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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. 34]

Decided: May 6, 1996

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. Under that schedule, the ICC imposed a March 29, 1996 due date for the filing of: (1) inconsistent and responsive applications; (2) all comments, protests, requests for conditions, and any other opposition evidence and argument; and (3) comments from the United States Department of Justice and the United States Department of Transportation.[3]

On March 29, 1996, the Board received motions for waiver of certain service requirements from the Rails to Trails Conservancy (RTC), a nationwide non-profit corporation, and Madison County Transit (MCT), a local government agency in Madison County, IL. RTC and MCT request, pursuant to 49 CFR 1110.9, that 49 CFR 1104.12 (service on all parties to the proceeding) be waived for purposes of the "statements of willingness," and instead that they be granted leave to file the statements with the Board (a) with service at this time only on representatives of Union Pacific (UP) and Southern Pacific (SP) so long as (b) said parties make the statements available promptly to any other party to this merger proceeding requesting them.[4]

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[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.

[2] This designation covers the Finance Docket No. 32760 lead proceeding as well as the embraced proceedings listed in Appendix A.

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

[4] RTC's motion for waiver (RTC-3) applies to its statements of willingness filed in Docket No. AB-12 (Sub-No. 188) and Docket No. AB-8 (Sub-No. 39) (RTC-4); Docket No. AB-12 (Sub-No. 189X) and Docket No. AB-8 (Sub-No. 36X) (RTC-5); Docket No. AB-12 (Sub-No. 184X) (RTC-6); Docket No. AB-3 (Sub-No. 130) and Docket No. AB-8 (Sub-No. 38) (RTC-7); Docket No. AB-33 (Sub-No. 96) (RTC-8); and Docket No. AB-3 (Sub-No. 131) and Docket No. AB-8 (Sub-No. 37) (RTC-9). MCT's motion for waiver (MCT-1) applies to its statements of willingness filed in Docket No. AB-33 (Sub-No. 97X) (MCT-2); and Docket No. AB-33 (Sub-No. 98X) (MCT-3).

RTC and MCT state that their interest in the merger proceeding is limited to merger-related abandonment proceedings, and service of the statements of willingness upon all parties in the merger proceeding is both cumbersome and likely to be of no interest to the vast majority of parties to the overall merger. Because service of RTC's and MCT's statements of willingness on all parties would be an unnecessary burden, their motions for waiver will be granted.

It is ordered:

1. RTC's and MCT's motions for waiver of service on all parties to the proceeding for purposes of the statements of willingness, are granted. RTC and MCT may file the statements with the Board with service at this time only on representatives of UP and SP so long as they make the statements available promptly to any other party to this merger proceeding upon request.

2. This decision is effective on the service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

Company--Abandonment Exemption--Iowa Junction-Manchester Line In Jefferson Davis and Calcasieu Parishes, LA; Docket No. AB-3 (Sub-No. 134X), Missouri Pacific Railroad Company--Abandonment Exemption--Troup-Whitehouse Line In Smith County, TX; Docket No. AB-8 (Sub-No. 36X), The Denver and Rio Grande Western Railroad Company--Discontinuance Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO; Docket No. AB-8 (Sub-No. 37), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Hope-Bridgeport Line In Dickinson and Saline Counties, KS; Docket No. AB-8 (Sub-No. 38), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO; Docket No. AB-8 (Sub-No. 39), The Denver and Rio Grande Western Railroad Company--Discontinuance--Malta-Cañon City Line In Lake, Chaffee and Fremont Counties, CO; Docket No. AB-12 (Sub-No. 184X), Southern Pacific Transportation Company--Abandonment Exemption--Wendel-Alturas Line In Modoc and Lassen Counties, CA; Docket No. AB-12 (Sub-No. 185X), Southern Pacific Transportation Company--Abandonment Exemption--Suman-Bryan Line In Brazos and Robertson Counties, TX; Docket No. AB-12 (Sub-No. 187X), Southern Pacific Transportation Company--Abandonment Exemption--Seabrook-San Leon Line In Galveston and Harris Counties, TX; Docket No. AB-12 (Sub-No. 188), Southern Pacific Transportation Company--Abandonment--Malta-Cañon City Line In Lake, Chafee, and Fremont Counties, CO; Docket No. AB-12 (Sub-No. 189X), Southern Pacific Transportation Company--Abandonment Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO; Docket No. AB-33 (Sub-No. 93X), Union Pacific Railroad Company--Abandonment Exemption--Whittier Junction-Colima Junction Line In Los Angeles County, CA; Docket No. AB-33 (Sub-No. 94X), Union Pacific Railroad Company--Abandonment Exemption--Magnolia Tower-Melrose Line In Alameda County, CA; Docket No. AB-33 (Sub-No. 96), Union Pacific Railroad Company--Abandonment--Barr-Girard Line In Menard, Sangamon, and Macoupin Counties, IL; Docket No. AB-33 (Sub-No. 97X), Union Pacific Railroad Company--Abandonment Exemption--DeCamp-Edwardsville Line In Madison County, IL; Docket No. AB-33 (Sub-No. 98X), Union Pacific Railroad Company--Abandonment Exemption--Edwardsville-Madison Line In Madison County, IL; Docket No. AB-33 (Sub-No. 99X), Union Pacific Railroad Company--Abandonment Exemption--Little Mountain Jct.-Little Mountain Line In Box Elder and Weber Counties, UT; Finance Docket No. 32760 (Sub-No. 10), Responsive Application--Capital Metropolitan Transportation Authority; Finance Docket No. 32760 (Sub-No. 11), Responsive Application--Montana Rail Link, Inc.; Finance Docket No. 32760 (Sub-No. 12), Responsive Application--Entergy Services, Inc., Arkansas Power & Light Company, and Gulf States Utility Company; Finance Docket No. 32760 (Sub-No. 13), Responsive Application--The Texas Mexican Railway Company; Finance Docket No. 32760 (Sub-No. 14), Application for Terminal Trackage Rights Over Lines of The Houston Belt & Terminal Railway Company--The Texas Mexican Railway Company; Finance Docket No. 32760 (Sub-No. 15), Responsive Application--Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd.;[5] Finance Docket No. 32760 (Sub-No. 16), Responsive Application--Wisconsin Electric Power Company; and Finance Docket No. 32760 (Sub-No. 17), Responsive Application--Magma Copper Company, The Magma Arizona Railroad Company, and The San Manuel Arizona Railroad Company.

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[5] In Decision No. 29 (served April 12, 1996), the responsive application filed by Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd. was rejected as incomplete.

APPENDIX A: EMBRACED PROCEEDINGS

This designation covers *both* the Finance Docket No. 32760 lead proceeding *and* the following embraced proceedings: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; Finance Docket No. 32760 (Sub-No. 3), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Alton & Southern Railway Company; Finance Docket No. 32760 (Sub-No. 4), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Central California Traction Company; Finance Docket No. 32760 (Sub-No. 5), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Ogden Union Railway & Depot Company; Finance Docket No. 32760 (Sub-No. 6), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Terminal Railroad Company; Finance Docket No. 32760 (Sub-No. 7), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Traction Company; Finance Docket No. 32760 (Sub-No. 8), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Overnite Transportation Company, Southern Pacific Motor Trucking Company, and Pacific Motor Transport Company; Finance Docket No. 32760 (Sub-No. 9), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Terminal Trackage Rights--Kansas City Southern Railway Company; Docket No. AB-3 (Sub-No. 129X), Missouri Pacific Railroad Company--Abandonment Exemption--Gurdon-Camden Line In Clark, Nevada, and Ouachita Counties, AR; Docket No. AB-3 (Sub-No. 130), Missouri Pacific Railroad Company--Abandonment--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO; Docket No. AB-3 (Sub-No. 131), Missouri Pacific Railroad Company--Abandonment--Hope-Bridgeport Line In Dickinson and Saline Counties, KS; Docket No. AB-3 (Sub-No. 132X), Missouri Pacific Railroad Company--Abandonment Exemption--Whitewater-Newton Line In Butler and Harvey Counties, KS; Docket No. AB-3 (Sub-No. 133X), Missouri Pacific Railroad

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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[2]

[Decision No. 35]

Decided: May 9, 1996

BACKGROUND

On April 19, 1996, applicants submitted a copy of a settlement agreement that they, together with the Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (collectively, BN/Santa Fe) reached with the Chemical Manufacturers Association on April 18, 1996 (UP/SP-219). Applicants addressed the settlement further in their rebuttal in support of the primary application, filed on April 29, 1996.[3] The CMA settlement agreement provides, among other things, that certain amendments shall be made to the BN/Santa Fe settlement agreement, which applicants and BN/Santa Fe entered into on September 25, 1995, and modified on November 18, 1995 (referred to here as the original BN/Santa Fe settlement agreement).

On April 29, 1996, The Kansas City Southern Railway Company (KCS) filed a motion requesting that we require applicants to amend the primary application or, alternatively, that we allow parties to conduct discovery and submit evidence relating to the CMA settlement agreement (KCS-49). KCS argues that, because applicants filed the primary application on November 30, 1995, with the original BN/Santa Fe settlement agreement as part of the overall proposal purported to rectify competitive problems, and because parties have considered the effects of the original

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[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.

[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] April 29, 1996, was the deadline for applicants to file their rebuttal in support of the primary application and related applications, and for all parties to file responses to inconsistent and responsive applications, and responses to comments, protests, requested conditions, and other opposition.

BN/Santa Fe settlement agreement in formulating their positions on the proposed merger, the CMA settlement agreement fundamentally changes the original BN/Santa Fe settlement agreement and the entire transaction under consideration. In KCS' view, the CMA settlement agreement renders obsolete applicants' operating plan, market impact analysis, and projections regarding post-merger revenues, benefits, traffic, and operating economies. KCS further alleges that the financial terms of the CMA settlement agreement are not fully disclosed. In summary, KCS contends that the application is inadequate to accurately reflect the proposed transaction, and we should require applicants to submit an amended application to present the information necessary to analyze whether the proposed transaction is in the public interest.

KCS also asserts that, after applicants submit the amended application, parties should be allowed to conduct discovery as to the issues raised for the first time in the amended application. According to KCS, there are fundamental issues of material fact in dispute with respect to the CMA settlement agreement including whether it resolves any adverse competitive consequences of the proposed merger. At a minimum, KCS alleges, parties should be allowed to conduct discovery as to the effect of the CMA settlement agreement and to present evidence on the issue. KCS is not satisfied with applicants' provision of information about the CMA settlement agreement in its April 29 filing; parties allegedly should have an opportunity to present further evidence that may illustrate the inadequacy of the CMA settlement agreement.

Applicants replied to KCS' motion on April 30, 1996 (UP/SP-237). They characterize the motion as a further attempt on KCS' part to delay this proceeding. Applicants state that the CMA settlement agreement moots a list of issues put forward not just by CMA, but by other opponents of the merger such as KCS. The fact that some issues raised in opposition to the merger have been addressed, applicants argue, does not mean that there is a new transaction, or that KCS needs more discovery or another evidentiary filing. Instead, applicants argue, the settlement with CMA addresses the issues on which KCS and other parties had months of discovery and have already submitted extensive evidence.[4] Applicants contend that the CMA settlement agreement does not raise new issues; instead, they say, it eliminates them. In applicants' view, KCS' argument, taken to its logical conclusion, implies that whenever, in the course of a merger proceeding, the applicants arrive at settlements to resolve issues of concern raised by particular parties, the applicants must submit an entire, new application, the procedural schedule must be suspended, and there must be new discovery and a new round of evidence. It is applicants' position that nothing would discourage settlements more effectively.

Applicants note that KCS does not name any specific matter in the CMA settlement agreement on which it needs more information, either by way of a substantially amended application or by way of renewed discovery. Instead, applicants contend, KCS simply lists all of the topics that are to be included in a merger application. It is applicants' position that every issue treated in the CMA settlement agreement was addressed in the application, in discovery, and in the March 29 filings. Although they concede that there are details of the application that might have been different if the CMA settlement agreement had been in place before they prepared the application, applicants assert

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[4] March 29, 1996, was the deadline for inconsistent and responsive applications, comments, protests, requests for conditions, and other opposition evidence.

that KCS has not made a showing that those details are so fundamental as to require the filing of a completely new or amended application. In applicants' view, the CMA settlement agreement confirms that BN/Santa Fe will be an effective competitor using the trackage rights and other rights agreed to in the original BN/Santa Fe settlement agreement. Because the application already assumed that, applicants argue, it cannot be said that the CMA settlement agreement fundamentally changes the parameters of the application.

Further, applicants point out that, on April 29, 1996, several parties provided comments on the CMA settlement agreement without an amended application, new discovery, or filing new evidence. Finally, applicants state that they fully address the CMA settlement in their April 29 submission, and that BN/Santa Fe also addresses the CMA settlement in its April 29 submission. Applicants maintain that, to any extent that cross-examination is needed to resolve material issues of disputed fact, KCS is free to depose all of the applicants' witnesses and BN/Santa Fe witnesses who address the CMA settlement agreement. Applicants state that KCS is free to advance any arguments it may have about the CMA settlement in its brief, due on June 3, 1996.[5]

DISCUSSION AND CONCLUSIONS

We will deny the relief KCS seeks. KCS has made no specific showing of what additional information it intends to uncover in discovery that would be material or relevant to this proceeding. Applicants have filed both the original BN/Santa Fe settlement agreement and the CMA settlement agreement. We will evaluate the effects of the CMA settlement agreement on the original BN/Santa Fe settlement agreement, and we will determine the efficacy of the agreements in rectifying any competitive problems that we conclude would result from applicants' unconditioned merger. Of course, the comments on the CMA settlement agreement that we have already received from certain parties (submitted, as applicants note, without further discovery or amendments to the primary application) will aid us in this task.

Moreover, our decision does not preclude additional information on the CMA settlement agreement from being filed. Again, we do not believe that KCS has shown the relevance or materiality of the sought information, and this normally would foreclose any relief being granted to KCS. However, we note that applicants have stated that their witnesses and BN/Santa Fe's witnesses who address the CMA settlement agreement in the April 29, 1996 filings may be deposed. Such discovery may take place, and information gained in such depositions may be included in the briefs, due June 3, 1996.[6]

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[5] In its April 29, 1996 filing, Consolidated Rail Corporation (Conrail) acknowledged KCS' motion and stated its view that further opportunity for comment on the CMA settlement agreement is necessary. In addition, the Society of the Plastics Industry (SPI), in its April 29, 1996 filing, at p. 2 n.2, supported the granting of any request to adjust the procedural schedule in this proceeding to allow full analysis of the CMA settlement agreement.

[6] A few other matters need to be addressed. On April 29, 1996, the Attorney General of the State of California (who filed a statement in support of the proposed merger on March 29, 1996) filed a petition for leave to late-file an exhibit to its March 29 statement, or, alternatively, to file the exhibit as rebuttal evidence (CA AG-2). The request to late-file an exhibit appears reasonable and will be granted.

(continued...)

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

It is ordered:

1. KCS' motion is denied.

2. The petition of the California Attorney General for leave to late-file an exhibit to his March 29, 1996 statement is granted.

3. The petitions to intervene by San Diego and Imperial Valley Railroad Company and by Arizona Chemical Company are granted.

4. Utah Railway's motion is denied.

5. 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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[6](...continued)

On April 29, 1996, the San Diego & Imperial Valley Railroad Company (SDIV) filed a petition for leave to intervene in this proceeding to respond in opposition to the conditions requested by the United States Gypsum Company (USG) in its filing on March 29, 1996. SDIV states that its interests are not directly affected by the proposed merger, but that USG's proposed conditions would have a direct and adverse effect on SDIV. SDIV argues that due process and fundamental fairness require that SDIV be permitted to intervene in opposition to USG's sought conditions. The request is reasonable and will be granted. Further, on April 29, 1996, Arizona Chemical Company (ACC) filed comments addressing the CMA settlement agreement. Because it is a member of CMA, ACC stated that it did not believe that it had to intervene separately in this proceeding. However, ACC requested a waiver of any formal requirements for its intervention. We will accept ACC's April 29, 1996 comments.

Finally, on May 2, 1996, Utah Railway Company (Utah) filed a motion to compel the Western Shippers' Coalition (WSC) to further explain or correct its position on Montana Rail Link, Inc.'s (MRL) responsive application. Utah contends that WSC's March 29, 1996 comments raise questions as to whether individual members of WSC participated in the formulation of WSC's position and, in fact, support that position. Utah suggests that WSC's counsel be given the opportunity to canvass each WSC member and report on its individual position regarding the MRL application. Alternatively, Utah suggests, the director of WSC could be required to file a statement detailing its membership and the results of a vote authorizing the MRL position. We will deny the relief Utah seeks. We recognize that not all members of a given group support every position taken by that group.

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MAY 9 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. 36]

Decided: May 9, 1996

Oral argument will be held in this proceeding on Monday, July 1, 1996, at 10:00 a.m., in Hearing Room A at the Surface Transportation Board, 1201 Constitution Ave, N.W., in Washington, DC. It is anticipated that the time for argument will be limited to 240 minutes, to be divided equally between the primary applicants (including Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company), on the one hand, and all other participants, on the other.[3]

An extensive written record is being developed in this proceeding. Each party is therefore encouraged to use oral argument to state simply and concisely why the evidence it has submitted supports its position, and to call our attention to points which it believes are particularly important. The purpose of oral argument is not to restate the written arguments previously made, but to summarize and emphasize the key points of each party's case and to provide an opportunity for questions from Members of the Board.

Parties who wish to participate in oral argument must indicate (a) the issue or issues they will address, (b) whether they support or oppose the primary application, the responsive applications, and the various requests for conditions, and (c)

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[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.

[2] The primary applicants are 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.

[3] Due to the extent of the record and the number of active parties in this proceeding, we are providing an additional 120 minutes for oral argument than provided in the most recent major rail merger. See Burlington Northern Inc. and Burlington Northern Railraod Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 31 (ICC served June 13, 1995).

how much speaking time is desired. Parties must provide this information to the Office of the Secretary no later than Friday, May 24, 1996, by letter addressed to:

Vernon A. Williams, Secretary
Room 2223
Surface Transportation Board
1201 Constitution Avenue, NW
Washington, DC 20423

Re: Finance Docket No. 32760 oral argument

A decision will then be issued setting a schedule for argument and specifying any issues we desire the participants to address. Parties are encouraged to consolidate and coordinate their presentations.

Any party wishing to enhance its argument by use of a map as a visual aid is encouraged to do so, and is asked to use a map large enough to be seen by the Members of the Board and other persons attending the oral argument. The party using the map will be expected to bring an easel or other device upon which the map may be mounted. Any such map and accompanying easel or other device will remain the property of the party supplying them, although we expect that other parties will be allowed to use any such map as well. Any party wishing, for logistical reasons, to have the map and/or the easel or other device delivered to the Board in advance of the oral argument date is advised to make arrangements with the Office of the Secretary at (202) 927-7428. It would be helpful if, following the oral argument, any such maps and/or easels or other devices were allowed to remain, to be available for use at the voting conference, which will be held on July 3, 1995.

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

It is ordered:

1. Oral argument in these proceedings will be held on Monday, July 1, 1996, at 10:00 a.m., in Hearing Room A, 1201 Constitution Ave., N.W., in Washington, DC.

2. Interested parties must inform the Board that they wish to participate in oral argument, as stated above.

3. This decision will be effective on the date of service.

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

Vernon A. Williams
Secretary

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SURFACE TRANSPORTATION BOARD[1]

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. 37]

Decided: May 21, 1996

BACKGROUND

On April 29, 1996, applicants filed their rebuttal in support of the primary application and related applications in this proceeding. On the same date, parties, including applicants, filed responses to the inconsistent and responsive applications, and responses to comments, protests, requested conditions, and other opposition.[3] Applicants' April 29 submission is designated UP/SP-230-234. On May 8, 1996, The Kansas City Southern Railway Company (KCS) filed a motion to strike portions of applicants' rebuttal and accompanying verified statements (KCS-53). In the same pleading, KCS moved to strike portions of the response to inconsistent and responsive applications, response to comments, protests, requested conditions, and other opposition, and rebuttal in support of related applications filed by Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (BN/Santa Fe). BN/Santa Fe's April 29 filing is designated BN/SF-54.

KCS Arguments

KCS notes that our rules and procedures limit the content of a party's rebuttal to "issues raised in reply statements to which

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[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.

[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] March 29, 1996, was the deadline for inconsistent and responsive applications, comments, protests, requests for conditions, and any other opposition evidence. Comments from the United States Department of Justice were due on April 12, 1996.

they are directed," and states that any material, issues, comments, or verified statements contained in UP/SP-230-234 and BN/SF-54 must be specifically directed to issues contained within the comments and responsive applications filed by other parties. 49 CFR 1112.6. KCS contends that both applicants' and BN/Santa Fe's April 29 filings contained "numerous" portions that are inappropriate at this stage of the proceeding and should be stricken.

First, KCS contends that certain portions of applicants' rebuttal do not seek to controvert evidence submitted by other parties in their comments or responsive applications, but are instead attempts to bolster the primary application and should have been submitted with the primary application. Specifically, KCS states that portions of Mr. La Londe's verified statement should be stricken, and that Mr. Uremovich's statement should be stricken in its entirety.

Second, KCS maintains that portions of applicants' rebuttal should be stricken because they relate to theories not previously advocated by applicants, or they introduce new studies, which are allegedly inappropriate for rebuttal testimony. Specifically, KCS asserts that all references to the settlement agreement applicants and BN/Santa Fe reached with the Chemical Manufacturers Association (CMA) on April 18, 1996, should be stricken.[4] KCS lists numerous specific items that allegedly should be stricken because they pertain to the CMA settlement agreement, but some of the items also contain other information. The items, which include the CMA settlement agreement itself, contain testimony describing the details of the CMA settlement agreement and other settlement agreements. One item contains applicants' responses to claims by various parties that they have build-out options that improve their competitive positions and would be taken away or weakened by the proposed merger. Other assailed items contain clarifications of the BN/Santa Fe settlement agreement. Regarding BN/SF-54, KCS contends that new testimony and comments relating to the CMA settlement agreement should be stricken.

Also, KCS contends that portions of the verified statements of Mr. Bernheim, Mr. Rebensdorf, and Mr. Peterson should be stricken because they contain information pertaining to new studies. KCS argues that the assailed portions contain information that was in applicants' possession at the time they filed the primary application, and that they should have submitted the information at that time.

Third, KCS asserts that matters as to which parties allegedly were denied discovery by applicants should be stricken, specifically, applicants' references to build-ins and build-outs.

Arguments of Applicants

Applicants replied to KCS' motion on May 13, 1996 (UP/SP-246). They contend that every item KCS seeks to have stricken is

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[4] On April 29, 1996, KCS filed a motion requesting that we require applicants to amend the primary application, or alternatively, that we allow parties to conduct discovery and submit evidence relating to the CMA settlement agreement (KCS-49). In Decision No. 35, served May 9, 1996, we denied the relief sought by KCS. However, we noted that applicants had stated that their witnesses and BN/Santa Fe's witnesses who addressed the CMA settlement agreement in the April 29 filings could be deposed. We stated that such discovery could take place, and that information gained in such depositions could be included in the briefs, due June 3, 1996.

proper rebuttal, and that KCS' motion should be denied in its entirety. Regarding Mr. La Londe's statement, applicants allege that it is in response to the March 29 arguments of various shippers and shipper organizations. It contains the following: (1) testimony addressing the role of the National Industrial Transportation League (NITL) as a representative of shipper interests and noting that there is significant support for the proposed merger among NITL members; (2) assessments of the comments of individual shippers; (3) rebuttal of various claims that applicants have overstated the degree of shipper support for the merger; (4) responses to shipper surveys relied upon by opponents to the merger; and (5) responses to various divestiture proposals.

Applicants state that Mr. Uremovich's statement refutes the March 29 arguments made by several parties that the merger would reduce competition and should either be denied or be conditioned by requiring line divestitures. In response to KCS' argument that this material should have been included in the original application, applicants argue that they could not have anticipated what contentions would be advanced by some parties on March 29 regarding SP's competitive vitality and various strategies for "carving up" SP. Mr. Uremovich also testifies regarding the alleged harms of divestiture proposals, which applicants contend is directly responsive to numerous March 29 submissions. Similarly, he responds to March 29 claims that BN/Santa Fe will not compete vigorously under the BN/Santa Fe settlement agreement.

Regarding all references to the CMA settlement agreement, applicants argue that the CMA settlement agreement responds to criticisms of the application by CMA and others in their March 29 filings, and that explaining it in rebuttal is appropriate.

With regard to new studies in general, applicants state that a "new" study is not per se improper. Applicants contend that Mr. Bernheim's study is in direct response to arguments made by various parties on March 29 that SP is a "lowball pricer" or leads prices downward in the markets where it competes. There is no ground for expecting applicants to have done this study before the opponents' claims were known, applicants argue.

The assailed portion of Mr. Rebensdorf's statement allegedly is in response to the arguments of Mr. Thomas Crowley, a witness appearing on behalf of several parties. Applicants state that, in his original statement, Mr. Rebensdorf presented a table allegedly showing that the trackage rights compensation fee agreed upon between applicants and BN/Santa Fe was within the range of comparable fees in other agreements. Mr. Crowley submitted arguments opposing this testimony, and Rebensdorf submitted rebuttal testimony. Applicants state that this is clearly proper rebuttal, and that, even though the information was previously available to applicants, it would be unreasonable to require it to have been included in the application.

Applicants state that, on April 29, Mr. Peterson, who originally filed rate studies allegedly demonstrating the intensity of two-railroad competition, submitted testimony regarding his study of autos--a commodity group he had not previously studied and in which at least one merger opponent had stated that SP plays a unique price leadership role. The testimony allegedly directly refutes March 29 claims regarding auto traffic, and is also allegedly proper rebuttal to general arguments about adverse effects of the merger on shippers who go from three serving railroads to two as a result of the merger (3-to-2 shippers).

Applicants dispute KCS' contention that it was denied discovery regarding build-ins and that, therefore, rebuttal testimony by various witnesses regarding build-ins should be stricken. Applicants admit that they objected to KCS' request for every document in the possession of UP or SP mentioning build-ins. Administrative Law Judge Nelson sustained that objection when KCS moved to compel. Applicants contend that at least two witnesses (Mr. Peterson and Mr. Gray) provided extensive discovery on the issue in their depositions. Applicants state that they also provided KCS with a written report that Mr. Peterson had described at his deposition. Applicants state that KCS raised with Judge Nelson a demand for data that Mr. Peterson referred to at his deposition, and applicants explained that Mr. Peterson had collected these data orally and that there were no documents to produce. Judge Nelson did not direct that any documents be produced, and neither KCS nor any other party appealed any discovery ruling regarding build-ins. Applicants contend that KCS received all discovery concerning build-ins in time to use the evidence in its March 29 filings, and has had the right to cross-examine the rebuttal witnesses on the subject. In applicants' view, the rebuttal testimony on build-ins responds to March 29 filings by several parties and is proper rebuttal.

BN/Santa Fe also replied to KCS' motion on May 13, 1996 (BN/SF-57). BN/Santa Fe maintains that all of the testimony and evidence relating to the CMA settlement agreement is proper rebuttal, and that to strike the material would deprive us of useful information and discourage parties from seeking to resolve disputes through negotiation.

DISCUSSION AND CONCLUSIONS

We will deny the relief sought by KCS. An examination of every item of testimony KCS seeks to have stricken indicates that each can properly be characterized as generally rebutting some evidence, argument, or testimony submitted on March 29 by an opponent of the proposed merger.

In support of its motion, KCS relies on a decision the ICC issued in Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133 (ICC served Sept. 12, 1994) (UP/CNW). This reliance is misplaced. As applicants note in UP/SP-246, the procedural posture here is different. In that proceeding, the ICC struck significant portions of the responsive applicants' rebuttal filings because they contained additional attacks on the primary application, instead of just rebuttal in support of the responsive applications. Here, applicants are entitled to respond to all the opposition to the case filed on March 29 and to close the record on their own case. If all "new" testimony, evidence, and argument were stricken from the record, applicants could not properly respond to the opposition. The same would be true if any evidence that was technically in applicants' possession when they filed the primary application was stricken. Applicants have to know to what they are responding, and cannot be expected to submit all evidence of any relevance whatsoever with the primary application.

We believe that Decision No. 35 addressed, to a large extent, KCS's arguments regarding the evidence pertaining to the CMA settlement agreement. As we stated there, we will evaluate the effects of the CMA settlement agreement on the original

BN/Santa Fe settlement agreement,[5] and we will determine the efficacy of the agreements in rectifying any competitive problems that we conclude would result from applicants' unconditioned merger. We generally want to encourage settlement agreements; barring applicants from discussing those agreements when they close the evidentiary record on their case would not further that policy.

We agree with applicants that the record does not indicate that KCS, or any other party, was denied discovery on the issue of build-outs. We will not strike any of the material pertaining to build-outs on that ground.

Finally, we note that KCS, and all other parties, have the opportunity to depose applicants' rebuttal witnesses. In fact, applicants stated that KCS is "proceeding with an active campaign" to depose those witnesses. Information gained in such depositions may be included in the briefs, which are due on June 3, 1996.

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

It is ordered:

1. KCS' 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

[5] The CMA settlement agreement amends applicants' original settlement agreement with BN/Santa Fe, which applicants submitted as part of the primary application, and which is purported to rectify competitive problems that would result from applicants' unconditioned merger.

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SERVICE DATE

MAY 31 1996

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[2]

[Decision No. 38]

Decided: May 31, 1996

BACKGROUND

This decision addresses two filings by The Kansas City Southern Railway Company (KCS): (1) KCS-54, a supplement to KCS' motion to strike (KCS-53); and (2) KCS-57, a petition to reopen Decision No. 35, served May 9, 1996, in this proceeding.

Supplement to Motion to Strike. In its motion to strike, KCS had argued, among other things, that portions of applicants' witness Dr. Bernheim's statement should be stricken because they contained information pertaining to new studies.[3] Applicants contended that Dr. Bernheim's study was in direct response to arguments made by various parties on March 29, 1996, that SP is a "lowball pricer" or leads prices downward in the markets where it

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[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.

[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] On April 29, 1996, applicants filed their rebuttal in support of the primary application and related applications in this proceeding. On the same date, parties, including applicants, filed responses to the inconsistent and responsive applications, and responses to comments, protests, requested conditions, and other opposition. In KCS-53, KCS also moved to strike other portions of applicants' rebuttal and accompanying verified statements. In the same pleading, it moved to strike portions of the response to inconsistent and responsive applications, response to comments, protests, requested conditions, and other opposition, and rebuttal in support of related applications filed by Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (BN/Santa Fe). We denied KCS' motion to strike in Decision No. 37, served May 22, 1996.

competes.[4] Applicants stated, we believe correctly, that there was no ground for expecting applicants to have done this study before opponents' claims were known. In denying KCS' motion in Decision No. 37, we noted that KCS, and all other parties, have the opportunity to depose applicants' rebuttal witnesses, and can include information gained in such depositions in the briefs, which are due on June 3, 1996.

In KCS-54, KCS notes that it took Dr. Bernheim's deposition on May 15, 1996.[5] On May 20, KCS alleges, applicants produced 54 pages of workpapers "presumably" relied upon by Dr. Bernheim in preparing his rebuttal verified statement, and the "new study" contained therein. KCS contends that production of these workpapers after the deposition provides an additional basis for striking this portion of Dr. Bernheim's testimony. KCS alleges that its preparation for Dr. Bernheim's deposition was based on applicants' representation that all of his workpapers had been produced.[6] The subsequent production of 54 additional pages indicates that this reliance was misplaced, KCS states. It is KCS' position that the portion of Dr. Bernheim's rebuttal verified statement regarding the "new study," and his deposition testimony regarding the subject of the "new study," should be stricken. KCS further contends that, if applicants suggest reconvening Dr. Bernheim's deposition to allow cross-examination regarding the additional workpapers, and if we accept that proposal, we should condition the granting of that proposal on the deposition being conducted in Washington, D.C., and upon applicants' reimbursement to the affected parties of their attorneys' and consultants' fees incurred in preparation for and in conducting this subsequent deposition.

Applicants replied to KCS-54 on May 24, 1996 (UP/SP-254). Applicants characterize KCS' "supplement" as another effort to have Dr. Bernheim's study removed from the record. Applicants state that KCS attempted, unsuccessfully, to undermine Dr. Bernheim's study in the deposition. Applicants claim that KCS' new argument for striking the study, and the deposition testimony pertaining to the study, is based on an erroneous factual premise. According to applicants, when Dr. Bernheim was deposed, KCS had been in possession of all of the workpapers underlying his study for more than a week. The documents produced on May 20 related not to Dr. Bernheim's initial study but to minor errata

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[4] March 29, 1996, was the deadline for inconsistent and responsive applications, comments, protests, requests for conditions, and any other opposition evidence and argument.

[5] The date is unclear. KCS states in one place that the deposition occurred on May 16, 1996 (KCS-54 at 1), but it states elsewhere that the deposition was scheduled for May 15, 1996 (KCS-54 at 3). In their reply to KCS-54, applicants state that the deposition occurred on May 15 (UP/SP-254 at 2). Consolidated Rail Corporation (Conrail) and the United States Department of Justice (DOJ) apparently also participated in the deposition.

[6] The record indicates that applicants produced some of Dr. Bernheim's workpapers on May 3, 1996, and others (some of which were on a computer disk) on May 7, 1996. KCS alleges that, because of applicants delay in producing the workpapers, the deposition, originally scheduled for May 9, 1996, was rescheduled for May 15, and that the deposing parties were prejudiced by having to take the deposition by telephone.

filed on May 21, applicants state.[7] The documents did not even exist at the time of Dr. Bernheim's deposition, applicants state.

It is applicants' position that there is no need for another deposition of Dr. Bernheim concerning the errata or the May 20 documents; they reflect minor corrections to Dr. Bernheim's data for an unimportant variable in Dr. Bernheim's regressions. According to applicants, no changes to the body of his statement were necessitated by the corrections, and Dr. Bernheim testified at his deposition that the corrections had no substantive effect on his conclusions. Further, applicants note that KCS already had the chance to question Dr. Bernheim about the errata to which the documents relate. He explained at his deposition what corrections he made and their effect, and KCS' counsel asked no questions about these corrections, applicants note. Applicants state that, if KCS does have questions about the errata or the documents, applicants will respond to them without the burden of another deposition.

Petition to reopen. In Decision No. 35, we denied KCS' motion (KCS-49) requesting that we require applicants to amend the primary application or, alternatively, that we allow parties to conduct discovery and submit evidence relating to the settlement agreement applicants and BN/Santa Fe had reached with the Chemical Manufacturers Association (CMA).[8] In denying KCS' motion, we noted the following: (1) that KCS had not demonstrated with specificity what additional relevant or material information it intended to uncover in discovery; (2) that we intend to evaluate the effects of the CMA settlement agreement on the original BN/Santa Fe settlement agreement, and to determine the efficacy of the agreements in rectifying any competitive problems that we conclude would result from applicants' unconditioned merger; and (3) that parties could depose applicants' witnesses and BN/Santa Fe's witnesses who addressed the CMA settlement agreement in the April 29, 1996 filings, and could include information gained in such depositions in the briefs, due on June 3, 1996.

KCS filed its petition to reopen Decision No. 35 on May 24, 1996 (KCS-57), arguing that the decision involved material error and should be reopened pursuant to 49 CFR 1115.4. KCS also alleges that it and other parties have now deposed applicants' and BN/Santa Fe's witnesses regarding the effect of the CMA settlement agreement, and that this new evidence also constitutes grounds for reopening Decision No. 35 pursuant to 49 CFR 1115.4.

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[7] Applicants state that Dr. Bernheim explained at his deposition that he made minor corrections to the data and confirmed that nothing substantive in the analysis was affected by those corrections. According to applicants, the corrections were not made until the morning of May 15 because Dr. Bernheim did not realize the need for them until the previous evening, when he was made aware of a possible inconsistency. Applicants state that the documents produced on May 20 were prepared over the next few days; they were essentially duplicates of workpapers previously produced with minor changes reflecting the corrections Dr. Bernheim described at his deposition.

[8] Applicants submitted a copy of the CMA settlement agreement on April 19, 1996. They addressed the settlement further in their rebuttal in support of the primary application, filed on April 29, 1996. The CMA settlement agreement provides, among other things, that certain amendments shall be made to the BN/Santa Fe settlement agreement, which applicants and BN/Santa Fe entered into on September 25, 1995, and modified on November 18, 1995.

Finally, KCS argues that the final decision on the merits of the proposed merger should be based on a complete record and that parties should be allowed to submit evidence regarding the adequacy or inadequacy of the CMA settlement agreement as a solution to competitive harms not solved by the original BN/Santa Fe settlement agreement.

KCS states that, in KCS-49, it set out the portions of the application that it believed would require amendment because of the CMA settlement agreement. As noted in Decision No. 35, these included applicants' operating plan, market impact analysis, projected benefits, and certain financial information. KCS alleges that, by stating that KCS did not show the relevance or materiality of the effect of the CMA settlement agreement we meant either that the original BN/Santa Fe settlement agreement is not relevant or material to the application or that the CMA settlement agreement is not relevant or material to the transaction.

KCS reiterates its earlier arguments that the application should be amended to reflect the impact of the CMA settlement agreement upon the transaction. The depositions KCS has taken allegedly indicate that amendments should be made to the market analyses and the operating plan, KCS contends. Further, KCS argues that the costs and benefits of the transaction reflected in the application do not reflect the changes that will result from the CMA settlement agreement.

KCS further alleges that parties should be allowed to submit evidence regarding the effects of the CMA settlement agreement to ensure that the final decision in this proceeding is based upon a complete record. Specifically, KCS maintains that parties should be allowed to submit evidence as to the effect of individual provisions of the CMA settlement agreement. Parties should also be allowed to submit evidence as to the effect of certain issues that deposition testimony has indicated are unresolved by the CMA settlement agreement.[9] Because of the "unresolved issues," KCS contends, the effects of the BN/Santa Fe settlement agreement and the CMA settlement agreement on competition cannot be calculated.

Additional evidence on the impact of the CMA settlement agreement is necessary to complete the record, KCS argues. Noting that the information it proposes to submit could be characterized as a reply to a reply (and therefore be prohibited by our rules), KCS states that the ICC often waived the prohibition on replies to replies in the interest of building a comprehensive and complete record. KCS argues, alternatively, that its proposed evidence could also be characterized as rebuttal or surrebuttal. Since applicants' reliance on the CMA settlement agreement in their April 29 rebuttal is "analogous" to the presentation of new evidence or a new study at the rebuttal stage of the proceeding, KCS contends, parties should not be denied the chance to rebut it.

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[9] These issues allegedly include: reciprocal switching charges, rates for traffic moving under haulage agreements, and the specific geographic locations of points where shippers would go from having two serving carriers to one as a result of the merger. Other matters which KCS believes the CMA settlement agreement fails to resolve include the availability of space at the Dayton storage-in-transit facility, whether the parties will use third party switching as opposed to reciprocal switching, the details of joint facility arrangements, and whether BN/Santa Fe will use haulage rights instead of trackage rights. KCS also contends that BN/Santa Fe has no post-merger plan of operation.

DISCUSSION AND CONCLUSIONS

We will deny any relief to KCS based on its supplement to its earlier motion to strike. As we stated in Decision No. 37, we believe that all of applicants' material filed on April 29, 1996, can properly be characterized as generally rebutting some evidence, argument, or testimony submitted on March 29 by an opponent of the proposed merger. We do not believe that applicants' May 20 production of documents undermines our earlier conclusions; applicants' explanation as to why and when those documents were produced appears reasonable. No relief for KCS is warranted. However, we expect that applicants will adhere to their representation that they will answer any further questions about the errata or the documents, if requested to do so by KCS or another party.

We will also deny KCS' petition to reopen Decision No. 35. We do not believe that KCS has demonstrated that Decision No. 35 involves material error. Further, we did not state in that decision that KCS had not shown the relevance or materiality of the effect of the CMA settlement agreement on the transaction, and did not imply that the settlement agreements are not relevant or material to the transaction we are considering. We stated that KCS had not shown what specific additional information it intends to uncover in discovery would be material or relevant to this proceeding. Broad statements that the market impact analysis, the operating plan, and the financial information need to be amended are insufficient. We believe the record provides sufficient information to enable the Board to make a determination on how the CMA settlement agreement affects the original BN/Santa Fe settlement agreement, and whether, together, they rectify anticompetitive impacts of an unconditioned merger. Further, as we have noted repeatedly, KCS and other parties can submit in their briefs information gained in depositions of applicants' and BN/Santa Fe's witnesses who addressed the CMA settlement agreement in the April 29, 1996 filings.

We are also unpersuaded that "unresolved issues" in the BN/Santa Fe and CMA settlement agreements constitute justification for requiring applicants to amend the application or for allowing an additional evidentiary submission by KCS. Undoubtedly there are details of the settlement agreements that would have to be finalized if we approved the proposed merger and imposed the settlement agreements or portions thereof as conditions. However, we believe that the parties have provided ample information for us to analyze the agreements and determine whether they would rectify anticompetitive harm from applicants' unconditioned merger. Again, parties are free to argue for or against the effectiveness of the settlement agreements in their briefs, and can submit argument based on information gained in their post-rebuttal depositions of applicants' witnesses.

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

It is ordered:

1. KCS' supplement to KCS-53 is rejected; our denial of KCS' motion to strike is affirmed.

2. KCS' petition to reopen Decision No. 35 is denied.

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

By tne Board, Chairman Morgan, Vice Chairman Simmons, Commissioner Owen.

Vernon A. Williams
Secretary

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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. 39]

Decided: May 31, 1996

BACKGROUND

This decision addresses an emergency appeal by applicants from an order of Administrative Law Judge Jerome Nelson (Judge Nelson), filed May 31, 1996 (UP/SP-258). Judge Nelson entered the order on May 30, 1996, requiring public release of a passage from a UPC Board of Directors' presentation that has been treated as "highly confidential" under the protective order governing this proceeding. Applicants argue that review of Judge Nelson's decision is appropriate to correct a clear error of judgment or to prevent a manifest injustice. 49 CFR 1115.1(c).

The Board of Directors' meeting took place in February 1995. According to applicants, the passage at issue is a "bullet point" from a slide that was part of the presentation. Applicants state that the slide does not accurately reflect the content of the oral remarks made to the UPC Board or the written materials handed out during the meeting. In December 1995, Applicants produced the presentation in discovery. On May 30, 1995, The Kansas City Southern Railway Company (KCS) requested that Judge Nelson require public release of the bullet point, asserting that it should be made part of the public debate over applicants' proposed merger. KCS also claimed that it would be difficult and burdensome to treat this point confidentially in its brief (due on June 3) or during oral argument.

In appealing Judge Nelson's ruling, applicants make the following arguments: (1) that Board of Directors' presentations are highly confidential and should not be publicly disclosed; (2) that releasing one "misleading snippet" from a highly confidential Board of Directors' presentation is manifestly

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[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.

[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.

unfair; and (3) that Judge Nelson's decision sets bad precedent that will hinder discovery in future proceedings.

KCS replied to applicants' appeal on May 31, 1996 (KCS-59). KCS argues: (1) that the information is not proprietary or confidential and is not deserving of the "highly confidential" designation; (2) that the document is not part of the official UPC Board record, and that it is therefore inappropriate for applicants to rely on a blanket confidentiality protection for Board of Directors' minutes; and (3) that no other justification exists for treating the statement as "highly confidential."

We will deny the relief sought by applicants. The information that applicants seek to suppress is not commercially sensitive in the traditional sense. We are not without reservations about disclosing comments made at a Board of Directors' meeting, particularly when the people at the meeting believed the minutes would be confidential. Nevertheless, our review of the record does not indicate that there was a clear error of judgment or that Judge Nelson's decision to release these few words will result in manifest injustice. The standard set out in section 1115.1 is a strict one, and applicants have failed to meet it.

The decision will not affect 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 May 30, 1996 order is denied.

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

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

Vernon A. Williams
Secretary

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SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY--CONTROL AND MERGER--SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY[2]

[Decision No. 40]

Decided: June 13, 1996

BACKGROUND

On June 3, 1996, The Kansas City Southern Railway Company (KCS) filed an appeal (KCS-61) from the May 30, 1996 order of Administrative Law Judge Jerome Nelson (Judge Nelson), denying KCS' renewed request that Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) (collectively BNSF) be required to produce studies of acquisition and consolidation strategies for the western rail market. KCS asserts that review of Judge Nelson's decision is proper to correct clear error of judgment or to prevent a manifest injustice.[3] BNSF filed its reply (BNSF-60) on June 6, 1996.

KCS' Arguments

KCS argues that the decision constitutes clear error of judgment, with regard to (1) what constitutes relevant evidence, (2) KCS' particular need to obtain these studies, and (3) the timeliness of this renewed discovery request. KCS also argues that its appeal presents an important opportunity for the Board to determine whether evidence suggesting possible collusion in violation of antitrust laws is relevant to the Board's decision to approve or deny the pending merger. In its appeal, KCS states that the record shows that SF had commissioned outside consultants, McKinsey & Company, to perform studies (McKinsey studies) in the 1990-91 time frame regarding acquisition and consolidation strategies for the western rail markets, and then

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[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.

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

shared these studies with at least two of its competitors at that time.[4]

On March 8, 1996, Judge Nelson had denied KCS' initial request for the production of the McKinsey studies because the studies were "too long ago, too old, too far afield" and "gets us into collateral issues." Based on alleged conflicting testimony obtained during Mr. Krebs' May 9 deposition, however, KCS states that it renewed its request for BNSF to produce these studies. KCS' counsel sent letters on May 9, 1996, and on May 15, 1996, to BNSF's counsel requesting the McKinsey studies. KCS states that BNSF did not respond to these requests until May 23, 1996, and denied the materials on the basis of Judge Nelson's March 8 ruling and KCS' alleged failure to provide a valid reason for reconsideration of this decision.

At the discovery conference held on May 30, 1996, KCS asserted four reasons why the McKinsey studies were relevant in view of alleged newly discovered facts from Mr. Krebs' verified statement and deposition: (1) Mr. Krebs shared certain of these studies with his competitors, in possible violation of the antitrust laws; (2) Mr. Krebs' deposition testimony indicates that one of the documents at issue suggested a carve up of the SP railroad, in a manner similar to what is being proposed by the parties advocating divestiture; (3) Mr. Krebs' deposition testimony is inconsistent with the affirmative claim in his verified statement that he never participated in a "blueprint" to divide up the western rail market, and never shared any such plan with his competitors; and (4) pursuant to Decision No. 37, served May 22, 1996, in this proceeding, new information discovered in depositions may be included in the briefs due June 3, 1996.

KCS states that Judge Nelson acknowledged that KCS introduced newly learned facts pertaining to the McKinsey studies, but that he denied their request because (1) it has been a long time since the deposition was taken and it was something that could have moved more quickly; (2) there is a significant question about whether, under Board procedures, more discovery of this nature is authorized; and (3) the studies' evidentiary value was cumulative and KCS could prove its case with the materials already provided.

KCS argues that Judge Nelson erred in his decision by not taking proper account of the significant probative value of providing evidence regarding past collusion to the Board for its

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[4] KCS states that, during his May 9, 1996 deposition, Mr. Robert D. Krebs, President and Chief Executive Officer of BNSF, acknowledged that SF had commissioned more than one study about where Santa Fe would end up eventually in the western rail system and that the studies analyzed the carving-up of SP's routes. According to KCS, Mr. Krebs admitted that he shared a copy of these studies with competitors while he was the Chief Executive Officer of Santa Fe, specifically with BN and SP.

KCS argues that Mr. Krebs' deposition testimony is inconsistent with his verified statement attached to BNSF's Response to Inconsistent and Responsive Applications filed on April 29, 1996, in which he states:

> Specifically, at no time did I participate in, nor did anyone else at BN or Santa Fe to my knowledge participate in, "drafting the blueprint for a western rail duopoly" in any way, shape, or form. I have never shared with a competitor--or even seen--a document that could fairly be described as a "blueprint" for "duopoly." Krebs V.S. at 9.

analysis of whether the merger will result in a duopoly. KCS also argues that, by denying its renewed request, highly probative evidence contained in studies discussed during Mr. Krebs' deposition will be excluded, and that Judge Nelson will have erroneously limited the Board's ruling in Decision No. 37, which states that parties have the opportunity to depose applicants' rebuttal witnesses, and that information gained in such depositions may be included in the briefs.

KCS also argues that, once Mr. Krebs admitted that the studies existed and that he had shared them with competing railroads, BNSF should have placed the McKinsey studies immediately into the document depository pursuant to Decision No. 6, served October 19, 1995, which requires that all parties place in the document depository all documents and working papers, the contents of which were discussed in their respective witnesses' verified statements. Decision No. 6 at 16.

Finally, KCS asserts that Judge Nelson did not take into proper account BNSF's failure to timely respond to KCS' renewed request for production of documents. When Judge Nelson asked BNSF's counsel why this issue was being heard on May 30 when the new facts about the McKinsey studies were learned on May 9, BNSF's counsel stated that the question should be directed at KCS' counsel. KCS asserts that this is misleading because it ignores the fact that BNSF's 2-week delay in providing a response to KCS' renewed request created the delay and that, if BNSF's counsel had been forthcoming about the time it took to respond, Judge Nelson might have ruled differently.

For these reasons, KCS urges the Board to reverse Judge Nelson's ruling denying its renewed request for the production of the McKinsey studies. KCS acknowledges that the opportunity for interested parties to provide written comments on the contents of these studies may have passed, and suggests alternatively that interested parties may be given the opportunity to address these studies during their oral arguments on July 1, 1996, or to supplement their written comments.

BNSF's Arguments

In its reply to KCS' appeal, BNSF contends that Judge Nelson's ruling was clearly warranted, and will not work an injustice of any kind upon KCS. BNSF argues that KCS' appeal should be denied because the evidentiary record has closed, because KCS is attempting to relitigate an issue it lost and did not appeal about 3 months ago, because the 5-6 year old documents at issue are stale and irrelevant, and because KCS has no legitimate need for the McKinsey studies.

BNSF argues that KCS' attempt to obtain production of these documents is untimely because the evidentiary record closed on May 14, 1996, and KCS failed to obtain a ruling on its renewed request for the McKinsey studies until May 30, 1996, well after the close of the evidentiary record. BNSF also states that KCS' argument that Decision No. 37 allows it to serve new discovery requests to obtain new documentary evidence based on subjects discussed during rebuttal depositions and that the McKinsey studies fall within that class of evidence is wrong. BNSF maintains its belief that KCS is precluded from obtaining further evidence through written discovery and demands for document production in this proceeding. BNSF asserts that KCS' request that the Board reopen the record is an attempt to prolong the proceedings, and that this effort should not be condoned.

BNSF asserts that KCS is attempting to relitigate an issue it lost previously, and did not appeal. Judge Nelson's March 30 ruling found that the McKinsey studies were too remote in time

and subject matter from the issues in this proceeding, and that production would be too burdensome for BNSF. BNSF contends that, if KCS had appealed that decision, KCS could have obtained a ruling on the studies from the Board in March. BNSF asserts that the ruling at issue is not a new ruling on the merits but a mere denial of reconsideration of a prior ruling that KCS did not appeal, and that KCS' prior failure to appeal should be deemed a waiver of the right to bring this issue before the Board, especially at this late date.[5]

Moreover, BNSF argues that KCS has failed to show how such outdated studies could be relevant to establishing the existence of any present or future collusion that could conceivably be relevant to the merger of UP and SP. BNSF points out that the ICC, in affirming an Administrative Law Judge's denial of a motion to compel production of documents, held that the applicants in that case should not be compelled to produce any studies that had been prepared more than 5 years before the decision because such material "is too remote to be relevant in th[e] proceeding." Union Pacific Corporation and Union Pacific Railroad Company--Control--Missouri Pacific Corporation and Missouri Pacific Railroad Company, Finance Docket No. 30,000 (ICC served Apr. 27, 1981).

BNSF states that Judge Nelson's two rulings on the McKinsey studies are consistent with the practice in this case. Other parties to this case, including KCS, have consistently refused to produce their strategic planning studies. First, BNSF points out that, in KCS' filing dated March 4, 1996 (KCS-24), KCS refused to produce its business plans or strategic plans because the request for such materials was unduly burdensome in that it sought information that was neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Second, BNSF points out that, in December 1995, Judge Nelson rejected KCS' motion to compel applicants in this proceeding to produce strategic and competitive analyses regarding the prior merger proposal between BN and SF.

BNSF contends that KCS has shown no need for the McKinsey studies, and that KCS did not learn anything new from Mr. Krebs' deposition that it did not already know from the previous depositions of Carl R. Ice, Larry M. Lawrence, and Gerald Grinstein. Specifically, BNSF notes that KCS had received extensive testimony from those depositions taken in February about the McKinsey studies, before Judge Nelson's first ruling. BNSF states that Judge Nelson correctly concluded that KCS could make its arguments without having the studies themselves, and that KCS was not harmed by the denial of its belated request for the studies.

BNSF asserts that KCS misleadingly argues that BNSF "placed in issue" the contents of the studies through Mr. Krebs' verified statement that he had never seen or shared a plan for duopoly in the West. BNSF states that Mr. Krebs' testimony directly and narrowly responded to allegations made by KCS concerning the

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[5] BNSF notes that KCS claims that Judge Nelson made findings at the May 30 conference relating to newly learned facts pertaining to the McKinsey studies, among which was that one of the studies described in the Krebs' deposition corroborates the divestiture conditions being sought in the UP/SP merger application. BNSF states that there were no such findings and that Judge Nelson properly assumed, solely for purposes of ruling on KCS' request, the truth of KCS' various assertions and that, even if true, those assertions would not justify production of the studies. BNSF states that KCS misrepresents the record in this regard.

sharing of a supposed plan for a duopoly in the West. BNSF also asserts that there is no substance to KCS' claim of inconsistency between Mr. Krebs' deposition testimony and his verified statement, and that both were to the effect that any documents Mr. Krebs shared with competitors were not, as KCS had claimed, any kind of "blueprint" for "duopoly."

Finally, BNSF asserts that there is no basis for the claim that the sharing of the SP break-up study was improper. BNSF states that the deposition testimony of Mr. Krebs shows that he inquired about a consensual, joint acquisition of SP lines in order to gauge interest in such a transaction, and there is nothing untoward, from an antitrust perspective or any other, about bringing a study concerning a possible transaction to the attention of possible participants in the transaction. BNSF further adds that, if the parties had decided to go forward with an acquisition, the ICC would have reviewed whether the transaction was anticompetitive in any respect.

For the foregoing reasons, BNSF maintains that the order of Judge Nelson was correctly decided, and that KCS' appeal should be denied.

DISCUSSION AND CONCLUSIONS

We will deny the relief KCS seeks. In Decision No. 35[6] and Decision No. 37, we provided parties a limited opportunity to depose rebuttal witnesses regarding new matters, and to include any information gained in the June 3 briefs.

Specifically, in Decision No. 35, we noted that KCS had not shown the "relevance or materiality of the sought information" pertaining to the applicants' settlement agreement with the Chemical Manufacturers Association (CMA), and that "this normally would foreclose any relief being granted to KCS," but because applicants had stated their willingness to allow parties to depose their witnesses and BNSF's witnesses who addressed the CMA settlement agreement in the April 29 filings, we permitted such discovery to take place and information gained in such depositions to be included in the June 3 briefs.

In Decision No. 37, we addressed, among other things, KCS' challenge of new theories and new studies introduced in the April 29 rebuttal testimony. We noted that

> applicants are entitled to respond to all the opposition . . . and to close the record on their own case. If all "new" testimony, evidence, and argument were stricken from the record, applicants could not properly respond to the opposition.

In that decision, we also noted that KCS and all other parties had "the opportunity to depose applicants' rebuttal witnesses" as to these new theories or new studies, and we extended them the opportunity to include information gained in such depositions in the June 3 briefs.

Here, KCS seeks further discovery of the McKinsey studies, which are not new studies introduced in the April 29 rebuttal filings. KCS has had the opportunity to obtain ample deposition testimony regarding these studies, and was not foreclosed from making its arguments in its June 3 brief by not having the studies themselves. The evidentiary record is closed in this proceeding, and no additional opportunity to file written comments will be provided.

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[6] Decision No. 35 was served on May 9, 1996.

The record does not indicate a clear error of judgment or manifest injustice with regard to Judge Nelson's ruling denying KCS' renewed request that BNSF be required to produce studies of acquisition and consolidation strategies for the western rail market. 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). The standard set out in section 1115.1(c) is a strict one. In its appeal, KCS has 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. KCS' appeal of Administrative Law Judge Jerome Nelson's May 30, 1996 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
Secretary

19839
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CORRECTED DECISION*
SURFACE TRANSPORTATION BOARD[1]

LATE RELEASE

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[3]

[Decision No. 41]

Decided: June 18, 1996

Oral argument in this proceding has been set for Monday, July 1, 1996, at 10:00 a.m., in Hearing Room A, at the Surface Transportation Board, 1201 Constitution Avenue, N.W., Washington, DC.[4] In Decision No. 36 served May 9, 1996, the Board required parties wishing to participate in the oral argument to notify the Secretary of the Board by May 24, 1996.

WSC's Motion and Interested Parties' responses.

On May 15, 1996, the Western Shippers Coalition (WSC) filed a motion for clarification or reconsideration of Decision No. 36 (WSC-19), stating that the Board should allocate oral argument time equally between those supporting the primary application and those opposing it, and that the Board should allocate the time provided those opposed (in whole or in part) to the primary application by "Corridors." Applicants replied on May 17, 1996, noting that the allocation of time at oral argument is a matter of the Board's discretion.

*This corrects the decision release early today to reflect the position of Commissioner Owen, which was inadvertently omitted.

[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.

[2] This designation includes all embraced proceedings noted in Appendix B.

[3] The primary applicants are 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 (collectively applicants).

[4] The voting conference in this proceeding has been set for Wednesday, July 3, 1996, at 10:00 a.m., in Hearing Room A.

On May 21, 1996, the Board received a Response of Interested Parties in support of WSC's motion.[5] These Interested Parties urged the Board not to decide until after June 7, 1996, the portion of WSC's motion dealing with the allocation of oral argument time.[6] These Interested Parties stated that, on or before June 7, 1996, they would inform the Board of the results of their efforts to develop an agreed allocation of oral argument time among the opponents of the primary application. They also note that they do not believe that WSC's suggested "Corridor" approach to oral argument would be very helpful or appropriate.

On June 7, 1996, the Board received a Supplemental Response of Interested Parties to WSC's motion. Interested Parties state that they have engaged in extensive discussions with the opponents of the primary application and, although they have made considerable progress towards developing an agreed allocation of argument time, 120 minutes of argument time for opposing parties is not sufficient. They request the Board to increase the argument time for opponents by 35 minutes, from 120 minutes to 155 minutes, and have submitted a proposal for the allocation of argument time that parties had agreed upon.[7] Interested

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[5] The Response was filed jointly by the following Interested Parties (listed alphabetically): Allied Rail Unions; City Public Service Board of San Antonio; Coalition for Competitive Rail Transportation; Entergy Services, Inc. and its affiliates; Kennecott Energy Company; Idaho Power Company; International Paper Company; Montana Rail Link, Inc.; Montell USA, Inc.; Save The Rock Island Committee, Inc.; Sierra Pacific Power Company; Texas Mexican Railway Company; Texas Utilities Electric, Inc.; The Attorney General of the State of Texas; The Dow Chemical Company; The Kansas City Southern Railway Company; The National Industrial Transportation League; The Society of the Plastics Industry, Inc.; The Texas Railroad Commission; Union Carbide Corporation; United States Department of Justice; Western Coal Traffic League; Wisconsin Power and Light Company; and Wisconsin Public Service Corporation. The Interested Parties state that Consolidated Rail Corporation, who had already filed on May 20, 1996, its pleading (CR-38) in support of WSC's motion, also agrees with their Response.

[6] This request is now moot.

[7] With the exceptions noted below, the Supplemental Response was filed jointly by those parties listed in n.4 in this decision, and joined by the following additional Interested Parties: Capital Metropolitan Transportation Authority; City of Reno; Consolidated Rail Corporation; Farmland Industries, Inc.; Mountain-Plains Communities & Shippers Coalition; Transportation-Communications International Union; Wisconsin Electric Power Co. The Attorney General of the State of Texas and the United States Department of Justice (DOJ) did not join in this response; however, the Interested Parties state that DOJ has no objection to the request and the proposed allocation of time.

The proposed allocation of time for oral argument includes the following parties who did not join in either the May 21 Response of Interested Parties or the June 7 Supplemental Response of Interested Parties: U.S. Department of Transportation (DOT); Sedgwick County, KS/City of Wichita, KS; and The Geon Company. Because we have not received any indication that DOT has agreed to the proposed allocation of time, we will allocate the same amount of time to both DOT and DOJ.

(continued...)

Parties state that implementation of this agreement will enable them to coordinate their arguments so as to minimize overlap and repetition, which will help make the issues more clear and materially assist the Board in making a decision in this case.[8]

On June 12, 1996, applicants replied to the Supplemental Response of Interested Parties, noting that, if the Board decides to adopt the proposal in the Supplemental Response, or something similar to it, then applicants request that their time be increased by an amount commensurate with the increase in time for opponents of the merger. Applicants also state that, because WSC has withdrawn its request to participate in oral argument and many of its members have withdrawn their opposition to the merger, the Board may wish to consider whether it is appropriate to permit WSC's counsel to substitute a request to participate in oral argument on behalf of new parties.

Except as noted for DOT, we will adopt the allocation of time proposed by the Interested Parties. Because we recognize that a settlement reached between applicants and a shipper organization may not satisfy the needs of all individual members of the organization, we will allow the substitution of WSC by Farmland Industries, Inc. at the oral argument.[9]

Oral argument procedures.

The schedule of appearances and the time provided for each party appear in Appendix A to this decision. The times provided for argument have in most cases been reduced from the original times requested. The purpose of oral argument is not to restate the written arguments previously made, but rather, as noted in Decision No. 36, to summarize and emphasize the key points of each party's case and to provide an opportunity for questions from Members of the Board. The time allocated is sufficient for these purposes. Parties who have similar arguments and/or are represented by the same counsel are allowed and encouraged to combine their arguments and allotted time in order to use that time more efficiently.[10] If a representative of two or more parties intends to combine the time allotted for those parties, he or she should inform Secretary Vernon A. Williams prior to the commencement of the oral argument.

Parties planning to use visual aids, such as maps, are advised to inform the Office of the Secretary at (202) 927-7428, no later than close of business on Monday, June 24, 1996.

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[7] (...continued)
The following parties no longer request oral argument time: WSC, Kennecott Energy Company, Joseph C. Szabo, John D. Fitzgerald, Clarence R. Ponsler, and Charles W. Downey.

[8] Interested Parties believe that, after further consultation, they may be able to agree to a specific order of presentation, and would like to reserve the right to notify the Board not later than 7 days prior to the oral argument of a proposed order of appearance and/or consolidation of arguments within this proposed allocation.

[9] We note that Farmland Industries, Inc. requests to participate in the oral argument on its behalf and on behalf of Mountain-Plains Communities & Shippers Coalition, who had different counsel file its statement jointly with the Colorado Wheat Administrative Committee by the May 24 deadline. We will require these parties to coordinate their arguments.

[10] We do not find it necessary or appropriate to allocate time to arguments by "Corridors" as WSC requested.

Parties are limited to one easily-moveable visual display. Secretary staff will be available in Hearing Room A from 12:00 noon to 4:00 p.m. on Friday, June 28, 1996, to permit parties to set up visual aids so they will be ready well in advance of the oral argument.

It is ordered:

1. WSC's motion for clarification or reconsideration of Decision No. 36 is granted to the extent discussed in this decision.

2. Time for oral argument is allotted as reflected in the Appendix to the decision.

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

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen. Commissioner Owen dissented in part with a separate expression

Commissioner Owen, *dissenting*, in part:

Given the numerous requests of parties desiring to address the Board, I would prefer that additional time be provided for oral argument and that additional interests be heard.

The Surface Transportation Board is not a court and is not bound by appellate court rules. Indeed, its strength -- and the strength of the predecessor Interstate Commerce Commission -- is diligence in building the factual record and identifying the public interest.

It is true that parties of interest have had substantial time to file pleadings and briefs. It is also true -- as evidenced by the ICC's creation of the National Grain Car Council and Congress' creation of a Railroad Shipper Transportation Advisory Council -- that face-to-face dialogue has substantial benefit beyond the written word.

Many parties with limited resources are involved in this proceeding and have traveled a considerable distance at a cost well beyond the price of transportation, meals and lodging. I believe that in our search for the public interest we owe them more time to emphasize their key points.

I would prefer that eight hours be allocated for oral argument -- and should questions posed to the parties by the Board cause the proceeding to continue past the eight-hour mark that we remain as necessary.

Vernon A. Williams

Vernon A. Williams
Secretary

APPENDIX A

SCHEDULE OF APPEARANCES

The Board will entertain requests from Members of Congress to speak prior to the formal schedule.

	TIME ALLOTTED
PRIMARY APPLICANTS, et al.	
Primary Applicants:	
Union Pacific Corporation, Union Pacific Railroad Co., Missouri Pacific Railroad Co., Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Rwy. Co. SPCSL Corp., and The Denver & Rio Grande Western Railroad Co.	**90 minutes**
Settlement Agreement Parties (Other Than Labor):	
Burlington Northern Railroad Co. and The Atchison, Topeka and Santa Fe Railway Company	**20 minutes**
Chemical Manufacturers Assoc.	**5 minutes**
Utah Railway Company	**5 minutes**
FEDERAL GOVERNMENT PARTIES	
U.S. Department of Transportation	**15 minutes**
U.S. Department of Justice	**15 minutes**
SHIPPER ORGANIZATIONS	
The National Industrial Transportation League	**10 minutes**
Save the Rock Island Committee, Inc.	**4 minutes**
Coalition for Competitive Rail Transportation	**3 minutes**
COAL SHIPPERS	
Western Coal Traffic League/Wisconsin Power & Light Co./Wisconsin Public Service Corp.	**5 minutes**
Entergy Services, Inc./Arkansas Power & Light Company/Gulf States Utilities Company	**4 minutes**
Texas Utilities Electric Company	**4 minutes**
City Public Service Board of San Antonio	**3 minutes**
Sierra Pacific Power Company and Idaho Power Company	**3 minutes**
Wisconsin Electric Power Company	**3 minutes**
GULF COAST SHIPPERS	
Society of Plastics Industry, Inc./Union Carbide Corporation/Montell USA, Inc.	**9 minutes**
Dow Chemical Company	**4 minutes**
International Paper Company	**4 minutes**
The Geon Company	**3 minutes**
GRAIN SHIPPERS	
Farmland Industries, Inc./Mountain-Plains Communities & Shippers Coalition and Colorado Wheat Administrative Committee	**8 minutes**
RAILROAD PARTIES	
Consolidated Rail Corporation	**10 minutes**
Kansas City Southern Railway Co.	**10 minutes**
Montana Rail Link, Inc.	**9 minutes**
Texas Mexican Railway Company	**8 minutes**
Capital Metropolitan Transportation Authority	**4 minutes**
STATE AND LOCAL GOVERNMENTS/ ABANDONMENT, ENVIRONMENTAL, AND RELATED INTERESTS	
Railroad Commission of Texas	**5 minutes**
State of Texas, Attorney General	**5 minutes**
California Public Utilities Comm.	**5 minutes**
Springfield Plastics Inc./Brandt Consolidated, Inc.	**3 minutes**
City of Reno, NV	**2 minutes**
Sedgwick County, KS/City of Wichita, KS	**2 minutes**
East Bay Regional Park District	**2 minutes**
Rails to Trails Conservancy	**2 minutes**
LABOR PARTIES	
Allied Rail Unions/Transportation•Communications International Union	**8 minutes**
United Transportation Union	**8 minutes**

REBUTTAL

The primary applicants are allotted the unused portion of their 90 minutes argument time for rebuttal.

APPENDIX B: EMBRACED PROCEEDINGS

This designation covers *both* the Finance Docket No. 32760 lead proceeding *and* the following embraced proceedings: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; Finance Docket No. 32760 (Sub-No. 3), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Alton & Southern Railway Company; Finance Docket No. 32760 (Sub-No. 4), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Central California Traction Company; Finance Docket No. 32760 (Sub-No. 5), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Ogden Union Railway & Depot Company; Finance Docket No. 32760 (Sub-No. 6), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Terminal Railroad Company; Finance Docket No. 32760 (Sub-No. 7), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Traction Company; Finance Docket No. 32760 (Sub-No. 8), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Overnite Transportation Company, Southern Pacific Motor Trucking Company, and Pacific Motor Transport Company; Finance Docket No. 32760 (Sub-No. 9), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Terminal Trackage Rights--Kansas City Southern Railway Company; Docket No. AB-3 (Sub-No. 129X), Missouri Pacific Railroad Company--Abandonment Exemption--Gurdon-Camden Line In Clark, Nevada, and Ouachita Counties, AR; Docket No. AB-3 (Sub-No. 130), Missouri Pacific Railroad Company--Abandonment--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO; Docket No. AB-3 (Sub-No. 131), Missouri Pacific Railroad Company--Abandonment--Hope-Bridgeport Line In Dickinson and Saline Counties, KS; Docket No. AB-3 (Sub-No. 132X), Missouri Pacific Railroad Company--Abandonment Exemption--Whitewater-Newton Line In Butler and Harvey Counties, KS; Docket No. AB-3 (Sub-No. 133X), Missouri Pacific Railroad Company--Abandonment Exemption--Iowa Junction-Manchester Line In Jefferson Davis and Calcasieu Parishes, LA; Docket No. AB-3 (Sub-No. 134X), Missouri Pacific Railroad Company--Abandonment Exemption--Troup-Whitehouse Line In Smith County, TX; Docket No. AB-8 (Sub-No. 36X), The Denver and Rio Grande Western Railroad Company--Discontinuance Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO; Docket No. AB-8 (Sub-No. 37), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Hope-Bridgeport Line In Dickinson and Saline Counties, KS; Docket No. AB-8 (Sub-No. 38), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO; Docket No. AB-8 (Sub-No. 39), The Denver and Rio Grande Western Railroad Company--Discontinuance--Malta-Cañon City Line In

Lake, Chaffee and Fremont Counties, CO; Docket No. AB-12 (Sub-No. 184X), Southern Pacific Transportation Company--Abandonment Exemption--Wendel-Alturas Line In Modoc and Lassen Counties, CA; Docket No. AB-12 (Sub-No. 185X), Southern Pacific Transportation Company--Abandonment Exemption--Suman-Bryan Line In Brazos and Robertson Counties, TX; Docket No. AB-12 (Sub-No. 187X), Southern Pacific Transportation Company--Abandonment Exemption--Seabrook-San Leon Line In Galveston and Harris Counties, TX; Docket No. AB-12 (Sub-No. 188), Southern Pacific Transportation Company--Abandonment--Malta-Cañon City Line In Lake, Chafee, and Fremont Counties, CO; Docket No. AB-12 (Sub-No. 189X), Southern Pacific Transportation Company--Abandonment Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO; Docket No. AB-33 (Sub-No. 93X), Union Pacific Railroad Company--Abandonment Exemption--Whittier Junction-Colima Junction Line In Los Angeles County, CA; Docket No. AB-33 (Sub-No. 94X), Union Pacific Railroad Company--Abandonment Exemption--Magnolia Tower-Melrose Line In Alameda County, CA; Docket No. AB-33 (Sub-No. 96), Union Pacific Railroad Company--Abandonment--Barr-Girard Line In Menard, Sangamon, and Macoupin Counties, IL; Docket No. AB-33 (Sub-No. 97X), Union Pacific Railroad Company--Abandonment Exemption--DeCamp-Edwardsville Line In Madison County, IL; Docket No. AB-33 (Sub-No. 98X), Union Pacific Railroad Company--Abandonment Exemption--Edwardsville-Madison Line In Madison County, IL; Docket No. AB-33 (Sub-No. 99X), Union Pacific Railroad Company--Abandonment Exemption--Little Mountain Jct.-Little Mountain Line In Box Elder and Weber Counties, UT; Finance Docket No. 32760 (Sub-No. 10), Responsive Application--Capital Metropolitan Transportation Authority; Finance Docket No. 32760 (Sub-No. 11), Responsive Application--Montana Rail Link, Inc.; Finance Docket No. 32760 (Sub-No. 12), Responsive Application--Entergy Services, Inc., Arkansas Power & Light Company, and Gulf States Utility Company; Finance Docket No. 32760 (Sub-No. 13), Responsive Application--The Texas Mexican Railway Company; Finance Docket No. 32760 (Sub-No. 14), Application for Terminal Trackage Rights Over Lines of The Houston Belt & Terminal Railway Company--The Texas Mexican Railway Company; Finance Docket No. 32760 (Sub-No. 15), Responsive Application--Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd.; Finance Docket No. 32760 (Sub-No. 16), Responsive Application--Wisconsin Electric Power Company; and Finance Docket No. 32760 (Sub-No. 17), Responsive Application--Magma Copper Company, The Magma Arizona Railroad Company, and The San Manuel Arizona Railroad Company.

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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. 42]

Decided: June 21, 1996

The oral argument and voting conference in this proceeding have been set for Monday and Wednesday, July 1 and 3, 1996, respectively, at 10:00 a.m. at the Surface Transportation Board, 1201 Constitution Avenue, N.W., Washington, DC. The hearings will be held in the Board's Hearing Room A. The embraced cases in the above proceeding are set forth in Appendix A hereto.

Hearing Room A has a limited seating capacity, and the Board deems it necessary to control access to the hearing room. The Board has reserved Hearing Room B, across the hall from Hearing Room A, to serve as an overflow room to accommodate persons unable to gain entry into Hearing Room A. The overflow hearing room will have a closed-circuit audio and visual telecast of all of the events in Hearing Room A. The access to Hearing Room B will be on a first come, first admitted basis.

In light of the necessity to control access to the Hearing Room A proceedings, the Board orders as follows:

It is ordered:

1. Each party that has been designated by the Board as a participant in the oral argument will be issued admission badges for the participant and one associate to gain access to designated reserved seating in Hearing Room A for both the oral argument and the voting conference. Staff assisting with any map presentations are requested to remain in Hearing Room B until shortly before their presentation, and to seek access to Hearing Room A only during the presentation of that particular party. The map assistants must be identified to the Board's Office of the Secretary (202/927-7428) by close of business on June 28, 1996. Persons so identified will be permitted access to Hearing Room A during the presentation, even if no seating is available at that time.

2. Participants located within the Washington, DC, Metropolitan area must pick up their two admission badges from

the Office of the Secretary (Rm 2215) by close of business on June 28, 1996. Participants outside the Washington Metropolitan Area have until 9:30 a.m. on July 1, 1996, to pick up their admission badges. All participants must present their admission badges to Board staff at the door of Hearing Room A by 9:30 a.m. on July 1, 1996, to claim their reserved seats. The Board will release unclaimed reserved seats to the public.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

Appendix A

Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company;

Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana;

Finance Docket No. 32760 (Sub-No. 3), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Alton & Southern Railway Company;

Finance Docket No. 32760 (Sub-No. 4), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Central California Traction Company;

Finance Docket No. 32760 (Sub-No. 5), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--The Ogden Union Railway & Depot Company;

Finance Docket No. 32760 (Sub-No. 6), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Terminal Railroad Company;

Finance Docket No. 32760 (Sub-No. 7), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Portland Traction Company;

Finance Docket No. 32760 (Sub-No. 8), Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Control Exemption--Overnite Transportation Company, Southern Pacific Motor Trucking Company, and Pacific Motor Transport Company;

Finance Docket No. 32760 (Sub-No. 9), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Terminal Trackage Rights--Kansas City Southern Railway Company;

Docket No. AB-3 (Sub-No. 129X), Missouri Pacific Railroad Company--Abandonment Exemption--Gurdon-Camden Line In Clark, Nevada, and Ouachita Counties, AR;

Docket No. AB-3 (Sub-No. 130), Missouri Pacific Railroad Company--Abandonment--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO;

Docket No. AB-3 (Sub-No. 131), Missouri Pacific Railroad Company--Abandonment--Hope-Bridgeport Line In Dickinson and Saline Counties, KS;

Docket No. AB-3 (Sub-No. 132X), Missouri Pacific Railroad Company--Abandonment Exemption--Whitewater-Newton Line In Butler and Harvey Counties, KS;

Docket No. AB-3 (Sub-No. 133X), Missouri Pacific Railroad Company--Abandonment Exemption--Iowa Junction-Manchester Line In Jefferson Davis and Calcasieu Parishes, LA;

Docket No. AB-3 (Sub-No. 134X), Missouri Pacific Railroad Company--Abandonment Exemption--Troup-Whitehouse Line In Smith County, TX;

Docket No. AB-8 (Sub-No. 36X), The Denver and Rio Grande Western Railroad Company--Discontinuance Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO;

Docket No. AB-8 (Sub-No. 37), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Hope-Bridgeport Line In Dickinson and Saline Counties, KS;

Docket No. AB-8 (Sub-No. 38), The Denver and Rio Grande Western Railroad Company--Discontinuance of Trackage Rights--Towner-NA Junction Line In Kiowa, Crowley, and Pueblo Counties, CO;

Docket No. AB-8 (Sub-No. 39), The Denver and Rio Grande

Western Railroad Company--Discontinuance--Malta-Cañon City Line In Lake, Chaffee and Fremont Counties, CO;

Docket No. AB-12 (Sub-No. 184X), Southern Pacific Transportation Company--Abandonment Exemption--Wendel-Alturas Line In Modoc and Lassen Counties, CA;

Docket No. AB-12 (Sub-No. 185X), Southern Pacific Transportation Company--Abandonment Exemption--Suman-Bryan Line In Brazos and Robertson Counties, TX;

Docket No. AB-12 (Sub-No. 187X), Southern Pacific Transportation Company--Abandonment Exemption--Seabrook-San Leon Line In Galveston and Harris Counties, TX;

Docket No. AB-12 (Sub-No. 188), Southern Pacific Transportation Company--Abandonment--Malta-Cañon City Line In Lake, Chafee, and Fremont Counties, CO;

Docket No. AB-12 (Sub-No. 189X), Southern Pacific Transportation Company--Abandonment Exemption--Sage-Leadville Line In Eagle and Lake Counties, CO;

Docket No. AB-33 (Sub-No. 93X), Union Pacific Railroad Company--Abandonment Exemption--Whittier Junction-Colima Junction Line In Los Angeles County, CA;

Docket No. AB-33 (Sub-No. 94X), Union Pacific Railroad Company--Abandonment Exemption--Magnolia Tower-Melrose Line In Alameda County, CA;

Docket No. AB-33 (Sub-No. 96), Union Pacific Railroad Company--Abandonment--Barr-Girard Line In Menard, Sangamon, and Macoupin Counties, IL;

Docket No. AB-33 (Sub-No. 97X), Union Pacific Railroad Company--Abandonment Exemption--DeCamp-Edwardsville Line In Madison County, IL;

Docket No. AB-33 (Sub-No. 98X), Union Pacific Railroad Company--Abandonment Exemption--Edwardsville-Madison Line In Madison County, IL;

Docket No. AB-33 (Sub-No. 99X), Union Pacific Railroad Company--Abandonment Exemption--Little Mountain Jct.-Little Mountain Line In Box Elder and Weber Counties, UT;

Finance Docket No. 32760 (Sub-No. 10), Responsive Application--Capital Metropolitan Transportation Authority;

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

Application--Montana Rail Link, Inc.;

Finance Docket No. 32760 (Sub-No. 12), Responsive Application--Entergy Services, Inc., Arkansas Power & Light Company, and Gulf States Utility Company;

Finance Docket No. 32760 (Sub-No. 13), Responsive Application--The Texas Mexican Railway Company;

Finance Docket No. 32760 (Sub-No. 14), Application for Terminal Trackage Rights Over Lines of The Houston Belt & Terminal Railway Company--The Texas Mexican Railway Company;

Finance Docket No. 32760 (Sub-No. 15), Responsive Application--Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd.;

Finance Docket No. 32760 (Sub-No. 16), Responsive Application--Wisconsin Electric Power Company; and

Finance Docket No. 32760 (Sub-No. 17), Responsive Application--Magma Copper Company, The Magma Arizona Railroad Company, and The San Manuel Arizona Railroad Company.

19985
EB

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. 43]

Decided: June 21, 1996

By the attached letter, the Board has been requested to provide unredacted copies of certain documents to Congressmen James Oberstar and Robert E. Wise, and certain identified staff members of the House Committee on Transportation and Infrastructure.

The Board is of the view that the undertakings of confidentiality are satisfactory, and we intend to provide the information requested ten days from the date of service of this decision. However, because the requirements of confidentiality imposed in this proceeding are designed to protect the interests of the parties to the proceeding, we are providing all parties the opportunity to object before that time.

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

Vernon A. Williams
Secretary

Committee on Transportation and Infrastructure

Congress of the United States
House of Representatives
Room 2165, Rayburn House Office Building
Washington, DC 20515
TELEPHONE: AREA CODE (202) 225-9446

June 17, 1996

The Honorable Linda J. Morgan
Chairman
Surface Transportation Board
12th Street and Constitution Avenue, N.W.
Washington, D.C. 20423

Dear Chairman Morgan:

The proposed merger between the Union Pacific and Southern Pacific Railroads is a critical current issue in transportation policy. We are confident that the Surface Transportation Board will exercise its authority appropriately in deciding whether to approve the merger and, if approved, what conditions to require in so approving it.

We also believe that it is part of the oversight responsibility of the Congress to be informed about and to review critical decisions made by regulatory agencies, so that, when it is time to reauthorize those agencies, the Congress can be well-informed about the issues those agencies face in the performance of their duties.

Our staff have recently reviewed some of the "redacted" versions of materials submitted to the docket in the UP/SP merger case. Unfortunately, confidentiality requirements make it necessary to remove so much material from these documents that they give only a partial sense of the actual market forces that are at issue in the merger decision.

We therefore request that we be provided with unredacted versions of the following documents submitted to the docket:

Verified Statement of W. Robert Majure
Verified Statement of Dr. Laurits R. Christensen
Verified Statement of Eileen Zimmer
Comments, Evidence, and Requests for Conditions submitted on behalf of the National Industrial Transportation League
Verified Statement of Dr. William G. Shepherd
Verified Statement of Mr. Thomas D. Crowley, President, L.E. Peabody and Associates
Brief of the United States Department of Transportation
Brief of the United States Department of Justice
Rebuttal Verified Statement of B. Douglas Bernheim
Verified Statement of Robert Willig

We are, of course, prepared to pledge, in writing, that we and our staff will not disclose any of the confidential information contained in any of these documents without the approval of the Board, and that we will not use the confidential information contained in them for any purpose other than to aid in our understanding of the record in the merger proceeding.

We propose that access to these documents be restricted to, in addition to ourselves, four members of our staff, who will also pledge, in writing, to protect the confidentiality of the confidential information contained therein:

Mr. David A. Heymsfeld, Democratic Staff Director, Committee on Transportation and Infrastructure
Mr. John V. Wells, Democratic Staff Director, Subcommittee on Railroads
Ms. Trinita Brown, Democratic Counsel, Subcommittee on Railroads
Ms. Debbie Hersman, Legislative Assistant to Rep. Wise

We look forward to your response.

Sincerely,

ROBERT E. WISE, JR.
Ranking Democratic Member
Subcommittee on Railroads

JAMES L. OBERSTAR
Ranking Democratic Member
Committee on Transportation and Infrastructure

20424
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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. 46]

Decided: August 26, 1996

In Decision No. 44, the Board imposed certain conditions respecting CPSB (Decision No. 44, slip op. at 185-186), and directed CPSB, UP/SP, and BNSF[2] to submit, by August 22, 1996, either agreed-upon terms or separate proposals respecting implementation of such conditions (Decision No. 44, slip op. at 233, ordering paragraph 30). In Decision No. 45, the August 22nd deadline was extended to August 23rd (Decision No. 45, slip op. at 2, ordering paragraph 1).

In a pleading (designated UP/SP-273/CPSB-9) filed on August 23rd, CPSB and UP/SP have jointly submitted agreed-upon terms respecting implementation of the CPSB conditions.

The agreed-upon terms, however, have not yet been agreed to by BNSF. By letter filed August 23rd, BNSF has indicated that it is currently reviewing the terms agreed upon by CPSB and UP/SP, and, in order to fully evaluate and understand these terms and their implications, has requested a 7-day extension of the August 23rd deadline. BNSF has further indicated that counsel for CPSB has agreed to this extension, but that counsel for UP/SP was unable to do so.

The extension request is reasonable, and it will therefore be granted.[3]

The terms agreed upon by CPSB and UP/SP would further amendthe trackage rights granted to BNSF under the BNSF agreement. If BNSF agrees to these terms (or if BNSF does not agree but the Board imposes these terms), the additional trackage rights will need to be included in a 49 CFR 1180.2(d)(7) class

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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] The City Public Service Board of San Antonio is referred to as CPSB. Union Pacific Railroad Company and Missouri Pacific Railroad Company are referred to collectively as UP. Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company are referred to collectively as SP. Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company are referred to collectively as BNSF.

[3] BNSF has also requested a waiver of otherwise applicable service requirements. This request is moot. See Decision No. 45, slip op. at 2, ordering paragraph 2.

exemption notice filed by UP/SP and BNSF. See, e.g., Decision No. 44, slip op. at 231-232, ordering paragraph 13.

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

It is ordered:

1. In Decision No. 44, ordering paragraph 30 (slip op. at 233), as previously modified in Decision No. 45, is further modified by extending the submission deadline from August 23, 1996, to August 30, 1996.

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

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SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

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

[Decision No. 47][2]

Decided: September 9, 1996

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

TABLE OF CONTENTS

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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. 104-38, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11102 and 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION AND CONCLUSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the 11.8-mile East Belt segment between T&NO Junction and Settegast Junction.[11]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued...)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is ordered:

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

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

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

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

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

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

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

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

Vernon A. Williams
Secretary

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SERVICE DATE
SEP 10 1996

SURFACE TRANSPORTATION BOARD[1]

CERTIFICATE AND DECISION

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

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

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

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

[Decision No. 48]

Decided: September 4, 1996

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

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

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

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

[2] These proceedings are embraced in Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company.

It is ordered:

1. Subject to the conditions set forth above, the railroads may discontinue service on the line after the effective date of this certificate and decision.

2. This certificate and decision will be effective 30 days from the date of service.

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

Vernon A. Williams
Secretary

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SURFACE TRANSPORTATION BOARD[1]

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

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

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

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

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

[Decision No. 49]

Decided: September 4, 1996

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

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

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

[2] These proceedings are embraced in Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company.

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

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

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

It is ordered:

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

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

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

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

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

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

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

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

Vernon A. Williams
Secretary

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SERVICE DATE - JUNE 1, 2000

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. 89

Decided: May 31, 2000

In this decision concerning two UP/SP merger conditions, we find that a particular shipper is a "2-to-1" shipper entitled to service of an additional rail carrier under the BNSF agreement's omnibus clause, but that the "contract modification" condition does not apply.[1]

BACKGROUND

On August 12, 1996, we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation and those controlled by Southern Pacific Rail

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[1] We address here the matters raised in the following pleadings: the petition "for clarification and enforcement of merger conditions" filed January 19, 2000, by Ameren Services Company on behalf of Union Electric Company d/b/a AmerenUE (these companies are referred to collectively as UE); the UP/SP-374 "response" filed February 8, 2000, by Union Pacific Railroad Company; the BNSF-90 "reply" filed February 8, 2000, by The Burlington Northern and Santa Fe Railway Company; the UE "reply" filed February 23, 2000, by UE; and the UP/SP-375 "reply" filed March 3, 2000, by Union Pacific Railroad Company. That these matters may be addressed on the most complete record available, the request for leave to file UE's February 23rd reply (at 1 n.2 of that reply) and the request for leave to file the UP/SP-375 reply (at UP/SP-375 at 2) will be granted, and these two replies will be accepted for filing and made part of the record in this proceeding. We also address the BNSF-91 petition filed May 2, 2000, involving the same or similar issues presented here.

Corporation.[2] We imposed various conditions to protect 2-to-1 shippers and points,[3] including, as relevant here, the BNSF agreement's omnibus clause and the contract modification condition.

The omnibus clause was included in the BNSF agreement[4] to protect the relatively few 2-to-1 points that were not explicitly covered by the trackage rights and line sales provided for in that agreement. Such additional 2-to-1 points, the UP/SP applicants insisted, were "covered by the agreement's 'omnibus' clause (Section 8i), which, they maintain[ed], represents a commitment by UP/SP to enter into arrangements with BNSF under which, 'through trackage rights, haulage, ratemaking authority or other mutually acceptable means,' BNSF will be able to provide competitive service to all 2-to-1 shippers not covered by the trackage rights and line sales provided for in the agreement." Merger Dec. No. 44, 1 S.T.B. at 252.

The contract modification condition required UP/SP "to make immediately available to BNSF at least 50% of the volume under contract at 2-to-1 points on all of the BNSF trackage rights corridors." Merger Dec. No. 44, 1 S.T.B. at 373. This condition "applies to every contract entered into prior to the consummation of the merger by a 2-to-1 shipper, on the one hand, and either UP or SP, on the other hand, provided only that such contract (i) was negotiated under the auspices either of old 49 U.S.C. 10713 or of new 49 U.S.C. 10709, and (ii) was in effect at the time the merger was consummated. A 2-to-1 shipper may tender to BNSF, and BNSF may transport, up to 50% of the volume covered by any contract to which the contract modification condition applies; and a shipper's obligation to ship traffic via UP/SP is waived to the extent that

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[2] See Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) (Merger Dec. No. 44), aff'd Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999). Common control was consummated on September 11, 1996. 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, "UP" refers to the combined UP/SP system.

[3] In the context of the UP/SP merger, a 2-to-1 shipper (sometimes referred to as a 2-to-1 "customer") is a shipper that, prior to the merger, had rail service from UP and SP and no other railroad. See Merger Dec. No. 44, 1 S.T.B. at 252. Similarly, a 2-to-1 point is a point at which, prior to the merger, service was provided by UP and by SP, but by no other railroad. Id.

[4] The BNSF agreement, entered into by UP/SP and BNSF (The Burlington Northern and Santa Fe Railway Company and its predecessors are referred to as BNSF), was the agreement pursuant to which BNSF received various merger-related rights, most prominently trackage rights over thousands of miles of UP/SP lines. See Merger Dec. No. 44, 1 S.T.B. at 247 n.15, 252-54. The terms of the BNSF agreement, including (among many other terms) the omnibus clause, were imposed as conditions. See Merger Dec. No. 44, 1 S.T.B. at 246-47.

traffic is tendered to BNSF under the auspices of the contract modification condition." Merger Dec. No. 57, slip op. at 9.[5]

UE operates a coal-fired electric generating plant at Labadie, Franklin County, MO, which was accessed, prior to the UP/SP merger, by UP and by SP and by no other railroad. There is no dispute as to the 2-to-1 status of UE's Labadie plant: UE and UP agree that, in the context of the UP/SP merger, UE is, as respects its Labadie plant, a 2-to-1 shipper. The dispute, rather, concerns the applicability of the omnibus clause and the contract modification condition. UE contends that its 2-to-1 status makes the clause and the condition applicable to its Labadie plant. UP insists that, 2-to-1 status notwithstanding, the clause and the condition are not applicable at Labadie.[6]

DISCUSSION AND CONCLUSIONS

We conclude that UE is covered by the omnibus clause but is not entitled to exercise the contract modification condition.

Omnibus Clause. The omnibus clause recites "the intent of the parties" (i.e., UP/SP and BNSF, the parties to the BNSF agreement) that the BNSF agreement "result in the preservation of service by two competing railroad companies for all customers listed on Exhibit A to this Agreement presently served by both UP and SP and no other railroad (2-to-1 customers)." The omnibus clause recognizes, however, that "some 2-to-1 customers will not be able to avail themselves of BNSF service by virtue of the trackage rights and line sales contemplated by this Agreement." The omnibus clause next lists, by way of "example," certain points at which 2-to-1 customers "are not accessible under the trackage rights and line sales" provided for in the BNSF agreement. The omnibus clause then concludes as follows: "Accordingly, UP/SP and BNSF agree to enter into arrangements under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service to 2-to-1 customers at the foregoing points and to any 2-to-1 customers who are not located at

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[5] In Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 57 (STB served Nov. 20, 1996) (Merger Dec. No. 57), we set out a series of guidelines to govern the implementation of the contract modification condition.

[6] All references in this decision to UE refer to UE at Labadie. Nothing in this decision is intended to apply to any UE facility located at any other point.

points expressly referred to in this Agreement or Exhibit A to this Agreement." (*Emphasis added.*)[7]

The omnibus clause, read literally, clearly extends to UE, a 2-to-1 customer not located at a point expressly referred to in the BNSF agreement or in Exhibit A to the BNSF agreement. Nothing in the text of the omnibus clause gives any indication that UP/SP intended that the omnibus clause would only selectively reach the "2-to-1 customers who are not located at points expressly referred to in this Agreement or Exhibit A to this Agreement."

A literal reading of the omnibus clause is consistent with two representations (the Rebensdorf/Peterson or R/P representations) made in the UP/SP application. Mr. Rebensdorf, a UP/SP witness, acknowledged that Labadie was not expressly mentioned in the omnibus clause, but represented that Labadie was "covered," reflecting "the parties' commitment to preserve two-railroad competition for all 2-to-1 customers, including those at points not specifically listed in the [BNSF] settlement agreement." See UP/SP-22 (filed Nov. 30, 1995) at 297 n.1 (emphasis in original).[8] Mr. Peterson, another UP/SP witness, also acknowledged that Labadie was not expressly listed in the omnibus clause, but represented that "in all events the Labadie plant is covered by the 'omnibus' clause." See UP/SP-23 (filed Nov. 30, 1995) at 166-67.[9] The conclusion is inescapable: as of November 30, 1995 (the date of filing of the UP/SP application), UE's Labadie plant was indeed covered by the omnibus clause.

UP insists, however, that UE is not now covered by the omnibus clause. UP cites a UP/UE "conceptual framework" document (the CF document), a UE letter supporting the UP/SP merger, and part though not all of the text of the R/P representations. We shall consider these in turn.

The CF document is dated March 11, 1996, and was signed by UE on March 14, 1996. See UP/SP-374, Exhibit 8. This document, which UP refers to as a "settlement agreement," provides for proportional rates for UE's use in conjunction with BNSF coal service via Kansas City or St. Louis, and (according to UP) "saved UE millions of dollars and secured a

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[7] There have been several iterations of the omnibus clause; the two most important iterations (for present purposes) are set forth in their entirety in Appendix A to this decision.

[8] The text of the Rebensdorf representation is set forth in its entirety in Appendix B to this decision.

[9] The text of the Peterson representation is also set forth in its entirety in Appendix B to this decision.

competitive alternative to the Labadie plant." UP/SP-374 at 5.[10] The CF document clearly indicates that UE had negotiated a proportional rate arrangement with UP. What the CF document does not clearly indicate, however, is that this proportional rate arrangement was intended to take Labadie out of the omnibus clause. Indeed, there is nothing at all in the text of the CF document that can be read as withdrawing Labadie from the otherwise applicable reach of that clause.[11]

The UE support letter, which is dated March 25, 1996, and which was included in the record on March 29, 1996,[12] indicates that UE and UP "have reached an agreement [the reference is apparently to the CF document] that will insure on-going competition for rail service to the Labadie Plant after the merger. Because of this agreement, the Union Pacific/Southern Pacific merger is in the best interests of Union Electric, and UE supports the merger application." UP/SP-374, Exhibit 9. The UE support letter clearly indicates that, because UE and UP had reached an agreement, UE had decided to express its support for the UP/SP merger. But the UE support letter does not indicate any intention by UE to waive whatever rights it might have under the omnibus clause. There is simply nothing in the text of the UE support letter that can be read as a restriction on the otherwise applicable scope of that clause. Nor is there anything in the text of the UE support letter that indicates that the agreement that UE and UP had reached had withdrawn Labadie from the otherwise applicable scope of the omnibus clause.

The R/P representations, which, as previously noted, are set forth in full in Appendix B to this decision, indicate that, at the time the UP/SP application was filed, UP/SP was attempting to negotiate, with UE, an arrangement to preserve two-railroad competition at Labadie that would not involve direct access by BNSF. UP argues that the proportional rate arrangement provided for in the CF document preserved two-railroad competition at Labadie without direct access by BNSF,[13] and thus amounted to the arrangement anticipated by the R/P representations. UP

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[10] For purposes of this decision, we will assume that UP is correct in its assertion that, under Missouri law, the CF document was at the time of its execution, and continues to be at the present time, a valid and enforceable contract.

[11] UP argues that there is no basis upon which to "release" UE from the UP/UE "settlement agreement" and/or to void that agreement. UP/SP-374 at 2, 5. We are neither releasing UE from that agreement nor voiding that agreement as to UE. We are merely holding that this agreement does not narrow the otherwise applicable reach of the omnibus clause.

[12] See UP/SP-195 (dated March 29, 1996), the relevant portion of which is excerpted in UP/SP-374, Exhibit 9.

[13] There is a dispute whether the proportional rate arrangement provided for in the CF

(continued...)

further argues that the "agreement" embodied in the CF document takes Labadie out of the omnibus clause. But, as stated previously, the CF document gives no indication that the proportional rate arrangement provided in it was intended to supersede, as respects UE, the otherwise applicable reach of the omnibus clause.

The most that can be said in support of UP's argument is that, when the UP/SP application was filed, UP apparently intended that the execution of a UP/UE "settlement agreement" would remove Labadie from the otherwise applicable reach of the omnibus clause.[14] There is, however, no indication in the record, and no reason to believe, that UE ever intended that result.[15] We realize, of course, that there is some force in UP's argument that UE's long delay in asserting its omnibus clause rights suggests that, until recently, UE shared UP's understanding that the execution of the CF document had removed Labadie from the otherwise applicable reach of the omnibus clause. We believe, however, that the more plausible explanation for UE's long delay is that, until recently, UE was unaware of the implications of the omnibus clause.[16]

One final consideration seals our conclusion that UE is covered by the omnibus clause, notwithstanding UE's long delay in asserting its rights under the clause. In the several months following the March 1996 execution of the CF document, UP had at least two opportunities (its

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[13](...continued)
document did in fact effectively preserve the intramodal competition that existed at Labadie prior to the UP/SP merger.

[14] See, in particular, UP/SP-374, Exhibit 10 (a UP letter to UE, dated December 6, 1995, indicating that Labadie is not specifically referred to in the omnibus clause because "our expectations have been that we would find an alternative for Labadie that does not require implementation of the provision there.").

[15] There is, by way of example, no written indication that UE ever shared the "expectations" voiced by UP in the UP letter dated December 6, 1995.

[16] UE has attempted to explain its long delay in asserting its omnibus clause rights by shifting the blame to UP. UE alleges, in essence, that, beginning with the negotiations that resulted in the CF document and continuing ever since, UP has engaged in a campaign of fraud and deceit with the intent of denying UE its rights as a 2-to-1 shipper. The pivotal misrepresentation complained of by UE is said to have occurred during the negotiations that resulted in the CF document: UP, UE insists, never fully explained to UE the mechanics of the omnibus clause. But there is no indication that UP misrepresented material facts. Moreover, the details of the omnibus clause, including the specifics of the R/P representations with respect to it, were, as of November 30, 1995, matters of public record.

April 29, 1996 rebuttal submission, and its June 3, 1996 brief) to indicate, on the record, that, in its opinion, the CF document had narrowed the scope of the omnibus clause. UP, however, has not cited, and we have been unable to find, any such indications, either in UP's rebuttal submission or in its brief. There are, in the rebuttal submission, explicit references to the omnibus clause,[17] but there is no indication that the scope of that clause has been narrowed in any way. There is even, in the rebuttal submission, an explicit reference to the omnibus clause in connection with a "separate understanding" that UP had come to with UE (the context confirms that this "separate understanding" is the CF document), but, again, there is no indication that the omnibus clause has been narrowed in any way.[18]

We therefore conclude that UE is covered by the omnibus clause. Accordingly, UP and BNSF should negotiate an arrangement "under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service" to UE at Labadie.[19] If such negotiations fail to produce a "mutually acceptable" resolution, and/or if such negotiations fail to produce a resolution acceptable to UE:

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[17] See UP/SP-230 (the UP/SP "narrative," filed Apr. 29, 1996) at 135. See also UP/SP-231 (also filed Apr. 29, 1996), Vol. 2B (Peterson rebuttal statement) at 29.

[18] See UP/SP-231 (filed Apr. 29, 1996), Vol. 2C, Rebensdorf rebuttal statement (Tab 18) at 7.

[19] UE insists that BNSF should be given trackage rights access to Labadie via both Kansas City and St. Louis. This is a possible, but not necessarily the only, conceivable outcome. The omnibus clause does not explicitly require UP to grant BNSF trackage rights access to Labadie, nor does that clause explicitly require that BNSF be given access to Labadie from both ends of the Kansas City-St. Louis line. The omnibus clause, rather, requires only that UP enter into an arrangement with BNSF "under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service" to UE at Labadie.

(1) BNSF will submit the matter to arbitration in accordance with the terms of the BNSF agreement;[20] and/or (2) UE will seek relief here, in an administrative proceeding.[21]

To avoid possible confusion, we clarify that our decision today does not rest upon Section 8(l) of the BNSF agreement, which provides that if, "for any reason, any of the trackage rights granted under this Agreement cannot be implemented because of the lack of sufficient legal authority to carry out such grant, then UP/SP shall be obligated to provide an alternative route or routes, or means of access of commercially equivalent utility at the same level of cost to BNSF as would have been provided by the originally contemplated rights."[22] UE suggests that Section 8(l) was made applicable to Labadie by UP's post-merger sale of the SP line over which SP formerly provided service at Labadie; this sale, UE contends, has made the SP line unavailable through no fault of UE or BNSF.[23] Section 8(l), however, applies only with respect to trackage

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[20] Section 15 of the BNSF agreement provides: "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." See UP/SP-303 (UP's July 1, 1997 Progress Report), Exhibit B at 27-28 (Exhibit B contains the BNSF agreement, "amended and restated" as of June 30, 1997).

[21] The BNSF agreement "provide[s] rights and claims (and, by implication, remedies) to persons other than the [parties to that agreement]," Merger Dec. No. 44, 1 S.T.B. at 247 n.15. However, because the arbitration provision of the BNSF agreement applies only to the parties to that agreement, a shipper seeking to vindicate its rights under that agreement can seek relief in an administrative proceeding. See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 72, slip op. at 8 n.18 (STB served May 23, 1997) ("We wish to clarify that shippers have rights under the BNSF agreement because we have imposed the terms thereof as a condition to the merger. These shipper rights, however, are not contract rights enforceable in courts. Rather, shippers have recourse to the Board for enforcement of the merger conditions.").

[22] See UP/SP-303, Exhibit B at 18.

[23] The contract under which the SP line was sold bars the purchaser from providing rail service to UE at Labadie. See UP/SP-374, Exhibit 2 at 5 (this detail was submitted under seal, but we think it necessary to put this detail in the public record; were it not for the prohibition against service to UE at Labadie, UE would presently have, at least as respects traffic moving via

(continued...)

rights granted under the BNSF agreement. Section 8(l) is irrelevant as respects UE because BNSF has not yet been granted, under the BNSF agreement, any trackage rights to Labadie.

Contract Modification Condition. The UP/UE contract at issue here (ICC-WRPI-C-0080) was entered into prior to the consummation of the merger by a 2-to-1 shipper, on the one hand, and UP, on the other hand; it was negotiated under the auspices of old 49 U.S.C. 10713; and it was in effect at the time the merger was consummated. It therefore follows that, at the time the merger was consummated, the contract modification condition applied to this contract.[24]

The contract modification condition, however, applies only to contracts that were "in effect at the time the merger was consummated," Merger Dec. No. 57, slip op. at 9, and must be exercised "prior to the expiration of a contract" to which that condition applies," Merger Dec. No. 57, slip op. at 10. The ICC-WRPI-C-0080 contract was amended in 1999 by an "Addendum Three," and we agree with UP's assessment that this addendum amounted to "major surgery" on the underlying contract. See UP/SP-374 at 18-22; UP/SP-374, Exhibit 1 at 7-8. Most of the relevant details have been submitted under seal, and properly so (and, given the essentially financial nature of these details, we are reluctant to put these details into the public record). We believe, however, that because Addendum Three relieved UE of "significant liabilities," UP/SP-374 at 22, the ICC-WRPI-C-0080 contract, as amended by Addendum Three, should not be regarded, for contract modification condition purposes, as the contract that was in effect at the

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[23](...continued)
St. Louis, the intramodal competitive option that it seeks under the auspices of the omnibus clause). See also UE's February 23rd reply at 6, and BNSF-90 at 6 n.6 (strong hints as to the nature of this detail are already in the public record).

[24] The argument that execution of the CF document made the contract modification condition inapplicable to this contract is no more persuasive than the similar argument that execution of that document took UE out of the reach of the omnibus clause. Neither Merger Dec. No. 44 nor Merger Dec. No. 57, nor any of the various submissions made by the UP/SP applicants during the course of the UP/SP merger proceeding, gives any indication that the reach of the contract modification condition had been narrowed by the CF document; nothing in the CF document itself gives any indication that the proportional rate arrangement provided in it was intended to supersede, as respects UE, the otherwise applicable reach of the contract modification condition; and nothing in the UE support letter gives any indication that UE, in expressing support for the UP/SP merger, had any intention whatsoever of waiving whatever rights it might have under that condition. Nevertheless, the Board herein finds the contract modification condition inapplicable but for other reasons.

time the UP/SP merger was consummated. We therefore conclude that the contract modification condition does not now apply to this contract.[25]

BNSF Petition. In its BNSF-91 petition filed May 2, 2000, BNSF seeks an order declaring that, as a result of the UP/SP merger, the UE plant at Labadie is a "2-to-1" shipper to which BNSF may gain access under the "omnibus" clause of the BNSF agreement and under the "2-To-1 Point Identification Protocol" entered into by BNSF and UP in June 1998. UP and UE filed replies to the BNSF-91 petition on May 22, 2000 (the UP reply is designated UP/SP-377; the UE reply is not designated). In view of the action taken in this decision with respect to UE's January 19th petition, the BNSF-91 petition will be dismissed as moot.[26]

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

It is ordered:

1. UE's request for leave to file its February 23rd reply and UP's request for leave to file its UP/SP-375 reply are granted, and these two replies are accepted for filing and made part of the record in this proceeding. The BNSF-91 petition is dismissed as moot.

2. UE's January 19th petition "for clarification and enforcement of merger conditions" is granted in part and denied in part, as indicated in this decision.

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[25] There is a dispute whether the amended ICC-WRPI-C-0080 contract amounts to a "new" contract as that term is understood in Missouri law. We think it sufficient to say that, new or not new, we never intended that the contract modification condition would apply to a contract that had received the kind of post-merger "major surgery," UP/SP-374 at 19, that this contract has received.

[26] Because the BNSF-91 petition adds nothing to the matters previously submitted by UE, UP, and BNSF, the purpose this petition was intended to serve is not immediately apparent. Even the supposed issue respecting the propriety of UP's rejection, under the auspices of the 2-To-1 Point Identification Protocol, of BNSF's request for access to Labadie had already been presented on the record. Compare BNSF-91, Attachment C (UP's letter, dated Feb. 7, 2000, rejecting access to Labadie) with BNSF-90, Attachment A (the very same letter).

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

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn. Vice Chairman Burkes commented with a separate expression.

Vernon A. Williams
Secretary

Vice Chairman Burkes, commenting:

I agree with the Board's decision that AmerenUE is a "2-to-1" shipper entitled to service of an additional rail carrier under the BNSF agreement's omnibus clause. However, I disagree with the conclusion that the contract modification condition does not now apply to this contract.

The contract modification condition applies to contracts that were "in effect at the time the merger was consummated." Although the contract was amended, it does not eliminate the fact that the original contract, ICC-WRPI-C-0080, was in effect at the time the merger was consummated. Moreover, the amendment at issue states that "nothing herein contained shall be construed as amending or modifying [the contract] except as herein provided." I disagree with the conclusion that the amendment amounted to "major surgery" to the contract. Furthermore, I believe that nothing in this decision should foreclose BNSF's right to immediate access to AmerenUE's Labadie plant for the traffic not already committed under the amended UP contract.

APPENDIX A: THE OMNIBUS CLAUSE

The two most important (for present purposes) iterations of the omnibus clause (i.e., Section 8i of the BNSF agreement) are set forth in this appendix. These two versions are, for present purposes, identical.

As of March 1996. Throughout March 1996, the omnibus clause of the BNSF agreement read in its entirety as follows:[27]

> It is the intent of the parties that this Agreement result in the preservation of service by two competing railroad companies for all customers listed on Exhibit A to this Agreement presently served by both UP and SP and no other railroad (2-to-1 customers).
>
> The parties recognize that some 2-to-1 customers will not be able to avail themselves of BNSF service by virtue of the trackage rights and line sales contemplated by this Agreement. For example, 2-to-1 customers located at points between Niles Junction and the end of the joint track near Midway (including Livermore, CA, Pleasanton, CA, Radum, CA, and Trevarno, CA), Turlock, CA, South Gate, CA, Tyler, TX, Defense, TX, College Station, TX, Great Southwest, TX, Victoria, TX, Sugar Land, TX, points on the former Galveston, Houston & Henderson Railroad served only by UP and SP, Opelousas, LA, Paragould, AR, Dexter, MO, and Herington, KS, are not accessible under the trackage rights and line sales covered by this Agreement. Accordingly, UP/SP and BNSF agree to enter into arrangements under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service to 2-to-1 customers at the foregoing points and to any 2-to-1 customers who are not located at points expressly referred to in this Agreement or Exhibit A to this Agreement.
>
> BNSF shall have the right to interchange with any short-line railroad which, prior to the date of this Agreement could interchange with both UP and SP and no other railroad.

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[27] See UP/SP-22 at 352-53 (this is the amended version of the omnibus clause that was contained in the so-called "supplemental agreement" dated Nov. 18, 1995).

As of today. The omnibus clause of the BNSF agreement presently reads in its entirety as follows:[28]

> It is the intent of the parties that this Agreement result in the preservation of service by two competing railroad companies for all customers listed on Exhibit A to this Agreement presently served by both UP and SP and no other railroad (2-to-1 customers).
>
> The parties recognize that some 2-to-1 customers will not be able to avail themselves of BNSF service by virtue of the trackage rights and line sales contemplated by this Agreement. For example, 2-to-1 customers located at points between Niles Junction and the end of the joint track near Midway (including Livermore, CA, Pleasanton, CA, Radum, CA, and Trevarno, CA), Lyoth, CA, Lathrop, CA, Turlock, CA, South Gate, CA, Tyler, TX, Defense, TX, College Station, TX, Great Southwest, TX, Victoria, TX, Sugar Land, TX, points on the former Galveston, Houston & Henderson Railroad served only by UP and SP, Opelousas, LA, and Herington, KS, are not accessible under the trackage rights and line sales covered by this Agreement. Accordingly, UP/SP and BNSF agree to enter into arrangements under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service to 2-to-1 customers at the foregoing points and to any 2-to-1 customers who are not located at points expressly referred to in this Agreement or Exhibit A to this Agreement.
>
> BNSF shall have the right to interchange with any short-line railroad which, prior to the date of this Agreement could interchange with both UP and SP and no other railroad.

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[28] See UP/SP-303, Exhibit B at 17.

APPENDIX B: THE REBENSDORF/PETERSON REPRESENTATIONS

Rebensdorf Representation. The full text of the Rebensdorf representation, which appears in the verified statement of John H. Rebensdorf, the then Vice President - Strategic Planning for Union Pacific Railroad Company, reads as follows:[29]

> The one exception [i.e., the only 2-to-1 point of which the UP/SP applicants were then aware that (a) was not reached by the trackage rights or line sales provided for in the then most recent version of the BNSF agreement, and (b) was not mentioned by name in the omnibus clause] is Labadie, Missouri, where we are working directly with the "2-to-1" shipper, Union Electric, to negotiate an arrangement to preserve two-railroad competition. BN/Santa Fe has agreed not to object to UP/SP seeking an arrangement, even with another railroad, to preserve rail competition for Union Electric. Nonetheless, even though the "omnibus" clause does not expressly mention Labadie, Labadie is covered by the clause, which expresses the parties' commitment to preserve two-railroad competition for all 2-to-1 customers, including those at points not specifically listed in the [BNSF] settlement agreement.

Peterson Representation. The full text of the Peterson representation, which appears in the verified statement of Richard B. Peterson, the then Senior Director - Interline Marketing for Union Pacific Railroad Company, reads as follows:[30]

> A handful of small "2-to-1" points, such as Herington, Kansas, and Dexter, Missouri, were not covered by the trackage rights that we negotiated with BN/Santa Fe, and we agreed on an "omnibus" clause, Section 8i of the agreement, committing the parties to enter into arrangements, such as trackage rights, haulage or ratemaking authority, that will ensure two-railroad competition for jointly-served shippers at these points, as well as for any other "2-to-1" shippers that our investigation may not have located. All such points of which we are aware are listed in section 8i except one, the Union Electric Plant at Labadie, Missouri, 43 miles from St. Louis. That point is also covered by the "omnibus" clause, but BN/Santa Fe was agreeable to our entering into an arrangement with Union Electric for service by a different railroad (there

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[29] See UP/SP-22 at 297 n.1.

[30] See UP/SP-23 at 166-67.

are multiple candidates at St. Louis), or for some other form of continued rail competition. We are continuing to discuss this with Union Electric, but in all events the Labadie plant is covered by the "omnibus" clause.

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SURFACE TRANSPORTATION BOARD[1]

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

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

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

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

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

[Decision No. 50]

Decided: September 4, 1996

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

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

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

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

[2] These proceedings are embraced in Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company.

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

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

It is ordered:

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

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

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

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

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

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

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

Vernon A. Williams
Secretary

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SURFACE TRANSPORTATION BOARD[1]

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB-33 (Sub-No. 96)[2]

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT--BARR-GIRARD LINE IN MENARD, SANGAMON, AND MACOUPIN COUNTIES, IL

[Decision No. 51]

Decided: September 4, 1996

In Decision No. 44 (Finance Docket No. 32760), served on August 12, 1996, and Federal Register notice (61 FR 41829) published on August 12, 1996, the Board authorized the Union Pacific Railroad Company (UP) to abandon approximately 38.4 miles of rail line extending from milepost 51.0, near Barr, to milepost 89.4, near Girard, in Menard, Sangamon, and Macoupin Counties, IL.

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

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

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

[2] This proceeding is embraced in Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company.

It is certified: The present and future public convenience and necessity permit the abandonment and discontinuance of service over the described line of railroad, subject to (a) the employee protective conditions in Oregon Short Line R. Co. - Abandonment - Goshen, 360 I.C.C. 91 (1979); (b) the 14 general and one specific mitigation conditions specified in Appendix G of the August 12 decision; (c) the requirement that UP leave intact all of the rights-of-way underlying the track, including bridges, culverts, and similar structures, for a period of 180 days from September 11, 1996, to enable any State or local government agency or other interested person to negotiate the acquisition of the rights-of-way for public use; and (d) the directives for implementing interim trail use/rail banking set forth below.

It is ordered:

1. Subject to the conditions set forth above, the railroad may abandon the described line consistent with interim trail use/rail banking after the effective date of this certificate and decision.

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

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

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

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

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

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

Vernon A. Williams
Secretary

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

SERVICE DATE

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SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

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

[Decision No. 52]

Decided: September 9, 1996

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

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

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

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

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

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

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

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

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

DISCUSSION AND CONCLUSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is ordered:

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

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

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

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

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

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

Vernon A. Williams
Secretary

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FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board[1]

[Finance Docket No. 32760 (Sub-No. 18)]

Utah Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver & Rio Grande Western Railroad Company

[Decision No. 54]

Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR),[2] Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), The Denver & Rio Grande Western Railroad Company (DRGW),[3] have agreed to grant overhead trackage rights, with certain local access rights, over a line of railroad of DRGW to Utah Railway Company (UTAH). These trackage rights are related to the recently approved

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission and transferred certain functions to the Surface Transportation Board (Board). This notice relates to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11323-24.

[2] UPRR and MPRR are referred to collectively as UP.

[3] SPT, SSW, SPCSL and DRGW are referred to collectively as SP.

UP/SP merger in Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company. See Finance Docket No. 32760 (STB served Aug. 12, 1996) (Decision No. 44). The overhead trackage rights extend from milepost 628.8, near Utah Railway Junction, UT, to milepost 450.0, near Grand Junction, CO, a total distance of approximately 178.8 miles, in Carbon, Emory and Grand Counties, UT, and Mesa County, CO. Utah will have the right to interchange at Utah Railway Junction and Grand Junction with UP/SP and the Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company. The local rights are for Utah to have access to the coal loading facility of Savage Industries, Inc., Savage Coal Terminal, which is located at the so-called CV Spur at milepost 615.8 near Price, UT, and for access to East Carbon Development Company Environmental L.C. at the CV Spur in a transload operation of non-hazardous waste materials.

The transaction is scheduled to be consummated on, or as soon as possible after, September 11, 1996.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the

conditions imposed in Norfolk and Western Ry. Co.--Trackage Rights--BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc. - Lease and Operate, 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to Finance Docket No. 32760 (Sub-No. 18), must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue, N.W., Washington, DC 20423. In addition, a copy of each pleading must be served on: (1) Charles H. White, Jr., Galland, Kharasch, Morse & Garfinkle, 1054 31st Street, N.W., Washington, DC 20007; (2) Paul A. Conley, Jr., Assistant Vice President-Law, 1416 Dodge Street, #830, Omaha, NE

68179; and (3) Louis P. Warchot, Associate General Counsel, One Market Plaza, San Francisco, CA 94105.

Decided: September 9, 1996.

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

Vernon A. Williams

Secretary

SERVICE LIST FOR: 09/13/1996 STB FD 32760 18 UTAH RAILWAY COMPANY--TRACKAGE RIGHT

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FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board[1]

[Finance Docket No. 32760 (Sub-No. 19)]

Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver & Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company

[Decision No. 53]

Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR),[2] Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), The Denver & Rio Grande Western Railroad Company (DRGW),[3] and The Southern Illinois &

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission and transferred certain functions to the Surface Transportation Board (Board). This notice relates to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11323-24.

[2] UPRR and MPRR are referred to collectively as UP.

[3] SPT, SSW, SPCSL and DRGW are referred to collectively as SP.

Missouri Bridge Company (SIMBCO)[4] have agreed to grant overhead trackage rights, with certain local access rights to Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF).[5] These trackage rights are related to the recently approved UP/SP merger in Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company. See Finance Docket No. 32760 (STB served Aug. 12, 1996) (Decision No. 44). These trackage rights, which provide for local access as specified in Decision No. 44, consist of three categories.

The first category consists of trackage rights that were provided for in an agreement entered into on April 18, 1996, by UP/SP, BNSF, and the Chemical Manufacturers Association (CMA). These trackage rights are over: (1) UP's lines--(a) Houston, TX - Longview, TX, (b) Longview, TX - Texarkana, AR, (c) Texarkana, AR - North Little Rock, AR, (d) North Little Rock, AR - Poplar Bluff, MO, (e) Poplar Bluff, MO - Dexter, MO, (f) SIMBCO, IL - Valley Junction, L, and (g) Bald Knob, AR - Fair Oaks, AR; (2) SP's lines--Fair

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[4] SIMBCO is jointly owned by MPRR and SSW.

[5] BN and SF are referred to collectively as BNSF.

Oaks, AR - Illmo, MO, via Jonesboro, AR, and Dexter Junction, MO; and (3) SIMBCO's lines--Illmo, MO - SIMBCO, IL.

The second category consists of trackage rights over SPT's line between Elvas, CA, in the vicinity of SPT's Fresno Line milepost 136.2 and Stockton, CA in the vicinity of SPT's Fresno Line milepost 88.9.

The third category consists of trackage rights over: (1) MPRR's main line near Avondale, LA, between MPRR milepost 14.29 and milepost 14.11; and (2) SPT's line near Avondale, LA, between SPT milepost 14.94 and SPT's milepost 9.97 in the vicinity of Westbridge Junction, LA.

The transaction is scheduled to be consummated on, or as soon as possible after, September 11, 1996.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in Norfolk and Western Ry. Co.--Trackage Rights--BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc. - Lease and Operate, 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to Finance Docket No. 32760 (Sub-No. 19), must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue, N.W., Washington, DC 20423. In addition, a copy of each pleading must be served on: (1) Paul A. Conley, Jr., Assistant Vice President-Law, 1416 Dodge Street, #830, Omaha, NE 68179; (2) Louis P. Warchot, Associate General Counsel, One Market Plaza, San Francisco, CA 94105; and (3) Richard E. Weicher, Vice President and General Counsel, 6th Floor, 1700 East Golf Road, Schaumburg, IL 60173-5860.

Decided: September 9, 1996.

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

Vernon A. Williams

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Secretary

SERVICE LIST FOR: 13-sep-1996 STB FD 32760 19 BURLINGTON NORTHERN RAILROAD COMPANY

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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. 55]

Decided: September 25, 1996

In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company)[2] and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company),[3] subject to various conditions. The common control we authorized in Decision No. 44 was consummated on September 11, 1996, when Southern Pacific Rail Corporation (SPR) was merged with and into UP Holding Company, Inc., a direct wholly owned subsidiary of Union Pacific Corporation (UPC). See UP/SP-277 at 1.

Among the conditions imposed in Decision No. 44 were numerous environmental mitigating conditions. See Decision No. 44, slip op. at 237 (ordering paragraph 62) and at 276-89 (the Appendix G environmental mitigating conditions). Several such conditions were imposed to alleviate concerns raised by the City of Reno (Reno). See Decision No. 44, slip op. at 82-83 (concerns of Reno), at 197 (conditions imposed with respect to concerns of Reno and other Nevada jurisdictions), at 220-23 (detailed discussion of environmental concerns of Reno), and at 276-79 (the relevant conditions). One of the Reno conditions, hereinafter referred to as Condition #22c, provides for the preparation of a further, more focused mitigation study under the direction and supervision of the Board's Section of Environmental Analysis (SEA) to address additional specific mitigation measures relating to the environmental effects on Reno of the additional rail freight traffic projected as a result of the UP/SP merger. See Decision No. 44, slip op. at 279. At the same time, the environmental status quo with regard to Reno was preserved while the study is being conducted. Condition #22a provides that, effective upon consummation of the merger and continuing for 18 calendar months, UP/SP shall operate no more than a daily average

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

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

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

count of 14.7 freight trains per day through the City of Reno. See Decision No. 44, slip op. at 278; and at 222 n.267 (explaining that the average count includes BNSF trains, but not Amtrak trains). This is below the threshold level for environmental analysis in our environmental regulations.

By pleading (RENO-8) filed September 9, 1996, Reno requests a stay of Condition #22c pending disposition of its appeal of Decision No. 44.[4] Reno contends: that we erred in making a finding of no significant impact (FONSI) in Decision No. 44. In addition, Reno asserts that there are environmental impact statement (EIS) issues without specifying what those issues are. Reno claims that we did not have a complete record to make a decision because the nature and extent of the operations of BNSF[5] under its trackage rights will not become a matter of record until October 1, 1996;[6] and that the record relative to environmental matters will not be complete until more is known about the operations BNSF will conduct under the trackage rights provided for in the BNSF agreement.[7] Reno further contends that Condition #22c will require Reno to commit significant personnel and budgetary resources to the 18-month study, which necessarily means that these resources will not be available to fulfill Reno's primary responsibilities as a municipal government.

UP/SP opposes Reno's request for a stay. See UP/SP-278 (filed September 11, 1996).

DISCUSSION AND CONCLUSIONS

"A party may petition for a stay of an action pending a request for judicial review . . . not less than 10 days prior to the date the terms of the action take effect." 49 CFR 1115.5(a). The particular condition that petitioner seeks to stay became effective on September 11, 1996. Reno's stay request was filed only 1 business day before that date. Thus, the petition is late under our rules, and Reno has not even attempted to provide an

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[4] Prior to the issuance of Decision No. 44, Reno filed a complaint in district court to compel the Board to use environmental impact statement procedures in conducting the Reno mitigation study. City of Reno v. STB, U.S.D.C. Nev. No. CV-N-96-441-HDM (RAM) (government's motion to dismiss granted Sept. 19, 1996). On August 21, 1996, Reno filed a petition for review of Decision No. 44 in the United States Court of Appeals for the Ninth Circuit. No. 96-70763, City of Reno v. STB. The Judicial Panel on Multi-District Litigation has ordered Reno's petition to be handled in the United States Court of Appeals for the D.C. Circuit with another petition seeking review of Decision No. 44 filed by the City of Wichita and Sedgwick County. No. 96-1293, City of Wichita v. STB (pet. for review filed Aug. 22, 1996). See UP/SP-278 at 3.

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

[6] See Decision No. 44, slip op. at 231, ordering paragraph 11 (BNSF is to file a progress report and an operating plan on or before October 1, 1996).

[7] See Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

explanation for the late filing. In any event, Reno has failed to present any evidence or argument that would justify a stay.[8]

Likelihood of Success on the Merits. We do not believe that Reno will prevail on the merits. Reno contends generally that it is likely to succeed "on appeal of the merits of FONSI and EIS issues," without explaining what those issues are. RENO-8 at 3. It offers only a highly generalized explanation of why it anticipates success (Reno suggests that success is likely due to "the record of acknowledged impacts, the absence of mitigation, and the applicable statutes, regulations and a variety of precedent," RENO-8 at 3).

This does not satisfy the requisite showing of likelihood of success on the merits. We properly issued a FONSI in this case, and thus determined that no EIS was required. In Decision No. 4 we found that our environmental mitigation conditions (including Condition #22) specifically remedy the environmental impacts associated with the merger and ensure that there will be no significant environmental effects. We noted that, in Reno, the environmental impacts are limited to the effects of an increase of traffic on an existing rail line. As the environmental assessment (EA), post environmental assessment (Post EA), and Decision No. 44 (at 220-23) show, we have already assessed the impact of the merger on Reno and identified its likely environmental effects. We explained that, with the systemwide and corridor-specific mitigation already imposed, and the conditions to be arrived at in the Reno mitigation study, there will be no significant environmental impacts to Reno. We emphasized that we already know the nature and general parameters of the appropriate mitigation measures for Reno, and that the sole purpose of the Reno study is to arrive at a specifically tailored mitigation plan to address impacts of additional traffic that will eventually move through Reno. Petitioner has presented no reason to question our conclusions on these issues.

Reno's allegation respecting an "absence of mitigation" is also wrong. Decision No. 44 contains numerous environmental mitigating conditions that will affect rail operations through Reno, and the Condition #22c study is specifically designed to identify additional final mitigating measures during a period when train volumes are capped so as to prevent any material effects on Reno. The only precedent cited by Reno, State of Idaho v. ICC, 35 F.3d 585 (D.C. Cir. 1994) (Idaho), provides no support for Reno's claim that it is likely to succeed on its appeal. In that case, the court faulted the agency for delegating to other agencies the decision about the scope of mitigating conditions and their efficacy in ameliorating the harm brought about by the proposed action. The Condition #22c study will be prepared under the direction and supervision of SEA, which will submit the study and its recommendations to the Board;

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[8] The standards of a stay petition are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed by a stay; and (4) that the public interest supports the granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Cuomo v. United States Nuclear Regulatory Com'n, 772 F.2d 972, 974 (D.C. Cir. 1985); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); and Virginia Petroleum Jobbers Ass'n v. Federal Power Com'n, 259 F.2d 921, 925 (D.C. Cir. 1958). See West Texas Utilities Company v. Burlington Northern Railroad Company, No. 41191 (STB served June 25, 1996) (slip op. at 5).

and we will then issue a decision imposing final mitigation. See Decision No. 44, slip op. at 279 (Condition #22d). Unlike the situation in Idaho, the Board itself will further consider Reno-related environmental impacts, and impose supplemental conditions to ameliorate them as appropriate.[9]

Irreparable Harm. Reno will not suffer "irreparable" harm if the Condition #22c study proceeds as ordered in Decision No. 44; the harm Reno claims is much akin to the expenditure of resources to conduct ongoing litigation pending appellate review. "The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." Virginia Petroleum Jobbers Ass'n, 259 F.2d at 925 (emphasis in original).

The City of Reno will not be irreparably harmed because it must participate in the administrative process to identify what regulatory relief it will be given. Nor will it be harmed because of any operational changes brought about by the merger during the study period. As previously noted, we have imposed a virtual stay on operational changes affecting Reno. Thus, there will be no significant environmental impacts to Reno while the environmental staff, the Board, and the parties work to arrive at additional tailored mitigation for Reno.[10]

Harm to Other Parties. Because a stay of Condition #22c would almost certainly require a corresponding extension of the Condition #22a freight train limitation (a daily average count of 14.7 freight trains per day), such a stay would cause severe harm to UP/SP and its customers, and would also cause some degree of harm to BNSF and its customers. The Condition #22a limitation, which is slated to continue in effect for 18 months following consummation of the merger, will limit UP/SP's ability to operate between Northern California and the Midwest via its most direct route, which runs through Reno. The Condition #22a limitation will also curtail UP/SP's ability to develop a high-speed intermodal route between Northern California and Chicago, and it will force UP/SP and BNSF to crowd their trains on another route where service may be adversely affected. Conditions #22c and #22a envision that the study will be completed and acted upon by the Board, and that the limitation will cease, no later than 18 months after the effective date of the merger. That is to say, no later than 18 months after the merger effective date, (i) final mitigating conditions will be imposed by the Board, and (ii) UP/SP may be allowed to exceed the Condition #22a limitation. A stay of Condition #22c would extend this 18-month period by the length of time such a stay was in effect.

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[9] Reno's arguments respecting BNSF, much like its other arguments, do not indicate a likelihood of success on the merits. We had an adequate record to make our decision because BNSF has already submitted detailed information about its long-range plans, see BNSF-1, -54, -55, and -56, and those plans were taken into consideration in the EA and Post EA prepared by SEA. Further refinements of BNSF's plans can be considered in the Condition #22c study, as necessary.

[10] UP/SP will be permitted to add only an average of two additional freight trains per day in Reno, and, pending further approval, will be prohibited from increasing traffic to the projected post-merger levels. See Decision No. 44, slip op. at 222, and nn.268-69.

The Public Interest. Reno, apparently referencing Condition #22a, suggests that the public interest in a stay is "recognized in Decision No. 44's requirement that [the] railroads essentially maintain [the] operational status quo." RENO-8 at 4. We agree with UP/SP that Reno's suggestion makes no sense, because what Reno is saying, in essence, is that our implicit determination that an 18-month "stay" would be in the public interest demonstrates that an even longer stay would also be in the public interest. We think that an 18-month "stay" is long enough (assuming, as we do, that the Condition #22c study can be prepared and acted upon within 18 months), and that the public interest could be harmed by further delay of the new services that will be possible once the Condition #22a "stay" expires in compliance with such further orders of the Board as may be entered upon completion of the mitigation study.

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-8 stay request is denied.

2. This decision shall be effective on the service date.

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

Vernon A. Williams
Secretary

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SERVICE DATE

SEP 27 1996

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. 56][2]

Decided: September 25, 1996

In Decision No. 44 (served August 12, 1996), the Board, acting under 49 U.S.C. 11103, granted BNSF terminal trackage rights over two segments of KCS track in Shreveport and over one segment of KCS track in Beaumont (Decision No. 44, slip op. at 167-70),[3] and directed BNSF and KCS to submit, by August 22, 1996, either agreed-upon terms or separate proposals respecting implementation of such terminal trackage rights (Decision No. 44, slip op. at 232, ordering paragraph 22). In Decision No. 45 (served August 23, 1996), the August 22nd deadline was extended to September 23, 1996.

By joint pleading (BN/SF-67 and KCS-67) filed September 23, 1996, BNSF and KCS have requested an additional 30-day extension of time to reach a negotiated agreement respecting compensation, the only matter respecting which an agreement has not yet been reached. The extension request is reasonable, and it 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. In Decision No. 44, ordering paragraph 22 (slip op. at 232), as previously modified in Decision No. 45, is further modified by extending the submission deadline from September 23, 1996, to October 23, 1996.[4]

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

[2] This decision embraces Finance Docket No. 32760 (Sub-No. 9), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Terminal Trackage Rights--Kansas City Southern Railway Company.

[3] Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company are referred to collectively as BNSF. The Kansas City Southern Railway Company is referred to as KCS.

[4] The effective date specified in ordering paragraph 22, however, remains September 11, 1996, because, except as agreed otherwise by BNSF and KCS, the terms respecting implementation of the Sub-No. 9 trackage rights (either the terms agreed to by BNSF

(continued...)

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

[4](...continued)
and KCS or the terms imposed by the Board) will be effective retroactive to September 11th.

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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. 63][2]

Decided: December 3, 1996

In Decision No. 44, we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company)[3] and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company),[4] subject to various conditions, the most prominent of which was the BNSF

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

[2] This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company; and STB Finance Docket No. 32760 (Sub-No. 20), The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Southern Pacific Transportation Company.

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

[4] Southern Pacific Rail Corporation is referred to as 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 SP.

agreement.[5] Common control was consummated on September 11, 1996.[6]

The trackage rights provided for in the BNSF agreement, as modified by the amendments required by Decision No. 44, allow BNSF: (1) to handle traffic of shippers open to all of UP, SP and KCS[7] at Lake Charles and Westlake, LA;[8] (2) to handle traffic of shippers open to SP and KCS at West Lake Charles, LA; and (3) to interchange with KCS at Shreveport and Texarkana, traffic that was originated by KCS at or that will be delivered by KCS to shippers at Lake Charles, Westlake, or West Lake Charles (collectively, the Lake Charles area).[9] The BNSF trackage rights respecting the Lake Charles area were not provided for in the initial version of the BNSF agreement dated September 25, 1995, nor in the supplemental agreement dated November 18, 1995. They were first provided for in Paragraph 8 of the CMA agreement dated April 18, 1996;[10] they were expanded by UP/SP in its brief dated June 3, 1996, see UP/SP-260 at 23 n.9; and they were further expanded by the modifications required by Decision No. 44, see slip op. at 152-54 (the Lake Charles discussion) and 188-89 (the Montell/Olin discussion).[11]

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

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

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

[8] The point we have previously referred to as "West Lake" (two words), see, e.g., Decision No. 44, slip op. at 188-89, is actually known as "Westlake" (one word). See KCS-65 at 1; BN/SF-70 at 2 & n.2; CMA-14 at 5; and MONT-11 at 2.

[9] Prior to the merger, Lake Charles was served exclusively by UP, but was open through reciprocal switching to SP and KCS; Westlake was served by KCS and SP jointly, but was open to UP through reciprocal switching; and West Lake Charles was served by KCS and SP, and was not open to reciprocal switching by UP. Prior to the merger, Rose Bluff Yard, located on the western edge of Westlake, was owned jointly by KCS and SP, and allowed KCS and SP to interchange with each other cars moving to/from industries at Westlake and West Lake Charles. UP did not have, prior to the merger, access to Rose Bluff Yard.

[10] The Chemical Manufacturers Association is referred to as CMA. See also Decision No. 44, slip op. at 18 (description of the CMA agreement); UP/SP-219 (CMA agreement is an attachment); and UP/SP-230 (same).

[11] In Decision No. 44, we required that the BNSF agreement be modified: (a) to eliminate certain geographical restrictions (continued...)

In this decision, we address the matters raised in the KCS-65 petition to reopen/reconsider filed by KCS, and in the replies filed by: BNSF;[12] CMA;[13] and Montell USA Inc. (Montell), Olin Corporation (Olin), and PPG Industries, Inc. (PPG).[14]

BACKGROUND

KCS' Argument. KCS concedes that an unconditioned UP/SP merger would have had certain anticompetitive consequences of the 2-to-1 variety in the Lake Charles area. This concession focuses upon traffic that prior to the merger could have moved in either an SP single-line routing or a KCS-UP joint-line routing. KCS notes that, after the merger, UP/SP will be in both such routings, and will therefore have a bottleneck on this traffic. KCS also notes that our Shreveport/Texarkana interchange condition, which KCS supports, represents an attempt to address one aspect of the bottleneck problem. This condition, KCS claims, preserves two independent routings with respect to traffic moving to/from Memphis, St. Louis, or beyond that previously could have used either an SP single-line routing or a KCS-UP joint-line routing.

KCS acknowledges that our Shreveport/Texarkana interchange condition does not address the bottleneck problem for traffic moving to/from Houston or New Orleans that prior to the merger could have been routed either SP single-line or KCS-UP joint-line. KCS notes that these bottleneck problems were addressed by CMA Paragraph 8 (which eliminated the New Orleans bottleneck by allowing BNSF to handle traffic moving to, from, and via New Orleans) and by the other conditions we imposed in Decision No. 44 (which eliminated the Houston bottleneck by allowing BNSF to handle traffic moving to, from, and via Houston, and which also eliminated the phantom haulage fee). KCS

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[11] (...continued)
respecting traffic either originated or terminated by BNSF at Lake Charles, Westlake, and West Lake Charles; (b) to allow KCS to interchange with BNSF, at Shreveport and Texarkana, traffic that was originated by KCS at or that will be delivered by KCS to shippers at Lake Charles, Westlake, or West Lake Charles; and (c) to eliminate the so-called "phantom haulage fee" applicable to certain traffic.

[12] BN/SF-70.

[13] CMA-14.

[14] The reply filed jointly by Montell, Olin, and PPG is designated "MONT-11, OLIN-5, PPG-4."

contends, however, that the solutions we provided were excessive because they gave BNSF direct access to all Lake Charles area shippers, even those that would have suffered no competitive harm from the merger.

Relief Sought By KCS. KCS asks, in essence: that we reject CMA Paragraph 8 as respects Lake Charles area traffic; that we likewise reject the corresponding provision of the BNSF agreement;[15] that we vacate our Decision No. 44 condition that required the elimination of certain geographical restrictions respecting traffic either originated or terminated by BNSF in the Lake Charles area; that we similarly vacate our Decision No. 44 condition that required the elimination of the phantom haulage fee; and that we require UP/SP to ensure that KCS can interchange traffic with BNSF (i) at Beaumont for movements to Houston and (ii) at Lake Charles for movements to New Orleans. This relief, KCS claims, will allow for the creation of a KCS-BNSF joint-line routing (replacing the pre-merger KCS-UP joint-line routing) to compete against a UP/SP single-line routing, and will resolve, in the least intrusive way possible, both the bottleneck problem and any concern over plastics storage capacity.

KCS suggests that, at the very least, we should vacate our Decision No. 44 conditions which eliminated the Houston bottleneck and the phantom haulage fee. This partial relief, KCS notes, will undo our expansion of CMA Paragraph 8. KCS adds that BNSF would still be required, for reasons provided below, to file a terminal trackage rights application.

KCS adds that another alternative, at least with respect to traffic moving to/from Houston, would be a complete grant of the Tex Mex[16] responsive application as sought by Tex Mex in its own petition for reconsideration. See Decision No. 62. KCS notes that this would allow for the creation of a KCS-Tex Mex routing via Beaumont, and would thus preserve two independent routings from Lake Charles to Houston.

KCS Asserts Veto Power Over BNSF Access. KCS contends that UP/SP can provide BNSF access to facilities at Westlake and West Lake Charles (and possibly at Lake Charles as well) only with KCS' consent, and that we can require KCS to provide such

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[15] The corresponding provision of the BNSF agreement is the fourth sentence of Section 5b, as contained in Section 4b of the second supplemental agreement dated June 27, 1996.

[16] The Texas Mexican Railway Company is referred to as Tex Mex.

access only under 49 U.S.C. 11103 (which, KCS notes, has not been invoked with respect to the Lake Charles area). It argues that the access provided *both* by CMA Paragraph 8 and the corresponding provision of the BNSF agreement *and* by our imposition (and expansion) of those provisions is unenforceable.[17]

KCS' argument rests upon four joint facility agreements entered into by KCS and The Texas and New Orleans Railroad Company (T&NO, an SPT predecessor): a 1934 contract; a 1940 contract; a 1948 contract; and a 1954 contract.[18] KCS claims that the four joint facility agreements prohibit T&NO (and, by succession, SP and UP/SP) from granting to BNSF, without the consent of KCS, access to the track and facilities covered by these contracts. KCS contends: with respect to the 1934 and 1940 contracts, that KCS is the sole owner of the trackage governed by these contracts, and that KCS and KCS alone has the right to grant another carrier access over that track; and, with respect to the 1948 and 1954 contracts, that neither KCS nor T&NO may grant another carrier access to the track governed by these contracts without the consent of the other.[19]

KCS maintains that UP/SP thus cannot unilaterally provide BNSF access to the Lake Charles area. It argues that, because KCS is not an applicant in the UP/SP merger proceeding, we cannot provide such access under the conditioning power authorized by 49 U.S.C. 11344(c).[20] It also contends that such access cannot be effected under the immunizing power of 49 U.S.C. 11341(a) because, in view of the availability of a 49 U.S.C. 11103(a)

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[17] There are certain ambiguities in the position taken by KCS. KCS contends either: (i) that KCS' consent is required for BNSF access to facilities at Westlake and West Lake Charles, see KCS-65 at 2, line 7 (as revised by the KCS-66 errata sheet); or (ii) that KCS' consent is required for BNSF access to facilities in the Lake Charles area (i.e., facilities at Lake Charles, Westlake, and West Lake Charles), see KCS-65 at 13, Heading C, line 2 (also as revised by the KCS-66 errata sheet). And it is not entirely clear whether KCS is referring to *all* facilities at Westlake and West Lake Charles (and possibly at Lake Charles as well) or only to *some* such facilities.

[18] KCS also references a 1951 contract entered into by KCS and T&NO (that added a segment of track to the 1940 contract) and a 1981 contract entered into by KCS and SPT (respecting operating procedures in the Lake Charles area). The veto power asserted by KCS, however, derives from the 1934, 1940, 1948, and 1954 contracts.

[19] KCS adds that certain trackage governed by the 1954 contract is owned solely by KCS, so that KCS and KCS alone can grant additional access to this trackage.

[20] See, e.g., Decision No. 44, slip op. at 74 n.79 and 191 (respecting the San Diego & Imperial Valley Railroad).

remedy, an override of the contractual prohibitions contained in the four joint facility agreements cannot be deemed necessary.[21] KCS therefore argues that, if we continue to believe that BNSF should be granted direct access to the Lake Charles area, we must require BNSF to file a terminal trackage rights application.[22]

DISCUSSION AND CONCLUSIONS

Applicable Standards. A proceeding may be reopened, and reconsideration granted, upon a showing of material error, new evidence, or substantially changed circumstances. 49 CFR 1115.3(b) (1995). See also Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Nov. 27, 1995) (Decision No. 43, slip op. at 2). KCS has asserted material error and, to a limited degree, new evidence; it has not asserted substantially changed circumstances. As a practical matter, however, the KCS-65 petition, except insofar as it deals with the KCS-T&NO joint facility agreements, rests entirely upon the assertion of material error because, aside from the joint facility agreements, the new evidence that has been presented is only tenuously "new" and is certainly not material.

Preliminary Matters. KCS has suggested that, if we decline to accept its KCS-68 reply,[23] we should treat KCS-68 *either* as a

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[21] See Decision No. 44, slip op. at 170 & n.217, where we noted: (i) that the 49 U.S.C. 11341(a) immunity provision *can* override a consent requirement in a joint facility agreement; but (ii) that such an override cannot be deemed *necessary* if terminal trackage rights can be awarded under 49 U.S.C. 11103(a).

[22] KCS apparently concedes that the Lake Charles area tracks covered by the four cited joint facility agreements constitute "terminal facilities" as that term is used in 49 U.S.C. 11103(a). KCS indicates that the filing of a 49 U.S.C. 11103(a) application would provide KCS an opportunity to demonstrate that the use of these tracks by BNSF would not be in the public interest, and would substantially impair the ability of KCS to handle its own traffic. See, e.g., Decision No. 44, slip op. at 167-69. And KCS apparently has in mind that approval of a BNSF terminal trackage rights application under 49 U.S.C. 11103(a) would allow KCS to charge compensation for such rights in excess of the compensation provided for by the four cited joint facility agreements. See KCS-65 at 19.

[23] Because BNSF's "Progress Report and Operating Plan" filed October 1, 1996 (BNSF-PR#1) includes, at pp. 22-24, material that had previously appeared in the BN/SF-70 reply, KCS has filed an additional pleading of its own (KCS-68) to address the arguments made both in BN/SF-70 and in BNSF-PR#1 at 22-24. (continued...)

motion for leave to file a reply to a reply or as a motion to strike BNSF-PR#1 at 22-24. KCS-68 at 2 n.3. Our acceptance of the KCS-68 reply moots this suggestion. Montell and PPG have filed a motion (MONT-12) to strike the KCS-68 reply, and KCS has filed a reply (KCS-69) to the MONT-12 motion to strike. That we may decide in a fully informed manner the matters raised by the KCS-65 petition, we will deny the MONT-12 motion to strike.

The Merits. KCS seeks elimination of certain important aspects of the conditions that we imposed giving BNSF access to shippers in the Lake Charles area.[24] KCS maintains that we selected the wrong remedy for the competitive problems presented by the merger in this region. Although KCS did not originally suggest any remedy other than divestiture or denial, it now says that it would have preferred for us to have allowed a KCS-BNSF routing via Beaumont for Houston traffic, and a KCS-BNSF interchange at Lake Charles for New Orleans traffic, rather than for us to have given BNSF additional rights and responsibilities. We will deny the KCS-65 petition.

We carefully considered the issues raised by KCS in Decision No. 44. We explained there that it was necessary to expand the voluntary settlement agreements involving UP/SP, BNSF, and CMA, and that giving BNSF additional rights was the most effective way to assure continued competition for Lake Charles area shippers. Id. at 105-07, 133. In spite of its service to the Lake Charles area, KCS lacks a sufficient route structure to be competitive with UP/SP in many corridors on a single-line basis. As KCS now acknowledges, it needs to interline traffic destined to New Orleans, Houston, and Laredo. Moreover, as various Lake Charles area shippers (Montell, Olin, and PPG) point out, and as we discussed in Decision No. 44, KCS must interline to offer competitive service to the St. Louis gateway.

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[2] (...continued)
The KCS-68 reply, for the most part, merely repeats arguments previously made in the KCS-65 petition.

[24] We found three shortcomings with CMA Paragraph 8, even as expanded by UP/SP in its June 3rd brief, that required us to craft additional competition-preserving remedies. The first problem was that Lake Charles movements from and to St. Louis and Chicago would have had to use one of applicants' lines, even if originated or terminated at Lake Charles by KCS. (KCS takes no issue with our solution here: preserving its opportunity to participate in St. Louis- and Chicago-bound traffic through interchanges with BNSF at Texarkana and Shreveport.) The second problem was that BNSF's access was restricted to shipments moving between the Lake Charles area and either Mexico or New Orleans. The third problem was that BNSF was to pay a fee to UP/SP above and beyond the trackage rights fee for a service that UP/SP would not actually be providing.

The competitive loss to Lake Charles area shippers was stressed by several parties in their original comments, including Montell, Olin, PPG, SPI[25], and KCS. KCS specifically noted that this area should be deemed, not a "3-to-2" point, but a "2-to-1" point due to the routing limitations faced by KCS in getting to Houston and New Orleans. Now that we have chosen BNSF to correct this, KCS argues that the problem of which it complained earlier is not really so severe, and that our solution is overly intrusive.[26] We must reject KCS' efforts to retract its prior testimony that the merger would cause a significant competitive problem for these shippers.[27] Moreover, we continue to believe that the conditions we imposed, by building upon a privately negotiated settlement agreement, as endorsed by all relevant shippers, offer a better competitive solution than KCS has offered.

The KCS-T&NO Joint Facility Agreements. KCS contends, in essence, that, unless and until the Board approves a terminal trackage rights application, neither UP/SP nor the Board can authorize BNSF to conduct trackage rights operations on the lines subject to the four KCS-T&NO joint facility agreements. KCS has further suggested, in its KCS-68 pleading, that these agreements bar UP/SP even from entering into a reciprocal switching arrangement with BNSF without KCS' consent. BNSF insists, however, that, despite the four agreements, it *can* access the Lake Charles area by reciprocal switch. BNSF further insists that, in any event, an override of the terms of the four agreements can be had under 49 U.S.C. 11341(a).

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[25] The Society of the Plastics Industry, Inc. is referred to as SPI.

[26] For example, KCS witness Grimm attempts to retract much of his own previous testimony regarding the economic significance of this downstream monopoly bottleneck. See KCS-65, V.S. Grimm at 6-8.

[27] KCS also argues that we removed the restrictions on BNSF access to the Lake Charles area based merely upon concerns about inadequate storage-in-transit capacity. This mischaracterizes our decision; we removed the limitations "[b]ecause BNSF would only be able to handle shipments routed to certain destinations, and because the destinations are not known when the product moves to the storage point . . ." Decision No. 44, slip op. at 153. If the Mexico/New Orleans BNSF restriction were allowed, then shipments going elsewhere would have to be returned from storage to complete the haul, thus severely limiting BNSF's ability to offer effective competition for those movements it would have been permitted to handle.

We need not resolve these matters at this time. As to the terms of the four KCS-T&NO joint facility agreements,[28] if the parties (KCS, BNSF, and UP/SP) are not able to come to an agreement, any differences in interpretation of the four joint facility agreements may be submitted to arbitration under the terms of those agreements.[29] If the parties (KCS, BNSF, and UP/SP) are unable to agree and the arbitral interpretation produces a situation where BNSF access to the Lake Charles area is blocked, BNSF may return to the Board to seek approval of a terminal trackage rights application under new 49 U.S.C. 11102(a);[30] and, if and to the extent that application is ultimately denied, an override of the terms of the four joint facility agreements might be necessary under old 49 U.S.C. 11341(a).[31]

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

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[28] KCS could have brought the four agreements to BNSF's attention prior to September 3rd, but it was not required to do so. The procedural posture of this case was such that, with respect to these four agreements, KCS simply was not in the position of a defendant that must raise any arguments by a certain date or be forever foreclosed from raising them thereafter.

[29] The four KCS-T&NO joint facility agreements provide that controversies arising thereunder that cannot be settled by the parties (KCS and T&NO) shall be referred to arbitration. We realize, of course, that BNSF is not a party to the four agreements. We expect, however: (i) that BNSF, which claims rights derivative to the rights conferred by the four agreements on T&NO, will accept the arbitration remedy provided by the four agreements; and (ii) that, if and to the extent BNSF so requests, SPT will invoke that arbitration remedy on behalf of BNSF.

[30] If BNSF were to file a terminal trackage rights application under new 49 U.S.C. 11102(a), and we granted the application, BNSF could not claim, under old 49 U.S.C. 11341(a), any necessity for an override of the terms of the four joint facility agreements.

[31] We have said that the immunity provision can effect an override of a consent requirement in a joint facility agreement, but only insofar as such an override can be considered "necessary" within the meaning of old 49 U.S.C. 11341(a) and new 49 U.S.C. 11321(a). We have also said, however, that an override cannot be considered "necessary" if a terminal trackage rights remedy under old 49 U.S.C. 11103(a) or new 49 U.S.C. 11102(a) is available. See Decision No. 44, slip op. at 170 & n.217. BNSF contends, in essence, that because any decision we might issue on a terminal trackage rights application cannot be issued at the same time as Decision No. 44, an override must be deemed necessary even if BNSF never invokes the terminal trackage rights remedy provided by new 49 U.S.C. 11102(a). We are not persuaded that the necessity alleged by BNSF is sufficient for anything more than a "bridge the gap" application of the immunity provision.

It is ordered:

1. The MONT-12 motion to strike is denied.

2. The KCS-65 petition is denied.

3. This decision shall be effective on December 4, 1996.

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

Vernon A. Williams
Secretary

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STB FD-32760 12-10-96 C-64 21312

21312
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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. 64][2]

Decided: December 10, 1996

In Decision No. 44, the Board imposed a condition (referred to as the TUE condition) that requires that the BNSF agreement be amended to permit KCS and BNSF to interchange TUE coal trains: (a) at Shreveport, for movement by BNSF over SP's line between Shreveport and Tenaha; and (b) at Texarkana, for movement by BNSF over UP's line between Texarkana and Longview. The Board directed the interested parties (TUE, UP/SP, BNSF, and KCS) to submit, by December 10, 1996, either agreed-upon terms or separate proposals respecting implementation of the TUE condition. Decision No. 44, slip op. at 186 and 233 (ordering paragraph 32).[3]

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

[2] This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company; and STB Finance Docket No. 32760 (Sub-No. 20), The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Southern Pacific Transportation Company.

[3] Texas Utilities Electric Company is referred to as TUE. The Kansas City Southern Railway Company is referred to as KCS. Union Pacific Railroad Company and Missouri Pacific Railroad Company are referred to collectively as UP. Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company are referred to collectively as SP. Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company are referred to collectively as BNSF. See also Decision No. 44, slip op. at 12 n.3 (description of the BNSF agreement).

In a joint petition (designated TUE-19, UP/SP-289, BNSF-73, and KCS-70) filed December 6, 1996, the interested parties have jointly requested both a 45-day extension of the deadline and a waiver of the certificate of service requirement.

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

The service list in this proceeding includes numerous persons who have no particular interest in the TUE condition, and the expense that would be incurred by TUE, UP/SP, BNSF, and/or KCS in serving such persons with any further filings respecting such condition would be substantial. Accordingly, any further papers filed in this proceeding by TUE, UP/SP, BNSF, and/or KCS, respecting the TUE condition imposed in Decision No. 44 and respecting no other matter, need be served only upon TUE, UP/SP, BNSF, and KCS, and upon any other party that has made, on or after the service date of this decision, a written request that such further papers be served upon such party.

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

It is ordered:

1. In Decision No. 44, ordering paragraph 32 (slip op. at 233) is modified by extending the submission deadline from December 10, 1996, to January 24, 1997.

2. The joint petition (designated TUE-19, etc.) filed December 6, 1996, and any further papers filed in this proceeding by TUE, UP/SP, BNSF and/or KCS, respecting the TUE condition imposed in Decision No. 44 and respecting no other matter, need be served only upon TUE, UP/SP, BNSF, and KCS, and upon any other party that has made, on or after the service date of this decision, a written request that such further papers be served upon such party.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams

Vernon A. Williams
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