September 18, 1995, USDOJ submitted comments on the procedural schedule that applicants had proposed for this proceeding. In those comments, USDOJ suggested an alternative schedule, which was similar to the schedule the ICC subsequently adopted. It provided for service of a final decision in 270 days, as opposed to the 255-day schedule adopted by the ICC. In particular, we note that USDOJ proposed the same time period as ultimately provided in the adopted schedule (120 days) for parties' preparation of inconsistent and responsive applications, comments, protests, requests for conditions, and other opposition evidence and argument.

[5] Applicants and BN/Santa Fe arrived at a settlement agreement on September 25, 1995. Applicants are requesting that we impose the terms of the agreement as a condition to approval of the overall merger transaction.

We have responded to the arguments these parties raise in Decision No. 10, and refer parties to that decision for our full analysis. The additional comments do not contain any unusual or new arguments. The schedule allows for a full and fair consideration of all parties' concerns. Again, we note with regard to discovery difficulties, that the schedule is not "expedited" with regard to the March 29, 1996 deadline. No party has less time to prepare filings in opposition to the primary application than is provided for under section 11345 of the Interstate Commerce Act or under the regulations at 49 CFR 1180.4. In fact, the statute and our regulations provide for comments by USDOJ to be filed within 45 days of publication of the notice of acceptance (75 days from the filing of the application) rather than within the 120 days allowed here.

We also affirm our position in Decision No. 10 regarding Congress' intent in allowing for a longer schedule for railroad mergers than the one we are using here. In summary, we read the Act to contain an intent to reduce significantly the time deadlines contained in the old law. The schedule for this proceeding is consistent with that intent, and the deadlines contained in the Act are not a basis for prolonging the procedural schedule.

We will deny the requests that we extend the procedural schedule in this proceeding by 60 days. Nevertheless, because USDOJ, unlike other parties, has lost a number of days as a result of its employees being furloughed, we will allow USDOJ an additional 14 days, until April 12, 1996, in which to file comments, protests, requests for conditions, or any other opposition evidence and argument. The other dates in the procedural schedule will remain unchanged.

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

It is ordered:

1. The requests to extend the procedural schedule by 60 days are denied.

2. USDOJ is granted a 14-day extension until April 12, 1996, to file comments, protests, requests for conditions, or any other opposition evidence and argument.

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

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

Vernon A. Williams

Vernon A. Williams
Secretary

STB FD-32760 2-15-96 C-12

SERVICE DATE

FEB 1 5 1996

EB

SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 12]

Decided: February 12, 1996

BACKGROUND

In Decision No. 9, the ICC affirmed the procedural schedule it had set out in Decision No. 6, served October 19, 1995. Under that schedule, the ICC imposed a January 29, 1996 due date for the filing of: (1) descriptions of anticipated inconsistent and responsive applications; and (2) petitions for waiver or clarification, with respect thereto.

On January 29, 1996, descriptions of anticipated inconsistent or responsive applications,[2] and petitions for

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), 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 Act 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 Act. 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 sections 11323-25 of the Act. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] In the primary application filed November 30, 1995, applicants--Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively applicants)--seek approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC. In Decision No. 9, served and published in the Federal Register on December 27, 1995, the ICC accepted the primary application for consideration.

UPC, UPRR, and MPRR are referred to collectively as Union Pacific. UPRR and MPRR are referred to collectively as UP. SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as Southern Pacific. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP.

(continued...)

waiver or clarification, with respect thereto, were filed separately by, among others: IBP, Inc. (IBP); Wisconsin Electric Power Company (WEPCO); Commonwealth Edison Company (ComEd); and Entergy Services, Inc., Arkansas Power & Light Company, and Gulf States Utility Company (collectively, Entergy).[3]

IBP intends to file applications for overhead trackage rights, terminal trackage rights, and/or reciprocal switching trackage rights on behalf of a rail carrier unaffiliated with applicants over UP rail lines at several locations in the States of Iowa and Nebraska. IBP states that it will also seek the right to operate over such terminal areas as may be necessary to implement any trackage and/or reciprocal switching rights as it may acquire. IBP petitions for waiver or clarification of certain regulations applicable to inconsistent or responsive applications.

WEPCO's application also will seek certain trackage rights conditions on behalf of a rail carrier unaffiliated with applicants over UP's rail lines: (1) overhead trackage rights between Chicago, IL, and WEPCO's Oak Creek Power Plant at Oak Creek, WI; (2) overhead trackage rights between Chicago, IL, and the Oak Creek Power Plant on one end, and Cudahy Shop, Inc., a railcar repair facility in Milwaukee, WI, on the other; and (3) terminal trackage rights in the Milwaukee terminal area. WEPCO also petitions for waiver or clarification of certain regulations applicable to inconsistent and/or responsive applications.

ComEd intends to seek, in the alternative, either acquisition of or trackage rights over certain of applicants' lines, on behalf of an unnamed rail carrier unaffiliated with applicants, allegedly to preserve the benefits of competitive options that ComEd presently possesses for coal traffic moving through the States of Utah, Colorado, Missouri, and Kansas. ComEd also petitions for waiver or clarification of certain regulations applicable to inconsistent and/or responsive applications.

Entergy also expects to seek trackage rights over certain of applicants' lines, on behalf of rail carriers unaffiliated with applicants, allegedly to preserve the benefits of competitive options that Entergy presently possesses for its coal traffic: (1) between Pine Bluff, AR, and Memphis, TN; and (2) between Beaumont, TX, and a point near Lake Charles, LA. Entergy also seeks waiver and/or clarification of certain of our regulations applicable to responsive applications.

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[2](...continued)
SPT is a wholly owned subsidiary of SPR. SPCSL and DRGW are wholly owned subsidiaries of SPT. SPT owns 99.9% of SSW.

[3] IBP designated its pleading IBP-1 (description of anticipated inconsistent and responsive applications and petition for waiver and clarification). WEPCO designated its pleading WEPC-1 (description of anticipated inconsistent and responsive application and petition for waiver and clarification). ComEd designated its pleadings CED-3 (description of anticipated responsive applications) and CED-4 (petition for clarification and/or waiver). Entergy designated its pleadings ESI-5 (description of anticipated responsive applications) and ESI-6 (petition for clarification and/or waiver).

DISCUSSION AND CONCLUSIONS

The petitions for clarification and/or waiver filed by IBP, WEPCO, ComEd, and Entergy are substantially similar. Each requests clarification that a responsive application seeking only trackage rights (and, in ComEd's case, the right for a carrier to acquire certain lines) as a condition requires neither environmental documentation nor a historical report. Each also requests, in the event that the response to the preceding request is negative, clarification or waiver of the 6-month pre-notification requirement for applications requiring an Environmental Impact Statement. Each further requests waiver of all requirements for the inclusion of information from "applicant carriers" in its responsive application. We will consider here those specific waiver requests and, to the extent set forth below, grant those requests.

(1) Environmental and Historical Data. IBP, WEPCO, ComEd and Entergy are correct that, for a trackage rights application, neither environmental documentation[4] nor a historic report[5] is ordinarily required. The ICC indicated in Decision No. 9, however, that, in order for us to fulfill our responsibilities under the National Environmental Policy Act and other environmental laws, responsive applications must contain certain information. The ICC noted, in particular, that anyone desiring to file a responsive application involving significant operational changes would have to include, with its application, a preliminary draft environmental assessment (PDEA). The ICC further noted that, if a responsive application does not involve significant operational changes or an action such as an abandonment or a construction, it would generally be exempt from environmental review. The ICC added, however, that the applicant would be required to file a verified statement certifying that its proposal meets the exemption criteria under 49 CFR 1105.6(c)(2). The ICC advised that anyone desiring to file a responsive application should consult with our Section of Environmental Analysis (SEA) as early as possible regarding the appropriate environmental documentation. Decision No. 9, slip op. at 13.

We cannot grant IBP, WEPCO, ComEd, and Entergy the clarification they seek with regard to their requests for trackage rights on behalf of as yet unnamed carriers. Rather, they must determine whether their requested actions require submission of a PDEA discussed above or a verified statement. The PDEA (or verified statement of no impact) must be filed either prior to or with the responsive application.

Similarly, we cannot grant ComEd the requested clarification with regard to the anticipated line acquisition application on behalf of an unnamed carrier. As with the trackage rights requests discussed above, ComEd must determine whether its requested action requires submission of a PDEA or a verified statement.

If a PDEA is required, it is critical that the responsive applicant consult with SEA immediately to determine the scope and content of this document. The document must include the following: (1) a detailed description of the proposed action and alternatives considered; (2) a description of the existing environment; (3) a discussion of the potential environmental impacts; (4) a summary of responses by various federal, state, and local environmental agencies--as set forth in our rules at 49

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[4] 49 CFR 1105.6(c)(4).

[5] 49 CFR 1105.8(b)(3).

CFR 1105.7(b)--to the responsive application; and (5) any recommended mitigation.

SEA has prepared a guide that generally sets forth the format and content for the PDEA. SEA has provided the guide attached to a letter sent to those persons indicating an intent to file a responsive application. If a responsive applicant is uncertain whether to file a PDEA or a verified statement of no impact, the responsive applicant should also consult with SEA immediately.

(2) Pre-Notification Waiver. IBP, WEPCO, ComEd, and Entergy also request, as an alternative to the previous request, either clarification or waiver of the 6-month pre-notification requirement for applications that might require an environmental impact statement.[6] ComEd and Entergy specifically seek such clarification or waiver insofar as necessary to permit their pre-filing consultations with SEA, to be scheduled shortly, to satisfy the pre-filing pre-notification requirement. The requested waiver is reasonable, and we will therefore grant it. IBP, WEPCO, ComEd, and Entergy may allow pre-filing consultations with SEA to satisfy the 6-month pre-notification requirement.

(3) Applicant Carriers. The regulations require that responsive applications include, among other things, certain information respecting "applicant carriers," a term which includes "[a]pplicant, all carriers related to the applicant, and all other carriers involved in the transaction" (emphasis in original). 49 CFR 1180.3(b). IBP, WEPCO, ComEd, and Entergy seek waiver of all requirements for the inclusion, in their responsive applications, of information respecting "applicant carriers." Each notes that it is a noncarrier seeking a trackage rights (or line acquisition) condition on behalf of a third-party carrier that has not yet been determined. Each urges that the Board should require such information to be filed only if and when its carrier nominee is objected to by applicants, at which point the suitability of the nominee could be determined in subsequent proceedings.

We will grant the sought waiver respecting "applicant carriers." If we approve the primary application and if we condition our approval thereof by granting any or all of the responsive applications to be filed by IBP, WEPCO, ComEd, and Entergy, that approval will amount to a requirement that applicants allow a carrier designated by IBP, WEPCO, ComEd, or Entergy to conduct the authorized trackage rights operations (or, in ComEd's case, to acquire a designated line). Any matters not resolved in the present proceeding (e.g., any matters respecting the suitability of the nominee or other specific trackage rights or line acquisition issues) would necessarily have to be resolved in a follow-up proceeding. We think it only fair to note, however, that applicants will be allowed to consummate an approved UP/SP transaction even if a follow-up proceeding has not been completed, and even though the trackage rights operation of a designated nominee might itself be delayed pending resolution of environmental issues or of a follow-up proceeding.

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

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[6] 49 CFR 1105.10(a)(1).

It is ordered:

1. The petitions for clarification and/or waiver filed by IBP, WEPCO, ComEd, and Entergy, respectively, are granted to the extent set forth in this decision.

2. This decision is effective on its service date.

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

Vernon A. Williams
Secretary

STB FD-32760 2-15-96 C-13

SERVICE DATE

FEB 15 1996

EB

SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 13]

Decided: February 12, 1996

BACKGROUND

In Decision No. 9, the ICC affirmed the procedural schedule it had set out in Decision No. 6, served October 19, 1995. Under that schedule, the ICC imposed a January 29, 1996 due date for the filing of: (1) descriptions of anticipated inconsistent and responsive applications; and (2) petitions for waiver or clarification, with respect thereto.

On January 29, 1996, descriptions of anticipated inconsistent or responsive applications,[2] and petitions for

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), 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 Act 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 Act. 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 sections 11323-25 of the Act. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] In the primary application filed November 30, 1995, applicants--Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively applicants)-- seek approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC. In Decision No. 9, served and published in the Federal Register on December 27, 1995, the ICC accepted the primary application for consideration.

UPC, UPRR, and MPRR are referred to collectively as Union Pacific. UPRR and MPRR are referred to collectively as UP. SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as Southern Pacific. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP.

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waiver or clarification, with respect thereto, were filed separately by, among others: Capital Metropolitan Transportation Authority (CMTA); Brownsville and Rio Grande International Railroad (BRGI); and Magma Copper Company and its wholly owned subsidiaries The Magma Arizona Railroad Company (MAA) and the San Manuel Arizona Railroad Company (SMA) (collectively, Magma).[3]

CMTA is a regional transit authority, a body politic, and a political subdivision of the State of Texas. It manages, and possesses a mass transit easement on and over, the Giddings/Llano Railroad, which is owned by the City of Austin. The Austin and Northwestern Railroad Co. provides rail freight operations over the railroad. CMTA alleges that the proposed merger will eliminate an interchange partner for freight carriers on the Giddings/Llano railroad, thereby threatening the economic viability of the railroad. CMTA anticipates that it will file a responsive application in this proceeding, requesting certain interchange rights at McNeil, Elgin, and Giddings, TX, for the City of Austin, its successors and assigns, and third party rail freight operators. It will request that approval of the proposed merger be conditioned on the granting of certain joint trackage and interchange rights to BN/Santa Fe, including joint trackage rights from Round Rock, TX, to McNeil, over the UP/SP line, and interchange rights at McNeil. Finally, it will seek "primary" interchange rights at McNeil for CMTA's future mass transit operations.

CMTA seeks clarification that its proposed responsive application involves a "minor" transaction as defined in 49 CFR 1180.2(c). In the alternative, CMTA requests that, if we determine that the transaction is significant, we waive the filing requirements of 49 CFR 1180.7 (market impact analyses) and 1180.8(a) (operating plan), applicable to "significant" transactions as defined in 49 CFR 1180.2(b). According to CMTA, production of this information would be unduly burdensome for CMTA, whose proposal will be limited in scope. CMTA notes that it would provide the operating data required for minor transactions under 1180.8(b).

BRGI states that, in its responsive application, it will seek as much as 375 miles of local and overhead trackage or haulage rights, negotiated with applicants, for service between Brownsville and Houston; interchange with BN/Santa Fe at Brownsville, TX; the extension of a 1982 agreement involving the relocation of trackage and facilities in Brownsville to apply to BN/Santa Fe; access by BRGI to the Mexican railroad system; and protective conditions regarding UP/SP's service and rates for agricultural commodities passing through the Port of Brownsville.

BRGI requests that we determine that its application does not involve a significant transaction, as defined in 49 CFR 1180.2, and thereby relieve BRGI from the regulatory requirements of 49 CFR 1180.6(a)(8) (environmental data), 1180.6(b)

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[2](...continued)
SPT is a wholly owned subsidiary of SPR. SPCSL and DRGW are wholly owned subsidiaries of SPT. SPT owns 99.9% of SSW.

[3] CMTA designated its pleadings CMTA-2 (description of anticipated responsive application) and CMTA-3 (petition for clarification or waiver). BRGI designated its pleadings BRGI-1 (designation of anticipated responsive application) and BRGI-2 (petition for waiver or clarification). Magma designated its pleading MGMA-2 (description of anticipated responsive application and petition for waiver or clarification).

(Form 10-K, Form S-14, annual reports, corporate charts, and other information), 1180.7 (market analyses), 1180.8(a) (operational data), and 1180.9 (financial information). If we find that BRGI's application will involve a significant transaction, BRGI requests that we waive, at least in part, the requirements of sections 1180.6, 1180.7, 1180.8(a), and 1180.9. BRGI argues that the transaction is limited in scope, and that the preparation of the information would be unduly burdensome for BRGI. BRGI asserts that it will provide information pursuant to 49 CFR 1180.6(a) and 1180.8(b).

BRGI also requests that we waive the requirement that it submit environmental and historic reports, which might be otherwise required pursuant to 49 CFR 1180.6(a)(8). BRGI notes that the ICC determined in prior merger and control proceedings that, when a responsive application does not involve significant operational changes or an action such as an abandonment or a construction, it is exempt from environmental review.

Magma will seek trackage rights over SP's lines between Magma, AZ, and Phoenix and Nogales, AZ, for M A, and between Hayden, AZ, and Phoenix and Nogales for SMA. It will also seek the right to interchange with UP/SP and with other connecting carriers at Phoenix and Nogales.

Magma requests that we determine that its responsive application involves a minor transaction. Magma also requests that we waive the 49 CFR 1180.9(b) requirement that it submit an operating plan. Magma states that, if the Board approves its trackage rights request, it will negotiate a mutually acceptable trackage rights agreement with the merged railroad. In Magma's view, this agreement would constitute the operating plan.

DISCUSSION AND CONCLUSIONS

(1) Minor Transaction. Our regulations provide that responsive applications that are not major transactions are presumed to be significant transactions. 49 CFR 1180.4(d)(4)(ii). The regulations further require, for significant transactions, certain evidentiary submissions more extensive than those required for minor transactions. These include 49 CFR 1180.6(a)(8) (environmental consultation), 1180.6(c) (ownership information, other relevant issues, a corporate chart, noncarrier information, and certain other relationships), 1180.7 (market analyses) and 1180.8(a) (operational data).* CMTA, BRGI, and Magma, each seeking to avoid compliance with certain of these requirements, urge that their respective responsive applications be considered minor transactions.

The responsive applications that CMTA, BRGI, and Magma anticipate clearly are not major transactions because they do not involve the merger or control of two or more Class I railroads. Therefore, they are necessarily either significant transactions or minor transactions. See 49 CFR 1180.2(a), (b), and (c). We agree that, in the case of each, the anticipated responsive application will be a minor transaction rather than a significant transaction. See 49 CFR 1180.2(b) (a significant transaction is a transaction that is of regional or national transportation significance; a transaction is not significant if it clearly will not have any anticompetitive effects).

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* We note that BRGI and Magma also seek waiver of 49 CFR 1180.9 (financial information); however, that provision is applicable to major transactions, not significant transactions.

Our authority to condition the primary application (e.g., by imposing the conditions to be sought by CMTA, BRGI, and Magma) is found in 49 U.S.C. 11344(c). The criteria for imposing conditions to remedy anticompetitive effects were set out in Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 562-65 (1982). There, the ICC stated that it would not impose conditions on a railroad consolidation unless it found that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of possible harm) outweighing any reduction to the public benefits produced by the merger. In this regard, we note that, although the responsive applications to be filed by CMTA, BRGI, and Magma will be considered minor, CMTA, BRGI, and Magma will be required to submit sufficient evidence to justify a grant of their respective responsive applications.

(2) Waiver of Certain Requirements. CMTA, BRGI, and Magma request that, if we do not find their responsive applications to be minor, we nonetheless waive certain requirements under 49 CFR 1180 otherwise applicable to significant transactions. Because we have found their anticipated applications to be minor, these requests are moot.

(3) Environmental and Historic Documentation. Regarding BRGI's request for a waiver of the environmental and historic report requirements, we note that, for a trackage rights application, neither environmental documentation[5] nor a historic report[6] is ordinarily required. The ICC indicated in Decision No. 9, however, that, in order for us to fulfill our responsibilities under the National Environmental Policy Act and other environmental laws, responsive applications must contain certain information. The ICC noted, in particular, that anyone desiring to file a responsive application involving significant operational changes would have to include, with its application, a preliminary draft environmental assessment (PDEA). The ICC further noted that, if a responsive application does not involve significant operational changes or an action such as an abandonment or a construction, it would generally be exempt from environmental review. The ICC added, however, that the responsive applicant would be required to file a verified statement certifying that its proposal meets the exemption criteria under 49 CFR 1105.6(c)(2). The ICC advised that anyone desiring to file a responsive application should consult with our Section of Environmental Analysis (SEA) as early as possible regarding the appropriate environmental documentation. Decision No. 9, slip op. at 13.

We cannot grant BRGI the clarification it seeks with regard to its request for trackage rights. Rather, it must determine whether its requested actions require submission of a PDEA, as discussed above, or a verified statement. The PDEA (or verified statement of no impact) must be filed either prior to or with the responsive application.

If a PDEA is required, it is critical that the responsive applicant consult with SEA immediately to determine the scope and content of this document. The document must include the following: (1) a detailed description of the proposed action and alternatives considered; (2) a description of the existing

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[5] 49 CFR 1105.6(c)(4).

[6] 49 CFR 1105.8(b)(3).

environment; (3) a discussion of the potential environmental impacts; (4) a summary of responses by various federal, state, and local environmental agencies--as set forth in our rules at 49 CFR 1105.7(b)--to the responsive application; and (5) any recommended mitigation.

SEA has prepared a guide that generally sets forth the format and content for the PDEA. SEA has provided the guide attached to a letter sent to those persons indicating an intent to file a responsive application. If a responsive applicant is uncertain whether to file a PDEA or a verified statement of no impact, the responsive applicant should also consult with SEA immediately.

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

It is ordered:

1. The petitions for waiver filed by CMTA, BRGI, and Magma, respectively, are granted to the extent set forth in this decision.

2. This decision is effective on its service date.

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

Vernon A. Williams
Secretary

STB FD-32760 2-15-96 C-14

SERVICE DATE

FEB 1 5 1996

EB

SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 14]

Decided: February 12, 1996

BACKGROUND

In Decision No. 9 in this proceeding, served and published in the Federal Register on December 27, 1995, the ICC affirmed the procedural schedule it had set out in Decision No. 6, served October 19, 1995. Under that schedule, the ICC imposed a January 29, 1996 due date for the filing of: (1) descriptions of anticipated inconsistent and responsive applications; and (2) petitions for waiver or clarification, with respect thereto.

On January 29, 1996, descriptions of anticipated inconsistent or responsive applications,[2] and petitions for

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), 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 Act 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 Act. 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 sections 11323-25 of the Act. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] In the primary application filed November 30, 1995, applicants--Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively applicants)--seek approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC. In Decision No. 9, the ICC accepted the primary application for consideration.

UPC, UPRR, and MPRR are referred to collectively as Union Pacific. UPRR and MPRR are referred to collectively as UP. SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as Southern Pacific. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP.

(continued...)

waiver or clarification, with respect thereto, were filed separately by, among others: Texas Mexican Railway Company (Tex Mex), Montana Rail Link, Inc. (MRL), and LSBC Holdings, Inc. (LSBC).[3]

Tex Mex expects to file a responsive application seeking trackage rights over certain UP and SP lines from Robstown and Corpus Christi, TX, to Houston, TX, and between Houston and a connection with the Kansas City Southern Railway Company (KCS) at Beaumont, TX. It also expects to seek the right to construct two improved connections, at Robstown and at Flatonia, TX. Further, it also will apply for rights over certain terminal tracks of the Houston Belt Terminal Railway Company (HBT) in Houston that it needs for it to get through Houston to Beaumont. Tex Mex requests that we waive or clarify certain requirements for providing information with a responsive application.

MRL intends to file an inconsistent or responsive application seeking authority from the Board to acquire UP and SP rail lines in California, Nevada, Oregon, Utah, Colorado, Kansas, Montana, and Idaho. MRL will also seek to acquire incidental trackage rights in Idaho and Utah, interchange access with all connecting carriers at all common points, and proportional ratemaking authority in the Central Corridor.

LSBC states that it has invited SPT and UPRR to enter into private transactions. It has offered to acquire all of DRGW's assets, including the railroad and all associated trackage, all operating, trackage, and haulage rights, all associated buildings and real estate, signals and dispatching facilities, equipment, parts, patents, trademarks and namesakes, and any and all motive power units specifically configured for operation on DRGW property. LSBC has offered to purchase the MPRR line from NA Tower, CO, to Towner, CO. It has offered to purchase, lease, or acquire operating or trackage rights from the DRGW yard in Pueblo, CO, to NA Tower. It has offered to purchase, lease, or acquire operating or trackage rights on the former MPRR's "Hoisington Sub" from Towner, east through the State of Kansas on to Kansas City, thereby encompassing in their entirety the trackage rights currently held by SP/DRGW.

DISCUSSION AND CONCLUSIONS

1. Definition of "applicant": 49 CFR 1180.3(a) defines "applicant" as "[t]he parties initiating a transaction." Tex Mex requests that we clarify that Tex Mex's noncarrier parent, Mexrail, Inc. (Mexrail) and the shareholders of Mexrail, need not be considered "applicants" under 49 CFR 1180.3(a). Mexrail owns

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[2](...continued)
SPT is a wholly owned subsidiary of SPR. SPCSL and DRGW are wholly owned subsidiaries of SPT. SPT owns 99.9% of SSW.

[3] Tex Mex designated its pleadings TM-7 (description of anticipated responsive application) and TM-8 (petition for waiver or clarification). MRL designated its pleadings MRL-2 (description of anticipated inconsistent or responsive application) and MRL-3 (petition for clarification or waiver).

The regulations provide for the identification of documents filed in proceedings such as this by an acronym/numbering system. 49 CFR 1180.4(a)(2). LSBC's pleading (description of anticipated inconsistent and responsive application and petition for waiver or clarification) was not numbered. We encourage LSBC to designate the next document it files as LSBC-2.

all of the common stock of Tex Mex, and until 1995 was a wholly owned subsidiary of Transportacion Maritima Mexicana S.A. de C.V. (TMM), a Mexican corporation. In November 1995, TMM sold 49% of the common stock of Mexrail, a noncontrolling interest, to Kansas City Southern Industries, Inc. (KCSI), a noncarrier which owns all of the common stock of KCS. TMM, a noncarrier, continues to control Tex Mex, but controls no other carriers providing transportation subject to the Board's jurisdiction. According to Tex Mex, there is no reason to deem Mexrail or the two shareholders of Mexrail, TMM and KCSI, as "applicants" for purposes of Tex Mex's anticipated responsive application. Mexrail, TMM, and KCSI are all noncarriers, will have no involvement in the requested trackage rights, and will not engage in any act for which Board approval is statutorily required. Tex Mex also asserts that there is no need for separate financial data from these companies.

The ICC granted waivers and/or clarifications similar to this one in the past.[4] Here, we note our concern about KCSI's ownership of 49% of Mexrail, and the fact that KCS has also appeared in this proceeding.[5] Although 49% is not a controlling interest at this time, it is conceivable that at some point it could become a controlling interest. Nevertheless, TMM currently owns a controlling interest (51%) of the common stock of Tex Mex. We will grant the sought waiver under the current circumstances and, for the present time, not consider Mexrail, TMM, or KCSI as "applicants" for purposes of Tex Mex's anticipated responsive application.

2. Definition of "applicant carriers": 49 CFR 1180.3(b) defines "applicant carriers" to include "applicant, all carriers related to the applicant, and all other carriers involved in the transaction." Tex Mex seeks a waiver or clarification that, as to its anticipated responsive application, we deem the term "applicant carrier" to include only Tex Mex, and not to include primary applicants, KCS, or HBT.

Tex Mex's request for waiver of 49 CFR 1180.3(b) to exclude primary applicants from the definition of "applicant carriers" is reasonable and we will grant it.[6] We believe provision of such information would be burdensome to Tex Mex and is not necessary for a proper evaluation of its responsive application. Moreover, sufficient data for the primary applicants should be available in the primary application.

Tex Mex requests that KCS not be deemed to be a "carrier related to the applicant." It contends that neither KCS nor KCSI control Mexrail or Tex Mex, and neither Mexrail nor Tex Mex control KCS. Tex Mex notes that, in the present proceeding and in other cases, the ICC excluded from the definition of

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[4] See Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Apr. 20, 1995) at 2 (BN/Santa Fe No. 16). See also Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Holdings Corp. and Chicago and North Western Transportation Company, Finance Docket No. 32133 (ICC served June 8, 1993) at 1 (UP/CNW No. 7).

[5] KCS did not file a description of an anticipated responsive or inconsistent application on January 29, 1996. It merely filed a notice stating that it will file comments on or before March 29, 1996, opposing the merger (KCS-18).

[6] See BN/Santa Fe No. 16 at 3 and UP/CNW No. 7 at 1.

"applicant carriers" other rail carriers in which the applicants possessed a 50% or less interest, and argues that the same conclusion is warranted here. The ICC has granted similar requests in prior decisions.[7] We will grant Tex Mex's requested waiver. Accordingly, KCS will not be considered an applicant carrier.

Tex Mex requests that we also exclude HBT from the definition of "applicant carrier" although it is a "carrier involved in" Tex Mex's anticipated application under 49 U.S.C. 11103 to obtain rights over sections of HBT's terminal tracks in Houston. Tex Mex points out that it currently has no affiliation with HBT and has no ability to require HBT to provide any information in this case. Tex Mex's request is reasonable and is consistent with its request discussed above. We will grant the requested waiver. Accordingly, HBT will not be considered an applicant carrier.

MRL seeks clarification or waiver of the definition of "applicant carriers" contained in 49 CFR 1180.3(b) to exclude Westran, Inc. (Westran), a motor carrier under common ownership with MRL. According to MRL, Westran is operated independently of MRL and its operations have nominal relevance to any railroad transaction proposed by MRL. In MRL's view, furnishing the information required of "applicant carriers" for Westran would be burdensome to MRL and unnecessary for full evaluation of MRL's responsive application. MRL's request is reasonable and consistent with similar waivers or clarifications that the ICC granted in other proceedings.[8] We conclude that MRL need not characterize Westran as an applicant carrier under 49 CFR 1180.3(b). Westran is not a party to, and will not be affected by, MRL's inconsistent or responsive application.

3. Signature of Controlling Persons: Tex Mex further requests that we waive its compliance with 49 CFR 1180.4(c)(2)(i), which requires that "[a]ny person controlling an applicant shall also sign the application." In Tex Mex's opinion, requiring officials of TMM or Mexrail to sign Tex Mex's responsive application would impose an unnecessary burden and would serve little purpose in view of their lack of involvement in the transaction. This request is reasonable and similar to others the ICC granted in the past.[9] Given that we have already waived joinder of the named parties, we will grant the request.

4. Requirements of 49 CFR 1180.6-.9: LSBC requests that we waive compliance with 49 CFR 1180.6 (supporting information), 1180.7 (market analyses), 1180.8 (operational data), and 1180.9 (financial information), due to the fact that material information required to comply with the regulation has not yet been forwarded to LSBC by either SPT or UPRR. Once this

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[7] See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760 (ICC served Sept. 5, 1995) at 2. 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 Oct. 3, 1994) at 2 (BN/Santa Fe No. 3).

[8] See UP/CNW No. 3 at 2; UP/CNW No. 7 at 2; BN/Santa Fe No. 16 at 3.

[9] See BN/Santa Fe No. 16 at 4.

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[7] See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760 (ICC served Sept. 5, 1995) at 2. 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 Oct. 3, 1994) at 2 (BN/Santa Fe No. 3).

[8] See UP/CNW No. 3 at 2; UP/CNW No. 7 at 2; BN/Santa Fe No. 16 at 3.

[9] See BN/Santa Fe No. 16 at 4.

information has been received, LSBC states, it intends to fully comply with the regulations.

We are unable to grant LSBC the waiver it seeks because it has not sufficiently explained with specificity what information it is unable to provide and must obtain from SPT and UPRR. An examination of the regulations at issue indicates that there is information that LSBC should be able to supply with its application. For instance, LSBC should be able to provide a description of its proposed transaction, including information regarding the time schedule for consummation, the purpose sought to be accomplished, the public interest justifications, the effects on competition, and the financial consideration involved. These are just a few of the requirements of 49 CFR 1180.6. LSBC should also be able to supply market analyses (1180.7), at least some operational data (1180.8), and at least some financial information (1180.9).[10] A complete waiver of compliance with these regulations would be inappropriate. LSBC should at least make an effort to comply with our regulations before seeking such extensive waivers. We will deny the waivers sought by LSBC.

5. Minor Transaction: Tex Mex notes that, with respect to operational data, 49 CFR 1180.8(a) requires substantially more detailed information for "major" and "significant" transactions than section 1180.8(b) requires for "minor" transactions. Tex Mex asserts that its responsive application seeks limited trackage rights between Corpus Christi and Beaumont, TX, and, if it is granted, Tex Mex expects to operate between two and three trains per day over those lines. In view of the limited scope of the rights being sought and the operations expected, Tex Mex believes that the detailed operational information and analysis required by section 1180.8(a) is unwarranted. It seeks waiver or clarification that it may submit the less detailed information required by section 1180.8(b).

Our regulations provide that responsive applications which are not major transactions are presumed to be significant transactions. 49 CFR 1180.4(d)(4)(ii). The regulations further require, for significant transactions, certain evidentiary submissions more extensive than those required for minor transactions, including the 49 CFR 1180.8(a) operational data. The responsive application which Tex Mex anticipates clearly does not involve a major transactions because it does not involve the merger or control of two or more Class I railroads. Therefore, it is necessarily either significant or minor. See 49 CFR 1180.2(a), (b), and (c). We agree that Tex Mex's anticipated responsive application will be a minor transaction rather than a significant transaction. See 49 CFR 1180.2(b) (a significant transaction is a transaction that is of regional or national transportation significance; a transaction is not significant if it clearly will not have any anticompetitive effects).

Our authority to condition the primary application (e.g., by imposing the conditions to be sought by Tex Mex) is found in 49

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[10] We note that, based upon the information in LSBC's pleading, it is not clear if LSBC's responsive and/or inconsistent application will involve a major, significant, or minor transaction. See 49 CFR 1180.2(a), (b), and (c). It seems probable that, at least, the application would involve a significant transaction. See 49 CFR 1180.2(b) (a significant transaction is a transaction that is of regional or national transportation significance; a transaction is not significant if it clearly will not have any anticompetitive effects). LSBC's determination of which classification its proposal fits into will make a difference in terms of what information it will have to file under 49 CFR 1180.6, 1180.7, 1180.8, and 1180.9.

U.S.C. 11344(c). The criteria for imposing conditions to remedy anticompetitive effects were set out in Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 562-65 (1982). There, the ICC stated that it would not impose conditions on a railroad consolidation unless it found that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of possible harm) outweighing any reduction to the public benefits produced by the merger. In this regard, we note that, although Tex Mex will not be required to comply with the particular 49 CFR 1180 requirement for which it submitted a waiver request, it will be required to submit sufficient evidence to justify a grant of its responsive application.

6. Special Requirements for Construction Applications: According to Tex Mex, if the Board grants the relief it will seek in its anticipated responsive application, it expects to seek the right to construct two improved connections, at Robstown and at Flatonia, TX, to improve service. The eventual application for approval of those construction projects will entail additional requirements set forth in 49 CFR 1150, Subpart A, and will require an environmental review. Tex Mex requests that it be permitted to file a responsive application without the additional 49 CFR 1150 requirements and the associated environmental review process. It will file an operating plan, marketing analyses, and other information with its responsive application based on the assumption that the anticipated connections will be constructed. Tex Mex states that, if the Board grants its responsive application, Tex Mex will then file the necessary construction application and perform the environmental review.

This request appears reasonable and is similar to one the ICC granted in the past.[11] We will grant Tex Mex's request with a condition that, if we approve the primary application and also impose Tex Mex's requested condition, Tex Mex will have to file 49 U.S.C. 10901 applications for the construction projects. We will not automatically approve the proposed construction projects without first reviewing the additional information. We also will not hold up consummation of the primary applicants' transaction (if it is approved) in order for Tex Mex to obtain Board approval for the construction of its connections.

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

It is ordered.

1. The petitions for waiver or clarification filed by Tex Mex and MRL are granted to the extent set forth in this decision.

2. The petition for waiver or clarification filed by LSBC is denied.

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[11] See BN/Santa Fe No. 16 at 6-7.

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

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

Vernon A. Williams
Secretary

SERVICE DATE

FEB 16 1996

SEC

SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760[2]

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

[Decision No. 15]

Dated: February 15, 1996

NOTICE TO THE PARTIES:

The attached service list has been compiled from the notices of intent to participate submitted in accordance with the procedural schedule set forth in Decision No. 9, served December 27, 1995 (60 FR 66988). All persons actively participating as a party of record in this proceeding must, within 10 days of the service date of this Notice, serve a copy of all filings submitted so far in this proceeding on each party of record (designated on the attached service list as **POR**), and submit an original plus five copies of a certificate of service to the Secretary of the Board indicating that service has been accomplished. All future filings must each have a certificate of

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board). Section 204(b)(1) of the Act 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 Act. This notice 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 49 U.S.C. 11323-11327. Therefore, this notice applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] This designation embraces the following: (1) 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; (2) 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; (3) Finance Docket No. 32760 (Sub-No. 3), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Alton & Southern Railway Company; (4) Finance Docket No. 32760 (Sub-No. 4), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Central California Traction Company;

(continued...)

service indicating that all **PORs** have been properly served with a copy of the filing. Persons designated as **VIS** (interested party) or **MOC** (Member of the United States Congress) on the service list are not parties of record and need not be served with copies of filings.

The procedure for persons designated as **VIS** to receive copies of Board decisions and notices served in this merger proceeding is being changed. In previous merger proceedings handled by the ICC, persons designated as **VIS** received copies of all served ICC decisions, orders, and notices without being charged for the copies. The service list in this proceeding, however, now contains over 1,000 names. Because of budget and staff limitations, the Board no longer will be able to provide copies of decisions, orders, and notices to parties designated as **VIS** in this proceeding. The Board has made arrangements with its copy contractor, **DC News & Data, Inc.** (**DC News**), to handle the collection of charges and the mailing and/or faxing of decisions for persons who request this service. Please refer to the attached sheet for information concerning the operating procedure and fee schedule of **DC News** for its services relating to this merger proceeding.

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[2](continued...)
(5) Finance Docket No. 32760 (Sub-No. 5), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Ogden Union Railway & Depot Company; (6) Finance Docket No. 32760 (Sub-No. 6), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Terminal Railroad Company; (7) Finance Docket No. 32760 (Sub-No. 7), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Traction Company; (8) Finance Docket No. 32760 (Sub-No. 8), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Overnite Transportation Company, Southern Pacific Motor Trucking Company, and Pacific Motor Transport Company; (9) Finance Docket No. 32760 (Sub-No. 9), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Terminal Trackage Rights--Kansas City Southern Railway Company; (10) Docket No. AB-3 (Sub-No. 129X), Missouri Pacific Railroad Company--Abandonment Exemption--Gurdon-Camden Line In Clark, Nevada, and Ouachita Counties, AR; (11) Docket No. AB-3 (Sub-No. 130), Missouri Pacific Railroad Company--Abandonment--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO, and Docket No. AB-8 (Sub-No. 38), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO; (12) Docket No. AB-3 (Sub-No. 131), Missouri Pacific Railroad Company--Abandonment--Hope-Bridgeport Line In
(continued...)

United States Senators and United States Representatives designated as **MOC** will continue to receive all served Board decisions, orders, and notices without being charged. However, constituents who write to their Senators and Representatives regarding this merger proceeding will not automatically be placed on the service list to receive copies of decisions, orders, and notices as interested persons. Moreover, even if non-parties of record have been advised previously in this proceeding that they would be added to the service list to receive copies of all served decisions and have been receiving them to date, the Board no longer will be able to continue this service for persons designated as **VIS**. These persons also must make arrangements through **DC News** to receive copies of decisions, orders, and notices served in this proceeding, if they wish to receive them in the future.

All persons named on the attached service list should review the list and determine whether information about their address and status (as a party of record or not a party of record) is correct. Persons seeking to change their status from **VIS** to **POR** must accompany that request with a written certification that he or she has complied with the service requirements set forth at 49 CFR 1180.4(a) and (d), and any other requirements set forth in Decision No. 9 and this decision.

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[2](continued...)
Dickinson and Saline Counties, KS, and Docket No. AB-8 (Sub-No. 37), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Hope-Bridgeport Line In Dickinson and Saline Counties, KS; (13) Docket No. AB-3 (Sub-No. 132X), Missouri Pacific Railroad Company--Abandonment Exemption--Whitewater-Newton Line In Butler and Harvey Counties, KS; (14) Docket No. AB-3 (Sub-No. 133X), Missouri Pacific Railroad Company--Abandonment Exemption--Iowa Junction-Manchester Line In Jefferson Davis and Calcasieu Parishes, LA; (15) Docket No. AB-3 (Sub-No. 134X), Missouri Pacific Railroad Company--Abandonment Exemption--Troup-Whitehouse Line In Smith County, TX; (16) Docket No. AB-8 (Sub-No. 36X), The Denver and Rio Grande Western Railroad Company--Discontinuance Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO, and Docket No. AB-12 (Sub-No. 189X), Southern Pacific Transportation Company--Abandonment Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO; (17) Docket No. AB-8 (Sub-No. 39), The Denver and Rio Grande Western Railroad Company--Discontinuance--Malta-Cañon City Line In Lake, Chaffee and Fremont Counties, CO, and Docket No. AB-12 (Sub-No. 188), Southern Pacific Transportation Company--Abandonment--Malta-Cañon City Line In Lake, Chafee, and Fremont Counties, CO; (18) Docket No. AB-12 (Sub-No. 184X), Southern Pacific Transportation Company--Abandonment Exemption--Wendel-Alturas Line In Modoc and Lassen Counties, CA; (19) Docket No. AB-12 (Sub-No. 185X), Southern Pacific Transportation Company--Abandonment Exemption--Suman-Bryan Line In Brazos and Robertson Counties, TX; (20) Docket No. AB-12 (Sub-No. 187X), Southern Pacific Transportation Company--Abandonment Exemption--Seabrook-San Leon Line In Galveston and Harris Counties, TX; (21) Docket No. AB-33 (Sub-No. 93X), Union Pacific Railroad Company--Abandonment Exemption--Whittier Junction-Colima Junction Line In Los Angeles County, CA; (22) Docket No. AB-33 (Sub-No. 94X), Union Pacific Railroad Company--Abandonment Exemption--Magnolia Tower-Melrose Line In Alameda County, CA; (23) Docket No. AB-33 (Sub-No. 96), Union Pacific Railroad Company--Abandonment--Barr-Girard Line In Menard, Sangamon, and Macoupin Counties, IL; (24) Docket No. AB-33 (Sub-No. 97X), Union Pacific Railroad
(continued...)

Requests to change or correct service list information, or to be deleted from the service list, must be **in writing** and filed with the Board by **February 26, 1996**. An original plus five copies of such requests should be directed to:

Office of the Secretary
Case Control Branch
Attn: Finance Docket No. 32760
Surface Transportation Board
1201 Constitution Avenue, N.W.
Washington, D.C. 20423

Vernon A. Williams
Secretary

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[1](continued...)
Company--Abandonment Exemption--DeCamp-Edwardsville Line In Madison County, IL; (25) Docket No. AB-33 (Sub-No. 98X), Union Pacific Railroad Company--Abandonment Exemption--Edwardsville-Madison Line In Madison County, IL; (26) Docket No. AB-33 (Sub-No. 99X), Union Pacific Railroad Company--Abandonment Exemption--Little Mountain Jct.-Little Mountain Line In Box Elder and Weber Counties, UT.

STB FD-32760 2-22-96 C-16

LATE RELEASE

SERVICE DATE
FEB 22 1996

SEC

SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 16]

Decided: February 22, 1996

In Decision No. 15, served February 16, 1996, notice was given of the service list, which was compiled from the notices of intent to participate submitted in accordance with Decision No. 9.[2] According to Decision No. 15, all persons actively participating as a party of record in this proceeding must, by February 26, 1996, serve a copy of all filings submitted so far in this proceeding on each party of record, and submit an original plus five copies of a certificate of service to the Secretary of the Board indicating that service has been accomplished.

On February 22, 1996, applicants, joined by several other active parties, filed a request for modification of Decision No. 15 (UP/SP-94). Applicants request modification of the decision to allow instead service on all parties of record of a list of numbered pleadings filed to date, along with an offer to provide any or all of those pleadings upon request. Applicants assert that this modification would relieve them of some of the burden and expense. Applicants request, in the alternative, additional time to comply.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), 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 Act 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 Act. 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 sections 11323-27 of the Act. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] By decision served and published in the Federal Register on December 27, 1995 (Decision No. 9) (60 FR 66988), the ICC accepted for consideration the application filed November 30, 1995, and modified on December 21, 1995, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively applicants), seeking approval and authorization under 49 U.S.C. 11343-47 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC.

Applicants' request appears reasonable. Parties will be allowed to serve other parties of record with lists of numbered pleadings filed to date if they wish to do so in lieu of serving copies of actual filings submitted so far in this proceeding as specified in our previous order. Parties electing to serve lists on other parties must do so by February 26, 1996 (the original deadline for serving copies of all filings), and submit an original plus five copies of a certificate of service to the Secretary of the Board indicating that service has been accomplished. Parties are required to provide copies of filings within 3 days of a request. This will enable all parties to acquire any materials which they need to prepare their submissions for March 29, 1996, the deadline for inconsistent and responsive applications, comments, protests, requests for conditions, and any other opposition evidence and argument.[3] The request for an extension of time in which to comply with Decision No. 15 is moot.

Applicants also request clarification that, as has been the practice in this proceeding thus far, future discovery-related pleadings need only be served on parties on the restricted service list established in the Administrative Law Judge's Order Adopting Discovery Guidelines, served December 7, 1995. Decision No. 15 is so clarified and parties need only serve future discovery-related pleadings on those parties on the restricted service list.

Vernon A. Williams
Secretary

[3] The United States Department of Justice has until April 12, 1996, to file comments, protests, requests for conditions, or any other opposition evidence and argument. See Decision No. 11, served February 2, 1996.

STB FD-32760 3-7-96 C-17

SERVICE DATE

MAR 7 1996

SEC

SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760[2]

DATE RELEASE

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. 17]

Dated: March 7, 1996

NOTICE TO THE PARTIES:

On February 16, 1996, a Notice to the Parties (Decision No. 15) was served in this proceeding. The service list was attached to the Notice. The Notice directed that corrections to the service list be filed with the Board by February 26, 1996. The Notice also directed that all persons actively participating as a party of record in this proceeding must serve a copy of all filings submitted so far on all persons listed as parties of record.

By Notice served February 22, 1996 (Decision No. 16), which modified Decision No. 15, parties of record were given the

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board). Section 204(b)(1) of the Act 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 Act. This notice 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 49 U.S.C. 11323-27. Therefore, this notice applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] This designation embraces the following: (1) 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; (2) 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; (3) Finance Docket No. 32760 (Sub-No. 3), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Alton & Southern Railway Company; (4) Finance Docket No. 32760 (Sub-No. 4), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Central California Traction Company;

(continued...)

alternative to serve on all other parties of record a list of numbered pleadings filed to date, and to provide copies of pleadings within 3 days of a request.

The final service list incorporates the revisions described below.

1. The designations for the following parties are changed from [**VIS**] to [**POR**]:

[**POR**] Sue Ballenski, Physical Resources
U.S.D.A. Forest Service
P. O. Box 25127
Lakewood, CO 80225

[**POR**] Jane T. Feldman, Asst. Attorney General
State of Colorado
1525 Sherman St., 5th Floor
Denver, CO 80203

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[2](continued...)
(5) Finance Docket No. 32760 (Sub-No. 5), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Ogden Union Railway & Depot Company; (6) Finance Docket No. 32760 (Sub-No. 6), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Terminal Railroad Company; (7) Finance Docket No. 32760 (Sub-No. 7), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Traction Company; (8) Finance Docket No. 32760 (Sub-No. 8), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Overnite Transportation Company, Southern Pacific Motor Trucking Company, and Pacific Motor Transport Company; (9) Finance Docket No. 32760 (Sub-No. 9), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Terminal Trackage Rights--Kansas City Southern Railway Company; (10) Docket No. AB-3 (Sub-No. 129X), Missouri Pacific Railroad Company--Abandonment Exemption--Gurdon-Camden Line In Clark, Nevada, and Ouachita Counties, AR; (11) Docket No. AB-3 (Sub-No. 130), Missouri Pacific Railroad Company--Abandonment--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO, and Docket No. AB-8 (Sub-No. 38), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO; (12) Docket No. AB-3 (Sub-No. 131), Missouri Pacific Railroad Company--Abandonment--Hope-Bridgeport Line In
(continued...)

[POR] Eric M. Hocky
Gollatz, Griffin & Ewing
213 West Miner Street
P. O. Box 796
West Chester, PA 19381-0796
Represents: Toledo, Peoria & Western Railway Corporation

[POR] Dick Schiefelbein
7801 Woodharbor Drive
Fort Worth, TX 76179

[POR] Anne D. Smith
White & Case
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Represents: Exxon Chemical Americas

[POR] D. E. Thompson, General Chairman
Brotherhood of Locomotive Engineers
414 Missouri Blvd.
Scott City, MO 63780

[POR] J. Tucker
P. O. Box 25181
Arlington, VA 22202

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[3](continued...)
Dickinson and Saline Counties, KS, and Docket No. AB-8 (Sub-No. 37), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Hope-Bridgeport Line In Dickinson and Saline Counties, KS; (13) Docket No. AB-3 (Sub-No. 132X), Missouri Pacific Railroad Company--Abandonment Exemption--Whitewater-Newton Line In Butler and Harvey Counties, KS;(14) Docket No. AB-3 (Sub-No. 133X), Missouri Pacific Railroad Company--Abandonment Exemption--Iowa Junction-Manchester Line In Jefferson Davis and Calcasieu Parishes, LA; (15) Docket No. AB-3 (Sub-No. 134X), Missouri Pacific Railroad Company--Abandonment Exemption--Troup-Whitehouse Line In Smith County, TX; (16) Docket No. AB-8 (Sub-No. 36X), The Denver and Rio Grande Western Railroad Company--Discontinuance Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO, and Docket No. AB-12 (Sub-No. 189X), Southern Pacific Transportation Company--Abandonment Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO; (17) Docket No. AB-8 (Sub-No. 39), The Denver and Rio Grande Western Railroad Company--Discontinuance--Malta-Cañon City Line In Lake, Chaffee and Fremont Counties, CO, and Docket No. AB-12 (Sub-No. 188), Southern Pacific Transportation Company--Abandonment--Malta-Cañon City Line In Lake, Chafee, and Fremont Counties, CO; (18) Docket No. AB-12 (Sub-No. 184X), Southern Pacific Transportation Company--Abandonment Exemption--Wendel-Alturas Line In Modoc and Lassen Counties, CA; (19) Docket No. AB-12 (Sub-No. 185X), Southern Pacific Transportation Company--Abandonment Exemption--Suman-Bryan Line In Brazos and Robertson Counties, TX; (20) Docket No. AB-12 (Sub-No. 187X), Southern Pacific Transportation Company--Abandonment Exemption--Seabrook-San Leon Line In Galveston and Harris Counties, TX; (21) Docket No. AB-33 (Sub-No. 93X), Union Pacific Railroad Company--Abandonment Exemption--Whittier Junction-Colima Junction Line In Los Angeles County, CA; (22) Docket No. AB-33 (Sub-No. 94X), Union Pacific Railroad Company--Abandonment Exemption--Magnolia Tower-Melrose Line In Alameda County, CA; (23) Docket No. AB-33 (Sub-No. 96), Union Pacific Railroad Company--Abandonment--Barr-Girard Line In Menard, Sangamon, and Macoupin Counties, IL; (24) Docket No. AB-33 (Sub-No. 97X), Union Pacific Railroad
(continued...

[**POR**] George T. Williamson
Managing Director, Port of
Houston Authority
P. O. Box 2562
111 E. Loop N.
Houston, TX 77029
Represents: Port of Houston Authority

[**POR**] Tami J. Yellico
Pueblo County Courthouse
215 West 10th Street
Pueblo, CO 81003
Represents: Pueblo County, CO

2. The designation for the following party is changed from [**POR**] to [**VIS**]:

[**VIS**] E. W. Wotipka

3. The following parties of record [**POR**] are added to the service list:

[**POR**] Stephen D. Alfers
Alfers & Carver
730 17th Street (#340)
Denver, CO 80202
Represents: Eagle County, CO, et al.[3]

[**POR**] John D. Ballas
Agency Engineer
Industry Urban-Development Agency
15651 East Stafford Street
P. O. Box 7089
City of Industry, CA 91744

[**POR**] Kenton Forrest
Secretary, Intermountain Chapter
National Railway Historical Society
P. O. Box 480181 Terminal Annex
Denver, CO 80248

[**POR**] Susan B. Gerson
J. Michael Cavanaugh
Graham & James, LLP
Suite 700
2000 M Street, N.W.
Washington, D.C. 20036
Represents: East Bay Regional Park District

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[2](continued...)
Company--Abandonment Exemption--DeCamp-Edwardsville Line In Madison County, IL; (25) Docket No. AB-33 (Sub-No. 98X), Union Pacific Railroad Company--Abandonment Exemption--Edwardsville-Madison Line In Madison County, IL; (26) Docket No. AB-33 (Sub-No. 99X), Union Pacific Railroad Company--Abandonment Exemption--Little Mountain Jct.-Little Mountain Line In Box Elder and Weber Counties, UT.

[3] On March 4, 1996, the Boards of County Commissioners of the Counties of Eagle and Lake, State of Colorado, and the Towns of Avon, Eagle, Gypsum, Minturn, Red Cliff, and Vail, filed a Petition and Notice requesting leave to file out of time their notice of intent to file a responsive application in this proceeding. Petitioners' request will be addressed in a subsequent decision.

[POR] Russell S. Jones, III
Mountain Coal Company
555 17th Street, (22nd fl.)
Denver, CO 80202

[POR] William R. Knight
Director-Fuel Services Department
Wisconsin Power & Light Company
P. O. Box 192
222 West Washington Avenue
Madison, WI 53701-0192

[POR] Richard H. Streeter
Barnes & Thornburg
1401 Eye St., N.W., Suite 500
Washington, D.C. 20005
Represents: Railroad Commission of Texas

[POR] Steve Tucker
President, Denver and Rio Grande Western
Employees Labor Committee
2048 J Road
Fruita, CO 81521

3. The following names should be deleted from the service list:

[POR] Richard L. Hester, Senior Manager
Engineering & Power Production
City Utilities of Springfield
P. O. Box 551
Springfield, MO 65801

[POR] Debra Ravel, Staff Attorney
Railroad Commission of TX
P. O. Box 12967
Austin, TX 78711-2967

[POR] Steve Thacker
Box 1460
Canon City, CO 81215-1460
Represents: City of Canon City
(See duplicate listing for Ruth H. Carter, Mayor, City of Canon City, page 2 of Decision No. 15's attached service list).

[POR] Dean L. Worley
Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd.
P. O. Box 551
One Riverfront Place, Eighth Floor
North Little Rock, AR 72119
Represents: Gulf Rice Arkansas

4. The firm name, address, and/or represented entity for the subsequent parties are revised as follows:

[POR] Linda K. Breggin, Esq.
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009-5728

[POR] Steven A. Brigance, Esq.
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
4025 Woodland Park Boulevard, Suite #250
Arlington, TX 76013

[**POR**] Stephen C. Herman
McFarland & Herman
20 North Wacker Drive, Suite 1330
Chicago, IL 60606-2902
Represents: IBP, Inc.

[**POR**] Thomas F. McFarland, Jr.
McFarland & Herman
20 North Wacker Drive, Suite 1330
Chicago, IL 60606-2902
Represents: Wisconsin Electric Power Company
Springfield Plastics, Inc.
Brandt Consolidated, Inc.
Mountain-Plains Communities & Shippers Coalition
Illinois Transit Assembly Corp.
NEBKOTA Railway, Inc.

5. The represented entity for the following party is added to the service list:

[**POR**] Betty Jo Christian
Steptoe & Johnson
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
Represents: Burlington Northern Railroad Co.

All parties of record who have filed pleadings in this proceeding must, within 5 days of the service date of this Notice, serve a copy of those pleadings or serve a list of numbered pleadings filed to date on the above-designated parties of record [**POR**], and submit an original and five copies of a certificate of service to the Secretary of the Board indicating that service has been accomplished. Parties electing to serve lists on other parties are required to provide copies of filings within 3 days of a request.

All future filings must each have a certificate of service indicating that all PORs have been properly served a copy of the filing. **Parties are reminded that they must submit an original and 20 copies of all future documents filed with the Board.** Parties are encouraged to submit all pleadings and attachments as computer data contained on a 3.5-inch floppy diskette formatted for WordPerfect 5.1 (or formatted so that it can be converted by WordPerfect 5.1). (See Decision No. 9, served December 27, 1995).

As clarified in Decision No. 16, discovery-related pleadings need only be served on parties on the restricted service list established in the Administrative Law Judge's Order Adopting Discovery Guidelines, served December 7, 1995.

Vernon A. Williams
Secretary

STB FD-32760 3-15-96 C-18

LATE RELEASE

SERVICE DATE

MAR 15 1996

EB

SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 18]

Decided: March 13, 1996

BACKGROUND

By motion filed March 4, 1996, the Golden Cat Division of the Ralston Purina Company (GCRP) requests that the Board consolidate the record in Docket No. 41550 (GCRP-1) with the record in this proceeding.[2] GCRP filed a notice of intent to participate in this proceeding on January 11, 1996, in order to propose a condition or conditions; it intends to file a request for conditions on or before the deadline of March 29, 1996.

GCRP manufactures and distributes cat box filler. It mines clay at a site near Bloomfield, MO. It transforms the clay at its adjacent plant into a product which it ships in bulk form to other GCRP facilities for packaging as cat box filler, or packages its product directly at the Bloomfield plant and ships its product to distribution centers or to large volume customers. The Bloomfield facility is located near an SSW main line which extends between Ilmo, MO, on the north, and Paragould, AR, on the south. The main line track is connected to GCRP's own loading

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), 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 Act 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 Act. 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 new sections 11323-27 of the Act. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] By decision served and published in the Federal Register on December 27, 1995 (Decision No. 9)(60 FR 66988), the ICC accepted for consideration the application filed November 30, 1995, and modified on December 21, 1995, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively applicants), seeking approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC.

and unloading track by two SP switches, one on the main line track and one on the lead track, 20 feet southwest of the main line track. MPRR has trackage rights over the main line track pursuant to a 1954 trackage rights agreement. The agreement prohibits MPRR from serving the Bloomfield location as an intermediate point. GCRP is, therefore, limited to using SSW service for rail traffic originating or terminating at the Bloomfield facility.

In Docket No. 41550, GCRP alleges that SSW has failed to provide adequate service at the Bloomfield facility.[3] It seeks an order from the Board, pursuant to 49 U.S.C. 11103(a), allowing MPRR to use the SSW facilities located at the Bloomfield manufacturing plant so that MPRR may serve GCRP at that location. GCRP alleges that the facilities are properly deemed "terminal facilities" and that, therefore, section 11103(a) applies.

In GCRP-1, GCRP alleges that, if the ICC had rendered a decision in Docket No. 41550 before its abolition, GCRP would be a "2-to-1" shipper because the ICC likely would have required SSW to grant trackage rights to MPRR in order to provide competitive service at Bloomfield.[4] If the ICC had done this, GCRP asserts, GCRP would automatically be entitled to protection by UP/SP and BN/Santa Fe under the settlement agreement, and GCRP would not have to intervene in this proceeding.

GCRP states that, in its March 29, 1996 request for conditions, it will be necessary for it to refer to the record that it has already built in Docket No. 41550. It believes that reproduction of the record would be duplicative, wasteful, and unnecessary. GCRP notes that the evidentiary record is "extensive," that it is already in the possession of applicants' counsel and of the Board, and that duplication would consume additional file space of all concerned. GCRP proposes that we consolidate the record in Docket No. 41550 with the record in this proceeding so that GCRP may refer to that record in its March 29, 1996 filing without reproducing and physically filing the record again. In support of its motion, GCRP cites 49 CFR 1114.4, which provides that, if a party offers in evidence any matter open to public inspection in the Board's files, that matter need not be made available again at a hearing. In GCRP's view, the record in Docket No. 41550 is embraced in section 1114.4 because it has been open to public inspection in the files of the ICC and the Board.

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[3] The Golden Cat Corporation (Golden Cat) filed the original complaint in Docket No. 41550 on February 27, 1995. On May 22, 1995, GCRP filed a motion requesting that it be substituted as the named complainant in the proceeding instead of Golden Cat. GCRP indicated that, after Golden Cat filed its complaint, Ralston Purina Company, a Missouri Corporation, purchased substantially all of the assets of Golden Cat, including the Bloomfield facility. The Secretary of the ICC issued an order on June 6, 1995, substituting GCRP as the complainant. The record closed on August 8, 1995.

[4] In the context of this proceeding, a 2-to-1 shipper is a rail customer who is served by both UP and SP but, in the event of an unconditioned approval of the proposed merger, will be served by only one rail system. Applicants have stated their intention to see that all 2-to-1 shippers have another competitive option if the Board grants the merger, and allege that a settlement agreement that they have reached with Burlington Northern Railroad Company and The Atchison, Topeka, and Santa Fe Railway Company (collectively, BN/Santa Fe) ensures that this will be so. See UP/SP-22 at 18.

Applicants filed a pleading in opposition to GCRP's motion on March 6, 1996 (UP/SP-162).

DISCUSSION AND CONCLUSIONS

We will deny GCRP's request. Docket No. 41550 is separate from this proceeding and, for administrative convenience, we prefer to keep the records separate as well. Because the record in Docket No. 41550 is of moderate size, GCRP should be able to reproduce the portions of that record necessary to support its request for conditions without undue burden. Moreover, there are many parties in this proceeding who are not parties in Docket No. 41550. See Decision No. 15, served February 16, 1996, and Decision No. 17, served March 7, 1996. GCRP must serve those parties with any parts of the record in Docket No. 41550 that it intends to rely on in its request for conditions. This is necessary to ensure that all parties will have a complete record to respond to GCRP's request, if appropriate.

Further, we do not believe that 49 CFR 1114.4 necessarily supports GCRP's request. 49 CFR 1114.5 states that, if any portion of the record before the Board in any proceeding other than the proceeding at issue is offered in evidence, a true copy will be presented for the record. Our rules do not allow a party in this or any other proceeding to rely on evidence that has not been made part of the record.

The Board is in the process of considering the record in Docket No. 41550 and will issue a decision as soon as possible. In the event that the Board does not issue a decision before March 29, 1996, GCRP should make its March 29 filing with the aim of preserving any and all remedies to which it feels it is entitled.

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

It is ordered:

1. GCRP's request to consolidate the record in Docket No. 41550 with the record in this proceeding is denied.

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

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

Vernon A. Williams

Vernon A. Williams
Secretary

STB FD-32760 3-15-96 C-19

LATE RELEASE

SERVICE DATE

MAR 15 1996

EB

SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 19]

Decided: March 14, 1996

BACKGROUND

In Decision No. 9 in this proceeding, served and published in the Federal Register on December 27, 1995, the ICC affirmed the procedural schedule it had set out in Decision No. 6, served October 19, 1995. Under that schedule, the ICC imposed a January 29, 1996 due date for the filing of: (1) descriptions of anticipated inconsistent and responsive applications; and (2) petitions for waiver or clarification, with respect thereto.[2]

In a pleading filed March 4, 1996, Eagle County, CO, et al., request leave to late file a description of an anticipated responsive application, and a petition for waiver with respect thereto (EGL-4).[3] Petitioners assert that they are interested

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), 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 Act 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 Act. 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 new 49 U.S.C. 11323-27. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] Also in Decision No. 9, the ICC accepted for consideration the application filed November 30, 1995, and modified on December 21, 1995, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively applicants), seeking approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC.

[3] The Board of County Commissioners of Eagle County, CO, is joined by the Board of County Commissioners of Lake County, CO, and the Towns of Avon, Eagle, Gypsum, Minturn, Red Cliff, and Vail, CO. The parties will be referred to collectively as

(continued...)

in the preservation of the Tennessee Pass railroad line, between Sage and Canon City, CO, which applicants seek to abandon as part of the merger proposal.[4] Petitioners note that Montana Rail Link (MRL) and Wisconsin Central Ltd. (WC) both filed notices of intent to file responsive applications wherein they indicate an interest in acquiring the Colorado rail lines formerly operated by DRGW and now owned by SP, with the exception of the Tennessee Pass line. Petitioners assert that, if the Board approves the responsive application of either MRL or WC, the approval will render the fate of the Tennessee Pass line uncertain. Neither MRL nor WC would acquire the property, and SP would probably not have any interest in operating it, state petitioners.

In support of their request to late file their description of an anticipated responsive application, petitioners note that they could not have known of this development until after the deadline for filing descriptions of anticipated responsive applications had passed. Since the January 29, 1996 deadline, they have considered the consequences of the MRL and WC filings, and the final petitioner to authorize the filing of EGL-4 did so on March 4, 1996. In petitioners' view, acceptance of this late-filed description will not prejudice applicants or any other party to this proceeding.

Petitioners state that, in their responsive application, they intend to attempt to acquire the Tennessee Pass line, at least between milepost 335.0 near Sage, CO, and milepost 276.1 near Leadville, CO. They request that their application be designated a minor transaction under 49 CFR 1180.4(d)(4)(ii) and (iv). Petitioners assert that, having noncarrier status, they would be able to acquire the Tennessee Pass line, pursuant to 49 CFR 1150.1, et seq. However, petitioners claim, they are unable to furnish some of the information our regulations require. They allege that they are unable to say how they would pay for the property because SP has refused to provide data that would permit them to calculate the net liquidation value of the Tennessee Pass line. Therefore, they request that we waive the requirements of 49 CFR 1150.4(a) (a description of the proposal and the significant terms and conditions, including consideration to be paid), 1150.5 (an operating plan), and 1150.6 (other financial information). Petitioners acknowledge that they would have to coordinate their operation of the Tennessee Pass line with a party successful in having its application approved (either MRL or WC).

DISCUSSION AND CONCLUSIONS

We will deny petitioners' request. We intend to adhere to the procedural schedule we set out in Decision No. 6 and

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[3] (...continued)
"petitioners." Petitioners actually title their pleading "petition and notice." It is clear from its content that it is actually a description and petition for waiver that would properly have been filed on January 29, 1996

[4] See Docket No. AB-8 (Sub-No. 36X), The Denver and Rio Grande Western Railroad Company--Discontinuance Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO, and Docket No. AB-12 (Sub-No. 189X), Southern Pacific Transportation Company--Abandonment Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO; and 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, and Docket No. AB-12 (Sub-No. 188), Southern Pacific Transportation Company--Abandonment--Malta-Canon City Line In Lake, Chaffee, and Fremont Counties, CO.

reaffirmed in Decision No. 9. It is true that petitioners could not have known until January 29, 1996, about the descriptions of the anticipated responsive applications filed by MRL and WC. However, information regarding the abandonments sought in AB-12 (Sub-No. 188 and 189X) and the discontinuances sought in AB-8 (Sub-No. 36X and 39) was available at least as early as November 30, 1995, when applicants filed the primary application. Also, applicants identified lines targeted for abandonment on their System Diagram Map on or about September 5, 1995. Petitioners' should have become aware of the status of the Tennessee Pass line and begun preparing to take appropriate action well before the January 29, 1996 deadline.

Moreover, petitioners' concern that the Tennessee Pass line was excluded from the descriptions of anticipated responsive applications filed on January 29, 1996, has been ameliorated. On March 7, 1996, MRL filed a clarification of its description of its responsive application (MRL-7). MRL states that it inadvertently left the two Colorado line segments off of maps showing the lines it will seek the authority to acquire. MRL seeks to acquire, in their entirety, the rail lines of DRGW.[5]

Further, in the event that the Board grants the sought abandonment but denies the relief MRL will seek in its responsive application with regards to the Sage-Leadville line and the Malta-Canon City line, petitioners have another remedy available to them. They may file an offer of financial assistance (OFA) pursuant to 49 U.S.C. 10905. Petitioners may offer to pay the abandoning carrier a subsidy or offer to purchase the line targeted for abandonment. If the Board finds that petitioners are "financially responsible," and if certain other requirements are met,[6] the Board shall (1) in the application context, issue a decision postponing the issuance of a certificate of abandonment or, if a certificate has been issued, postponing the effective date of the certificate, and (2) in the exemption context, postpone the effective date of the decision granting an exemption. See 49 CFR 1152.27(e).[7]

Our rules also require a carrier seeking abandonment or discontinuance authority to provide promptly upon request in an application proceeding the information necessary to determine the annual subsidy amount and the line's purchase price. In an exemption proceeding, the carrier must promptly provide the necessary information for determining one or the other, depending

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[5] We also note that LSBC Holdings, Inc., a private corporation, has indicated in its description of anticipated responsive application that it will seek to acquire all of the assets of DRGW.

[6] The Board also must find that it is likely that the financial assistance would be equal to: (1) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or (2) the acquisition cost of that part of the railroad line.

[7] As applicants have stated in their primary application, the merger-related abandonment applications, petitions, and notices are contingent upon the Board's approval of the proposed merger. By discussing the hypothetical scenario wherein petitioners make an OFA, we are not presupposing that we will approve the proposed merger, that we will grant the abandonments and discontinuances sought in AB-12 (Sub-Nos. 188 and 189X) and AB-8 (Sub-Nos. 36X and 39), or that we will deny the relief MRL will seek in its responsive application.

upon the type of financial assistance indicated in the potential offeror's formal expression of intent once submitted. See 49 CFR 1152.27(a). Thus, our rules provide a means for requiring applicants to provide the financial information petitioners need to determine the net liquidation value of the line, and other information relevant to making an OFA that, according to petitioners, applicants are currently not providing.

Given our denial of petitioners' request to late file a description of an anticipated responsive application, petitioners' petition for waiver is moot. Further, we need not determine whether petitioners' anticipated responsive application involves a minor transaction.

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

It is ordered:

1. Petitioners' request for leave to late file a description of an anticipated responsive application is denied.

2. Petitioners' petition for waiver is dismissed as moot.

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

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

Vernon A. Williams

Vernon A. Williams
Secretary

STB FD-32760 3-20-96 C-22

LATE RELEASE | SERVICE DATE
MAR 20 1996

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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. 22][2]

Decided: March 19, 1996

By notice filed November 7, 1995, in Finance Docket No. 32805, Southern Pacific Transportation Company (SPT) and The Denver and Rio Grande Western Railroad Company (DRGW) sought to exempt a transaction whereby (1) DRGW was to sell to SPT 10 segments of DRGW's right-of-way, together with adjoining lands and improvements, (2) DRGW was to grant to SPT an easement over 1 additional segment of DRGW's right-of-way, (3) DRGW was to retain an easement for rail operations over the 11 segments, (4) DRGW was to continue to provide rail service over the 11 segments, and (5) SPT was required to obtain additional authorization from the ICC prior to commencing rail operations over the 11 segments. The transaction was subject to ICC jurisdiction under 49 U.S.C. 11343-45, and appeared to come within the scope of the corporate family class exemption codified at 49 CFR 1180.2(d)(3). The notice was served, and published in the Federal Register, on December 14, 1995 (60 FR 64178).[3]

By application filed November 30, 1995 (and modified on December 21, 1995) in Finance Docket No. 32760, Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW)[4] seek approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), 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 Act 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 Act. 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 new 49 U.S.C. 11323-27. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] This decision embraces Finance Docket No. 32805, Southern Pacific Transportation Company--Corporate Family Reorganization Exemption--The Denver and Rio Grande Western Railroad Company.

[3] The notice filed November 7, 1995, indicates that SPT and DRGW expected to consummate the Finance Docket No. 32805 transaction on or shortly after November 13, 1995. See 49 CFR 1180.4(g)(1).

[4] UPRR and MPRR are referred to collectively as UP. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP.

Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC. By decision served, and published in the Federal Register, on December 27, 1995 (Decision No. 9; 60 FR 66988), the ICC accepted the application for consideration and established a procedural schedule.[5]

In this decision, we address a petition filed March 13, 1996, by Mountain-Plains Communities & Shippers Coalition (the Coalition), that calls for (1) the revocation of the exemption in Finance Docket No. 32805, and (2) the consolidation of the proceedings in Finance Docket Nos. 32805 and 32760. The Coalition points out that various opposing parties in the Finance Docket No. 32760 proceeding are likely to ask that we condition any approval of the UP/SP application on divestiture of (or grants of trackage rights over) some or all of the DRGW segments involved in the Finance Docket No. 32805 proceeding. For this reason, the Coalition insists, the Finance Docket No. 32805 transaction cannot be regarded as "the kind of run-of-the-mill corporate family transaction to which the [49 CFR 1180.2(d)(3)] class exemption was intended to apply." The Coalition fears that SPT's acquisition of the 11 DRGW segments could affect a DRGW divestiture, and therefore argues that SPT and DRGW should be required to explain the reason(s) for the Finance Docket No. 32805 transaction and how that transaction would affect the proposed UP/SP merger or would be affected by that merger.[6]

We find no compelling reason to grant the Coalition's petition. For the purpose of acting upon the Coalition's petition, we note that, if the evidence in the Finance Docket No. 32760 proceeding leads us to approve the UP/SP application, and if such evidence further leads us to condition such approval by requiring divestiture of, or trackage rights over, or some other similar relief with respect to, some or all of the lines operated by DRGW, our authority to impose such conditions requires neither revocation of the exemption heretofore granted in the Finance Docket No. 32805 proceeding, nor consolidation of the proceedings in Finance Docket Nos. 32805 and 32760. Our authority under 49 U.S.C. 11344(c) to impose conditions governing the UP/SP transaction reaches both SPT and DRGW because both are among the "applicants" in the Finance Docket No. 32760 proceeding. Neither revocation nor consolidation would enhance our authority because we already have all the authority needed (1) to require divestiture of, or trackage rights over, or some other similar relief with respect to, some or all of the lines operated by DRGW, and (2) to undo, in whole or in part, the Finance Docket No. 32805 transaction (if necessary to effectuate the divestiture, the trackage rights, or the other similar relief). For this reason, we will deny the petition filed by the Coalition.

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[5] In Decision No. 11 (served February 2, 1996), the United States Department of Justice was granted a 14-day extension (to April 12, 1996) to file its comments, protests, requests for conditions, or any other opposition evidence and argument.

[6] The notice filed November 7, 1995, indicates that the Finance Docket No. 32805 transaction was motivated by corporate finance considerations within the SPT consolidated group of companies, and was intended to result in the prospective reduction of SPT's consolidated income and combined property tax liabilities.

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 March 13, 1996, by Mountain-Plains Communities & Shippers Coalition is denied.

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

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

Vernon A. Williams
Secretary

STB FD-32760 3-20-96 C-21

LATE RELEASE

SERVICE DATE

MAR 20 1996

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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. 21]

Decided: March 19, 1996

By decision served and published in the Federal Register on December 27, 1995 (Decision No. 9) (60 FR 66988),[2] the ICC established a procedural schedule providing that inconsistent and responsive applications, and all comments, protests, requests for conditions, and any other opposition evidence and argument, are due on March 29, 1996. Decision No. 9, slip op. at 15 (60 FR at 66994).[3]

In this decision, we address the motion filed by the City of Reno (Reno) on March 14, 1996, requesting that the due date for filing its comments be extended from March 29, 1996, to at least April 29, 1996 (RENO-3). Reno advances several reasons in support of its request. First, Reno indicates that, on March 5, 1996, UP, recognizing that the proposed merged operations meet or exceed applicable thresholds, agreed to undertake a 30-day engineering study of options to mitigate the impact on public

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), 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 Act 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 Act. 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 new 49 U.S.C. 11323-27. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] In Decision No. 9, the ICC accepted for consideration the application filed November 30, 1995, and modified on December 21, 1995, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively applicants) seeking approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC. UPRR and MPRR are referred to collectively as UP. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP.

[3] In Decision No. 11 (served February 2, 1996), the United States Department of Justice was granted a 14-day extension (to April 12, 1996) to file its comments, protests, requests for conditions, or any other opposition evidence and argument.

health, safety, and the environment. Second, Reno contends that, although the operations permitted under the settlement agreement entered into by Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (collectively BNSF) and applicants meet or exceed applicable thresholds, neither BNSF nor applicants have filed appropriate environmental assessment information required for an agreement of that scope and substance. Third, Reno notes that, by letter dated March 5, 1996, our Section of Environmental Analysis (SEA) asked UP to submit, by March 29, 1996, either a Preliminary Draft Environmental Assessment (PDEA) or a Verified Statement for each executed settlement agreement that involves trackage rights, rail line acquisitions, or operational changes.[4]

The matters which Reno seeks to address in this proceeding are "the potential adverse public health and safety, and environmental impacts of the proposed merged operations as well as the BNSF/UP/SP agreement," RENO-3 at 2. These matters may be addressed in comments submitted in response to the Environmental Assessment (EA) that SEA expects to issue in this proceeding in April. As noted in Decision No. 9, interested persons will have 20 days to comment on the EA. Decision No. 9, slip op. at 13 (60 FR at 66993) ("We further note that, for purposes of this proceeding, persons will have 20 days to comment on the Environmental Assessment, which SEA expects to issue in April.").

Because the reasons advanced by Reno in support of its motion do not justify an extension of the date set for filing comments on the merits, the motion will be denied.

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

It is ordered:

1. The RENO-3 motion is denied.

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

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

Vernon A. Williams

Vernon A. Williams
Secretary

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[4] A PDEA is required if a settlement agreement involves either substantive operational changes or an action such as a rail line abandonment or construction. A Verified Statement (certifying that the settlement agreement meets certain exemption criteria) is required if the settlement agreement involves no substantive operational changes and no abandonment or construction projects.

STB FD-32760 3-20-96 C-20

DATE RELEASE
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SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 20]

Decided: March 19, 1996

BACKGROUND

In this decision, we address two appeals from orders of Administrative Law Judge Jerome Nelson (Judge Nelson) in this proceeding.[2]

First, on March 6, 1996, Entergy Services, Inc., and its affiliates Arkansas Power & Light Company and Gulf States Utilities Company (collectively, Entergy), and the Western Coal

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), 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 Act 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 Act. 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 new 49 U.S.C. 11323-27. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] By decision served and published in the Federal Register on December 27, 1995 (Decision No. 9)(60 FR 66988), the ICC accepted for consideration the application filed November 30, 1995, and modified on December 21, 1995, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively applicants), seeking approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC. The ICC also affirmed the procedural schedule set out in Decision No. 6, served October 19, 1995. According to that schedule, all inconsistent and responsive applications, comments, protests, requests for conditions, and any other opposition evidence and argument are due on March 29, 1996. Comments from The United States Department of Justice are due on April 12, 1996.

Applicants reached a settlement agreement with BN/Santa Fe on September 25, 1995. They reached a supplemental agreement with BN/Santa Fe on November 18, 1995.

Traffic League (WCTL) filed a joint appeal (ESI-8/WCTL-7) from Judge Nelson's oral order, entered March 1, 1996. The order denied Entergy/WCTL's requests (1) that Burlington Northern Railroad Company and The Atchison, Topeka, and Santa Fe Railway Company (collectively, BN/Santa Fe) be ordered to produce Mr. Sami Shalah, its Assistant Vice President-Coal Marketing, for deposition, and (2) that applicants be ordered to produce Mr. F.M. Gough, Business Director in the Energy Marketing Group of Union Pacific Railroad Company's Marketing and Sales Department, and Mr. J.T. Hutton, Director-Coal Marketing & Sales of Southern Pacific Lines, for deposition.

Second, on March 12, 1996, applicants in this proceeding filed an appeal from Judge Nelson's oral order, entered March 6, 1996, granting Dow Chemical Company's (Dow) request to take the depositions of Mr. Daniel Witte and Mr. Tommy Coale, two UP employees who have had responsibility for Dow's account (UP/SP-171).[3]

Entergy/WCTL

According to Entergy/WCTL, BN/Santa Fe has identified Mr. Shalah as the person in its coal marketing department responsible for the Entergy account, and Entergy/WCTL wishes to depose Mr. Shalah regarding the effect of the proposed UP/SP merger and applicants' settlement agreement with BN/Santa Fe on competition for the movement of SP-originated Colorado/Utah coal. Mr. Gough and Mr. Hutton allegedly hold important positions with regard to relevant issues of concern to Entergy/WCTL--the competition between UP and SP to originate coal from either Colorado/Utah or the Powder River Basin. Entergy/WCTL asserts that other witnesses who submitted verified statements with the merger application and have testified in depositions have stated that they are unable to address issues within the areas of Mr. Gough's and Mr. Hutton's expertise.

BN/Santa Fe denied Entergy/WCTL's request to depose Mr. Shalah, stating that, as a non-applicant's employee who has not submitted written testimony, Mr. Shalah should not be required to appear at a deposition. Applicants similarly denied Entergy/WCTL's request to depose Mr. Gough and Mr. Hutton, noting the burden associated with additional discovery and the fact that applicants had already made available witnesses with knowledge of the coal transportation business available.

On March 1, 1996, Judge Nelson heard argument from counsel for several parties regarding the ability of interested parties to depose "non-testifying witnesses," or witnesses who have not submitted written testimony in this proceeding. The judge ruled that he would not adopt a distinction between testifying and non-testifying witnesses for purposes of depositions, but denied Entergy/WCTL's requests to take the depositions in question. Entergy/WCTL claims that Judge Nelson based his ruling upon: (1) his perception that certain issues to be raised in the subject depositions did not appear relevant; (2) his perception that prior witnesses had testified regarding certain relevant

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[3] Applicants' appeal to Judge Nelson's Wednesday, March 6 order should have been filed on Monday, March 11, pursuant to Decision No. 6. Although applicants dated the pleading March 11, it was in fact filed with the Board at approximately 3:00 a.m. on Tuesday, March 12. Likewise, applicants' and BN/Santa Fe's replies to Entergy/WCTL's appeal were filed in the early hours of March 12, but should have been filed on March 11. We will accept the appeal and replies, but warn all parties that adherence to the deadlines set forth in Decision No. 6 is important to aid in the prompt and efficient resolution of procedural issues.

issues in an adequate fashion; and (3) his "apparent pre-determination" of the merits of Entergy's position in this proceeding.[4]

First, Entergy/WCTL argues that it based its request to depose Mr. Shalah upon the specific need for information regarding the competition that BN/Santa Fe would be likely to provide for coal movements to Entergy's Nelson and White Bluff power plants if the Board approves the proposed merger. Entergy states that it seeks to develop information pertinent to the viability of BN/Santa Fe's participation in future Entergy coal movements from a person with direct knowledge of the competitive forces at work with respect to such movements. After inquiring into the pre- and post- merger competitive relationship between the carriers serving Entergy's plants, Entergy/WCTL states, Judge Nelson stated that he did not see the need for the depositions, and denied the request.

Entergy/WCTL asserts that the depositions of Mr. Gough and Mr. Hutton are necessary because of WCTL's need for information concerning the effect of the merger upon competition between UP-originated and SP-originated coal, and Entergy's need to inquire into the impact of the proposed merger on competition for the movement of coal to the Nelson and White Bluff plants. Entergy/WCTL alleges that Judge Nelson's denial of these deposition requests lacked any consideration of the relevance of the witnesses' testimony. In Entergy/WCTL's view, Judge Nelson made a dispositive determination of the request because of a timing objection, but suggested that he had also based his ruling upon a lack of relevance, although he had allowed no argument regarding that issue.

Second, Entergy/WCTL contends that the information sought from Mr. Shalah, Mr. Gough, and Mr. Hutton was unavailable from other "testifying witnesses" who submitted verified statements and were deposed. Without the information, Entergy and WCTL argue that they will be disadvantaged in opposing the proposed merger or seeking conditions to ameliorate anticompetitive impacts with respect to certain coal movements. Denying Entergy and WCTL access to information necessary to meet the burden of proof to justify the grant of conditions works a "manifest injustice," Entergy/WCTL argues. Further, Entergy/WCTL maintains that the Discovery Guidelines, issued December 7, 1995, specifically approve depositions of non-testifying witnesses in this case.

Third, Entergy/WCTL asserts that we should reverse Judge Nelson's decision to the extent that it went beyond a determination of relevance and reflects a premature determination of the merits of Entergy/WCTL's intended claims in this proceeding. Entergy/WCTL state that Judge Nelson's chief inquiry during the consideration of the request for Mr. Shalah's deposition involved a discussion of UP's and SP's abilities to exclude other carriers from the market for coal transportation service to Entergy's plant. According to Entergy/WCTL, Judge Nelson evaluated Entergy's position with respect to the impact of the merger, speculated that the merger would not harm Entergy, and ruled that Entergy did not need competition-related evidence.

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[4] According to Entergy/WCTL, Judge Nelson alternatively based his denial of the requests to depose Mr. Gough and Mr. Hutton upon a timing defect. Entergy/WCTL claims that the purported defect stemmed from applicants' 12-day delay in responding to Entergy/WCTL's deposition requests.

This premature determination of the merits, Entergy/WCTL argues, flies in the face of proper discovery procedure.[5]

On March 12, 1996, applicants filed a response to Entergy/WCTL's appeal (UP/SP-172). It is applicants' position that the deposition requests are unjustified and cumulative because applicants have presented witnesses to address the subjects about which Entergy/WCTL want to question Mr. Gough and Mr. Hutton.[6] In addition, applicants contend that these requests for depositions of non-testifying witnesses are inconsistent with the Board's rules regarding depositions, the principles established in the Discovery Guidelines entered in this proceeding, and the expedited nature of the proceeding.

In response to Entergy/WCTL's claim that Judge Nelson did not address the relevance of Mr. Gough's and Mr. Hutton's proposed testimony, applicants note that Entergy/WCTL had represented that the subjects on which it wanted to depose Mr. Gough and Mr. Hutton were very similar to the subjects to be covered in Mr. Shalah's deposition.[7] Further, state applicants, Judge Nelson allowed Entergy/WCTL's counsel to explain why the deposition of Mr. Shalah might lead to the discovery of relevant information, and concluded that Entergy/WCTL had made no adequate threshold showing of relevance. According to applicants, when Entergy/WCTL stated that it was also seeking to depose Mr. Gough and Mr. Hutton, stated that the request covered several of the

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[5] On March 11, 1996, Western Shippers' Coalition (WSC) filed a reply in support of Entergy/WCTL's appeal (WSC-8). WSC alleges that it intended to attend the depositions at issue, and that, although they are non-testifying witnesses, Mr. Shalah, Mr. Gough, and Mr. Hutton have relevant knowledge of coal marketing at BN/Santa Fe, UP, and SP, respectively. Currently, WSC alleges, no person particularly knowledgeable about coal marketing at either UP or SP has testified in this proceeding. In fact, states WSC, the UP/SP coal expert, Mr. Sharp, testified that he had not spoken to anyone at SP before submitting his verified statement in this proceeding. Further, states WSC, BN/Santa Fe has not submitted testimony from any person knowledgeable about coal traffic. WSC claims that an important issue is whether SP-origin coal competes with UP-origin or BN/Santa Fe-origin coal, and that the sought testimony is relevant to this issue and will not be cumulative.

[6] According to applicants, Mr. King and Mr. Ongerth were available to discuss the Operating Plan in general, and the movement of western coal in particular; Mr. Peterson was available as a knowledgeable individual from UP who could discuss the effects of the merger on coal shippers; and Mr. Gray was available as a knowledgeable individual from SP who could do so. Applicants state that, in fact, both Mr. Peterson and Mr. Gray testified at their depositions about their railroads' coal business. Applicants also note that Mr. Sharp was available as a witness who focused solely on coal issues, and that while Mr. Sharp was unable to respond to a few questions about specific UP or SP coal movements, Mr. Peterson and Mr. Gray were available to testify regarding shipper-specific coal issues.

[7] Entergy/WCTL made this representation in its request to place the issue of the Gough and Hutton depositions on the agenda for the March 1 discovery hearing. Even though the request was untimely, Entergy/WCTL claimed that the issue should be placed on the agenda because of the similarity between the proposed deposition of Mr. Shalah and the proposed depositions of Mr. Gough and Mr. Hutton, and because of the fact that Entergy/WCTL had properly and timely noticed the issue of Mr. Shalah's deposition for the March 1 hearing.

same subjects Entergy/WCTL wanted to cover with Mr. Shalah, and acknowledged that the request was untimely, Judge Nelson denied the request.

Applicants maintain that they have provided Entergy/WCTL with more than enough information, both through depositions and through responses to interrogatories and document requests, for Entergy/WCTL to explore fully the merger's effect on competition for Western coal in general, and the Nelson and White Bluff plants in particular.[8] Applicants dispute Entergy/WCTL's claim that Mr. Gough and Mr. Hutton have more direct knowledge of coal issues than applicants' witnesses, noting that, although Mr. Sharp testified that he spoke with Mr. Gough to gather information, Mr. Gough is no different from the two other members of UP's energy marketing group with whom Mr. Sharp testified he spoke. Applicants contend that Mr. Gough's situation is indistinguishable from that of the hundreds of UP and SP personnel who contributed information to the preparation of the application. Further, regarding Entergy/WCTL's claims that Mr. Gough and Mr. Hutton have specific knowledge about the Nelson and White Bluff stations, applicants maintain that Entergy/WCTL does not explain what testimony it expects to elicit from those witnesses,[9] and does not explain why the answers applicants' testifying witnesses provided were insufficient. In applicants' view, Entergy/WCTL's standard would equally justify depositions of UP's and SP's entire marketing departments, without regard for whether the depositions are needed.

It is applicants' position that Judge Nelson did not ignore or prejudge Entergy/WCTL's arguments. They point out that Judge Nelson had an awareness of the concerns regarding the issue of competition between UP and SP coal originations from an earlier discovery hearing where he ordered applicants to provide discovery to WCTL, from at least one other party's arguments regarding coal discovery at the March 1 hearing, from reading letters exchanged between applicants and WCTL, and from Entergy/WCTL's arguments regarding the deposition of Mr. Shalah.

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[8] Applicants allege that they have provided 100% of their traffic data, their coal business plans, their coal volume forecasts, historic rate data, information regarding Powder River Basin and non-Powder River Basin coal originations and terminations, and information on UP and SP bid proposals for coal movements. They allegedly have provided discovery to Entergy regarding the Nelson and White Bluff stations. Further, applicants contend that they have already presented five witnesses to answer WCTL's questions about the impact of the proposed merger on competition between UP-originated and SP-originated coal and Entergy's questions about the Nelson and White Bluff plants.

Applicants state that Mr. Sharp and Mr. Peterson both testified about the competitive impact of the merger on the White Bluff and Nelson plants, and notes that Entergy/WCTL failed to ask questions regarding the Nelson and White Bluff facilities of other witnesses who may have been able to provide information, such as Mr. King and Mr. Ongerth. Further, applicants state that counsel for Entergy/WCTL actually did not attend the deposition of one such witness, Mr. Gray. See UP/SP-172 at 10-11. Applicants contend that Entergy/WCTL has not demonstrated what, if any, specific additional testimony from Mr. Shalah, Mr. Gough, and Mr. Hutton is necessary for preparation of Entergy/WCTL's March 29, 1996 filings.

[9] See 49 CFR 1114.22(b)(1).

Further, applicants contend that Judge Nelson did not base his rulings on a pre-determination of the merits of Entergy/WCTL's position. Instead, applicants maintain, Judge Nelson's attempt to understand the facts involving transportation to Entergy's facilities was the only way for him to determine whether the requested discovery was relevant. It would be difficult, applicants state, for Judge Nelson to make a determination regarding relevance without considering the types of arguments that parties might raise in this proceeding.

It is applicants' position that the standard for the ordering of a deposition found in our discovery rules set forth at 49 CFR 1114 is applicable to Entergy/WCTL's request for depositions. Applicants argue that the nature of this proceeding requires that some limitation beyond a mere relevance standard be placed on requests to depose non-testifying witnesses.

On March 12, 1996, BN/Santa Fe also filed a response to Entergy/WCTL's appeal regarding the requested deposition of Mr. Shalah (BN/SF-48). It is BN/Santa Fe's opinion that Entergy/WCTL erroneously relies on the proposition that there is a right to deposition testimony to discover any relevant information. Instead, claims BN/Santa Fe, Entergy/WCTL must demonstrate that there is a need for the specific deposition of Mr. Shalah, and that the material sought will aid us in ruling on the case. Entergy/WCTL have failed to meet this burden, BN/Santa Fe argues. In BN/Santa Fe's view, Mr. Shalah's deposition would provide information cumulative to information already obtained (or capable of being obtained) from applicants.

BN/Santa Fe further argues that Judge Nelson's decision is consistent with our precedent regarding depositions. Our rules state that we will order a deposition to be taken only if the deposition will prevent a failure or delay of justice. 49 CFR 1114.22(c). The proponent of a deposition must submit a petition setting forth the facts it desires to establish and the substance it expects to elicit and must convince the Board that the need for the deposition meets the proper standard. 49 CFR 1114.22(b)(1), (c).

Finally, BN/Santa Fe argues that Entergy/WCTL relies on a mischaracterization of the scheduling order and discovery guidelines in this proceeding when claiming that the Board has approved the taking of depositions of non-testifying witnesses in this case on the same basis as the required depositions of testifying witnesses. BN/Santa Fe notes that parties may object to the taking of depositions of non-testifying witnesses, and claims that in those instances, our rules govern whether a deposition may be taken. In BN/Santa Fe's view, a less stringent standard is incompatible with the schedule in this proceeding, and opens the door for depositions of dozens of marketing representatives of applicants and BN/Santa Fe who have particularized knowledge about the transportation needs of certain shippers.

Dow

Applicants argue that review of Judge Nelson's decision with regard to Dow's requested depositions is proper to correct a clear error of judgment or to prevent a manifest injustice.[1] In their view, the order constitutes a clear error of judgment, with regard to both our rules governing deposition discovery and Dow's particular need to depose Mr. Witte and Mr. Coale.

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[1] See 49 CFR 1115.1(c).

According to applicants, Dow based its deposition requests on statements by applicants' witnesses Mr. Spero and Mr. Peterson that they consulted with Mr. Witte and Mr. Coale about chemicals and plastics matters, including matters relating to Dow, and the fact that applicants had identified Mr. Coale as an employee knowledgeable about plastics transportation. Applicants assert that Dow's request was unjustified and cumulative because applicants had submitted three witnesses--Mr. Peterson, Mr. Barber, and Mr. Spero--who addressed chemicals and plastics matters. Also, applicants state, they have already produced the UP and SP Dow plastics and chemicals files, which document UP's and SP's relationships with Dow. In addition, it is applicants' position that the deposition requests are inconsistent with our rules regarding depositions, the principles established in the discovery guidelines entered in this proceeding, and with the expedited nature of this proceeding.

Applicants state that, in its letter asking Judge Nelson to order applicants to produce Mr. Witte and Mr. Coale for depositions, Dow stated that it wanted to depose the witnesses because of their familiarity with Dow, their length of service, and their roles in the preparation of the merger application. Dow stated that Mr. Witte was particularly important because he was the source of several statements about Dow that appeared in Mr. Spero's workpapers; Mr. Coale was important because he was the source of information on a specific issue cited by witnesses in depositions. Finally, according to applicants, Dow stated that Mr. Witte and Mr. Coale would be able to provide information regarding Dow's ability to exert competitive pressure upon UP through modal and source competition at its facilities.

Applicants assert that it is inappropriate for non-testifying witnesses to be deposed as readily as testifying witnesses, and that the depositions would disrupt UP's business operations and applicants' work on their rebuttal case in this proceeding.[11] In applicants' view, Dow has not pointed to critical facts that Mr. Witte and Mr. Coale know, and that Dow has not been able to get from other sources, including their own sources. It is applicants' position that the standard for ordering a deposition, which is found in our discovery rules set forth at 49 CFR 1114, is applicable to Dow's request for depositions. Applicants argue that we should place some limitation beyond a mere relevance standard on requests to depose non-testifying witnesses; there must be a demonstration that there is a real need for a particular deposition.

Applicants contend that, for several reasons, Dow has not shown any need to depose Mr. Witte and Mr. Coale. First, in applicants' view, the fact that Mr. Witte and Mr. Coale were sources of information about Dow for applicants' testifying witnesses does not establish Dow's need to depose them. Applicants assert that the witnesses it has produced have ample knowledge of the issues concerning Dow. Applicants maintain that Dow personnel have equal if not greater knowledge of every specific issue on which Dow wants to depose Mr. Witte and Mr. Coale. Further, applicants contend, Dow could have obtained the information through less disruptive methods such as interrogatories, or from the documents applicants have already produced.

Second, applicants assert that any information Mr. Witte and Mr. Coale could provide regarding competition for chemicals traffic in general, or competition for Dow traffic in particular,

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[11] According to Judge Nelson's ruling, the depositions of Mr. Witte and Mr. Coale will take a total of one-half day and will take place at UP's offices in Omaha, NE.

would be cumulative. Applicants state that the merger application contains statements from three witnesses that discuss the impact of the merger on competition for chemical products, and that these witnesses were deposed by Dow and other parties for a total of 15 days. This testimony, in addition to the information contained in the documents applicants have already produced, should be sufficient for Dow's purposes, in applicants' view.

Third, applicants maintain that there was nothing unique about the roles of Mr. Witte and Mr. Coale in connection with the preparation of the application. Applicants state that Mr. Witte and Mr. Coale merely shared their knowledge with witnesses who were preparing verified statements, and that their roles in this proceeding are indistinguishable from the "hundreds" of UP and SP personnel who contributed information during the preparation of the application. Applicants argue that they are also no different from the dozens of marketing personnel at UP and SP who deal directly with customers who have expressed an interest in this proceeding. Applicants fear that allowing these depositions will lead to many similar requests by other parties.

On March 13, 1996, Dow filed a reply to applicants' appeal to Judge Nelson's ruling. Dow argues that applicants' appeal should be denied. Dow asserts that this case does not involve general ICC precedent regarding procedures and standards for taking depositions; instead, it involves a matter given by the Board to the discretion of Judge Nelson.

In Dow's view, the discovery guidelines specifically permit the deposition of non-testifying witnesses, upon reasonable written notice, without any of the showings applicants argue are necessary. Dow notes that the procedures and standards for the taking of depositions of non-testifying witnesses in this proceeding were specifically addressed at the discovery conference held on December 1, 1995, that led to the discovery guidelines. According to Dow, applicants urged that depositions of non-testifying witnesses be limited to two situations: (1) where the party seeking a deposition advised the party from whom the deposition was sought that it requested the testimony on a specific subject matter relevant to the issues raised in this proceeding which had not been specifically addressed by a witness who had submitted written testimony, or (2) when a party filed a petition to conduct a deposition pursuant to 49 CFR 1114.2 and Judge Nelson approved it.

Dow maintains that Judge Nelson rejected applicants' suggestion, that discussion ensued, and that the discovery guidelines were crafted to allow for depositions of non-testifying witnesses without the party seeking the deposition having to meet the 49 CFR 1114 standards. Dow alleges that depositions of non-testifying witnesses are not unduly burdensome or inconsistent with the expedited schedule in this proceeding. Depositions can be scheduled quickly, and the questions answered directly, without the delay that occurs inevitably with interrogatories and requests for admissions.

It is Dow's position that applicants are actually appealing the discovery guidelines themselves. Dow argues that such an appeal is not timely under Decision No. 6 in this proceeding, served October 19, 1995, where we established a 3-day deadline for any appeals to Judge Nelson's decisions. Finally, Dow asserts that the depositions of Mr. Witte and Mr. Coale are necessary to obtain information directly relevant to this proceeding that it was unable to obtain from testifying witnesses.

DISCUSSION AND CONCLUSIONS

We will deny the relief Entergy/WCTL seeks, and we will also deny the relief applicants seek. Our regulations applicable to appeals of decisions of the Administrative Law Judge provide that "such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 CFR 1115.1(c). We clearly pointed out in Decision No. 6 that "[a]ny interlocutory appeal to a decision issued by Judge Nelson will be governed by the stringent standards of 49 CFR 1115.1(c)."

Also in Decision No. 6, we authorized Judge Nelson to establish such discovery guidelines as he deemed appropriate. Those guidelines, served on December 7, 1995, govern the discovery in this proceeding. Paragraph 6 of the guidelines reads in part as follows:

> A person who has submitted written testimony in this proceeding shall be made available for deposition on request. Depositions of other persons or of parties on a specified subject matter may be taken on reasonable written notice. Any party objecting to such deposition shall follow the procedures set forth in Paragraph 2 above. (Emphasis added).

Applicants and BN/Santa Fe are correct in their assertions that our rules do not necessarily favor depositions. Under 49 CFR 1114.22(b)(1), the petitioner requesting an order to take a deposition should set forth the facts it desires to establish and the substance it expects to elicit in the deposition. 49 CFR 1114.22(c) reads in part as follows:

> If the [Board] is convinced on its own initiative or by the petition requesting an order to take a deposition that the deposition will prevent a failure or delay of justice, it will serve an order upon the parties and the witness, naming the witness whose deposition is to be taken, specifying the time when, the place where, and the officer before whom the deposition is to be taken, and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories.

Here, however, the discovery guidelines prevail in any conflict between those guidelines and our rules.

Applicants, BN/Santa Fe, Entergy/WCTL, and Dow have submitted arguments regarding the applicability of Paragraph 6 to so-called "non-testifying" witnesses. Both applicants and BN/Santa Fe appear to believe that the rules set forth at 49 CFR 1114 apply because of Paragraph 10 of the guidelines, which provides that the discovery rules set forth at 49 CFR 1114 apply to this proceeding except as modified by a decision by the Board or by the discovery guidelines. (Emphasis added).

Contrary to what BN/Santa Fe and applicants argue, we find that the second sentence of Paragraph 6 indicates that depositions of non-testifying witnesses are under the purview of the discovery guidelines, and are not automatically subject to the standards set out in 49 CFR 1114.22(c). While an outright ban on depositions of non-testifying witnesses would be inconsistent with the spirit of Paragraph 6, requiring that a party automatically produce a non-testifying witness whenever there is a claim of "relevance" also would be inconsistent with the spirit of Paragraph 6. Testifying and non-testifying witnesses are not treated identically in the guidelines, and we recognize that there is a distinction drawn between the two. Given the ambiguity of the guidelines on this issue, we believe

Judge Nelson is in the best position to interpret those guidelines and to determine whether specific requests for depositions of non-testifying witnesses are proper under the guidelines.

The record does not indicate a clear error of judgment or manifest injustice with regard to Judge Nelson's rulings on either Entergy/WCTL's or Dow's deposition requests. We will affirm Judge Nelson's determination that the requested depositions of Mr. Shalah, Mr. Gough, and Mr. Hutton are not relevant, or that he did not see a sufficient connection with this proceeding to warrant granting Entergy/WCTL's requests for the depositions. Further, we will affirm his determination that Dow's requested depositions of Mr. Witte and Mr. Coale are appropriate under the discovery guidelines.

We also do not find that Judge Nelson prejudged the merits of Entergy/WCTL's cases in this proceeding. His inquiries as to the natures of Entergy/WCTL's respective cases were pertinent in making his determination as to whether the depositions were necessary for them to make those cases.

As stated, our review of the written record does not indicate that in either instance there was a clear error of judgment or that Judge Nelson's decision will result in manifest injustice. The standard set out in section 1115.1(c) is a strict one. In their respective appeals, Entergy/WCTL and applicants have failed to meet it.

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

It is ordered:

1. Entergy/WCTL's appeal of Administrative Law Judge Jerome Nelson's March 1, 1996 oral order is denied.

2. Applicants' appeal of Administrative Law Judge Jerome Nelson's March 6, 1996 oral order is denied.

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

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

Vernon A. Williams

Vernon A. Williams
Secretary

STB FD-32760 3-25-96 C-24

SERVICE DATE

MAR 2 5 1996

EB

SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 24]

Decided: March 22, 1996

BACKGROUND

In Decision No. 9 in this proceeding, served and published in the Federal Register (60 FR 66988), on December 27, 1995, the ICC established a procedural schedule that provided, among other things, that descriptions of anticipated inconsistent and responsive applications, and petitions for waiver or clarification with respect thereto, were due on January 29, 1996.[2]

In their March 18, 1996 EGL-5 petition, petitioners (the Boards of County Commissioners of the Counties of Eagle and Lake, State of Colorado, and the Towns of Avon, Eagle, Gypsum, Minturn, Red Cliff, and Vail, State of Colorado) seek reconsideration of Decision No. 19, served on March 15, 1996, in which we denied their EGL-4 petition. In the EGL-4 petition (filed March 13, 1996), petitioners requested leave to late file a description of an anticipated responsive application and a petition for waiver with respect thereto. Petitioners asserted that they were interested in the preservation of the Tennessee Pass railroad line between Sage and Cañon City, CO, which applicants seek to discontinue operations over and to abandon, in the event we approve the UP/SP control application.[3] Petitioners noted,

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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] In Decision No. 9, the ICC also accepted for consideration the application filed November 30, 1995 (and modified on December 21, 1995), by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively applicants) seeking approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC.

[3] See Docket No. AB-8 (Sub-No. 36X), The Denver and Rio Grande Western Railroad Company--Discontinuance Exemption--

(continued...)

purchase, lease, or acquire operating or trackage rights on the former MPRR's "Hoisington Sub" from Towner, east through the State of Kansas on to Kansas City, thereby encompassing in their entirety the trackage rights currently held by SP/DRGW.

LSBC requested that we waive compliance with 49 CFR 1180.6 (supporting information), 1180.7 (market analyses), 1180.8 (operational data), and 1180.9 (financial information), due to the fact that material information required to comply with the regulation had not been forwarded to LSBC by either SPT or UPRR. In Decision No. 14 in this proceeding, served February 15, 1996, we denied the waivers LSBC sought, stating that it had not sufficiently explained with specificity what information it was unable to provide and must obtain from SPT and UPRR, and that LSBC should be able to comply with at least some of our requirements.

On March 22, 1996, LSBC filed a request for an extension of time until April 12, 1996, in which to file its responsive application (LSBC-2).[3] LSBC states that it was contacted on March 3, 1996, by individuals representing employees of the former DRGW who are interested in examining an employee-led or employee-sponsored buyout of the former lines of the DRGW, including access from Kansas City to Oakland, CA. The group, formally known as the "DRGW Employee Labor Committee" allegedly is interested in combining their efforts to purchase these lines with LSBC's. According to LSBC, the two groups have agreed that combining their interests may be a way to maintain a third rail carrier in the Central Corridor.

LSBC asserts that it has not had the "privilege of discovery" and has not had the time to study all relevant information regarding the proposed merger.[4] It allegedly has been limited in its ability to draft a comprehensive and complete responsive application. The addition of the DRGW Employee Labor Committee, and the coordination of their agenda with LSBC's, could substantially change LSBC's responsive or inconsistent application, and, LSBC notes, it has had less than 3 weeks to effect such a coordination. LSBC states that the requests of current railroad employees who will be directly affected by the proposed merger should be given fair and due consideration.

DISCUSSION AND CONCLUSIONS

We will deny the relief sought by LSBC. We have stated our intent to adhere to the procedural schedule many times since this proceeding began. See Decision No. 9 at p. 11 and Decision No. 11 at p. 3. We do not believe LSBC has made a compelling case for departing from that schedule now. LSBC is responsible for building and presenting its case, and has had the same amount of time in which to do so as all other parties to this proceeding have had.[5] LSBC has had ample notice of the March 29 filing deadline for inconsistent and responsive applications. If LSBC

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[3] Applicants filed a reply on March 22, 1996.

[4] We know of no reason why LSBC would not be allowed to conduct discovery.

[5] The one exception to this statement is the United States Department of Justice (USDOJ). In Decision No. 11, served February 2, 1996, we granted USDOJ a 2-week extension of time in which to file any comments, protests, requests for conditions, or any other opposition evidence and argument. Our reason for granting this extension was that USDOJ had lost a number of days as a result of its employees being furloughed. We stressed that the rest of the procedural schedule would remain unchanged.

We therefore find petitioners' argument irrelevant that neither applicants nor any other party opposed the EGL-4 petition. We further find irrelevant whether the filings of either MRL or WC indicate any intention to acquire the Tennessee Pass line. Petitioners had no right to expect that they would be allowed to late file their own notice of intent to file a responsive application to acquire the Tennessee Pass line in the event that no one else filed a notice of intent to file a responsive application to acquire such line.

Petitioners mistakenly believe that the Board erred in suggesting that the financial provisions of 49 U.S.C. 10905 may afford petitioners adequate relief. They claim that, even though the Board may authorize the proposed abandonment of the Tennessee Pass line, there is no assurance that the SP will consummate the abandonment. Although SP cannot be forced to consummate an abandonment, if the Board authorizes an abandonment, the OFA process would go forward regardless of whether or not SP intended to act on the abandonment authority granted. If another entity acquires the Tennessee Pass line by virtue of the OFA process or otherwise, then that entity would be obligated to provide service over the line. If the OFA process does not result in a sale and SP does not pursue its abandonment of the Tennessee Pass line, then SP would be obligated to continue operating over the line.

We note also that, if SP were to withdraw its abandonment application and/or petition for exemption prior to any authorization, petitioners would have ample remedies under new 49 U.S.C. 11101(a) (a rail carrier shall provide transportation or service on reasonable request) and under new 49 U.S.C. 10907(b)(1)(A)(i) (forced sale of a rail line if required or permitted by the public convenience and necessity).

In any event, because petitioners could have complied with the procedural schedule but chose not to, and their reasons advanced in defense of their noncompliance are insubstantial, we will deny their EGL-5 petition.

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

It is ordered:

1. The EGL-5 petition is denied.

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

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

Vernon A. Williams

Vernon A. Williams
Secretary

STB FD-32760 3-26-96 C-23

LATE RELEASE

SERVICE DATE

MAR 2 6 1996

EB

SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 23]

Decided: March 25, 1996

BACKGROUND

In this decision, we address an appeal from an order of Administrative Law Judge Jerome Nelson (Judge Nelson) in this proceeding.[2] On March 13, 1996, applicants appealed Judge Nelson's oral order of March 8, 1996, alleging that the order prevents applicants from conducting timely discovery in this proceeding. Applicants assert that Judge Nelson's decisions at the discovery hearing held March 8 constitute clear errors of judgment, and that our review is necessary to prevent a manifest injustice.[3]

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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] By decision served and published in the Federal Register on December 27, 1995 (Decision No. 9)(60 FR 66988), the ICC accepted for consideration the application filed November 30, 1995, and modified on December 21, 1995, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively applicants), seeking approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC. The ICC also affirmed the procedural schedule set out in Decision No. 6, served October 19, 1995. According to that schedule, all inconsistent and responsive applications, comments, protests, requests for conditions, and any other opposition evidence and argument are due on March 29, 1996. Comments from The United States Department of Justice are due on April 12, 1996. On April 29, 1996, responses to inconsistent and responsive applications are due; responses to comments, protests, requested conditions, and other opposition are also due. Applicants' rebuttal in support of the primary application and related applications is also due on April 29, 1996.

[3] See 49 CFR 1115.1(c). See also Decision No. 6 in this proceeding, served October 19, 1995.

Applicants served discovery requests on other active parties in this proceeding on February 26, 1996, and maintain that they were authorized to do so by the discovery guidelines entered in this proceeding on December 7, 1995. Applicants assert that waiting until February 26 to propound discovery requests allowed them to focus their discovery so that the requests were not unduly burdensome or irrelevant.[4] On March 8, 2 business days before the March 12 deadline for the discovery responses, applicants allege that Judge Nelson overrode the discovery guideline procedures and ordered that applicants conduct discovery under more restrictive rules. Applicants maintain that they will not receive meaningful discovery until the middle of April 1996, which is too late to be of any use in preparing their filing due April 29, 1996.

According to applicants, on March 6, Consolidated Rail Corporation (Conrail) asked Judge Nelson to hold a discovery conference on March 8 to decide whether applicants' discovery requests were "premature." Conrail relied on language from Decision No. 6, served October 19, 1995, at 16, which states: "Discovery on responsive and inconsistent applications will begin immediately upon their filing." Conrail argued that, because such filings would not be made until March 29, applicants could not begin discovery until that date.[5]

According to applicants, at the March 8 hearing Judge Nelson stated that he had not read any authority supporting the idea that applicants' discovery could not go on, and also did not find fault with the timing of applicants' discovery requests. According to applicants, he then stated that he would allow applicants to propound a few specific interrogatories to which parties would have to respond by March 12, and would require them to defer any other discovery until after parties had made their

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[4] The general categories of applicants' discovery requests were as follows: (1) information relating to the effectiveness of trackage rights; (2) information relating to other specific issues that had arisen repeatedly in discovery; (3) information relating to statements that parties had made regarding the merger to shippers, the public, and government officials; (4) information regarding parties' analyses of the impact of the proposed merger; (5) information regarding reasons parties might have interests in this proceeding other than those that have been made public; and (6) with respect to Conrail, information about Conrail's interest in purchasing certain SP track as a solution to alleged competitive problems raised by the merger. Applicants state that they requested traffic data from Conrail and other railroads. They propounded several requests to coal producers and consumers to obtain information about whether there is in fact competition between coals originated by UP and SP, and propounded several other requests to parties based on the particular issues they had raised in this proceeding.

[5] Applicants state that many other parties, including The Kansas City Southern Railway Company (KCS), The Texas Mexican Railway Company (Tex Mex), Western Coal Traffic League (WCTL), the National Industrial Transportation League (NITL), Western Shippers' Coalition (WSC), Sierra Pacific Power Company (Sierra Pacific), Dow Chemical Company (Dow), and Kennecott Energy Company and Kennecott Utah Copper Corporation (Kennecott), also submitted letters to the Judge seeking a deferral of discovery, arguing that applicants' requests were "premature," and advancing generalized claims about relevance, burden, work product, and privilege.

March 29 filings.[6] Judge Nelson also said that Conrail could rest on its objections in responding to the requests to which he had required a March 12 response.[7] Judge Nelson stated that other parties should be guided by his rulings with respect to Conrail in determining which requests they would be required to answer by March 12.[8]

In applicants' view, Judge Nelson's "vetting" of their discovery was completely inconsistent with the method of resolving discovery disputes that has been applied to discovery against applicants. Applicants assert that Judge Nelson had no reason to depart from the discovery guidelines. Applicants contend that Judge Nelson lost sight of the fact that they are entitled to discovery from parties in order to develop their own case. Further, state applicants, he lost sight of the fact that, by preventing applicants from obtaining discovery until April, he was effectively denying them discovery. More than once, state applicants, Judge Nelson suggested that the issue was not whether applicants were entitled to discovery, but when they should receive it.

In applicants' view, the time remaining in which applicants may conduct discovery is too short for us not to correct Judge Nelson's action. Applicants state that there is no need to adjust the procedural schedule to make this correction. Noting that parties were 2 business days away from responding to applicants' February 26 discovery requests when Judge Nelson entered his decision, applicants ask that we order that discovery proceed from that point and that parties respond to all of applicants' requests in 2 business days.

On March 16, 1996, the following parties filed responses to applicants' appeal: (1) Conrail (CR-20); (2) KCS (KCS-29);

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[6] Generally, Judge Nelson divided all discovery into two categories. The first category encompassed discovery requests that he determined were sufficiently focused to be answered as written. Of the requests in that category, Judge Nelson ruled that parties should answer some on March 12, while answering others (which Judge Nelson believed related to specific positions that the parties were to take in their March 29 filings) on April 1. The second category involved discovery requests that Judge Nelson determined were broad and/or unfocused. He required applicants to reformulate these requests, considering the content of the March 29 filings, and resubmit them to the parties. Judge Nelson also stated that applicants could not propound any discovery raising "constitutional questions" until after March 29.

Judge Nelson set deadlines for the discovery propounded after March 29, 1996. Applicants are to submit the discovery on or before April 3, 1996. Parties are to reply within 5 calendar days. On April 12, 1996, there will be a hearing with Judge Nelson for him to rule on objections. Parties objecting to discovery requests on grounds of relevance or privilege should bring those documents to the April 12 hearing so that, if Judge Nelson overrules their objection, they can immediately produce the documents for applicants.

[7] According to applicants, of their 16 interrogatories and 56 document requests to Conrail, Judge Nelson determined that applicants were entitled to responses on March 12 to 4 interrogatories and parts of 13 document requests.

[8] For the most part, applicants' first 24 discovery requests sought similar information from all parties.

(3) WCTL, Arizona Electric Power Cooperative, Inc., Texas Utilities Electric Company, and Entergy Services, Inc. (WCTL-10/AEPC-4/TUE-6/ESI-11); (4) Tex Mex (TM-21); (5) WSC (WSC-10); (6) Sierra Pacific and The Idaho Power Company (SPP-8); (7) NITL, Dow, Kennecott, and Western Resources, Inc. (NITL-8/DOW-9/KENN-9/WSTR-11); and (8) The Society of the Plastics Industry and Union Carbide Corporation (SPI-9/UCC-5). Generally, they make similar arguments, which are discussed below.

The replying parties argue that applicants' appeal is without merit, and should not be granted under our strict standards for considering appeals to the decisions of an administrative law judge. Most of the replying parties state that applicants' discovery requests were overly broad and not sufficiently focused, especially given the fact that they have not submitted comments or sought conditions in the proceeding. Discovery that is not directed to a particular issue raised by a party in the case does not meet the test of relevancy, they argue. They allege that the fact that parties with widely divergent interests were served with identical discovery requests indicates that applicants did not focus their requests at all. Further, they allege that applicants waited until the last day written discovery requests were permitted, February 26, 1996, to propound discovery requests in order to interfere with parties' preparation of their March 29 filings.

In the replying parties' view, Judge Nelson's painstaking examination of each discovery request to determine when it could be answered appropriately was in no way arbitrary or inconsistent, as applicants claim. Instead, state the replying parties, he properly exercised his discretion and effected a reasonable compromise of the conflicting interests involved. They point out that Judge Nelson expedited the post-March 29 discovery schedule to accommodate applicants' concerns regarding the preparation time for their April 29 filing.

In the replying parties' views, applicants will have the opportunity to obtain sufficient meaningful discovery. Under Judge Nelson's ruling, they should have received some responses already, they will receive others immediately after the March 29 filings, and they will receive replies to their reformulated discovery requests, propounded after March 29, on an expedited basis.

Several of the replying parties reiterate the argument that applicants' discovery is premature in its entirety, and that applicants properly could serve the discovery only after March 29. In support of this argument, they note that, when applicants were served with one formal discovery request 2 weeks before filing their formal application, but 3 months after they had announced the proposed merger, they unilaterally refused to respond on the ground that pre-filing discovery of any party was prohibited by the discovery ground rules. Further, in their filing, NITL, Dow, Kennecott, and Western Resources allege that in last year's proceeding involving the merger of the Burlington Northern Railroad Company and The Atchison, Topeka, and Santa Fe Railway Company (BN/Santa Fe), counsel for the applicants in that proceeding did not file discovery on the intervening parties until those parties had filed comments and sought conditions before the ICC.

SPP and UCC also argue that applicants' requests to them were not timely served, and that applicants are not entitled to the responses on that basis.[9]

DISCUSSION AND CONCLUSIONS

We will deny the relief applicants seek. Our regulations applicable to appeals of decisions of the Administrative Law Judge provide that "such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 CFR 1115.1(c). We clearly pointed out in Decision No. 6 that "any interlocutory appeal to a decision issued by Judge Nelson will be governed by the stringent standards of 49 CFR 1115.1(c)." Also in Decision No. 6, we authorized Judge Nelson to establish such discovery guidelines as he deemed appropriate. Those guidelines, served on December 7, 1995, govern discovery in this proceeding and prevail in any conflict with our rules.

Paragraph 1 of the discovery guidelines states that "all discovery requests must be tailored to be consistent with the procedural schedule in this proceeding." It further states that "all objections to discovery requests shall be made within five business days from the date of service of the discovery request by means of a written objection containing a general statement of the basis for the objection. Unless objected to, all discovery requests shall be answered within fifteen days after service of the requests." Paragraph 10 of the guidelines states that Judge Nelson may vary any discovery guideline for good cause.

We are sympathetic to applicants' concerns regarding the amount of time necessary to propound their discovery requests, receive and analyze the responses, and prepare their April 29 filing. However in Decision No. 6 in this proceeding, served October 19, 1995, the ICC stated that "discovery on responsive and inconsistent applications will begin immediately upon their filing." To be consistent with Paragraph 1 of the discovery guidelines, applicants' discovery requests must not be premature.

The record indicates that Judge Nelson exercised the discretion, given to him by the Board, in an attempt to satisfy the competing interests involved in this dispute. We believe that, having conducted many discovery hearings and gained familiarity with the arguments pertaining to discovery in this proceeding, he is in the best position to determine the appropriate solution. Moreover, contrary to what applicants' argue, we believe he acted in accordance with the discovery guidelines in making his ruling. He can vary the guidelines for good cause, and that is what he did. If he had not done so, applicants could be waiting until after March 29 to propound any discovery requests or receive any discovery responses. Instead, Judge Nelson determined that some of applicants' discovery requests could be answered now, while others could be answered more appropriately after parties have submitted their opposition filings. He also expedited the post-March 29 discovery schedule to accommodate applicants' concerns regarding the preparation time for their April 29 filing. Judge Nelson has the authority to craft such resolutions.

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[9] According to the discovery guidelines, no written discovery requests were to be served between February 27, 1996, and March 29, 1996. SPI and UCC allege that the applicants' discovery was served, by messenger to counsel for SPI and UCC, on the morning of February 27, 1996. We see no need to respond to SPI's and UCC's assertions that applicants' discovery requests were not timely. SPI and UCC state that they timely responded to applicants' discovery requests, as limited by Judge Nelson.

Our review of the written record does not indicate that there was a clear error of judgment on Judge Nelson's part or that his decision will result in manifest injustice. The standard set out in section 1115.1(c) is a strict one. Applicants have failed to meet it.

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

It is ordered:

1. Applicants' appeal of Administrative Law Judge Jerome Nelson's March 8, 1996 oral order is denied.

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

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

Vernon A. Williams

Vernon A. Williams
Secretary

STB FD-32760 3-25-96 C-25

SERVICE DATE

MAR 2 5 1996

EB

SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 25]

Decided: March 22, 1996

BACKGROUND

In Decision No. 9, served and published in the Federal Register on December 27, 1995, the ICC affirmed the procedural schedule it had set out in Decision No. 6, served October 19, 1995.[2] Under that schedule, the ICC imposed a January 29, 1996 due date for the filing of: (1) descriptions of anticipated inconsistent and responsive applications; and (2) petitions for waiver or clarification, with respect thereto. On January 29, 1996, Capital Metropolitan Transportation Authority (CMTA) filed a description of an anticipated responsive application (CMTA-2), and a petition for waiver or clarification, with respect thereto (CMTA-3). On March 20, 1996, CMTA filed a motion for leave to amend its description of its anticipated responsive application and its petition for waiver or clarification with respect thereto (CMTA-7), an amended description of its anticipated responsive application (CMTA-8), and an amended petition for clarification or waiver (CMTA-9).

CMTA is a regional transit authority, a body politic, and a political subdivision of the State of Texas. It manages, and possesses a mass transit easement on and over, the Giddings/Llano Railroad, which is owned by the City of Austin. The Austin and Northwestern Railroad Co. (AUNW) provides rail freight operations over the railroad. CMTA alleges that the proposed merger will eliminate an interchange partner for freight carriers on the Giddings/Llano railroad, thereby threatening the economic viability of the railroad. In its January 29 filing, CMTA stated

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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] In Decision No. 9, the ICC also accepted for consideration the application filed November 30, 1995, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively applicants) seeking approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC.

that it anticipates that it will file a responsive application in this proceeding, requesting certain interchange rights at McNeil, Elgin, and Giddings, TX, for the City of Austin, its successors and assigns, and third party rail freight operators. It stated that it would request that we condition any approval of the proposed merger on the granting of certain joint trackage and interchange rights to BN/Santa Fe, including joint trackage rights from Round Rock, TX, to McNeil, over the UP/SP line, and interchange rights at McNeil. Finally, it stated that it would seek "primary" interchange rights at McNeil for CMTA's future mass transit operations.

CMTA sought clarification that its proposed responsive application involves a "minor" transaction as defined in 49 CFR 1180.2(c). CMTA noted that it would provide the operating data required for minor transactions under 1180.8(b). In Decision No. 13 in this proceeding, served February 15, 1996, we granted CMTA's petition for clarification or waiver.

In CMTA-7, CMTA states that, when it filed CMTA-2 and CMTA-3, it believed that there was a "high probability" that BN/Santa Fe would pursue trackage and interchange rights over the 7-mile segment from Kerr (near Round Rock) to McNeil, which would allow that carrier to serve shippers along the Giddings/Llano line. Because of uncertainty regarding the CMTA's ownership status, potential common carrier duties, and BN/SF's position, CMTA stated in both CMTA-2 and CMTA-3 that it may have to amend its pleadings.

CMTA alleges that, because of the City of Austin's recent plan to convey the Giddings Llano line to CMTA, and because of recent discovery responses it has received from BN/Santa Fe, it believes that limited amendments to CMTA-2 and CMTA-3 are warranted. The proposed amendments insert the phrase "an unnamed rail carrier unaffiliated with applicants" instead of "BN/Santa Fe" as the holder of the sought trackage rights from Kerr to McNeil. According to CMTA, the amendments accommodate the diminished potential that BN/Santa Fe will pursue the trackage rights, and obviate potential litigation between CMTA, BN/Santa Fe, and applicants. Further, they give CMTA flexibility in pursuing an alternate carrier to assume the relevant trackage and interchange rights. CMTA requests that we waive the 49 CFR 1180 requirements for the inclusion of information from an applicant carrier. CMTA notes that it is not an applicant carrier, and cannot furnish information from an unidentified applicant carrier.

DISCUSSION AND CONCLUSIONS

CMTA's request appears reasonable and we will grant it. Other parties that filed descriptions of anticipated inconsistent or responsive applications on January 29, 1996, requested certain rights on behalf of unnamed carriers unaffiliated with applicants.[3] See Decision No. 12 in this proceeding, served February 15, 1996. For those parties, we granted requests that they not be required to file the information required of "applicant carriers." We believe the same result is warranted here. In Decision No. 12, we stated:

> We will grant the sought waiver respecting "applicant carriers." If we approve the primary application and if we

[3] These parties include IBP, Inc. (IBP); Wisconsin Electric Power Company (WEPCO); Commonwealth Edison Company (ComEd); and Entergy Services, Inc., Arkansas Power & Light Company, and Gulf States Utility Company (collectively, Entergy).

condition our approval thereof by granting any or all of the responsive applications to be filed by IBP, WEPCO, ComEd, and Entergy, that approval will amount to a requirement that applicants allow a carrier designated by IBP, WEPCO, ComEd, or Entergy to conduct the authorized trackage rights operations (or, in ComEd's case, to acquire a designated line). Any matters not resolved in the present proceeding (e.g., any matters respecting the suitability of the nominee or other specific trackage rights or line acquisition issues) would necessarily have to be resolved in a follow-up proceeding. We think it only fair to note, however, that applicants will be allowed to consummate an approved UP/SP transaction even if a follow-up proceeding has not been completed, and even though the trackage rights operation of a designated nominee might itself be delayed pending resolution of environmental issues or of a follow-up proceeding.

The language of Decision No. 12 is applicable to CMTA. Further, we agree with CMTA that no parties will be prejudiced by our allowing the relief they seek in CMTA-7.[4]

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

It is ordered:

1. CMTA's motion for leave to amend its description of its anticipated responsive application, and its petition for waiver or clarification with respect thereto, is granted.

2. CMTA's amended petition for clarification or waiver is granted to the extent set forth in this decision.

3. This decision is 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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[4] We note that, in a pleading filed March 4, 1996, Eagle County, CO, et al., requested leave to late file a description of an anticipated responsive application, and a petition for waiver with respect thereto (EGL-4), which were due January 29, 1996. We denied their request in Decision No. 19, served March 15, 1996, and affirmed in Decision No. 24, served March 25, 1996. In the present instance, granting CMTA's relief is appropriate for two reasons. First, CMTA's original description of its anticipated responsive application, and its petition for waiver or clarification with respect thereto, were timely filed. Second, in its March 20 pleadings, CMTA-8 is not a new description of an anticipated responsive application. It appears simply to be a minor amendment, as CMTA indicated that it might need to propose (CMTA-2, at 4 n.1, and CMTA-3 at 6 n.1).

STB FD-32760 3-25-96 C-26

SERVICE DATE

MAR 2 5 1996

SEC

SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760[2]

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

[Decision No. 26]

Dated: March 22, 1996

NOTICE TO THE PARTIES:

In a Notice to the Parties (Decision No. 15), served on February 16, 1996, the Board issued a preliminary service list in this proceeding, and requested that corrections to the service list be filed with the Board by February 26, 1996. On March 7, 1996, a Notice to the Parties (Decision No. 17) was served describing the corrections received as the final service list in this proceeding.

The Board has received several late-filed corrections to the final service list, and the changes are described below.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board). Section 204(b)(1) of the Act 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 Act. This notice 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 49 U.S.C. 11323-27. Therefore, this notice applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] This designation embraces the following: (1) 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; (2) 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; (3) Finance Docket No. 32760 (Sub-No. 3), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Alton & Southern Railway Company; (4) Finance Docket No. 32760 (Sub-No. 4), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Central California Traction Company;

(continued...)

1. The following party representing the Town of Avon, CO, should be deleted:

[**POR**] Anthony J. McMahon
2828 Pennsylvania Ave., N.W.
Suite 203
Washington, D.C. 20007
Represents: Town of Avon, CO

2. Richard Elston's name representing Cyprus Amax Coal Sales Corporation should be deleted, and the following name should be substituted:

[**POR**] Betsy P. Monseau
Cyprus Amax Coal Sales Corporation
9100 East Mineral Circle
P. O. Box 3299
Englewood, CO 80112-3299
Represents: Cyprus Amax Coal Sales Corporation

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[2](continued...)
(5) Finance Docket No. 32760 (Sub-No. 5), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Ogden Union Railway & Depot Company; (6) Finance Docket No. 32760 (Sub-No. 6), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Terminal Railroad Company; (7) Finance Docket No. 32760 (Sub-No. 7), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Traction Company; (8) Finance Docket No. 32760 (Sub-No. 8), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Overnite Transportation Company, Southern Pacific Motor Trucking Company, and Pacific Motor Transport Company; (9) Finance Docket No. 32760 (Sub-No. 9), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Terminal Trackage Rights--Kansas City Southern Railway Company; (10) Docket No. AB-3 (Sub-No. 129X), Missouri Pacific Railroad Company--Abandonment Exemption--Gurdon-Camden Line In Clark, Nevada, and Ouachita Counties, AR; (11) Docket No. AB-3 (Sub-No. 130), Missouri Pacific Railroad Company--Abandonment--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO, and Docket No. AB-8 (Sub-No. 38), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO; (12) Docket No. AB-3 (Sub-No. 131), Missouri Pacific Railroad Company--Abandonment--Hope-Bridgeport Line In
(continued...)

3. The following name should be deleted:

[**POR**] Honorable Earl Hutto
U.S. House of Representatives
Washington, D.C. 20515

4. Highsaw, Mahoney & Clarke, P.C., has withdrawn as counsel for the United Transportation Union (UTU) and Brotherhood of Locomotive Engineers (BLE). Service on UTU and BLE of filings in this proceeding should continue to be made on Daniel Elliott, III, and Ronald P. McLaughlin, already shown on the final service list as PORs. The following additional POR should also be served with filings for the UTU:

[**POR**] Clinton Miller, III
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107
Represents: United Transportation Union

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[2](continued...)
Dickinson and Saline Counties, KS, and Docket No. AB-8 (Sub-No. 37), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Hope-Bridgeport Line In Dickinson and Saline Counties, KS; (13) Docket No. AB-3 (Sub-No. 132X), Missouri Pacific Railroad Company--Abandonment Exemption--Whitewater-Newton Line In Butler and Harvey Counties, KS;(14) Docket No. AB-3 (Sub-No. 133X), Missouri Pacific Railroad Company--Abandonment Exemption--Iowa Junction-Manchester Line In Jefferson Davis and Calcasieu Parishes, LA; (15) Docket No. AB-3 (Sub-No. 134X), Missouri Pacific Railroad Company--Abandonment Exemption--Troup-Whitehouse Line In Smith County, TX; (16) Docket No. AB-8 (Sub-No. 36X), The Denver and Rio Grande Western Railroad Company--Discontinuance Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO, and Docket No. AB-12 (Sub-No. 189X), Southern Pacific Transportation Company--Abandonment Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO; (17) Docket No. AB-8 (Sub-No. 39), The Denver and Rio Grande Western Railroad Company--Discontinuance--Malta-Cañon City Line In Lake, Chaffee and Fremont Counties, CO, and Docket No. AB-12 (Sub-No. 188), Southern Pacific Transportation Company--Abandonment--Malta-Cañon City Line In Lake, Chafee, and Fremont Counties, CO; (18) Docket No. AB-12 (Sub-No. 184X), Southern Pacific Transportation Company--Abandonment Exemption--Wendel-Alturas Line In Modoc and Lassen Counties, CA; (19) Docket No. AB-12 (Sub-No. 185X), Southern Pacific Transportation Company--Abandonment Exemption--Suman-Bryan Line In Brazos and Robertson Counties, TX; (20) Docket No. AB-12 (Sub-No. 187X), Southern Pacific Transportation Company--Abandonment Exemption--Seabrook-San Leon Line In Galveston and Harris Counties, TX; (21) Docket No. AB-33 (Sub-No. 93X), Union Pacific Railroad Company--Abandonment Exemption--Whittier Junction-Colima Junction Line In Los Angeles County, CA; (22) Docket No. AB-33 (Sub No. 94X), Union Pacific Railroad Company--Abandonment Exemption--Magnolia Tower-Melrose Line In Alameda County, CA; (23) Docket No. AB-33 (Sub-No. 96), Union Pacific Railroad Company--Abandonment--Barr-Girard Line In Menard, Sangamon, and Macoupin Counties, IL; (24) Docket No. AB-33 (Sub-No. 97X), Union Pacific Railroad

(continued...

5. Highsaw, Mahoney & Clarke, P.C., will represent the Allied Rail Unions (ARU).[3] Service on ARU of filings in this proceeding should be made on each of the following parties:

[**POR**] William G. Mahoney
[**POR**] Richard S. Edelman
[**POR**] Donald F. Griffin
Highsaw, Mahoney & Clarke, P.C.
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
Represents: Allied Rail Unions

6. The Enid Board of Trade (Enid), an Oklahoma Corporation located at 2309 N. 10th Street, Suite E, Enid, OK 73701, filed a Motion to Intervene in this case as a party of record. Service on Enid of filings in this proceeding should be made on James J. Irlandi, already shown on the final service list as a POR representing the Kansas Shippers Association, et al., as follows:

[**POR**] James J. Irlandi
STB Practitioner
1809 N. Broadway/Suite F
Wichita, KS 67214
Represents: Enid Board of Trade
Kansas Shippers Association, et al.

7. The designation for the following party is changed from **POR** to **VIS**:

[**VIS**] Timothy Hay, Esq.
General Counsel
Public Service Commission of Nevada
727 Fairview Drive
Carson City, NV 89710

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[2](continued...)
Company--Abandonment Exemption--DeCamp-Edwardsville Line In Madison County, IL; (25) Docket No. AB-33 (Sub-No. 98X), Union Pacific Railroad Company--Abandonment Exemption--Edwardsville-Madison Line In Madison County, IL; (26) Docket No. AB-33 (Sub-No. 99X), Union Pacific Railroad Company--Abandonment Exemption--Little Mountain Jct.-Little Mountain Line In Box Elder and Weber Counties, UT.

[3] Because of the withdrawal of Highsaw, Mahoney & Clarke, P.C., as counsel for BLE in this proceeding, the other Railway Labor Executives' Association unions will no longer file under the "RLEA" acronym. Instead those unions [Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees International Union; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen & Oilers; and Sheet Metal Workers' International Association] will participate jointly as the Allied Rail Unions and they will use the acronym "ARU".

All parties of record who have filed pleadings in this proceeding must, within 5 days of the service date of this Notice, serve a copy of those pleadings or serve a list of numbered pleadings filed to date on the above designated parties of record [POR]. Parties electing to serve lists on other parties are required to provide copies of filings within 3 days of a request.

All future filings must each have a certificate of service indicating that all PORs have been properly served a copy of the filing. **Parties are reminded that they must submit an original and 20 copies of all future documents filed with the Board.** Parties are encouraged to submit all pleadings and attachments as computer data contained on a 3.5-inch flopp, diskette formatted for WordPerfect 5.1 (or formatted so that it can be converted by WordPerfect 5.1). (See Decision No. 9, served December 27, 1995).

As clarified in Decision No. 16, discovery-related pleadings need only be served on parties on the restricted service list established in the Administrative Law Judge's Order Adopting Discovery Guidelines, served December 7, 1995.

Vernon A. Williams

Vernon A. Williams
Secretary

STB FD-32760 3-25-96 C-27

DATE RELEASED
SERVICE DATE
MAR 2 5 1996

EB

SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 27]

Decided: March 25, 1996

BACKGROUND

In Decision No. 9, served and published in the Federal Register on December 27, 1995, the ICC affirmed the procedural schedule it had set out in Decision No. 6, served October 19, 1995.[2] Under that schedule, the ICC imposed a January 29, 1996 due date for the filing of: (1) descriptions of anticipated inconsistent and responsive applications; and (2) petitions for waiver or clarification, with respect thereto. Inconsistent and responsive applications, requests for conditions, comments, protests, and any other opposition evidence are due on March 29, 1996. On January 29, 1996, LSBC Holdings, Inc. filed a pleading containing both a description of an anticipated responsive or inconsistent application and a petition for waiver or clarification with respect thereto.

LSBC stated that it has invited SPT and UPRR to enter into private transactions. It has offered to acquire all of DRGW's assets, including the railroad and all associated trackage, all operating, trackage and haulage rights, all associated buildings and real estate, signals and dispatching facilities, equipment, parts, patents, trademarks and namesakes, and any and all motive power units specifically configured for operation on DRGW property. LSBC stated that it has offered to purchase the MPRR line from NA Tower, CO, to Towner, CO. It has offered to purchase, lease, or acquire operating or trackage rights from the DRGW yard in Pueblo, CO, to NA Tower. It has offered to

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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] In Decision No. 9, the ICC also accepted for consideration the application filed November 30, 1995, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively applicants) seeking approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC.

among other things, that the notices of intent to file responsive applications submitted separately by Montana Rail Link (MRL) and Wisconsin Central Ltd. (WC) indicated that these parties, though they intend to file responsive applications to acquire most of SP's Colorado rail lines, do not intend to seek acquisition of the Tennessee Pass line. Petitioners expressed their fear that our approval of the responsive application of either MRL or WC would render the fate of the Tennessee Pass line uncertain.

In Decision No. 19, we noted, among other things, that MRL had subsequently clarified that it did indeed intend to seek acquisition of the Tennessee Pass line. We further noted that, even in the event we both approve abandonment of the line and do not approve any responsive application to acquire the line, petitioners will still have an available remedy: they will be able to acquire the line themselves by means of an offer of financial assistance (OFA) pursuant to 49 U.S.C. 10905.

In their EGL-5 petition, petitioners advance five arguments in support of their new petition. First, petitioners note that neither applicants nor any other party opposed the EGL-4 petition. Second, petitioners indicate that the filing of their EGL-4 petition was prompted by the filing by MRL and WC of their notices of intent to file responsive applications. Neither such notice, petitioners suggest, indicates any intention to acquire the Tennessee Pass line. Third, petitioners note that, although MRL may now intend to file a responsive application to acquire the Tennessee Pass line, WC must still be assumed to have no interest in acquiring such line. Fourth, petitioners maintain that Decision No. 19 does not allow for the possibility that we will approve a responsive application that allows another entity to acquire most of SP's Colorado lines but not the Tennessee Pass line. Petitioners claim that, if this were to happen, the Tennessee Pass line would face an uncertain fate (because SP would have little incentive to operate over it). Fifth, petitioners claim that the OFA provisions of old 49 U.S.C. 10905 will not afford adequate relief in the event that the Tennessee Pass line is neither acquired by a responsive applicant nor abandoned by SP.

DISCUSSION AND CONCLUSION

We will deny petitioners' request. As we stated in Decision No. 19, "[w]e intend to adhere to the procedural schedule we set out in Decision No. 6 and reaffirmed in Decision No. 9." We also noted in that decision that the applicants had identified the lines targeted for abandonment on their System Diagram Map on or about September 5, 1995, and that "[p]etitioners should have become aware of the status of the Tennessee Pass line and begun preparing to take appropriate action well before the January 29, 1996 deadline." By not filing on January 29, petitioners took the risk that potential responsive applicants may or may not be interested in acquiring the Sage-Leadville line and the Malta-Cañon City line.

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[1] (...continued)
Sage-Leadville Line In Eagle and Lake Counties, CO, and Docket No. AB-12 (Sub-No. 189X), Southern Pacific Transportation Company--Abandonment Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO; and Docket No. AB-8 (Sub-No. 39), The Denver and Rio Grande Western Railroad Company--Discontinuance--Malta-Cañon City Line In Lake, Chaffee, and Fremont Counties, CO, and Docket No. AB-12 (Sub-No. 188), Southern Pacific Transportation Company--Abandonment--Malta-Cañon City Line In Lake, Chaffee, and Fremont Counties, CO.

has decided to change tactics at this stage in the proceeding, it must do so within the previously designated time frame. We also believe that the effect of the proposed merger on current railroad employees is an important issue, and we will give those effects the proper consideration in the context of our evaluation of the merger application.

It is ordered:

1. LSBC's request for an extension of time in which to file its inconsistent or responsive application is denied.

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

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

Vernon A. Williams

Vernon A. Williams
Secretary

STB FD-32760 3-29-96 C-28

DATE RELEASE
SERVICE DATE
MAR 29 1996

EB

SURFACE TPANSPORTATION BOARD[1]

DECISION

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. 28]

Decided: March 29, 1996

BACKGROUND

On March 5, 1996, our Section of Environmental Analysis (SEA) sent a letter to applicants in this proceeding.[2] In that letter, SEA explained that, in order for SEA to meet the procedural schedule established in this proceeding, applicants must submit a Preliminary Draft Environmental Assessment (PDEA), or a verified statement that none is required, for executed settlement agreements that involve trackage rights, rail line acquisitions and other operational changes.[3] SEA instructed applicants that they must file their PDEA or verified statement either on or before March 29, 1996.

SEA stated that applicants may file a verified statement for a settlement agreement if the agreement involves no substantive operational changes and no abandonment or construction projects. If, after reviewing the operating plans for each settlement agreement, applicants determine that a verified statement is appropriate, they must certify that the agreement meets the

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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] In Decision No. 9, served and published in the Federal Register on December 27, 1995, the ICC accepted for consideration the application filed November 30, 1995, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively applicants) seeking approval and authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC. In Decision No. 9, the ICC also established the procedural schedule for this proceeding, under which the Board will issue a final decision by August 12, 1996.

[3] SEA sent a substantially similar letter to all parties who, on or before January 29, 1996, filed descriptions of anticipated inconsistent and responsive applications.

exemption criteria under 49 CFR 1105.6(c)(2). Each verified statement must include supporting operating information. Further, SEA stated in the March 5 letter that a PDEA is required if a settlement agreement involves either (1) substantive operational changes [49 CFR 1105.6(b)(4)] or (2) an action such as a rail line abandonment or construction. The PDEA should include the following: (1) a detailed description of the proposed action (i.e., proposed operations, abandonments and/or constructions) and alternatives considered; (2) a description of the existing environment; (3) a discussion of the potential environmental impacts; (4) a summary of agency responses; and (5) any recommended mitigation.[4]

Further, SEA stated in the March 5 letter that it will serve an Environmental Assessment (EA), with all PDEAs and/or verified statements, on the public and all appropriate federal, state and local agencies for their review and comment. There will be a 20-day period for comments on the EA. After the comment period, SEA will assess the comments and all available information and make its final environmental recommendations. SEA stated that the Board will consider SEA's recommendations and the environmental record in making the final decision.

On March 22, 1996, the Kansas City Southern Railway Company (KCS) filed a motion for an order requiring applicants to submit a PDEA for the settlement-related trackage rights (KCS-31).[5] KCS requests that we: (1) find that applicants' environmental report, as submitted, is inadequate;[6] and (2) require submission of a PDEA or comparable environmental report in connection with operations proposed under applicants' notice of exemption for settlement-related trackage rights (Sub-No. 1), applicants' petition for exemption for settlement-related line sales (Sub-No. 2), applicants' application for terminal trackage rights (Sub-No. 9), and related access by BN/Santa Fe over the New Orleans Public Belt Railroad (NOPB) (collectively, the related trackage proposals).[7]

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[4] The information to be included in a PDEA is similar to that required in an environmental and historic report under the environmental rules at 49 CFR 1105.7 and 1105.8.

[5] Applicants originally reached an agreement with Burlington Northern Railroad Company and The Atchison, Topeka, and Santa Fe Railway Company (collectively, BN/Santa Fe) on September 25, 1995. They reached a supplemental agreement on November 18, 1995, which governs the grants of trackage rights.

[6] Volume 6 of the application contains applicants' environmental report.

[7] UP, SP, and BN/Santa Fe filed the related trackage proposals concurrently with the merger application. KCS notes that the proposals would, among other things: (1) grant BN/Santa Fe limited trackage rights over UP/SP rail lines between Houston, TX, and Memphis, TN, and between Houston and Iowa Junction, LA; (2) give BN/Santa Fe the right to acquire the rail line currently owned by SP between Iowa Junction, and Avondale, LA, with the reservation of full trackage rights along that corridor for UP/SP; and (3) grant BN/Santa Fe terminal trackage rights in Shreveport, LA, and Beaumont, TX. In addition, BN/Santa Fe will seek access over the NOPB to reach Eastern carriers at New Orleans. Applicants allege that the related trackage proposals are necessary to address competitive issues along various corridors, including the Houston to Memphis and the Houston to New Orleans corridors.

KCS alleges that applicants filed no environmental report or PDEA concurrently with the related trackage proposals, and argues that the environmental report submitted in support of the proposed merger does not address "significant" operational changes, increases in traffic densities, potential environmental impacts associated with shipments of hazardous commodities, and other safety issues presented by the related trackage proposals. KCS alleges that applicants must prepare a PDEA or comparable environmental report because the related trackage proposals involving UP/SP, BN/Santa Fe, KCS, and the NOPB will result in operational changes that will exceed the energy and air thresholds found at 1105.7(e)(4)-(5). Furthermore, notes KCS, notwithstanding the thresholds, the potential impact of the related trackage proposals on the quality of the human environment alone warrants environmental documentation.

On March 27, 1996, applicants filed a reply opposing KCS's motion for several reasons (UP/SP-190). Applicants make the following arguments: (1) that there is no legal basis for KCS's assertion that applicants' environmental report was not adequate; (2) that applicants presented a fully adequate environmental report; (3) that KCS's motion is inconsistent with the procedures established by the Board and by SEA; and (4) that, if KCS wishes to raise environmental concerns, it should follow the procedure established by SEA for the submission of environmental comments. Applicants also state that they intend to file a PDEA on March 29, 1996, concerning the BN/Santa Fe settlement agreement. According to applicants, the PDEA will address, among other things, certain construction projects that BN/Santa Fe has said that it intends to undertake as a result of the settlement. It will also address, to the extent appropriate, environmental issues arising from BN/Santa Fe's estimates of train counts, applicants state.

DISCUSSION AND CONCLUSIONS

We will deny the relief KCS seeks. KCS's request is premature. The environmental process is ongoing in this proceeding, and we have no reason to believe that it is not working adequately. SEA has established its procedures for obtaining additional environmental information relating to the BN/Santa Fe settlement, and KCS's request is incompatible with that process. As explained above, SEA will make environmental recommendations based upon its analysis of the environmental data submitted and upon the comments to the EA. SEA's March 5, 1996 letter explains to applicants that they have the responsibility of submitting environmental data pertinent to the settlement related trackage rights. Applicants bear that burden, and will bear the consequences if they do not submit sufficient environmental data to enable SEA to make its recommendations.

KCS will have ample opportunity to raise environmental concerns. SEA is preparing the EA, which is expected to be issued in April. Interested parties will then have 20 days to submit comments. KCS can submit comments to SEA at that time raising any environmental issues. See Decision No. 21, served March 20, 1996.

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

It is ordered:

1. The KCS-31 motion is denied.

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

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

Vernon A. Williams
Secretary

STB FD-32760 4-12-96 C-29

SERVICE DATE
APR 12 1996

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SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 10)

RESPONSIVE APPLICATION--CAPITAL METROPOLITAN TRANSPORTATION AUTHORITY

Finance Docket No. 32760 (Sub-No. 11)

RESPONSIVE APPLICATION--MONTANA RAIL LINK, INC.

Finance Docket No. 32760 (Sub-No. 12)

RESPONSIVE APPLICATION--ENTERGY SERVICES, INC., ARKANSAS POWER & LIGHT COMPANY, AND GULF STATES UTILITY COMPANY

Finance Docket No. 32760 (Sub-No. 13)

RESPONSIVE APPLICATION--THE TEXAS MEXICAN RAILWAY COMPANY

Finance Docket No. 32760 (Sub-No. 14)

APPLICATION FOR TERMINAL TRACKAGE RIGHTS OVER LINES OF THE HOUSTON BELT & TERMINAL RAILWAY COMPANY--THE TEXAS MEXICAN RAILWAY COMPANY

Finance Docket No. 32760 (Sub-No. 15)

RESPONSIVE APPLICATION--CEN-TEX RAIL LINK, LTD./SOUTH ORIENT RAILROAD COMPANY, LTD.

Finance Docket No. 32760 (Sub-No. 16)

RESPONSIVE APPLICATION--WISCONSIN ELECTRIC POWER COMPANY

Finance Docket No. 32760 (Sub-No. 17)

RESPONSIVE APPLICATION--MAGMA COPPER COMPANY, THE MAGMA ARIZONA RAILROAD COMPANY, AND THE SAN MANUEL ARIZONA RAILROAD COMPANY

AGENCY: Surface Transportation Board.

ACTION: Decision No. 29; notice of acceptance of responsive applications.

SUMMARY: The Board is accepting for consideration the responsive applications filed by Capital Metropolitan Transportation Authority (CMTA) in Finance Docket No. 32760 (Sub-No. 10); Montana Rail Link, Inc. (MRL) in Finance Docket No. 32760 (Sub-No. 11); Entergy Services, Inc. (ESI), Arkansas Power & Light Co. (AP&L), and Gulf States Utilities Co. (GSU) (collectively, Entergy) in Finance Docket No. 32760 (Sub-No. 12); The Texas Mexican Railway Company (Tex Mex) in Finance Docket No. 32760 (Sub-No. 13), including Tex Mex's application for terminal trackage rights over lines of the Houston Belt & Terminal Railway Co. in Finance Docket No. 32760 (Sub-No. 14); Wisconsin Electric Power Company (WEPCO) in Finance Docket No. 32760 (Sub-No. 16); and Magma Copper Company, The Magma Arizona Railroad Company (MAA), and the San Manuel Arizona Railroad Company (SMA) (collectively, Magma) in Finance Docket No. 32760 (Sub-No. 17). The Board is not accepting for consideration the responsive application filed by Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd. (Cen-Tex/South Orient) in Finance Docket No. 32760 (Sub-No. 15).[1] These responsive applications are

[1] The Alameda Historic Complex (Alameda) filed a pleading on March 29, 1996, titled as a responsive application for

(continued...)

responsive to the primary application filed November 30, 1995, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW).[2]

DATES: The effective date of this decision is April 12, 1996. Comments regarding any responsive application must be filed with the Board by April 29, 1996. Rebuttal in support of these responsive applications must be filed with the Board by May 14, 1996. Briefs (not to exceed 50 pages) must be filed with the Board by June 3, 1996.

ADDRESSES: An original and 20 copies of all comments referring to Finance Docket No. 32760 (Sub-No. 10), Finance Docket No. 32760 (Sub-No. 11), Finance Docket No. 32760 (Sub-No. 12), Finance Docket No. 32760 (Sub-No. 13), Finance Docket No. 32760 (Sub-No. 14), Finance Docket No. 32760 (Sub-No. 16), and/or Finance Docket No. 32760 (Sub-No. 17), as appropriate, must be filed with the Office of the Secretary, Case Control Branch (Attn: Finance Docket No. 32760), Surface Transportation Board, 1201 Constitution Avenue, N.W., Washington, D.C. 20423. Parties are encouraged also to submit all comments on a 3.5-inch diskette in WordPerfect 5.1 format.

In addition, one copy of all comments filed in these proceedings must be served, by first class mail, on: the Secretary of Transportation; the Attorney General of the United States; Administrative Law Judge Jerome Nelson, Federal Energy Regulatory Commission, 825 North Capitol Street, NE, Washington, D.C. 20426; Arvid E. Roach II, Esq., Covington & Burling, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044-7566 (representing primary applicants UPC, UPRR, and MPRR); and Paul A. Cunningham, Esq., Harkins Cunningham, 1300 Nineteenth Street, N.W., Washington, D.C. 20036 (representing primary applicants SPR, SPT, SSW, SPCSL, and DRGW).

Also, one copy of all comments filed in these proceedings must be served, by first class mail on the appropriate responsive applicant's representative: Albert B. Krachman, Esq., Bracewell & Patterson, L.L.P., 2000 K Street, N.W., Suite 500, Washington, D.C. 20006 (representing CMTA); Mark H. Sidman, Esq., Weiner, Brodsky, Sidman & Kider, P.C., 1350 New York Ave., N.W., Suite 800, Washington, D.C. 20005 (representing MRL); Christopher A.

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[1](...continued)
trackage rights and other specified conditions. Because Alameda did not file a description of an anticipated responsive application by the January 29, 1996 deadline, and because it has not complied with the procedures for filing applications found at 49 CFR 1180, we will treat Alameda's pleading as comments on the primary application.

LSBC Holdings, Inc. (LSBC), which filed a timely notice and description of inconsistent/responsive application, filed its LSBC-3 pleading on March 29, 1996, titled as a proposed inconsistent and responsive application. LSBC explains that, at this time, it is "unable to file a Responsive Application worthy of review by the STB." We will treat LSBC's pleading as comments on the primary application.

[2] UPRR and MPRR are referred to collectively as UP. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP.

Mills, Esq., Slover & Loftus, 1224 Seventeenth St., N.W., Washington, D.C. 20036 (representing Entergy); Richard A. Allen, Esq., Zuckert, Scoutt & Rasenberger, 888 17th St., N.W., Suite 600, Washington, D.C. 20006-3939 (representing Tex Mex); Thomas F. McFarland, Jr., Esq., McFarland & Herman, 20 North Wacker Drive, Suite 1330, Chicago, IL 60606-2902 (representing WEPCO); and Fritz R. Kahn, Esq., Fritz R. Kahn, P.C., Suite 750 West, 1100 New York Ave., N.W., Washington, D.C. 20005-3934 (representing Magma).

Furthermore, one copy of all documents in these proceedings must be served, by first class mail, on all other persons designated parties of record [POR] on the Board's service list in Finance Docket No. 32760. See Finance Docket No. 32760, Decision No. 15 (served February 16, 1996), as modified by Finance Docket No. 32760, Decision No. 17 (served March 7, 1996), and Decision No. 26 (served March 25, 1996).

FOR FURTHER INFORMATION CONTACT: Julia Farr, (202) 927-5352. [TDD for the hearing impaired: (202) 927-5721.]

SUPPLEMENTARY INFORMATION: In the primary application filed with the Interstate Commerce Commission (ICC) on November 30, 1995, primary applicants UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL, and DRGW seek approval and authorization under 49 U.S.C. 11343-45 (as effective prior to January 1, 1996) for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC. In Decision No. 9 (served December 27, 1995, and published that same day in the Federal Register at 60 FR 66988), the ICC accepted the primary application for consideration, and directed that all responsive applications be filed by March 29, 1996.

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 ICC but transferred certain of its functions and certain proceedings then pending before it to the Board. We issue this decision in accordance with the ICCTA section 204(b)(1) transition rule, which provides that proceedings pending before the ICC at the time of its termination that involve functions transferred to the Board shall be decided by the Board under the law in effect prior to January 1, 1996. The Finance Docket No. 32760 proceeding, which was pending with the ICC at the time of its termination, involves functions transferred to the Board under 49 U.S.C. 11323-26 (as effective on and after January 1, 1996).

In Finance Docket No. 32760 (Sub-No. 10), CMTA seeks, on behalf of an unnamed rail carrier unaffiliated with applicants, trackage rights over what will be, if the Board approves the proposed merger, the UP/SP track between McNeil and Kerr, TX, with interchange rights with the Burlington Northern Railroad Company and The Atchison, Topeka, and Santa Fe Railway Company (collectively, BN/Santa Fe) at either McNeil or Kerr. CMTA further requests that we direct applicants to cooperate with CMTA to arrive at a mutually acceptable accommodation of CMTA's planned passenger rail service through the McNeil interchange, and that we retain jurisdiction over this issue in the event CMTA and the merged railroad are unable to reach agreement.

In Finance Docket No. 32760 (Sub-No. 11), MRL seeks authority to acquire rail lines, incidental trackage rights, interchange access, and proportional ratemaking authority to SP stations in California and Oregon to mitigate alleged loss of

competition in the central route from Northern California to Kansas City, MO, resulting from the proposed merger.[3]

In Finance Docket No. 32760 (Sub-No. 12), Entergy seeks the following trackage rights: (1) overhead trackage rights on behalf of BN/Santa Fe or some other rail carrier unaffiliated with applicants over SSW's lines between Pine Bluff, AR, and Memphis, TN, with the right to transport loaded and empty trains of coal to and from AP&L's coal-fired, electric generating facilities known as the White Bluff Steam Electric Station near Redfield, AR (White Bluff) upon construction of a spur build-out from the White Bluff power plant to a connection with SP at Pine Bluff; and (2) overhead trackage rights on behalf of BN/Santa Fe

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[3] MRL seeks to have a to-be-formed entity (the "Acquisition Company") purchase the following lines: (1) the UP lines in California from Stockton, through Sacramento to Marysville, along with the contiguous branch lines to Read and Sutter, north through Keddie to Flanigan, NV, including the UP branch line from Reno Junction south to Reno, NV, and the branch south from Hawley to Loyalton, CA; (2) the SP line running north from Flanigan to Alturas, CA, then northwest to Klamath Falls, OR (the "Modoc Line"); (3) the line from Flanigan east via the UP route to Winnemucca, NV, then east to Wells, NV, and Ogden, UT, via the SP route;
(4) from Ogden, all of the DRGW lines, and their contiguous branches to Salt Lake City, UT, and down to Provo, UT, and east on the DRGW to Denver, CO, including the branches to Potash, Sunnyside, Clear Creek, Copperton, and Garfield, UT; (5) all of the DRGW lines in Colorado, from the Utah border east to Dotsero, including the branches to Montrose, Oliver, and Woody Creek, and at Dotsero, the lines northeast to Denver and southeast to Pueblo (the "Tennessee Pass"), including branches to Craig and Energy Fuels via Steamboat Springs; (6) the DRGW line between Denver and Pueblo, extending south of Pueblo to Antonito, CO, including the branch line to Creede, CO, and the DRGW's rights, if any, to Trinidad, CO; (7) east of Pueblo, the rights and ownership of the former MPRR line between Pueblo and Herington, KS; (8) SP's ownership in and access to the Kansas City Terminal; and (9) the UP line from Silver Bow, MT, to Pocatello, ID, and the contiguous branches to Arco, Aberdeen, and Gay, ID.

MRL seeks approval for the Acquisition Company to acquire all the railroad rolling stock and equipment owned and leased by UP/SP, including locomotives, cars, cabooses and equipment, roadway maintenance equipment and other vehicles currently used to perform service on the subject lines.

MRL seeks approval for the Acquisition Company to acquire trackage rights over the following lines:
(1) overhead rights on the UP line from Pocatello to Ogden;
(2) overhead rights on the UP from Lindsborg, KS, to Salina, KS, and from Salina to Solomon, KS, with access to a direct interchange with Kyle Railways at Solomon; (3) local trackage rights on the SSW between Herington, KS, and Topeka, KS;
(4) overhead trackage rights on UP between Topeka and Kansas City; (5) SP's rights on BN/Santa Fe between Topeka and Kansas City.

MRL seeks, on behalf of the Acquisition Company, full access to interchange with connecting carriers, including shortlines, at all common points. Finally, MRL seeks for Acquisition Company the right to quote rates to and from SP stations in California and Oregon for traffic moving, respectively, via Stockton, CA, and Klamath Falls, OR.

or some other rail carrier unaffiliated with applicants over SP's line between Beaumont, TX, and a point of connection with the Southern Gulf Railway Company (SGR) near Lake Charles, LA, with the right to transport loaded and empty trains of coal to and from GSU's coal-fired, electric generating facilities known as the Roy S. Nelson Generating Station near Mossville, LA, upon completion of construction of SGR's rail line between the connection with SP and the Nelson power plant.

In Finance Docket No. 32760 (Sub-No. 13), Tex Mex seeks trackage rights over lines from Robstown and Corpus Christi, TX, to Houston, TX, to a connection with the Kansas City Southern Railway Company (KCS) at Beaumont, TX. Tex Mex seeks rights over those lines to permit it to carry overhead traffic and to serve all local shippers currently capable of receiving service from both UP and SP, directly or through reciprocal switching, with full rights to interchange traffic with UP, SP, and any other railroad at any interchange point on such lines.[4]

In Finance Docket No. 32760 (Sub-No. 14), Tex Mex seeks certain terminal trackage rights, contingent upon the grant of the conditions sought in Finance Docket No. 32760 (Sub-No. 13).

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[4] Tex Mex requests trackage rights over the following main lines: (1) the UP line between Robstown and Placedo, TX; (2) the UP line between Corpus Christi and Odem, TX, via Savage Lane to Viola Yard on the UP; (3) the SP line from Placedo to Victoria, TX; (4) the SP line between Victoria and Flatonia, TX; (5) the SP line between Flatonia and West Junction, TX; (6) in the alternative, the UP line from Gulf Coast Junction, TX, through Settegast Junction, TX, to Amelia, TX (UP main line option), or the SP line from Tower 87 to Amelia, TX (SP main line option); and (7) the joint UP/SP line from Amelia to Beaumont, TX, and the connection with KCS at the Neches River Draw Bridge in Beaumont.

Tex Mex requests trackage rights in Houston over the following SP lines: (1) the line from West Junction through Bellaire Junction to Eureka at milepost 5.37 (Chaney Junction, TX); (2) the SP line from milepost 5.37 to milepost 360.7 near Tower 26 via the Houston Passenger station; (3) the SP line from milepost 5.37 to milepost 360.7 near Tower 26 via the Hardy Street yard; (4) if the UP main line option is used, the SP line from milepost 360.7 near Tower 26 to the connection with the Houston Belt & Terminal Railway Company (HB&T) at Quitman Street near milepost 1.5; (5) if the SP main line option is used, 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 the Port Terminal Railway Association (PTRA) at Katy Neck, TX, by way of Pierce Junction.

Tex Mex requests the right to use the following yard and other terminal facilities of SP, UP, and HB&T: (1) SP's Glidden (TX) Yard; (2) interchanges with PTRA at the North Yard, Manchester Yard, and Pasadena Yard in Houston, TX; and (3) interchanges with HB&T at HB&T's New South Yard.

Tex Mex will seek the right to construct two improved connections, at Robstown and Flatonia.

Tex Mex requests the Board to condition any approval of the merger on granting Tex Mex the trackage rights at the same compensation provided for in the settlement agreement applicants reached with BN/Santa Fe, except that Tex Mex requests that the compensation level for its trackage rights operations be subject to quarterly adjustments for changes in railroad productivity.

It requests an order pursuant to 49 U.S.C. 11103 permitting Tex Mex to use the following segments of HB&T terminal trackage in Houston, TX: (1) the HB&T line from the Quitman Street connection with SP to the HB&T's connection with UP at Gulf Coast Junction; and (2) the HB&T line from its connection with the SP at T. & N.O. Junction (Tower 81) to HB&T's connection with UP at Settegast Junction.

In Finance Docket No. 32760 (Sub-No. 15), Cen-Tex/South Orient seeks trackage rights in Texas, and the elimination of minimum payments and passenger restrictions on trackage rights over SP track from Alpine Junction, TX, to Paisano Junction, TX.[5]

In Finance Docket No. 32760 (Sub-No. 16), WEPCO seeks a grant of overhead trackage rights on behalf of Wisconsin Central (WC) or Canadian Pacific-Soo Line (CP/Soo) over the following UP rail lines: (1) between Chicago, IL, Milwaukee, WI, and Cleveland, WI, on the one hand, and on the other, WEPCO's Oak Creek Power Plant at Oak Creek, WI; (2) between the Oak Creek Power Plant and Cudahy Shop, Inc., a railcar repair facility located at Cudahy, WI; and (3) in the terminal areas of Chicago, IL, and Milwaukee, WI, as may be necessary or desirable to implement the operations described above.

In Finance Docket No. 32760 (Sub-No. 17), Magma, and its wholly owned subsidiaries, MAA and SMA, seek overhead trackage rights over the lines operated by SP between Magma, AZ, and Phoenix and Nogales, AZ, for the MAA, and between Hayden, AZ (via the Copper Basin Railway Company (CBRY), a switching carrier for the SP operating between Hayden and Magma), and Phoenix and Nogales for the SMA.

The responsive applications filed by CMTA, MRL, Entergy, Tex Mex, WEPCO, and Magma substantially comply with the applicable regulations, and therefore are being accepted for consideration by the Board.

The responsive application filed by Cen-Tex/South Orient does not comply with the applicable regulations. The application contains virtually none of the information required by 49 CFR 1180 for responsive applications, such as supporting information (49 CFR 1180.6), market analyses (49 CFR 1180.7), operational data (49 CFR 1180.8), and financial information (49 CFR 1180.9).[6] Because Cen-Tex/South Orient's responsive application is incomplete, it is being rejected by the Board.

The responsive applications are available for inspection in the Public Docket Room at the offices of the Board in Washington, D.C. The responsive application filed by any particular

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[5] Specifically, Cen-Tex/South Orient seeks trackage rights over: (1) UPRR's Fort Worth line from Tower 55 to the UP Fort Worth connection with Railtran's line; (2) the UPRR Dallas connection with Railtran's line to the C.J. Yard in Dallas; (3) the SP line from Sulphur Springs, TX, to the KCS connection in Texarkana, TX/AR.

[6] Cen-Tex/South Orient did not, on or before the January 29, 1996 deadline, file a petition for waiver or clarification to have its responsive application designated a minor transaction. However, even if it had successfully done so, it has not filed the information necessary to support even a responsive application for a minor transaction.

responsive applicant may also be obtained upon request from that applicant's representative named above.

The responsive applications in Finance Docket No. 32760 (Sub-Nos. 10, 11, 12, 13, 14, 16, and 17) are consolidated for disposition with the primary application in Finance Docket No. 32760 (and all embraced proceedings). Service of an initial decision will be waived, and determination of the merits of these responsive applications will be made in the first instance by the Board itself. See 49 U.S.C. 11345(f) (as effective prior to January 1, 1996).

Interested persons may participate formally by submitting written comments regarding any or all of these responsive applications, subject to the filing and service requirements specified above. Such comments (referred to as "response[s]" in the procedural schedule, see 60 FR at 66994) should be filed with the Board by April 29, 1996. Comments should include the following: the commenter's position in support of or in opposition to the transaction proposed in the responsive application; any and all evidence, including verified statements, in support of or in opposition to such proposed transaction; and specific reasons why approval of such proposed transaction would or would not be in the public interest.

Because the responsive applications accepted for consideration in this decision contain proposed conditions to approval of the primary application in Finance Docket No. 32760, the Board will entertain no requests for affirmative relief with respect to these responsive applications. Parties may only participate in direct support of or in direct opposition to these responsive applications as filed.

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

It is ordered:

1. The responsive applications in Finance Docket No. 32760 (Sub-Nos. 10, 11, 12, 13, 14, 16 and 17) are accepted for consideration, and are consolidated for disposition with the primary application in Finance Docket No. 32760 (and all embraced proceedings).

2. The responsive application in Finance Docket No. 32760 (Sub-No. 15) is rejected.

3. The parties shall comply with all provisions as stated above.

Decided: April 5, 1996.

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

Vernon A. Williams
Secretary

SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423-0001

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, $300
RETURN AFTER FIVE DAYS

SERVICE DATE

APR 18 1996

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. 30]

Decided: April 17, 1996

In this decision we address (1) the UP/SP-208 petition filed by applicants,[2] and (2) the ARU-8 motion filed by the Allied Rail Unions.[3]

UP/SP-208. On January 29, 1996, affiliated carriers Cen-Tex Rail Link, Ltd., and South Orient Railroad Company, Ltd. (referred to collectively as Cen-Tex), which operate between Presidio, TX, and Fort Worth, TX, filed a description of an anticipated responsive application. Applicants thereafter served, on February 26, 1996, their first set of interrogatories and document requests (UP/SP-107) on Cen-Tex by delivery to its President. Any objections thereto were due by March 4, 1996; any response thereto was due by March 12, 1996. Cen-Tex, however, filed neither objections nor a response, neither by the indicated deadlines nor at any time thereafter. By letter dated March 13, 1996, applicants put Cen-Tex's failure to respond on the agenda for the next discovery hearing. That hearing was held on March 20, 1996; Cen-Tex did not attend; and, because the record was incomplete, Judge Nelson denied the relief then sought by applicants.

On April 1, 1996, Cen-Tex filed a "request for conditions" opposing the proposed UP/SP merger unless approval thereof was conditioned by requiring applicants to negotiate certain trackage rights. Cen-Tex requested, among other things, that it be granted trackage rights over certain UP lines in Fort Worth and Dallas, TX, and over SP's line between Sulphur Springs, TX, and Texarkana, TX/AR.

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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 Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), 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 applicants. UPRR and MPRR are referred to collectively as UP. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP.

[3] American Train Dispatchers Department/BLE, Brotherhood of Maintenance of Way Employes, and Brotherhood of Railroad Signalmen are referred to collectively as the Allied Rail Unions (ARU).

By letter dated April 1, 1996, applicants again put Cen-Tex's failure to respond on the agenda for the next discovery hearing. That hearing was held on April 3, 1996; Cen-Tex again did not attend; applicants asked Judge Nelson to strike or dismiss Cen-Tex's request for conditions; but Judge Nelson denied relief, believing (correctly) that only the Board had the authority to strike or dismiss Cen-Tex's request for conditions.

By petition filed April 5, 1996 (UP/SP-208), applicants ask that Cen-Tex's request for conditions be stricken and dismissed based on Cen-Tex's willful and unexcusable failure to respond to discovery.[4]

In our decision served April 12, 1996 (Decision No. 29), we treated Cen-Tex's request for conditions as a responsive application, both because Cen-Tex had previously indicated that it would be filing a responsive application and also because Cen-Tex had docketed its request for conditions in the manner of a responsive application. Because Cen-Tex's responsive application was incomplete (it contained virtually none of the information required for a responsive application), we rejected it. Cen-Tex's request for conditions, though rejected as a responsive application, is still in the record as a request for conditions, and is therefore still a vehicle by which Cen-Tex may participate in this proceeding. Because Decision No. 29, in and of itself, does not moot applicants' UP/SP-208 petition, we must address the request for relief contained therein.

We do not lightly deny parties the opportunity to participate in agency proceedings. Here, however, Cen-tex has blatantly and repeatedly refused to meets its discovery obligations. Its conduct has disabled applicants from responding to its request for conditions (which, in any event, is sketchy to begin with). Giving Cen-tex a further opportunity to meet its discovery obligations at this point would unreasonably delay this proceeding. Under the circumstances, we will strike its request for conditions filed April 1, 1996. See 49 CFR 1114.31(d) (if a party fails to serve answers to interrogatories, the Board may strike any pleading of that party).

ARU-8. Under the BN/Santa Fe settlement agreement,[5] Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (referred to collectively as BN/Santa Fe) would receive approximately 3,968 miles of trackage rights over UP/SP (1,727 miles on UP and 2,241 miles on SP), and UP/SP would receive or retain approximately 376 miles of trackage rights over BN/Santa Fe. In Finance Docket No. 32760 (Sub-No. 1), applicants have filed a notice of exemption that covers the trackage rights provided for in the BN/Santa Fe settlement agreement. This notice invokes the trackage rights class exemption codified at 49 CFR 1180.2(d)(7).

The labor protective conditions generally applicable to trackage rights are the Norfolk and Western conditions. Norfolk

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[4] By letter dated April 8, 1996, applicants indicate that, on April 5, 1996, UP/SP-208 was served upon Cen-Tex by facsimile telecopy (excluding the exhibits attached thereto) and by first class mail. Cen-Tex had until April 10, 1996, to respond. See Decision No. 9 (served December 27, 1995), slip op. at 13 (any reply to any procedural motion filed with the Board itself in the first instance must be filed within 3 working days). Cen-Tex has not responded to the UP/SP-208 petition.

[5] See UP/SP-22 at 318-359.

and Western Ry. Co.--Trackage Rights--BN, 354 I.C.C. 605 (1978), modified in Mendocino Coast Ry., Inc.--Lease and Operate, 360 I.C.C. 653 (1980), aff'd sub nom. RLEA v. ICC, 675 F.2d 1248 (D.C. Cir. 1982). The labor protective conditions generally applicable to mergers, consolidations, control acquisitions, line purchases, and contracts by one railroad to operate the properties of another are the New York Dock conditions. New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. ICC, 609 F.2d 83 (2d Cir. 1979).

In its ARU-8 motion filed April 5, 1996, ARU seeks the designation of BN/Santa Fe as a co-applicant in the Finance Docket No. 32760 lead proceeding or, in the alternative, the imposition of New York Dock conditions on the trackage rights provided for in the BN/Santa Fe settlement agreement. ARU argues in essence that, because the BN/Santa Fe settlement agreement is intended to ameliorate the anticompetitive consequences of an unconditioned UP/SP merger, it should be regarded as part and parcel of that merger, and BN/Santa Fe should therefore be regarded as a co-applicant. ARU's ultimate goal is the imposition of the New York Dock conditions on the trackage rights provided for in the BN/Santa Fe settlement agreement. ARU contends that only imposition of the New York Dock conditions will provide full protection for employees.[6]

In a railroad control proceeding, a party entering into a settlement agreement with the applicants does not become, simply by virtue of such settlement agreement, an applicant itself. It makes no difference that the settlement agreement was entered into at a time prior to the formal filing of the application. The control transaction at issue in this proceeding is the common control (generally referred to as the merger) of UP and SP. The trackage rights, line sales, and other arrangements provided for in the BN/Santa Fe settlement agreement were entered into in an effort to alleviate the anticompetitive consequences that would occur if the UP/SP merger were unconditioned. These trackage rights, line sales, and other arrangements, however, do not make BN/Santa Fe part of the UP/SP merger. We will therefore deny the ARU-8 motion insofar as ARU seeks the designation of BN/Santa Fe as a co-applicant.

The alternative relief sought in the ARU-8 motion (imposition of the New York Dock conditions on the trackage rights provided for in the BN/Santa Fe settlement agreement) goes to the merits of this proceeding and will therefore be addressed in the final decision. Because this relief has already been sought by ARU,[7] the ARU-8 motion serves no apparent purpose. We will therefore deny the ARU-8 motion in its entirety, though this denial is without prejudice to ARU's right to continue to argue that the New York Dock conditions should be imposed on the trackage rights provided for in the BN/Santa Fe settlement agreement.

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[6] BN/Santa Fe has filed a reply (BN/SF-51) to the ARU-8 motion. Applicants have indicated, by letter dated April 8, 1996, that they will reply to the ARU-8 motion in their rebuttal filings (due April 29, 1996) and in their brief (due June 3, 1996).

[7] The relief sought by ARU in its ARU-8 motion was previously sought by ARU in its ARU-3 comments. See ARU-3 at 68-70.

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

It is ordered:

1. The request for conditions filed April 1, 1996, by affiliated carriers Cen-Tex Rail Link, Ltd., and South Orient Railroad Company, Ltd. is stricken from the record.

2. The ARU-8 motion filed by the Allied Rail Unions is denied.

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

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

Vernon A. Williams
Secretary

STB FD-32760 4-19-96 C-31 9425

LATE RELEASE
SERVICE DATE
APR 19 1996

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SURFACE TRANSPORTATION BOARD[1]

DECISION

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[2]

[Decision No. 31]

Decided: April 19, 1996

BACKGROUND

In this decision, we address the joint motion of National Industrial Transportation League (NITL), Society of the Plastics Industry, Inc. (SPI), Western Shippers' Coalition (WSC), Dow Chemical Company (Dow), International Paper Company (IP), Kennecott Energy Company (Kennecott), Kansas City Southern Railway Company (KCS), and Consolidated Rail Corporation (Conrail) (collectively, movants) for clarification of Decision No. 6 in this proceeding.[3]

In Decision No. 6, served October 19, 1995, the ICC issued the procedural schedule governing this proceeding. The ICC reaffirmed that schedule in Decision No. 9, served December 27, 1995. According to the schedule, all inconsistent and responsive applications, comments, protests, requests for conditions, and any other opposition evidence or argument were due on March 29, 1996. April 29, 1996, is the deadline for responses to inconsistent and responsive applications, and rebuttal in support of the primary application and related applications. Further, the schedule specifically states that April 29, 1996, is the deadline for "responses to comments, protests, requests for conditions, and other opposition."

Movants note that, in comments filed on March 29, 1996, some non-applicant parties reserved the right to file replies to the comments and evidence submitted by other parties on March 29. Movants ask us to clarify that non-applicant parties are not entitled to file comments or evidence on April 29, 1996, in

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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 Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), 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 applicants. UPRR and MPRR are referred to collectively as UP. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP.

[3] The parties use the following designations to identify the motion: NITL-13, SPI-14, WSC-14, DOW-15, IP-13, KENN-14, KCS-36, and CR-28.

response to comments, protests, or requests for conditions submitted on March 29, 1996.

According to movants, in Decision No. 6, the ICC stated its intention to require that all comments, whether in support of or in opposition to the application, be filed on March 29. Thus, in movants' view, Decision No. 6 indicates that the ICC did not anticipate filings by non-applicant parties on April 29. Further, movants note that non-applicant parties will have the opportunity to respond to arguments made in any of the March 29 filings in their briefs due on June 3, 1996. Movants allege that their position is supported by the fact that the ICC specifically stated in Decision No. 6 that parties filing comments, protests, or requests for conditions (as opposed to inconsistent or responsive applications) would not be allowed to file rebuttal testimony. Movants state that this statement was based on the ICC's finding that allowing non-applicant parties to file rebuttal would serve no necessary purpose and would deprive applicants of the right to close the evidentiary record in their case.

It is movants' position that allowing the filings at issue would undermine the considerations of efficiency and fairness that underlie Decision No. 6. Movants argue that allowing parties to respond to comments by other parties with a different view of the proposed merger would add unnecessarily to the record and hamper our ability to review the entire record thoroughly. It would also, movants contend, encourage parties in future proceedings to wait to make any substantive filing until after all opposition evidence had been filed.

Movants further contend that permitting non-applicant parties to respond to comments would sanction "sandbagging." As a matter of fairness, movants argue, if we permit any party to raise new arguments or present new evidence in its April 29 response, we have to allow parties whose filings were the subjects of such responses to answer these additional arguments, as a matter of due process. Movants allege that this would cause the record to grow out of control.

Movants specifically request us to clarify that permissible filings on April 29 are limited to the following: (1) UP's and SP's responses to comments and rebuttal in support of their primary application; (2) rebuttal and response from Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (referred to collectively as BN/Santa Fe) limited to BN/Santa Fe-related applications;[4] and (3) any party's comments or evidence regarding responsive applications filed on March 29.

On April 15, 1996, applicants and Canadian National Railway Company filed pleadings in opposition to the joint motion (UP/SP-215 and CN-5). Both applicants and CN contend that Decisions No. 6 and No. 9 authorize the filings at issue, and that not allowing non-applicants to file responses to comments, protests, and requests for conditions would deprive the Board of critical information. Applicants allege that the motion primarily is an attempt to keep BN/Santa Fe from responding to allegations relating to BN/Santa Fe that movants and other parties submitted

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[4] The BN/Santa Fe-related applications include the following: (1) Finance Docket No. 32760 (Sub-No. 1), involving a notice of exemption for settlement-related trackage rights; (2) Finance Docket No. 32760 (Sub-No. 2), involving a petition for exemption for settlement-related line sales; and (3) Finance Docket No. 32760 (Sub-No. 9), involving a terminal trackage rights application.

on March 29. In applicants' view, BN/Santa Fe is entitled to respond to such allegations.

DISCUSSION AND CONCLUSIONS

We will clarify Decision No. 6 and Decision No. 9 by specifically stating that it was our intent to allow non-applicant parties to file responses to comments, protests, requests for conditions, and other opposition evidence under limited circumstances. For instance, BN/Santa Fe is entitled to respond to allegations in the March 29 filings concerning BN/Santa Fe's ability and willingness to use the trackage rights that it would receive under the BN/Santa Fe settlement agreement to provide a competitive alternative for certain shippers in certain corridors. Likewise, a non-applicant party that believes that it would be harmed by a condition proposed by another party is entitled to submit evidence in response to the requested condition. Because parties other than applicants may be affected if we impose particular conditions or accept certain arguments, they should have the opportunity to submit filings on April 29 responding to issues and arguments raised in relevant March 29 filings.

As applicants note in UP/SP-215, the March 29 filings are the first detailed presentations made by parties opposing the proposed merger and proposing conditions. Non-applicant parties have not had any chance to respond to the arguments and proposals in those filings. Movants seem to believe that allowing the filings by non-applicants would, in effect, allow another round of evidentiary submissions. This is not the case; parties filing responses on April 29 are limited to responding to issues and arguments raised in the March 29 filings.

We further disagree with movants' contention that parties filing comments, protests, and requests for conditions would need an opportunity to respond to arguments non-applicant parties may raise on April 29. Movants are aware that, under the procedural schedule, only inconsistent and responsive applicants are entitled to file rebuttal evidence, due on May 14, 1996. Parties filing on March 29 (including movants) chose their means of presenting their arguments with knowledge of the restriction on rebuttal filings. Parties may file on April 29 only in response to inconsistent and responsive applications, and in response to other parties' comments, protests, requests for conditions, and other opposition evidence. They may file briefs on June 3, 1996, but these briefs may not contain new evidence in the proceeding. The purpose of the briefs is for parties to present legal arguments succinctly and to marshal previously filed evidence favorable to their position. Thus, parties that did not file inconsistent or responsive applications may not file rebuttal evidence concerning responses to their March 29 filings which may be filed on April 29, 1996. Inappropriate evidentiary material will be stricken.

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

It is ordered:

1. Decision No. 6 and Decision No. 9 are clarified as set forth above.

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

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

Vernon A. Williams
Secretary

STB FD-32760 4-24-96 C-32

LATE RELEASE

SERVICE DATE

APR 24 1996

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SEC

SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760[2]

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

[Decision No. 32]

Dated: April 23, 1996

NOTICE TO THE PARTIES:

In Decision No. 6, served October 19, 1995, the ICC adopted an expedited procedural schedule in this proceeding. In accordance with that schedule, on March 29, 1996, comments, protests, requests for conditions, any other opposition evidence and argument were due, along with inconsistent and responsive applications. The Board has received several requests for parties to be added to the service list, as well as corrections to the service list.

On February 16, 1996, a Notice to the Parties (Decision No. 15) was served in this proceeding, and the service list was attached to the Notice. On March 7, 1996 (Decision No. 17), and March 25, 1996 (Decision No. 26), Notices to the Parties were served describing revisions to the service list.

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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 designation embraces the following: (1) 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; (2) 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; (3) Finance Docket No. 32760 (Sub-No. 3), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Alton & Southern Railway Company; (4) Finance Docket No. 32760 (Sub-No. 4), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Central California Traction Company;

(continued...)

The Board has received several additional late-filed revisions to the service list, and the changes are described below.

1. The Golden Cat Division of Ralston Purina Company has withdrawn as a party of record in this proceeding, and the following party should be deleted as a [**POR**]:

Martin A. Weissert
Baker & Daniels
111 E. Wayne Street, Suite 800
Fort Wayne, IN 46802

2. Pueblo County, CO, has withdrawn as a party of record in this proceeding, and is joining the Mountain-Plains Communities and Shippers Coalition which is already a party to said proceeding. The following party should be deleted as a [**POR**]:

Tami J. Yellico
Pueblo County Courthouse
215 West 10th Street
Pueblo, CO 81003
Represents: Pueblo County, CO

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[2](continued...)
(5) Finance Docket No. 32760 (Sub-No. 5), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Ogden Union Railway & Depot Company; (6) Finance Docket No. 32760 (Sub-No. 6), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Terminal Railroad Company; (7) Finance Docket No. 32760 (Sub-No. 7), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Traction Company; (8) Finance Docket No. 32760 (Sub-No. 8), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Overnite Transportation Company, Southern Pacific Motor Trucking Company, and Pacific Motor Transport Company; (9) Finance Docket No. 32760 (Sub-No. 9), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Terminal Trackage Rights--Kansas City Southern Railway Company; (10) Docket No. AB-3 (Sub-No. 129X), Missouri Pacific Railroad Company--Abandonment Exemption--Gurdon-Camden Line In Clark, Nevada, and Ouachita Counties, AR; (11) Docket No. AB-3 (Sub-No. 130), Missouri Pacific Railroad Company--Abandonment--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO, and Docket No. AB-8 (Sub-No. 38), The Denver and Rio Grande Western Railroad Company--Discontinuance of
(continued...)

3. The following parties of record [POR] are added to the service list:

[POR] Timm R. Adams
Chairman, Idaho Barley Commission
1199 Main Street, Suite G
Boise, ID 83702-5630

[POR] Gerald O. Carden, Chief Deputy
Placer County Counsel
175 Fulweiler Avenue
Auburn, CA 95603
Represents: County of Placer, CO

[POR] Terry L. Claassen
President, Corn Refiners Association, Inc.
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Represents: Corn Refiners Association, Inc.

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[4] (continued...)
Trackage Rights--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO; (12) Docket No. AB-3 (Sub-No. 131), Missouri Pacific Railroad Company--Abandonment--Hope-Bridgeport Line In Dickinson and Saline Counties, KS, and Docket No. AB-8 (Sub-No. 37), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Hope-Bridgeport Line In Dickinson and Saline Counties, KS; (13) Docket No. AB-3 (Sub-No. 132X), Missouri Pacific Railroad Company--Abandonment Exemption--Whitewater-Newton Line In Butler and Harvey Counties, KS; (14) Docket No. AB-3 (Sub-No. 133X), Missouri Pacific Railroad Company--Abandonment Exemption--Iowa Junction-Manchester Line In Jefferson Davis and Calcasieu Parishes, LA; (15) Docket No. AB-3 (Sub-No. 134X), Missouri Pacific Railroad Company--Abandonment Exemption--Troup-Whitehouse Line In Smith County, TX; (16) Docket No. AB-8 (Sub-No. 36X), The Denver and Rio Grande Western Railroad Company--Discontinuance Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO, and Docket No. AB-12 (Sub-No. 189X), Southern Pacific Transportation Company--Abandonment Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO; (17) Docket No. AB-8 (Sub-No. 39), The Denver and Rio Grande Western Railroad Company--Discontinuance--Malta-Cañon City Line In Lake, Chaffee and Fremont Counties, CO, and Docket No. AB-12 (Sub-No. 188), Southern Pacific Transportation Company--Abandonment--Malta-Cañon City Line In Lake, Chafee, and Fremont Counties, CO; (18) Docket No. AB-12 (Sub-No. 184X), Southern Pacific Transportation Company--Abandonment Exemption--Wendel-Alturas Line In Modoc and Lassen Counties, CA; (19) Docket No. AB-12 (Sub-No. 185X), Southern Pacific Transportation Company--Abandonment Exemption--Suman-Bryan Line In Brazos and Robertson Counties, TX; (20) Docket No. AB-12 (Sub-No. 187X), Southern Pacific Transportation Company--Abandonment Exemption--Seabrook-San Leon Line In Galveston and Harris Counties, TX; (21) Docket No. AB-33 (Sub-No. 93X), Union Pacific Railroad Company--Abandonment Exemption--Whittier Junction-Colima Junction Line In Los Angeles County, CA; (22) Docket No. AB-33 (Sub-No. 94X), Union Pacific Railroad Company--Abandonment Exemption--Magnolia Tower-Melrose Line In Alameda County, CA; (23) Docket No. AB-33 (Sub-No. 96), Union Pacific Railroad Company--Abandonment--Barr-Girard Line In Menard, Sangamon, and Macoupin Counties, IL; (24) Docket No. AB-33 (Sub-No. 97X), Union Pacific Railroad
(continued...)

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[2](continued...)
Company--Abandonment Exemption--DeCamp-Edwardsville Line In Madison County, IL; (25) Docket No. AB-33 (Sub-No. 98X), Union Pacific Railroad Company--Abandonment Exemption--Edwardsville-Madison Line In Madison County, IL; (26) Docket No. AB-33 (Sub-No. 99X), Union Pacific Railroad Company--Abandonment Exemption--Little Mountain Jct.-Little Mountain Line In Box Elder and Weber Counties, UT.

4. Highsaw, Mahoney & Clarke, P.C., has withdrawn as counsel for the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB). IBB will continue to participate in this proceeding but through its own representative. Service on IBB of filings in this proceeding should be made on its representative, as follows:

[**POR**] Joseph A. Stinger
Assistant to President
International Brotherhood of Boilermakers & Blacksmiths
570 New Brotherhood Building
Kansas City, KS 66101

5. Donelan, Cleary, Wood & Maser, P.C., has withdrawn as counsel for the Institute of Scrap Recycling Industries, Inc. (ISRI). ISRI will continue to participate in this proceeding but through its own representatives: Dr. Herschel Cutler, Executive Director of ISRI, and Mr. Michael Mattia, Director, Risk Management of ISRI. Service on ISRI of filings in this proceeding should be made on Mr. Michael Mattia, already listed as a party of record in this proceeding, as follows:

[**POR**] Michael Mattia
Director - Risk Management
Institute of Scrap Recycling Industries, Inc.
1325 G Street, N.W.
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6. Mr. Clarence R. Ponsler, for and on behalf of the General Committee of Adjustment-United Transportation Union for The Alton and Southern Railway Company, petitioned for leave to intervene in these consolidated proceedings, to file a verified statement, and to become a party of record. Mr. Ponsler is added to the service list as a party of record, as follows:

[**POR**] Clarence R. Ponsler
General Chairman
General Committee of Adjustment
United Transportation Union
1017 W. Main Street
Belleville, IL 62220

7. Pioneer Railcorp (Pioneer) and its subsidiary, the Keokuck Junction Railway (KJRY) filed a Motion for Leave to Intervene and request that the Board accept and consider their jointly-filed comments contained in KJRY-2. Service on Pioneer and KJRY of filings in this proceeding should made on the following representatives:

[**POR**] John D. Heffner
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[**POR**] Daniel A. LaKemper
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By Notice served February 22, 1996 (Decision No. 16), parties of record were given the alternative to serve on all other parties of record a list of numbered pleadings filed to

date, and to provide copies of pleadings within 3 days of a request.

All parties of record who have filed pleadings in this proceeding must, within 5 days of the service date of this Notice, serve a copy of those pleadings or serve a list of numbered pleadings filed to date on the above designated parties of record (**POR**). Parties electing to serve lists on other parties are required to provide copies of filings within 3 days of a request.

All future filings must each have a certificate of service indicating that all PORs have been properly served a copy of the filing. **Parties are reminded that they must submit an original and 20 copies of all future documents filed with the Board.** Parties are encouraged to submit all pleadings and attachments as computer data contained on a 3.5-inch floppy diskette formatted for WordPerfect 5.1 (or formatted so that it can be converted by WordPerfect 5.1). (See Decision No. 9, served December 27, 1995).

As clarified in Decision No. 16, discovery-related pleadings need only be served on parties on the restricted service list established in the Administrative Law Judge's Order Adopting Discovery Guidelines, served December 7, 1995.

Vernon A. Williams
Secretary

STB FD-32760 4-26-96 C-33 9609

SERVICE DATE

APR 2 6 1996

3609
EB

LATE RELEASE

SURFACE TRANSPORTATION BOARD[1]

DECISION

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. 33]

Decided: April 26, 1996

In Decision No. 9, served December 27, 1995, the ICC established the procedural schedule for this proceeding. In that decision, the ICC stated that the determinations regarding whether to hold an oral argument and a voting conference in this proceeding would be left to the ICC's (now the Board's) discretion, and, if held, the ICC projected that the oral argument would take place on July 2, 1996, and that the voting conference would take place on July 3, 1996.

We will hold both an oral argument and an open voting conference in this proceeding. We will hold the oral argument on July 1, 1996. The voting conference remains set for July 3, 1996. We will issue a decision in the near future that will advise interested parties on how to participate in the oral argument.

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

It is ordered:

1. The oral argument will be held on July 1, 1996.

2. The voting conference will be held on July 3, 1996.

3. This decision is effective on its service date.

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

Vernon A. Williams

Vernon A. Williams
Secretary

[1] Proceedings pending before the Interstate Commerce Commission (ICC) at the time of its termination must be decided under the law in effect prior to January 1, 1996, 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.

STB FD-32760 12-26-01 C-93 32442

32442 SERVICE DATE - LATE RELEASE DECEMBER 26, 2001
SEC

SURFACE TRANSPORTATION BOARD

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. 93

Decided: December 26, 2001

By petition (designated BNSF-97) filed December 17, 2001, The Burlington Northern and Santa Fe Railway Company (BN) seeks clarification respecting the build-in/build-out condition that the Board imposed on the UP/SP merger.

By letter (not designated) filed December 21, 2001, Union Pacific Railroad Company (UP), citing the travel and other commitments of its counsel and employees, requests that the time for filing replies to the BNSF-97 petition be extended to January 14, 2002. According to UP, BN does not object to the requested extension.

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

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

It is ordered:

1. The time for filing replies to the BNSF-97 petition is extended to January 14, 2002.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

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SERVICE DATE - JANUARY 4, 2002

SURFACE TRANSPORTATION BOARD

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. 94

Decided: January 3, 2002

By petition (designated BNSF-98) filed December 21, 2001, The Burlington Northern and Santa Fe Railway Company (BNSF) seeks clarification respecting the adjustment of the fees applicable to the trackage rights that were awarded to BNSF in connection with the UP/SP merger.

By letter (not designated) filed December 28, 2001, Union Pacific Railroad Company (UP), citing the travel and other commitments of its counsel and employees, requests that the time for filing replies to the BNSF-98 petition be extended to January 14, 2002. According to UP, BNSF does not object to the requested extension.

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

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

It is ordered:

1. The time for filing replies to the BNSF-98 petition is extended to January 14, 2002.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

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SERVICE DATE – MARCH 4, 2002

SURFACE TRANSPORTATION BOARD

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. 95

Decided: February 28, 2002

In this decision, we address the petition filed by The Burlington Northern and Santa Fe Railway Company (BNSF) concerning conditions imposed in the underlying merger proceeding to preserve "build-in/build-out" options for shippers to obtain access to an additional rail carrier. While some general guidance is appropriate, we urge further negotiations, and we will address controversies that remain as necessary in specific cases in which they arise.

BACKGROUND

By decision served August 12, 1996, we approved the merger of the "UP" rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the "SP" rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) subject to various conditions, including the extensive BNSF trackage rights over UP/SP lines that were provided for in the BNSF Settlement Agreement (BNSF Agreement) with UP, and further including a "build-in/build-out" condition that was intended to preserve certain procompetitive options that might otherwise have been eliminated by the merger. See Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) (UP/SP Merger).

By petition (designated BNSF-97) filed December 17, 2001, BNSF has asked that we clarify the circumstances in which it should be required to construct or fund, on the lines of UP, new connections, facilities, or other improvements in order to provide service to a build-in/build-out line. BNSF proposes that it should be required to construct or fund new connections, facilities, or other improvements only if (i) UP demonstrates that, absent such construction, BNSF's proposed service would unreasonably and materially interfere with UP's service to its customers, and (ii) requiring BNSF to undertake such construction would not

impair BNSF's ability to provide competitive service. Specifically, BNSF seeks the imposition of the following procedures: (1) when BNSF presents to UP an operating plan to serve a build-in/build-out line, UP must approve that plan unless it would cause unreasonable and material interference with UP's operations; (2) if UP believes that the proposed plan would cause such interference, UP must provide both a detailed written explanation and also an alternative plan that would enable BNSF to provide competitive service with the least additional cost; (3) if UP's alternative plan would require BNSF to construct or fund new facilities or other improvements, UP must explain why the operations of the two carriers cannot be coordinated to avoid the need for the construction of new facilities; and (4) if UP and BNSF continue to disagree as to the need for the construction of new facilities and as to how they should be funded, the issue may be resolved either in arbitration or by the Board.[1]

By reply (designated UP/SP-391) filed January 14, 2002, UP states that BNSF has asked the Board to impose an inflexible, multi-step procedure that would discourage negotiations to solve operating conflicts and shift BNSF's responsibilities for finding solutions to UP. Instead, UP argues that we should make clear that BNSF must bear the responsibility of avoiding or remedying all unreasonable interference during construction and, upon completion, all material interference between its build-in/build-out operations and existing rail service, consistent with the requirements of 49 U.S.C. 10901(d).[2]

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[1] BNSF's clarification request was prompted by disputes related to its anticipated construction of the recently exempted Kamey-Seadrift line, which will run between Kamey, TX (a point on a pre-merger SP line) and Seadrift, TX (the site of a chemical complex that, prior to the merger, was rail-served exclusively by UP). See The Burlington Northern and Santa Fe Railway Company—Construction and Operation Exemption—Seadrift and Kamey, TX, STB Finance Docket No. 34003 (STB served Jan. 25, 2002). BNSF has indicated that it is not now seeking Board resolution of the specific disputes related to the Kamey-Seadrift line, but instead seeks a general policy clarification regarding such matters.

BNSF also suggests one other instance, San Jacinto Rail Limited's proposed build-out to the Bayport Loop, where guidance might be necessary. See San Jacinto Rail Limited Construction Exemption and The Burlington Northern and Santa Fe Railway Company Operation Exemption—Build-Out To The Bayport Loop Near Houston, Harris County, TX, STB Finance Docket No. 34079 (STB served Nov. 28, 2001) (instituting a proceeding).

[2] In particular, according to UP, BNSF would have UP show that BNSF's service to or from a build-in/build-out line would "unreasonably and materially" interfere with UP's operations before BNSF would be responsible for constructing or funding a construction project. This, says UP, would, by mixing what it describes as two different standards, in effect apply the assertedly more liberal "unreasonable interference" construction-phase standard of 10901(d)(1)(A) to determine liability during the post-construction operations phase of any BNSF

(continued...)

Additional replies to the BNSF-97 petition were filed separately by Union Carbide Corporation (UCC), The National Industrial Transportation League (NITL), and the American Chemistry Council (ACC), and jointly by ATOFINA Petrochemicals, Inc., Basell USA Inc., Equistar Chemicals, LP, and Lyondell Chemical Company (referred to collectively as the Bayport Producers). UCC, NITL, and the Bayport Producers generally support the position taken by BNSF as respects the interference issue.[3] ACC indicates that, although it agrees with BNSF that UP has no right to demand that BNSF undertake expensive capital improvements whenever its trackage rights create any interference with UP's operations, ACC believes that the more important issue is whether the potential interference can be avoided or remedied by dispatching, scheduling, or other operational coordination, and, if so, BNSF and UP should be required to work out the problems themselves.

DISCUSSION AND CONCLUSIONS

We find it inappropriate to adopt either of the broad standards suggested by BNSF and UP to apply to all operational problems resulting from the application of our build-in/build-out condition. BNSF has suggested only two instances in which a rule of general applicability would provide useful guidance to parties in build-in/build-out situations. More importantly, the standards proposed by BNSF and UP appear to provide undue leverage to the party proposing the standard, creating disincentives on the part of one party or the other to actively seek out creative dispatching, scheduling, or other operational solutions that would minimize the need for additional capital expenditures. The BNSF standard could affect UP's ability to conduct its own operations on the trackage rights lines, and, in certain instances, could compel UP to subsidize the build-in/build-out operations. BNSF's proposal also would result in an inflexible, multi-step procedure that would discourage negotiations to solve operating conflicts. And the UP standard could limit the underlying competition-preserving purpose of the build-in/build-out condition,

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[2](...continued)
build-in. UP states that, as an alternative, it is proposing to apply the "unreasonable interference" standard only to the construction phase of a build-in and its associated projects, and would apply the "material interference" standard of 10901(d)(1)(B) to post-construction operations. UP states that, while section 10901(d) technically applies only to rail crossings. BNSF's build-in/build-out projects will cause interference not only at rail crossings, but at other locations on UP's lines where BNSF must use the trackage rights it received in UP/SP Merger to reach the build-in/build-out line.

[3] We note that UCC's interests relate to the Kamey-Seadrift line, see supra note 1. Similarly, the Bayport Producers' interests relate to the "Bayport Loop" line, construction and operation of which are at issue in a pending proceeding, see supra note 1.

and, in certain instances, could prevent BNSF from replicating the competitive posture of the pre-merger SP.[4]

In view of these shortcomings, we urge BNSF and UP to settle, through negotiation, as many of the issues arising from implementation of the build-in/build-out condition as possible. Any remaining controversies may be submitted to us for resolution, as necessary, on a case-by-case basis within the factual confines of each case or to arbitration as provided in the BNSF Agreement. We will, however, offer certain guidance to BNSF and UP for purposes of their negotiations.

In this regard, UP should recognize that it cannot successfully assert entitlement to a remedy or compensation whenever new BNSF service to a build-in/build-out line via the trackage rights lines leads to any interference with its operations. BNSF's trackage rights operations, by definition, potentially interfere with UP's operations on the trackage rights lines and UP agreed to this potential interference when it accepted the conditions, including the terms of the BNSF Agreement, that we imposed when we approved the UP/SP merger. At the same time, BNSF should recognize that it would not, in most circumstances, be free from responsibility for at least a share of the costs for improvements required by new traffic patterns associated with a build-in/build-out line, depending upon the particular circumstances of the case (which, as we have stated above, should be examined individually in each case).

BNSF and UP, in attempting to craft a solution to an operational problem resulting from the application of the build-in/build-out condition, should, as indicated in Section 8(l) of the BNSF Agreement, "seek to minimize the operating inconvenience to UP, consistent with ensuring that BNSF can provide competitive service." UP/SP-386 (filed July 25, 2001, in STB Finance Docket No. 32760 (Sub-No. 21)) at 34. Although Section 8(l) purports to apply only to the routing of any additional trackage rights needed by BNSF to access a build-in/build-out line, the general principle set forth in Section 8(l) should also be applied to off-site problems generated by BNSF's operations over a build-in/build-out line. We are endorsing this general principle, in this broader context, because we agree with ACC that "[t]he UP and BNSF interests, and the interests of shippers and the public, will best be accommodated if UP and BNSF both have incentives to avoid the construction of new facilities if they are not needed, to minimize the costs of any new facilities that are needed, to construct new facilities that will make both UP and BNSF operations more efficient, and to share the cost of the new facilities in accordance with their respective use by and economic benefit to UP and BNSF." CMA-14 at 6.

Accordingly, we will not adopt a generic standard for all build-in/build-out situations. For us to attempt to establish a standard now for future use in determining the necessity of, or the

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[4] The UP standard is not compelled by 49 U.S.C. 10901(d). That provision normally applies only when one railroad seeks to build a line that must "cross" the line of another railroad.

responsibility for the funding of, every particular construction associated with a build-in/build-out would remove important incentives on the part of BNSF and UP to arrive at appropriate and mutually agreeable scheduling, dispatching, or other operational solutions to problems that they may encounter – solutions that could minimize the need for those capital expenditures.

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

It is ordered:

1. The BNSF-97 petition for clarification is granted to the extent set forth in this decision, but the specific relief sought in the BNSF-97 petition is denied.

2. BNSF and UP should resume negotiations consistent with this decision.

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

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary

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SERVICE DATE – MARCH 21, 2002

SURFACE TRANSPORTATION BOARD

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. 96

Decided: March 19, 2002

This decision addresses a dispute concerning the mechanism for adjusting the fees that are applicable to the trackage rights that The Burlington Northern and Santa Fe Railway Company (BNSF) acquired over the lines of Union Pacific Railroad Company (UP) in connection with the 1996 UP/SP merger.

BACKGROUND

By decision served August 12, 1996,[1] we approved the merger of the "UP" rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the "SP" rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) subject to various conditions, including, most prominently, the extensive BNSF trackage rights over UP/SP lines that were provided for in the BNSF Agreement.[2]

The initial rates applicable to the BNSF trackage rights were established in Section 9(a) of the BNSF Agreement. The initial rates were: 3.48 mills per ton-mile (applicable to intermodal and carload traffic on the Keddie-Stockton/Richmond line); 3.1 mills per ton-mile (applicable to intermodal and carload traffic on all other lines); and 3.0 mills per ton-mile (applicable to bulk traffic, which is defined for this purpose as "67 cars or more of one commodity in one car type").

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[1] Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) (Merger Dec. No. 44).

[2] With respect to the period ending September 10, 1996, "UP" refers to the rail carriers then controlled by Union Pacific Corporation and "SP" refers to the rail carriers then controlled by Southern Pacific Rail Corporation. With respect to the period beginning September 11, 1996 (the date of consummation of common control), "UP" refers to the combined UP/SP system.

See UP/SP-386 at 36.[3] Section 9(a) further provides that the initial rates "shall be escalated in accordance with the procedures described in Section 12 of this Agreement."

Section 12 of the BNSF Agreement provides for the "adjustment" of the Section 9(a) rates: "All trackage rights charges under this Agreement shall be subject to adjustment upward or downward July 1 of each year by the difference in the two preceding years in UP/SP's system average URCS costs for the categories of maintenance and operating costs covered by the trackage rights fee. 'URCS costs' shall mean costs developed using the Uniform Rail Costing System." UP/SP-386 at 47-48.

The dispute between BNSF and UP concerns two of the items that are components of the "maintenance and operating costs covered by the trackage rights fee" when using standard accounting procedures – that is, procedures consistent with the Uniform System of Accounts – in developing URCS costs. The first disputed item is the so-called "acquisition premium" — the excess of the price paid to acquire the SP rail carriers over the pre-acquisition book value of the SP rail carriers. See CSX Corp. et al.—Control—Conrail Inc. et al., 3 S.T.B. 196, 261-66 (1998); Western Coal Traffic League v. Union Pacific Railroad Company, STB Finance Docket No. 33726 (STB served May 12, 2000). The second disputed item concerns the costs of certain capacity improvements undertaken by UP on the trackage rights lines which have been allocated — by Sections 9(c)(i) and 9(c)(iii) of the BNSF Agreement — entirely to UP, even though such lines are used both by UP and by BNSF and the BNSF Agreement otherwise generally requires that both railroads share costs based upon their respective usage of the line in question. The capacity improvements governed by Section 9(c)(i) are those that are necessary to achieve the benefits of the UP/SP merger as outlined in the UP/SP merger application. The capacity improvements governed by Section 9(c)(iii) are those that were undertaken within the first 18 months following UP's acquisition of control of SP.[4]

BNSF's Position. In its BNSF-98 petition for clarification (filed December 21, 2001) and in its BNSF-99 reply (filed February 4, 2002), BNSF contends that the disputed items should be omitted (in the years in which they would otherwise be included) in the URCS calculations required to create the Section 12 adjustment factor. As to the inclusion of the disputed acquisition

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[3] The "UP/SP-386, BNSF-92" pleading (herein referred to as the "UP/SP-386" pleading) was filed in STB Finance Docket No. 32760 (Sub-No. 21) on July 25, 2001.

[4] Section 9(c)(i) provides: "UP/SP shall bear the cost of all capacity improvements that are necessary to achieve the benefits of its merger as outlined in the application filed with the ICC for authority for UP to control SP. The operating plan filed by UP/SP in support of the application shall be given presumptive weight in determining what capacity improvements are necessary to achieve these benefits." Section 9(c)(iii) provides that, "[f]or 18 months following UP's acquisition of control of SP, BNSF shall not be required to share in the cost" of any capacity improvements not covered by Section 9(c)(i). See UP/SP-386 at 37.

premium, BNSF contends that, at the time the BNSF Agreement was negotiated, BNSF and UP were aware that UP would be paying a price in excess of book value in connection with its acquisition of control of SP; that this acquisition premium was taken into account when BNSF and UP agreed on the initial rates established in Section 9(a); and that the inclusion of the acquisition premium in the Section 12 adjustment factor would effectively require BNSF to again pay a part of that acquisition premium and amount to a kind of double-counting. As to the inclusion in the Section 12 adjustment factor of the disputed capacity improvement costs, BNSF contends that Section 9(c) of the Agreement relieves it of any obligation for those costs.

BNSF acknowledges that Section 15 of the BNSF Agreement provides that, "[e]xcept as otherwise provided by any decision of the STB or by separate agreement, unresolved disputes and controversies concerning any of the terms and provisions of this Agreement or the application of charges hereunder shall be submitted for binding arbitration under [the] Commercial Arbitration Rules of the American Arbitration Association which shall be the exclusive remedy of the parties." UP/SP-386 at 50. BNSF insists, however, that, even though an arbitration proceeding as to the present dispute was commenced by UP prior to the filing of the BNSF-98 petition, the present dispute should be resolved in an administrative proceeding. BNSF contends that this is appropriate here because it would provide guidance to the parties and to arbitrators as to the intended scope of the conditions we imposed on the UP/SP merger and allow for the participation of other persons (principally shippers and shipper organizations) that may not be allowed to participate as parties in an arbitration proceeding.

UP's Position. In its UP/SP-392 motion to dismiss (filed January 14, 2002), UP contends that the BNSF-98 petition should be dismissed not only because the present dispute has already been submitted to arbitration but also because, in UP's view, BNSF has failed to "state a claim." UP further contends that, in view of BNSF's competitiveness to date on the trackage rights lines and the fact that the present dispute will not cause the trackage rights fees to rise in the future, there is no important policy question for the Board to address, and thus this dispute can appropriately be resolved in an arbitration proceeding. Further, UP asserts, BNSF has failed to submit any evidence in support of its argument that the Section 12 adjustment factor should be altered to exclude the disputed cost items.

Other Parties. Pleadings expressing support for the positions taken by BNSF have been submitted separately by The National Industrial Transportation League (NITL), the American Chemistry Council (ACC), the Western Coal Traffic League (WCTL), and TXU US Holdings Company (TXU), and jointly by Entergy Services, Inc., and Entergy Arkansas, Inc. (referred to collectively as Entergy).

DISCUSSION AND CONCLUSIONS

The Arbitration Issue. The present dispute respecting the mechanism for adjusting the fees applicable to the trackage rights that BNSF acquired in connection with the UP/SP merger appears to us at this time to involve a "general matter[] with broad implications with respect to

implementation of [the conditions we imposed on the UP/SP merger],"[5] and, therefore, we believe is better suited to resolution in an administrative proceeding than in an arbitration proceeding. Accordingly, the UP/SP-392 motion to dismiss is denied at this time, insofar as that motion is premised on the argument that an arbitration proceeding would be preferable.

The Merits. The original version of the BNSF Agreement (dated September 25, 1995) provided that the 3.48, 3.1, and 3.0 mills per ton-mile trackage rights rates "shall be subject to adjustment annually beginning as of the effective date of this Agreement to reflect seventy percent (70%) of increases or decreases in [the] Rail Cost Adjustment Factor, not adjusted for changes in productivity ('RCAF-U') published by the ICC or successor agency or other organizations." UP/SP-22 (filed November 30, 1995) at 318, 337. The UP/SP applicants argued that

> [t]he use of RCAF-U is appropriate because productivity has been driven more by initiatives in areas such as crew consist and fuel conservation than in the area of maintenance of way. To use a productivity-adjusted RCAF [i.e., the RCAF-A] would, among numerous other serious deficiencies, reflect productivity gains that would not reduce maintenance of way costs — which are the principal costs covered by the trackage rights fees. Using a percentage of RCAF-U as the adjustment mechanism is also common in long term agreements. Here, the 70% factor shares some productivity gains with BN/Santa Fe without disincenting UP/SP from making investments (such as to purchase high production maintenance of way equipment) that will improve maintenance of way efficiency — investments which must earn an adequate return.

UP/SP-22 at 308.

During the course of the UP/SP merger proceeding, however, several parties insisted that the use of 70% of the unadjusted RCAF index as the adjustment mechanism would, over time, create an advantage for UP/SP vis-à-vis BNSF. The UP/SP applicants, though they consistently argued that there would be no advantage, elected to eliminate the issue by agreeing, with BNSF and the Chemical Manufacturers Association (CMA), "to a purely actual-cost-based escalator." UP/SP-230 (filed April 29, 1996) at 125. This resolution of the adjustment issue was memorialized in §7 of the CMA Agreement, which provides: "Section 12 of the BN/Santa Fe Settlement Agreement shall be amended to provide that BN/Santa Fe's trackage rights fees shall be adjusted upward or downward each year by the difference between the year in question and the

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[5] Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 86 (STB served July 12, 1999) (Merger Dec. No. 86), slip op. at 6.

preceding year in UP/SP's system average URCS costs for the categories of maintenance and operating costs covered by the fee." UP/SP-230, Attachment at 3.

In our decision approving the UP/SP merger, we noted that CMA §7 had "improved the method by which the [trackage rights] charges are updated each year. Originally, the index was to be 70% of the RCAF, unadjusted for productivity. Certain protestants wanted to use the RCAF, adjusted for productivity. UP/SP has agreed to use actual maintenance related expenses, rather than using an index at all. This reflects costs more accurately." Merger Dec. No. 44, 1 S.T.B. at 416 n.169. Without any doubt, an URCS mechanism based on pertinent UP-specific maintenance and operating cost data reflects UP's relevant costs of providing BNSF access to its track more accurately than would an RCAF mechanism based on industry-wide data.[6]

There is no indication in the record — either in the text of §7 of the CMA Agreement, the text of Section 12 of the BNSF Agreement, or anywhere else in the record as far as we are aware — that any party ever contemplated that the URCS calculations required to create the Section 12 adjustment factor would not be performed as required. Moreover, BNSF's present assertion that it contemplated that the URCS adjustment mechanism would reflect actual costs does not advance BNSF's case. URCS costs, when calculated in the required manner, reflect actual costs; that, in fact, is what URCS is all about. While BNSF may have contemplated that the Section 12 adjustment factor would exclude costs related to the acquisition premium and to Section 9(c)(i) and (iii) capacity improvements, it has not yet provided evidence of any agreement with UP/SP to exclude such items. BNSF agreed to a formulation that references, without any mention of any such exclusion, "UP/SP's system average URCS costs for the categories of maintenance and operating costs covered by the trackage rights fee."

BNSF argues that it will not be able to maintain its success in establishing a competitive presence over the trackage rights lines if costs related to the acquisition premium and to Section 9(c)(i) and (iii) capacity improvements continue to be incorporated in the trackage rights fee. BNSF indicates that its preliminary estimates are that inclusion of the disputed costs have increased its trackage rights fees "in the range of approximately 0.2 mills" per ton-mile, BNSF-99 at 13 n.11, which amounts (by our calculations) to 6.7% of the 3.0 mills rate, 6.5% of the 3.1 mills rate, and 5.7% of the 3.48 mills rate. While these increases, by themselves, are not insignificant,

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[6] We note that BNSF has benefitted, and competition over the trackage rights lines has been enhanced, by the change from the RCAF-based fee adjustment (initially agreed to by BNSF) to the URCS-based adjustment that we imposed, at the urging of CMA and other parties, as a condition to our approval of the UP/SP merger. We calculate that an adjustment based on 70% of the unadjusted RCAF would have resulted in about an 8.5% increase in the trackage rights fee to date. In contrast, even including the disputed items that BNSF now says should be omitted from the adjustment formula, UP states that "the trackage rights fees have not increased above their original levels, with one minor exception. BNSF's complaint is that the fees have not fallen as much as they should have." UP/SP-392 at 7 n.8.

they are misleading in terms of assessing BNSF's competitiveness with UP. BNSF fails to account for the fact that, for any particular BNSF movement conducted on the UP/SP trackage rights lines, BNSF's *trackage rights fees* are only a small part of its *total costs*.[7] Thus, even if BNSF is correct as to the 0.2 mills calculation, the increase in BNSF's total costs will necessarily be substantially less than the 6.7% or 6.5% or 5.7% increases in trackage rights fees suggested by that calculation.[8]

We do not believe that BNSF has shown on this record that the disputed items (i.e., costs related to the acquisition premium and costs related to Section 9(c)(i) and (iii) capacity improvements) should be excluded (in the years in which they would otherwise be included) from the URCS calculations required to create the Section 12 adjustment factor. Nevertheless, we will not now dismiss the BNSF-98 clarification petition for failure to "state a claim." Rather, we will allow BNSF a further opportunity to demonstrate that the disputed items should be omitted from the URCS calculations required to create the Section 12 adjustment factor. We are giving BNSF this additional opportunity because, as we recently noted in our decision concluding the formal oversight process for the UP/SP merger, "it is important that the trackage rights fee adjustment mechanism work as intended, so that any increases or decreases in UP's costs are properly reflected in the agreed-upon adjustments to the trackage rights fee."[9]

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

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[7] For any BNSF movement conducted on the UP/SP trackage rights lines, BNSF's *total costs* necessarily include: the trackage rights fees for the portion of the movement that is conducted on the UP/SP trackage rights lines; various other "above-the-wheel" costs (e.g., the cost of labor, equipment, and fuel) for the portion of the movement that is conducted on the UP/SP trackage rights lines; and all the costs of the portion of the movement that is conducted on BNSF's own lines.

[8] The same logic applies to the dollar figures cited by BNSF. See BNSF-99 at 13 n.11 (BNSF estimates that the disputed costs amount to $2.7 million a year, which, BNSF notes, works out to more than $250 million over the 99-year life of the BNSF Agreement). What BNSF has not mentioned, however, is how those figures relate to its total costs on an annual basis or on a 99-year basis.

[9] Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company [General Oversight], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 21 (STB served Dec. 20, 2001) (General Oversight Dec. No. 21), slip op. at 6.

It is ordered:

1. BNSF must show cause, by pleading filed by April 22, 2002, why the Board should not dismiss the BNSF-98 clarification petition for failure to state a claim.

2. NITL, ACC, WCTL, TXU, and Entergy may, if any or all of them so choose, show cause, by pleading(s) filed by April 22, 2002, why the Board should not dismiss the BNSF-98 clarification petition for failure to state a claim.

3. UP may file, by May 20, 2002, a reply to any pleading(s) filed by BNSF, NITL, ACC, WCTL, TXU, or Entergy.

4. The UP/SP-392 dismissal motion is denied at this time, insofar as that motion is premised on the argument that an arbitration proceeding would be preferable.

5. The UP/SP-392 dismissal motion will be held in abeyance, pending the submission of the pleadings referenced in paragraphs 1 and 2 and the reply referenced in paragraph 3, insofar as that motion is premised on the argument that BNSF has failed to state a claim.

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

By the Board, Chairman Morgan and Vice Chairman Burkes. Vice Chairman Burkes commented with a separate expression.

Vernon A. Williams

Vernon A. Williams
Secretary

Vice Chairman Burkes, Commenting:

I agree that BNSF should show more clearly why the disputed items should be treated differently or excluded from the actual-cost-based escalator. However, I believe that it is inappropriate to presume, as we do here, that these items should not be excluded before BNSF and the other interested parties have had a further opportunity to demonstrate that the disputed items should be omitted.

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SERVICE DATE - LATE RELEASE APRIL 16, 2002

SURFACE TRANSPORTATION BOARD

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. 97

Decided: April 16, 2002

By petition (designated BNSF-98) filed December 21, 2001, The Burlington Northern and Santa Fe Railway Company (BNSF) seeks clarification respecting the adjustment of the fees applicable to the trackage rights that were awarded to BNSF in connection with the UP/SP merger.

In Decision No. 96 (served March 21, 2002), the Board ruled that, by April 22, 2002, BNSF must (and other interested parties may) show cause why the BNSF-98 petition should not be dismissed for failure to state a claim.

By letter filed April 15, 2002, BNSF, citing ongoing discovery efforts, asks that the show cause deadline be extended to May 22, 2002. BNSF indicates that Union Pacific Railroad Company (UP) does not object to the requested extension.

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

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

It is ordered:

1. The deadline by which BNSF must, and by which other interested parties may, show cause why the Board should not dismiss the BNSF-98 petition for failure to state a claim is extended to May 22, 2002.

2. The deadline by which UP may file a reply to any pleading that purports to show cause why the Board should not dismiss the BNSF-98 petition for failure to state a claim is extended to June 19, 2002.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

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