STB FD-32760 12-12-96 C-65 21327

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SEC

SERVICE DATE

DEC 12 1996

LATE RELEASE

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. 65][2]

Decided: December 12, 1996

In Decision No. 44, the Board imposed a condition (referred to as the CMTA condition) that requires that BNSF be granted the right to interchange traffic with the operator of the Giddings-Llano line either at Giddings or at Elgin. The Board directed the interested parties (CMTA, Longhorn, UP/SP, and BNSF) to submit, by December 10, 1996, either agreed-upon terms or separate proposals respecting implementation of the CMTA condition. The Board added, however, that one implementation detail (the choice between Giddings and Elgin) could be decided unilaterally by CMTA. Decision No. 44, slip op. at 182-83 and 233 (ordering paragraph 31).[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. 10), Responsive Application--Capital Metropolitan Transportation Authority; 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] Capital Metropolitan Transportation Authority, which holds a mass transit easement over a segment of the Giddings-Llano line, and which indicated that it intended to purchase the line by the end of 1996, is referred to as CMTA. The new operator of the line, Central of Tennessee Railway & Navigation Company Incorporated, d/b/a The Longhorn Railway Company, is referred to as Longhorn. Union Pacific Railroad Company and

(continued...)

In a joint petition (designated CMTA-13, LHRR-1, and BNSF-74) filed December 10, 1996, CMTA, Longhorn, and BNSF have jointly requested both a 30-day extension of the deadline (which, they indicate, UP/SP does not oppose) and a waiver of the 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 CMTA condition, and the expense that would be incurred by CMTA, Longhorn, UP/SP, and BNSF in serving such persons with any further filings respecting such condition would be substantial. Accordingly, any further papers filed in this proceeding by CMTA, Longhorn, UP/SP, and/or BNSF, respecting the CMTA condition imposed in Decision No. 44 and respecting no other matter, need be served only upon CMTA, Longhorn, UP/SP, and BNSF, 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 31 (slip op. at 233) is modified by extending the submission deadline from December 10, 1996, to January 9, 1997.

2. The joint petition (designated CMTA-13, etc.) filed December 10, 1996, and any further papers filed in this proceeding by CMTA, Longhorn, UP/SP, and/or BNSF, respecting the CMTA condition imposed in Decision No. 44 and respecting no other matter, need be served only upon CMTA, Longhorn, UP/SP, and BNSF, 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
Secretary

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[3](...continued)
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.15 (description of the BNSF agreement).

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STB FD-32760 1-14-97 C-67 21456

21456 SERVICE DATE - LATE RELEASE JANUARY 14, 1997
SEC

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. 67][2]

Decided: January 14, 1997

In Decision No. 44, the Board imposed a condition (referred to as the CMTA condition) that requires that BNSF be granted the right to interchange traffic with the operator of the Giddings-Llano line either at Elgin or at Giddings. The Board directed the interested parties (CMTA, Longhorn, UP/SP, and BNSF) to submit, by December 10, 1996, either agreed-upon terms or separate proposals respecting implementation of the CMTA condition. The Board added, however, that one implementation detail (the choice between Elgin and Giddings) could be decided unilaterally by CMTA. Decision No. 44, slip op. at 182-83 and 233 (ordering paragraph 31).[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. 10), Responsive Application-Capital Metropolitan Transportation Authority; 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] Capital Metropolitan Transportation Authority, which holds a mass transit easement over a segment of the Giddings-Llano line, and which indicated that it intended to purchase the line by the end of 1996, is referred to as CMTA. The new operator of the line, Central of Tennessee Railway & Navigation Company Incorporated, d/b/a The Longhorn Railway Company, is referred to as Longhorn. Union Pacific Railroad Company (UPRR)

(continued...)

In Decision No. 65, the December 10th deadline was extended to January 9, 1997.

The interested parties have now filed several pleadings: CMTA and BNSF have filed a joint submission (designated CMTA-14 and BN/SF-75, and referred to herein simply as CMTA-14); UP/SP has filed its own submission (UP/SP-292); and Longhorn has filed a request for an extension of time.

BACKGROUND

CMTA indicates: that UP refused to approve CMTA's request for interchange at both Elgin and Giddings; that, for this reason, CMTA was required to choose one or the other; that CMTA chose Elgin; and that CMTA's choice was influenced by several factors, including the level of service BNSF intends to provide through Elgin and the proximity of Elgin to the majority of shippers on the Giddings-Llano line. CMTA adds that the parties will carry out the interchange under the terms provided for in the BNSF agreement, and, as between BNSF and the Giddings-Llano operator, under the terms provided for in the BNSF Operating Plan submitted to the Board on October 1, 1996, and an interchange agreement between those two parties. CMTA further indicates that UP has agreed, as an additional term of the interchange, (1) that the Giddings-Llano operator and BNSF may use the existing interchange facilities at Elgin, and (2) that BNSF trains can interchange Giddings-Llano cars by using a UP-owned siding located approximately a mile south of Elgin on the UP mainline (hereinafter referred to as the UP siding), in coordination with UP's dispatcher and as train operations permit, for running around the trains, so long as the siding is left free of cars and equipment except while a BNSF train is at Elgin. CMTA adds that UP has agreed to cooperate fully to facilitate use of the existing interchange facilities at Elgin and the UP siding south of Elgin.

Longhorn argues that an Elgin interchange would not satisfy the purposes of the CMTA condition. Longhorn claims: that a Longhorn-BNSF routing to Houston could not be achieved with an Elgin interchange, but could be achieved with a Giddings interchange; that the volumes of inbound freight received by one shipper at McNeil are such that an Elgin interchange would not be adequate; and that, in general, various practical matters affecting the shipping public have not been given appropriate

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[3](...continued)
and Missouri Pacific Railroad Company (MPRR) were formerly referred to collectively as UP. On January 1, 1997, MPRR merged into UPRR, see UP/SP-292 at 1 n.1; and, for the sake of consistency, for the period beginning January 1, 1997, the acronym "UP," as used in this decision, shall be understood to refer to the post-merger UPRR. 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 (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) were formerly referred to collectively as BNSF. On December 31, 1996, SF merged into BN, and the surviving corporation was renamed The Burlington Northern and Santa Fe Railway Company, see CMTA-14 at 1 n.2; and, for the sake of consistency, for the period beginning December 31, 1996, the acronym "BNSF," as used in this decision, shall be understood to refer to the surviving corporation. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

consideration by the other parties. Longhorn therefore requests a 30-day extension to file a brief describing the terms that it believes are required to satisfy the CMTA condition.

BNSF indicates that it is not entirely certain that the existing interchange facilities at Elgin, even when combined with the use of the UP siding south of Elgin, are adequate for BNSF to interchange with Giddings-Llano cars. BNSF adds that, after it reviews UP/SP's filing (i.e., UP/SP-292), it may file a further submission on this issue within 14 days (i.e., on or before January 23rd).

UP urges that the Board not delay in implementing the CMTA condition on the terms to which UP has already agreed. (1) As respects the choice of Elgin as opposed to Giddings, UP contends that this choice takes into consideration several factors: that BNSF, under its existing trackage rights, will not be serving Giddings, but will be conducting through-train operations through Elgin; that shippers on the Giddings-Llano line are located west of Elgin, and thus are closer to Elgin than to Giddings; and that the portion of the Giddings-Llano line between Elgin and Giddings remains out of service. (2) As respects the adequacy of the interchange arrangements at Elgin, UP contends: that the existing interchange facilities at Elgin are adequate to meet the needs of a Longhorn-BNSF interchange; that, even if existing facilities are inadequate, the BNSF agreement and implementing trackage rights agreements provide BNSF the right to build any new facilities (including connections and sidings) it might need to facilitate an Elgin interchange; and that, to assure the adequacy of the Elgin interchange, UP has committed to allow BNSF to make limited use of the UP siding located approximately a mile south of Elgin. UP warns that BNSF has in mind expanded rights to use the UP siding and the UP mainline in order to improve the ease with which BNSF can interchange with Longhorn at Elgin, without having to make any of its own improvements to the Elgin facilities. UP claims that BNSF has indicated that it may insist both that it have the right to leave cars resting on the UP siding for later pick-up by Longhorn and that Longhorn have the right to operate over the UP mainline to reach the UP siding to pick-up BNSF's deliveries and/or to leave cars on the UP siding for later pick-up by BNSF. UP fears that use of the UP siding in the fashion supposedly envisioned by BNSF would lead to unacceptable interference with train operations on the UP mainline.

DISCUSSION AND CONCLUSIONS

In Decision No. 44, slip op. at 183, the Board explicitly stated that the choice between Elgin and Giddings could be decided unilaterally by CMTA. Neither Longhorn nor any other party sought reconsideration of this aspect of Decision No. 44, and the time for seeking reconsideration has long since expired. It necessarily follows that the Elgin vs. Giddings issue is no longer subject to administrative review.

The other issue raised in the pleadings, the adequacy of the interchange arrangements at Elgin agreed to by CMTA and UP (and apparently agreed to, in part, by BNSF), has not previously been decided by the Board. Longhorn and BNSF will therefore be allowed an opportunity to submit, in accordance with the procedural schedule set out below, evidence and arguments respecting the alleged deficiencies in these arrangements. All parties will then have an opportunity to reply to any such submissions.

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

It is ordered:

1. Submissions respecting the arrangements agreed to by CMTA and UP are due by January 21, 1997.

2. Replies thereto are due by January 28, 1997.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

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February 24, 1997

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 SOUTH WESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[DECISION NOS. 10, 11, 28, AND 35]

NOTICE

A court action, entitled as shown below, was instituted on or about February 3, 1997, involving the above-entitled proceeding:

No. 97-1072[1]

The Kansas City Southern Railway Company

V.

Surface Transportation Board

United States of America

before the

United States Court of Appeals for the

District of Columbia Circuit

Vernon A. Williams

VERNON A. WILLIAMS
Secretary

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[1]This case is consolidated in the United States Court of Appeals for the District of Columbia Circuit with Case Nos. 96-1293, 96-1373, 96-1386, 96-1388, 96-1389, 96-1418, 96-1470, 96-1492, 96-1493, 96-1494, 97-1004, 97-1007, 97-1025, 97-1041, and 97-1042. Case No. 96-1293 has been designated as the lead case.

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Records: 490

STB FD-32760 3-10-97 C-68 21490

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SERVICE DATE - MARCH 10, 1997

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. 68][2]

Decided: March 5, 1997

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) 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) subject to various conditions, including the terms of the BNSF agreement and the build-in/build-out condition. Common control was consummated on September 11, 1996.[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] Union Pacific Corporation is referred to as UPC. Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) were formerly referred to collectively as UP. On January 1, 1997, MPRR merged into UPRR, see Decision No. 67, slip op. at 1 n.3; and, for the period beginning January 1, 1997, the acronym "UP," as used in this decision, shall be understood to refer to UPRR.

(continued...)

In this decision, we address the matters discussed in the following pleadings: the petition filed December 19, 1996, by Enterprise Products Company (EPC); the UP/SP-291 reply filed January 8, 1997, by applicants; and the pleading styled "petition and reply" (hereinafter referred to as the P&R pleading) filed January 13, 1997, by EPC.[4]

BACKGROUND

In the earlier phase of this proceeding, EPC, which operates hydrocarbon production facilities at Mont Belvieu, TX, opposed the UP/SP merger on the grounds that the merger would have an anticompetitive impact at these facilities. EPC conceded that these facilities were rail-served, prior to the merger, solely by SP (via its Baytown Branch), but claimed that the merger would eliminate the potential competition promised by UP's previously announced plans to construct a new Mont Belvieu Branch, which would have extended 10½ miles from the UP line at McNair and which would have directly served several major plastics and petrochemicals plants on SP's Baytown Branch. EPC acknowledged that the Mont Belvieu Branch was not proposed to serve EPC initially, but maintained that, because the Exxon plant that the Mont Belvieu Branch would serve was less than a mile from EPC's facilities, the short extension that would be needed to reach EPC

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

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

Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) were formerly referred to collectively as BNSF. On December 31, 1996, SF merged into BN, and the surviving corporation was renamed The Burlington Northern and Santa Fe Railway Company, see Decision No. 67, slip op. at 1 n.3; and, for the period beginning December 31, 1996, the acronym "BNSF," as used in this decision, shall be understood to refer to the surviving corporation. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

[4] EPC asks, in its petition filed December 19, 1996, that we entertain that petition and by procedural order afford interested parties 30 days to comment and EPC 15 days to reply. We reject EPC's request, and will adhere to the procedural schedule provided by 49 CFR 1104.13(a), as recently amended in Expedited Procedures For Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527, 61 FR 52710, 52711 (Oct. 8, 1996) (a party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided).

EPC, recognizing that its P&R pleading is subject to being stricken as a reply to a reply, see 49 CFR 1104.13(c) (a reply to a reply is not permitted), asks that this pleading be entertained because, in EPC's view, the UP/SP-291 reply "so egregiously distorts the truth." EPC's P&R pleading at 1. The UP/SP-291 reply, in our view, does not distort the truth, egregiously or otherwise, but, because EPC's P&R pleading sheds light on the nature of the relief sought by EPC, we will not strike it, despite the UP/SP-294 filing on January 17, 1997, that urges rejection of the P&R pleading as a reply to a reply.

could be justified on economic grounds at an early date. EPC therefore urged the denial of the merger, and added that, if the merger were to be approved, it would have to be conditioned by requiring that UP/SP either (1) build the Mont Belvieu Branch as proposed and grant trackage rights upon it to a competing carrier (BNSF) with no limitations on providing service to additional customers at Mont Belvieu, or (2) authorize a shortline to operate the Baytown Branch and grant trackage rights for multiple railroads to access it at Dayton along the SP Houston-New Orleans mainline and through the interchange point with the UP line at the southern terminus. See Decision No. 44, slip op. at 68.

Despite the opposition expressed by EPC and others, we approved the UP/SP merger because we believed that the merger, subject to the mitigating conditions that we imposed, would be in the public interest, and that any competitive harm would be heavily outweighed by the positive effects and benefits of the merger as conditioned. See, generally, Decision No. 44. The mitigating conditions we imposed included, among many others, the build-in/build-out condition. See Decision No. 44, slip op. at 106 and 146.

We did not impose, however, the two conditions requested by EPC. (1) We denied EPC's condition #1 because a requirement that UP/SP build the Mont Belvieu Branch that had been proposed by UP would have exceeded by far the relief theretofore afforded in the build-in/build-out context; and the excess, we noted, was underscored by the fact that the relief that had been proposed by UP, would not even have reached EPC. We initially proposed by UP, would not even have reached EPC. We added, however, that our denial of EPC's condition #1 was without prejudice to EPC's right to invoke the build-in/build-out condition #2 because the insertion of a second carrier on the Baytown Branch was not necessary to alleviate merger-caused competitive harms and would have vastly improved EPC's competitive options. We noted that, prior to the merger, EPC would be rail-served solely by SP, and that, after the merger, EPC would be rail-served solely by UP/SP; and we therefore concluded that the merger would not result in a reduction in EPC's competitive alternatives.

Now, in its petition filed December 19, 1996, EPC argues that it should have access to service by BNSF. EPC claims that it previously had a feasible build-in/build-out option for service by UP, and that, for this reason, BNSF should be authorized to serve EPC as a 2-to-1 shipper.[5]

DISCUSSION AND CONCLUSIONS

EPC contends that the relief it seeks should be provided under the build-in/build out condition, and insists that its petition does not seek reconsideration or reopening of Decision No. 44. See EPC's P&R pleading at 1-2. We are of the opinion, however, that EPC's petition filed December 19, 1996, should be denied whether it is properly characterized as seeking clarification of our build-in/build-out relief or reopening relief.

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[5] BNSF states that it agrees with EPC's position and is prepared to provide direct service to EPC, provided that we grant EPC the relief it seeks. See BN/SF-79, filed Jan. 24, 1997 (verified statement of a General Director in BNSF's Merchandise Business Unit). See also UP/SP-297, filed Jan. 28, 1997 (UP/SP's reply).

Build-In/Build-Out Relief. The CMA settlement agreement, which was entered into by UP/SP, BNSF, and the Chemical Manufacturers Association (CMA), provides a post-merger procedure by which a CMA member may raise a claim that the merger has deprived it of a build-in/build-out option. See Decision No. 44, slip op. at 18 (general description of the CMA agreement) and 146 (description of CMA Paragraph 13, the CMA build-in/build-out procedure). CMA Paragraph 13, from which our build-in/build-out condition is derived, applies to any situation in which a shipper has a facility that, pre-merger, was solely served by SP but could have had a build-in/build-out to a point on UP (and vice versa). The build-in/build-out condition that we imposed in Decision No. 44 expands upon CMA Paragraph 13: by making it applicable to all shippers, not just CMA members; by removing the time limit previously agreed to by UP/SP and CMA; and by clarifying that a shipper invoking this condition need not demonstrate economic feasibility. See Decision No. 44, slip op. at 146; Decision No. 61, slip op. at 13-14 (¶ 5); Decision No. 66, slip op. at 12-13. Both CMA Paragraph 13 and our build-in/build-out condition, however, require that a build-in/build-out line actually be built, either by the shipper or by BNSF, or by any entity other than UP/SP.[6]

Prior to the merger, EPC was solely served by SP but could have had a build-in/build-out to a point on UP. EPC may therefore invoke the build-in/build-out condition, but it can invoke that condition only if either EPC, or BNSF, or any entity other than UP/SP, actually intends to construct a connection between the EPC facilities and a UP line. EPC's pleadings make clear, however, that neither EPC nor BNSF nor any other entity actually intends to construct any such connection. For this reason, insofar as EPC's petition filed December 19, 1996, can be properly characterized as seeking relief under our build-in/build-out condition, that petition must be denied.

EPC claims that, because applicants have not granted BNSF trackage rights to McNair (the point at which a build-in/build-out line would connect to the nearby UP line), it has had no choice but to seek direct service by BNSF at Mont Belvieu. See EPC's P&R pleading at 4. As we have previously noted, however, see Decision No. 61, slip op. at 14 n.35, CMA Paragraph 13 provides that BNSF will be granted any trackage rights that may be necessary for BNSF to reach the build-in/build-out point. EPC

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[6] CMA Paragraph 13 provides, among other things, that the standard for determining whether a shipper asserting a build-in/build-out right "shall be entitled to relief shall be the principles with regard to build-ins articulated by the Interstate Commerce Commission in Finance Docket No. 32549, Decision served Aug. 23, 1995, or, if more favorable to the Shipper, any principles with regard to build-ins articulated by the STB in [its decision in the UP/SP proceeding]." In the Finance Docket No. 32549 proceeding (the BN/SF merger proceeding), the ICC clearly indicated that a build-in/build-out line could be constructed either by the shipper or by the trackage rights carrier, or by any entity other than the merging carrier. See Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Aug. 23, 1995) (Decision No. 38, slip op. at 98). 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. 16, 1995) (Decision No. 42, slip op. at 3).

is therefore wrong in suggesting that a build-in/build-out cannot run to a line over which BNSF does not already have trackage rights.[7]

Reopening Relief. A proceeding may be reopened upon a showing of material error, new evidence, or substantially changed circumstances. See 49 CFR 1115.3(b), as recently amended in Expedited Procedures For Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527, 61 FR 52710, 52714 (Oct. 8, 1996). 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).

EPC's characterization to the contrary notwithstanding, its petition amounts to an allegation of material error in Decision No. 44, and the relief EPC seeks would necessarily require the reopening of Decision No. 44 and a change in its result. Furthermore, the relief EPC seeks now could have been sought in the prior phase of this proceeding and, indeed, similar relief (EPC's condition #2) was sought in the prior phase of this proceeding. We will therefore treat EPC's petition filed December 19, 1996, as if it explicitly sought, in addition to the build-in/build-out relief urged by EPC, reopening of Decision No. 44. As so construed, however, that petition must be denied.[8]

EPC claims, in essence, that, as a 2-to-1 shipper, it was adversely affected by the merger. EPC, however, was not a 2-to-1 shipper; it was a 1-to-1 shipper. Prior to the merger, it was rail-served solely by SP; since the merger, it has been rail-served solely by UP/SP; the merger did not result in a reduction in EPC's competitive alternatives. If anything, EPC's competitive alternatives have been expanded by the prospect that new transloading facilities will be established that can be served by BNSF. As applicants have explained:

> EPC's situation, however, is no different from that facing any other non-"2-to-1" shipper along

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[7] EPC is also wrong in suggesting that we did not impose any other forms of relief for shippers such as itself. The new facilities condition, one of the several broad-based conditions we imposed in Decision No. 44, requires that BNSF be granted the right to serve new facilities (including transload facilities, and specifically including transload facilities owned or operated by BNSF) on both UP-owned and SP-owned track (including SP's Baytown Branch) over which BNSF will be operating pursuant to trackage rights provided for in the BNSF agreement. See Decision No. 44, slip op. at 106 (third paragraph) and 145-46 (the "new facilities and transloading facilities" requirement). We have also explained that BNSF has been granted access to many 2-to-1 plastics and chemicals shippers. Thus, the pre-merger level of geographic competition has been preserved. That source and geographic competition provides substantial competitive leverage to exclusively served shippers such as EPC. See Decision No. 44, slip op. at 124-26.

[8] Petitions seeking reconsideration of Decision No. 44 were due by September 3, 1996, see 49 CFR 1115.3(e). The recent revisions to 49 CFR 1115.3 did not change the deadlines applicable to petitions seeking reconsideration. Compare 49 CFR 1115.3(e) (1995) and 61 FR at 52714. Thus, the time period in which EPC could file a petition for reconsideration has long expired.

> UP or SP lines over which BNSF received overhead trackage rights. Those shippers, like EPC, may be able to take advantage of the build-in or transloading conditions the Board imposed, but they are not entitled to direct BNSF service.

UP/SP-294 at 3-4.

EPC has also raised a discriminatory treatment allegation. EPC notes, among other things, that other shippers on the SP Baytown Branch, that are located in or near Mont Belvieu and that would have been served by UP's proposed Mont Belvieu Branch, have been treated as 2-to-1 shippers and, as such, have been given access to BNSF. EPC also notes that other shippers at other locations, that would have lost build-in/build-out opportunities as a result of the merger, have also been identified as 2-to-1 shippers and, as such, have also been given access to BNSF. EPC, demanding equality of treatment, asks that it too be given access to BNSF. However, with respect to at least some of the comparison shippers (those located in or near Mont Belvieu), EPC can not claim to be similarly situated; these shippers would have been served directly by the proposed Mont Belvieu Branch. Moreover, with respect to all of the comparison shippers, we reiterate that the harm sustained by a shipper that has not benefitted from pro-competitive conditions provided for others in settlement agreements is not the kind of harm that should be rectified under the 49 U.S.C. 11344(c) conditioning power. EPC is not concerned that it is losing a transportation option, but only that some of its competitors, and other shippers generally, are gaining one. Given this context, we will not require that a settlement agreement be changed to improve the competitive situation of a particular shipper. See Decision No. 44, slip op. at 183 (Montana Wheat and Barley Committee, Montana Farmers Union, and Governor Racicot), 189-90 (Formosa Plastics Corporation), 191 (International Paper Company and United States Gypsum Company), and 193 (Weyerhaeuser Company). See also Decision No. 66, slip op. at 14 (Railco, Inc.); and 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 Aug. 23, 1995) (Decision No. 38, slip op. at 99) (Bunge Corporation).

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

It is ordered:

1. The petition filed December 19, 1996, by EPC is denied.

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

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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SERVICE DATE - MARCH 10, 1997

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. 69][2]

Decided: March 7, 1997

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) 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) subject to various conditions, including the terms of the BNSF agreement and a condition (referred to as the CMTA condition) that requires that BNSF be granted the right to interchange traffic with the operator of the Giddings-Llano line either at Elgin, TX, or at Giddings, TX. With respect to the implementation of the CMTA condition, we directed the interested parties (CMTA, Longhorn, UP/SP, and BNSF) to submit, by December 10, 1996, either

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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. 10), Responsive Application--Capital Metropolitan Transportation Authority; 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.

agreed-upon terms or separate proposals. See Decision No. 44, slip op. at 182-83 and 233 (ordering paragraph 31).[3]

In Decision No. 65, the December 10th deadline was extended to January 9, 1997. Prior to January 9th, interchange arrangements at Elgin were agreed to by CMTA and UP/SP. In view of this agreement, the interested parties filed, on or about January 9th, several pleadings: CMTA and BNSF filed a joint submission (designated "CMTA-14 and BN/SF-75," and referred to herein as CMTA-14); UP/SP filed its own submission (UP/SP-292); and Longhorn filed a request for an extension of time.

In Decision No. 67, Longhorn and BNSF were given additional time to submit evidence and arguments respecting certain alleged deficiencies in the arrangements agreed to by CMTA and UP/SP. It was ordered that submissions respecting these arrangements were to be filed by January 21, 1997. It was further ordered that any replies to such submissions were to be filed by January 28, 1997.

We address, in this decision, the issues raised in the following pleadings: the pleading filed on or about January 21, 1997, by Longhorn (not designated, but referred to herein as

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[3] Capital Metropolitan Transportation Authority, which held a mass transit easement over a segment of the Giddings-Llano line and which indicated that it intended to purchase the line by the end of 1996, is referred to as CMTA. The new operator of the line, Central of Tennessee Railway & Navigation Company Incorporated, d/b/a The Longhorn Railway Company, is referred to as Longhorn. See Decision No. 44, slip op. at 33-35.

Union Pacific Corporation is referred to as UPC. Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) were formerly referred to collectively as UP. On January 1, 1997, MPRR merged into UPRR, see Decision No. 67, slip op. at 1 n.3; and, for the period beginning January 1, 1997, the acronym "UP," as used in this decision, shall be understood to refer to UPRR.

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

UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3. Common control of UP and SP, as approved in Decision No. 44, was consummated on September 11, 1996.

Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) were formerly referred to collectively as BNSF. On December 31, 1996, SF merged into BN, and the surviving corporation was renamed The Burlington Northern and Santa Fe Railway Company, see Decision No. 67, slip op. at 1 n.3; and, for the period beginning December 31, 1996, the acronym "BNSF," as used in this decision, shall be understood to refer to the surviving corporation. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

LHRR-3);[4] the BN/SF-76 pleading filed by BNSF; and the UP/SP-298 pleading filed by UP/SP.

POSITIONS OF THE PARTIES

CMTA. CMTA has indicated: that UP/SP refused to approve CMTA's request for interchange at both Elgin and Giddings; that CMTA was therefore required to choose one or the other, see Decision No. 44, slip op. at 182 (final paragraph); that CMTA chose Elgin; and that CMTA's choice was influenced by several factors, including the level of service BNSF intends to provide through Elgin and the proximity of Elgin to the majority of shippers on the Giddings-Llano line. CMTA has also indicated that the parties will carry out the interchange under the terms provided for in the BNSF agreement, and, as between BNSF and the Giddings-Llano operator, under the terms provided for in the BNSF Operating Plan submitted to the Board on October 1, 1996, and an interchange agreement between those two parties. CMTA has further indicated that UP/SP has agreed, as an additional term of the interchange, (1) that the Giddings-Llano operator and BNSF may use the existing interchange facilities at Elgin, and (2) that BNSF trains can interchange Giddings-Llano cars by using a UP-owned siding located approximately a mile south of Elgin on the UP/SP mainline (hereinafter referred to as the UP siding), in coordination with UP/SP's dispatcher and as train operations permit, for running around the trains, so long as the siding is left free of cars and equipment except while a BNSF train is at Elgin. CMTA has also indicated that UP/SP has agreed to cooperate fully to facilitate use of both the existing interchange facilities at Elgin and the UP siding south of Elgin.[5]

Longhorn. Longhorn, which indicates that it has reopened the Giddings-Llano line to Elgin and that it is in the process of reopening the line to Giddings, insists that the Elgin interchange is inadequate, and will not allow Longhorn to provide 2-to-1 routing competition (UP/SP at McNeil vs. BNSF at Elgin). Longhorn insists that the interchanges at McNeil and Elgin are not similar: the McNeil interchange connects with the UP/SP mainline in two directions, whereas the Elgin interchange connects in one direction only; and the McNeil interchange has room for dozens of cars and has no road crossings inhibiting movements, whereas the Elgin interchange is such that, for various reasons (including several road crossings), Longhorn will be unable to interchange more than 10 to 14 cars at any given time. Longhorn maintains that, whereas the Elgin interchange will never be competitive with the McNeil interchange, the Giddings interchange would be competitive. With the Giddings interchange, Longhorn claims, Longhorn could interchange with BNSF in volumes of several thousand carloads per year (primarily granite blocks and aggregates). These volumes, Longhorn adds, will not be possible with an Elgin interchange; Elgin, Longhorn insists, is currently handling all the traffic it can, and its configuration will not allow for any increase over present volumes. Longhorn therefore urges that Giddings, not Elgin, be

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[4] The cover letter that accompanies this pleading refers to it as "CMTA-13, BNSF-74, LHRR-1," but that designation was previously used to designate a joint extension request filed December 10, 1996, see Decision No. 65, slip op. at 2 (lines 1-2).

[5] CMTA's position was presented in the CMTA-14 pleading filed January 9, 1997.

the site of the Longhorn/BNSF interchange provided for by the CMTA condition.

BNSF. BNSF, which had previously expressed concern that the existing interchange facilities at Elgin, even when combined with the use of the UP siding south of Elgin, might not be adequate for a BNSF/Longhorn interchange, now indicates that it believes that the existing interchange facilities together with the UP siding are adequate for a BNSF/Longhorn interchange, provided that BNSF and Longhorn are able, consistent with standard industry practice and custom regarding the interchange of cars, to leave cars and equipment on the UP siding for a reasonable period of time and to use the UP/SP line in order to effect such interchange. BNSF maintains that, if UP/SP, BNSF, and Longhorn cooperate and coordinate their train operations with each other through UP/SP's dispatcher, the UP siding can be used for purposes of interchanging cars between Longhorn and BNSF, and that any use of the UP/SP line by Longhorn to reach the siding to pick up or deliver cars temporarily left on the siding will not interfere with through train operations on the UP/SP line. BNSF contends: that northbound interchanges can be effected by having the BNSF train pull north past the switch at Elgin and then back over the switch to connect to (or disconnect from) cars interchanged with Longhorn; that the UP siding will therefore be used primarily for southbound movements and then only if the number of cars to be interchanged exceeds the capacity of the existing facilities at Elgin; and that, given current projections, there should be only three southbound BNSF trains per week for which any use of the UP siding and the UP/SP line would be needed. BNSF adds, with respect to the potential for interference with train operations on the UP/SP line, that it does not matter whether it is BNSF or Longhorn that uses the line to effect the interchange; either way, BNSF notes, the interchange activities will need to be coordinated with UP/SP's dispatcher, and the carrier implementing the interchange will generally need to be on the UP/SP line the same amount of time; and, if it is Longhorn rather than BNSF that implements the interchange, any use of the UP/SP line may be lessened because Longhorn, unlike BNSF, will not need to run its locomotive around the BNSF train.

UP/SP. UP/SP asks that we implement the CMTA condition on the terms agreed to by CMTA and UP/SP.

DISCUSSION AND CONCLUSIONS

We are denying the requests embraced in LHRR-3 and BN/SF-76. Our denial of these requests will allow the implementation of the Elgin interchange on the terms agreed to by CMTA and UP/SP.

The CMTA Condition. Prior to the UP/SP merger, the operator of the Giddings-Llano line had one active Class I connection (UP at McNeil) and one potential Class I connection (SP at Giddings; the SP connection was inactive because Longhorn's predecessor had discontinued operations over the Smoot-Giddings segment of the Giddings-Llano line). To preserve the potential competitive option at Giddings we imposed a requirement that the operator of the Giddings-Llano line was to be regarded as a 2-to-1 shortline for purposes of Section 8i of the BNSF agreement (which provides, among other things, that BNSF shall have the right to interchange with any shortline which, prior to September 25, 1995, could interchange with both UP and SP and no other railroad).

The CMTA condition, however, was complicated by the fact that in Section 4b of the BNSF agreement, as amended by

Section 3b of the second supplemental agreement dated June 27, 1996, UP/SP and BNSF had agreed that BNSF was to have the right to interchange at Elgin with the operator of the Giddings-Llano line, should service be reinstituted on that line to Elgin. We noted that, in view of this agreement, CMTA would have a right to a connection with BNSF either at Giddings (because we had decided to require such a connection) or at Elgin (because we intended to hold applicants to their representation that they would allow such a connection). We further noted that, because the potential competition that we sought to preserve was based upon a single connection, CMTA would have no right to insist upon connections at both Elgin and Giddings. We therefore required that CMTA choose between Elgin and Giddings, unless the parties agreed otherwise. We allowed the interested parties (CMTA, Longhorn, UP/SP, and BNSF) an opportunity to reach a negotiated settlement respecting the precise details of the CMTA condition, but we noted that one such detail (the choice between Elgin and Giddings) could be decided unilaterally by CMTA. See Decision No. 44, slip op. at 182-83.

CMTA ultimately chose Elgin over Giddings, and CMTA and UP/SP ultimately reached an agreement respecting the details of the Elgin interchange. In the pleadings filed in response to Decision No. 67, Longhorn contends that the interchange should be at Giddings, BNSF contends that the arrangements agreed to by CMTA and UP/SP should be modified in certain ways that concern the use of the UP siding south of Elgin, and UP/SP contends that neither Longhorn nor BNSF has provided any justification for implementing the CMTA condition on terms other than those agreed to by CMTA and UP/SP.

Elgin vs. Giddings. We need not decide whether an Elgin interchange is or is not superior to a Giddings interchange; it suffices simply to note that the choice of Elgin vs. Giddings was CMTA's, and that CMTA, which has an incentive to protect the long-term interests of Giddings-Llano shippers, had good reasons to prefer an Elgin interchange over a Giddings interchange. First, Elgin is 32 miles closer to Giddings-Llano shippers than is Giddings. An interchange at Giddings would have required the revival, and thereafter the subsequent maintenance, of 32 miles of heretofore out-of-service track east of Elgin. Second, there is good reason to believe that BNSF will be able to offer a much higher level of service at Elgin than at Giddings. CMTA had every reason to expect that, in terms of frequency and transit time, the level of service provided by a BNSF "branchline" operation over the 29-mile SP segment between Caldwell and Giddings, for the sole purpose of serving an interchange with Longhorn, would likely be inferior to BNSF's planned mainline operations at Elgin.

Longhorn's arguments in favor of a Giddings interchange are not persuasive. (1) Longhorn insists that an Elgin interchange will be inferior to a McNeil interchange. We imposed the CMTA condition, however, to preserve the potential competition (McNeil vs. Giddings) that existed prior to the UP/SP merger, and, in view of the representations that had been made by applicants, we allowed CMTA to choose between Elgin and Giddings. McNeil, however attractive it might be, was not an option that CMTA could have chosen. The correct comparison, therefore, is Elgin vs. Giddings, and, as noted above, we think that CMTA had good reasons for choosing Elgin. (2) Longhorn, focusing on Elgin vs. Giddings, claims that "Giddings was good enough and superior to Elgin for the SP unmerged," LHRR-3 at 4. This argument, however, is misleading: Elgin was never the interchange point for "the SP unmerged" because the north-south line at Elgin was formerly a UP

line (prior to 1988, an MKT line),[6] not an SP line. Longhorn, recognizing this historical reality, adds that the MKT's Elgin interchange "was always known to be inferior" to the SP's Giddings interchange, LHRR-3 at 4. Even assuming that Longhorn's view is correct, the Elgin vs. Giddings issue before us now is not MKT at Elgin vs. SP at Giddings; it is BNSF at Elgin via agreed-upon trackage rights vs. BNSF at Giddings via extra trackage rights (presumably over the Caldwell-Giddings segment).

In any event, the choice between Elgin and Giddings was CMTA's, not Longhorn's. We explicitly stated, see Decision No. 44, slip op. at 183, that this choice could be made unilaterally by CMTA. Neither Longhorn nor any other party sought reconsideration of this aspect of Decision No. 44, and the time for seeking reconsideration has long since expired; and, for this reason, the Elgin vs. Giddings issue is no longer subject to administrative review. Longhorn claims that it had no standing to participate prior to May 6, 1996. See LHRR-3 at 1. This, however, is misleading; Longhorn in fact did participate in this proceeding both before and after May 6, 1996, although it did so in support of the responsive application filed by CMTA. See CMTA-10, Exhibit 5 (filed March 29, 1996) (verified statement of Donald T. Cheatham, Longhorn's chairman and general manager); CMTA-11, Exhibit 1 (filed May 14, 1996) (Mr. Cheatham's rebuttal verified statement). Furthermore, even if Longhorn lacked standing prior to May 6, 1996, it had standing after that date, and had standing to file a timely request for reconsideration of Decision No. 44, which was not served until August 12, 1996.

Arrangements Respecting Elgin. The arrangements agreed to by CMTA and UP/SP allow BNSF to use the UP siding and the UP/SP mainline to effect the Longhorn/BNSF interchange. These arrangements, however, do not allow BNSF to leave cars and equipment on the UP siding (except while the interchange is actually being carried out) and do not allow Longhorn to operate over the UP/SP mainline. BNSF requests that these arrangements be modified: (1) to allow Longhorn (and not only BNSF) also to use the UP/SP mainline in order to effect the Longhorn/BNSF interchange; and (2) to allow both Longhorn and BNSF to leave cars and equipment on the UP siding for a reasonable period of time.

The arrangements agreed to by CMTA and UP/SP envision that, before being picked up by BNSF or after being delivered by BNSF, cars involved in the Longhorn/BNSF interchange will rest either on UP/SP interchange tracks at Elgin or on Giddings-Llano tracks approaching Elgin. These arrangements do not envision that such cars will rest on the UP siding; and, as a necessary consequence, these arrangements do not envision that Longhorn will operate over the UP/SP mainline to and from the UP siding. The modifications requested by BNSF would allow Longhorn to operate over the UP/SP mainline to reach the UP siding to pick up cars previously left on the siding by BNSF and/or to leave cars on the siding for later pick-up by BNSF. The modifications requested by BNSF would allow the UP siding to be used as a storage track for cars interchanged between BNSF and Longhorn, and would tie up the UP siding for any period during which such cars were located thereon.

UP/SP, by agreeing to the use of the UP siding by BNSF, has implicitly conceded that the existing track configuration at Elgin may be less than ideal, at least with respect to cars

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[6] MKT is the acronym for the former Missouri-Kansas-Texas Railroad Company.

interchanged from or to southbound trains. For several reasons, however, we will deny BNSF's requested modifications of the Elgin interchange arrangements agreed to by CMTA and UP/SP.

(1) The choice between Elgin and Giddings was a choice between two locations, each of which has certain pluses and minuses. CMTA, in choosing Elgin over Giddings as the better overall alternative, was choosing the existing Elgin and not an idealized version thereof. CMTA's choice of Elgin should be taken to represent CMTA's view that the existing interchange facilities at Elgin, combined with the use by BNSF of the UP siding south of Elgin, are adequate to meet the needs of a Longhorn/BNSF interchange.

(2) The BNSF agreement and implementing trackage rights agreements provide BNSF the right to build any new facilities (including connections and sidings) it might need to facilitate an Elgin interchange. There appears to be no obstacle to the construction, at Elgin, of any new facilities that BNSF might deem necessary or desirable. See UP/SP-298 (verified statement of Steve Searle).

(3) CMTA and/or Longhorn presumably have the right to build any new Giddings-Llano facilities (including connections and sidings) that Longhorn might need to facilitate an Elgin interchange. There appears to be ample room for a lengthy new siding adjacent to the Giddings-Llano line a few hundred feet east of the UP crossing at Elgin. Such a siding could apparently accommodate cuts of almost a mile in length without blocking any grade crossings.

(4) The modifications requested by BNSF would interfere with operations on the UP/SP mainline through Elgin. Because that line only has a single track, it requires well-spaced passing sidings. If the UP siding south of Elgin were occupied, for hours (or even days) at a time, by BNSF-Longhorn interchange cars, it would be unavailable for UP/SP (and/or BNSF) train meets, leaving a gap of 30 miles between sidings that would significantly impair the fluidity of train operations on the UP/SP mainline.

(5) We are not persuaded by BNSF's argument that, as to potential interference with train operations on the UP/SP line, it does not matter whether it is BNSF or Longhorn that uses the line to effect the interchange. In fact, it does matter. If BNSF effects the interchange, cars will not be left on the UP siding beyond the relatively brief amount of time necessary for the BNSF locomotive to move around the train, haul the interchange cars to/from Elgin, and move in the reverse direction. If, however, Longhorn effects the interchange, the interchange cars may be left sitting on the UP siding for a much longer time.

Related Matter. In its second quarterly progress report (BNSF-PR-2, filed January 2, 1997), BNSF noted that, since January 15, 1996, it has been operating between Temple and San Antonio under the terms of a BNSF-SP settlement negotiated in connection with the BN/SF merger. This service, BNSF added in its progress report, will continue to operate on SP's Caldwell-Giddings-Flatonia line until such time as the UP route via Elgin and Smithville is upgraded to allow multiple movements of 286,000 pounds. See BNSF-PR-2 at 6 (the next to the last indented item). BNSF now notes that, until such time as BNSF's operations move to the UP line through Elgin, any BNSF/Longhorn interchange will have to be at Giddings. See BN/SF-76 at 1 n.1. Because no party has addressed problems that may arise if there is a long delay in

implementing BNSF's operations via Elgin, we will not address this matter either. Rather, we expect BNSF to commence operations via Elgin in the relatively near future.

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

It is ordered:

1. Longhorn's request that the Longhorn/BNSF interchange be located at Giddings is denied.

2. BNSF's request that the Elgin interchange arrangements agreed to by CMTA and UP/SP be modified in certain ways that concern the use of the UP siding south of Elgin is denied.

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

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
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STB FD-32760 4-14-97 C-70 25426

25426
SEC

SERVICE DATE - APRIL 14, 1997

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. 70]

Decided: April 9, 1997

In Decision No. 44, the Board approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) 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) subject to various conditions, including certain environmental mitigation conditions respecting the City of Reno, NV (hereinafter referred to as the Reno conditions). See Decision No. 44, slip op. at 220-23, 237 (ordering paragraph 62), and 278-79 (conditions 22a, 22b, 22c, and 22d). Common control was consummated on September 11, 1996.[2]

In a pleading (UP/SP-301) filed April 4, 1997, applicants UPRR and SPT have: (1) submitted their first set of interrogatories and requests for the production of documents to the City of Reno (hereinafter referred to as Reno); and (2) petitioned for waiver of the otherwise applicable service requirements respecting the UP/SP-301 pleading and any future pleadings concerning the Reno conditions.

This decision addresses that portion of the UP/SP-301 pleading wherein applicants have sought a waiver of the otherwise applicable service requirements. Applicants contend that, aside from applicants and Reno, the only other parties with any possible interest in the Reno conditions are the City of Wichita (Wichita) and Sedgwick County (Sedgwick). See Decision No. 44, slip

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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] Union Pacific Corporation is referred to as UPC. Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) were formerly referred to collectively as UP. On January 1, 1997, MPRR merged into UPRR, see Decision No. 67, slip op. at 1 n.3; and, for the period beginning January 1, 1997, the acronym "UP," as used in this decision, shall be understood to refer to UPRR.

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.

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

op. at 279-80 (similar environmental mitigation conditions respecting the City of Wichita and Sedgwick County, KS).

The service list in this proceeding includes numerous persons who have no particular interest in the Reno conditions imposed in Decision No. 44, and the expense that would be incurred by applicants and Reno in serving such persons with any further filings respecting such conditions would be substantial. Therefore, any further papers filed in this proceeding by UP/SP, Reno, Wichita, or Sedgwick, respecting the Reno conditions imposed in Decision No. 44 and respecting no other matter, need be served only upon UP/SP, Reno, Wichita, and Sedgwick, and upon any other party that has made, on or after April 4, 1997, 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. The UP/SP-301 pleading, and any further papers filed in this proceeding by UP/SP, Reno, Wichita, and/or Sedgwick, respecting the Reno conditions imposed in Decision No. 44 and respecting no other matter, need be served only upon UP/SP, Reno, Wichita, and Sedgwick, and upon any other party that has made, on or after April 4, 1997, a written request that such further papers be served upon such party.

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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STB FD-32760 4-17-97 C-71 25447

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SERVICE DATE - APRIL 17, 1997

SURFACE TRANSPORTATION BOARD[1]

DECISION

Finance Docket No. 32760

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

[Decision No. 71]

Decided: April 15, 1997

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) 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)(collectively UP/SP), subject to various conditions, including numerous environmental mitigating conditions. As pertinent here, the environmental conditions imposed in Decision No. 44 call for further, more focused, mitigation studies to arrive at specifically tailored mitigation plans for Wichita, KS and Reno, NV, in addition to the environmental mitigation that already has been imposed, to assure that localized environmental issues unique to those two communities are effectively addressed.

After Decision No. 44 was issued, the City of Wichita and the Board of County Commissioners of Sedgwick County, KS (Wichita/Sedgwick) filed an environmental court challenge in the United States Court of Appeals for the District of Columbia Circuit. No. 96-1293, City of Wichita v. Surface Transportation Board (pet. for review filed Aug. 21, 1996) (Wichita).[2] From pleadings filed in that litigation, it became apparent that the Wichita appeal is addressed solely to the sentence in Decision No. 44 (at p. 223) stating, "The [mitigation] studies [that are

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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. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and 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] Another environmental court challenge is pending in the D.C. Circuit in No. 96-1418, City of Reno v. Surface Transportation Board (Reno). The D.C. Circuit, on its own motion, ordered the Reno and Wichita appeals consolidated with the petitions for review raising issues other than environmental issues that were filed in that court. The Board and the United States have moved to sever the Reno and Wichita appeals from the other cases seeking review of Decision No. 44 and to hold briefing in abeyance in these two cases because, unlike the other petitions seeking review of Decision No. 44, the Reno and Wichita petitions are environmental court challenges that are not ripe or final for judicial review at this time. That motion remains pending in the court.

now underway for Wichita and Reno] will carefully examine private and public funding options, as we believe that the cost of mitigation for Reno and Wichita should be shared." Then, following an inquiry looking toward settlement of the Wichita litigation, petitioners' counsel in the Wichita case advised our General Counsel, by letter dated April 7, 1997,[3] that if the Board issues a decision clarifying that UP/SP will be required to pay 100% of the cost of mandated environmental mitigation, Wichita/Sedgwick will withdraw their appeal.

Petitioners' counsel states that Wichita/Sedgwick understands that, consistent with Decision No. 44, the Board is considering both "base line" mitigation, i.e., mitigation including, but not limited to, the type discussed in Decision No. 44, that UP/SP would be required to implement and fund in order to increase the number of through trains operating through Wichita/Sedgwick, and alternative mitigation, i.e., more expensive options. As to the latter, Wichita/Sedgwick understands that the Board may suggest funding alternatives, but such suggestions would be in no way binding. See Addendum A.

Having ascertained that UP/SP has no objection to the issuance of a decision clarifying the intent of the sentence at page 223 of Decision No. 44, quoted above, in the manner requested by Wichita/Sedgwick, it appears to us appropriate to clarify our intent with respect to developing final mitigation for Wichita and Reno. Specifically, the final environmental mitigation that will be developed for Wichita and Reno following the completion of the ongoing mitigation studies will include (in addition to the mitigation that has already been imposed) both (1) mandated or base line mitigation, which the Board will require UP/SP to implement and entirely fund, and (2) alternative mitigation that might be a more far reaching solution for all concerned, but which will not be binding absent a voluntary agreement by the parties to share costs or expend greater resources.

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

It is ordered:

1. The discussion of environmental mitigation in Decision No. 44 is clarified as set forth in this decision.

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

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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[3] A copy of that letter is attached as Addendum A.

ADDENDUM A

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April 7, 1997

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1925 K Street, N.W. -- Suite 610
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Re: No. 96-1293, City of Wichita, et al. v. Surface Transportation Board and United States of America

Dear Ms. Rush and Ms. Kitay:

I advised the City of Wichita, Kansas and the Board of County Commissioners of Sedgwick County, Kansas ("Wichita/Sedgwick") of our March 27, 1997 conversation, and they authorized me to state the following.

The referenced appeal is addressed solely to the Board's statement in Finance Docket No. 32760, Decision No. 44, that "The [mitigation] studies will carefully examine private and public funding options, as we believe that the cost of mitigation for Reno and Wichita should be shared."

If the Board issues a decision to the effect that the Union Pacific Railroad will be required to pay 100% of the cost of mandated mitigation, Wichita/Sedgwick will withdraw their appeal.

By way of clarification, Wichita/Sedgwick understand that, consistent with Order No. 44, the Board is considering both "base line" mitigation, i.e. mitigation including, but not limited to, the type discussed in Order No. 44, that UP would be required to implement and fund in order to increase the number of through trains operating through Wichita/Sedgwick, and alternative mitigation, i.e. more expensive options. As to the latter, the Board may suggest funding alternatives, but such suggestions would in no way be binding

Finally, the agreement of Wichita/Sedgwick to withdraw No. 96-1293 under these circumstances would in no way limit their right either to participate fully in the Board's mitigation

studies and future proceedings or their right of appeal of any future Board order.

Yours,

Steven J. Kalish

cc: J. Michael Hemmer
Gary Rebenstorf
Richard Euson
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STB FD-32760 5-23-97 C-72 21654

21654
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SERVICE DATE - MAY 23, 1997

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. 72][2]

Decided: May 9, 1997

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) 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) subject to various conditions, including the terms of the BNSF agreement and 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, LA, for movement by BNSF over SP's line between Shreveport, LA, and Tenaha, TX; and (b) at Texarkana, TX/AR, for movement by BNSF over UP's line between Texarkana, TX/AR, and Longview, TX. With respect to the implementation of the TUE condition, we directed the interested parties (TUE, UP/SP, BNSF, and KCS) to submit, by December 10, 1996, either agreed-upon terms or separate proposals. *See* 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] Union Pacific Corporation is referred to as UPC. Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) were formerly referred to collectively as UP. On January 1, 1997, MPRR merged into UPRR, *see* Decision No. 67, slip op. at 1 n.3,

(continued...)

In Decision No. 64, the December 10 deadline was extended to January 24, 1997.

We address, in this decision, the issues raised in the following pleadings: the submissions respecting implementation filed January 24, 1997, by TUE (TUE-20), applicants (UP/SP-296), BNSF (BN/SF-78), and KCS (KCS-72); and the replies thereto filed by applicants (UP/SP-299, filed January 29, 1997) and TUE (TUE-23, filed February 3, 1997).[4]

BACKGROUND

We noted in Decision No. 44 that, prior to the UP/SP merger, the generating units at TUE's Martin Lake Station near Henderson, TX, were fueled by lignite mined nearby and hauled to Martin Lake over a private rail line operated by a TUE affiliate, Texas Utilities Mining Company (TUMC). We further noted that, although the UP/SP merger would have no impact on the transportation of this lignite, TUE anticipated that, in the year 2000, it would begin to supplement local lignite receipts with Wyoming Powder River Basin (PRB) coal receipts, with Wyoming PRB coal receipts to continue over the remaining 20-year life of Martin Lake. TUE, we noted, had explained that both BNSF and UP will be able to deliver this coal to Martin Lake: BNSF already has direct access to Martin Lake (via a spur that connects its Longview-Tenaha line with the TUMC line near Tatum, TX), and UP, though it does not yet have direct access, will soon be able to achieve direct access (by constructing a 6-mile connection to link the TUMC line with the UP line into Henderson).[5]

We further noted in Decision No. 44 that, but for the merger, TUE's PRB coal receipts could have been routed into Martin Lake via either of two efficient routings: a 1,480-mile

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[3](...continued)
and, for the period beginning January 1, 1997, the acronym "UP," as used in this decision, shall be understood to refer to UPRR.

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

UPC, UP, SPR, and SP are referred to collectively as applicants. *See* Decision No. 44, slip op. at 7 n.3. Common control of UP and SP, as approved in Decision No. 44, was consummated on September 11, 1996.

Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) were formerly referred to collectively as BNSF. On December 31, 1996, SF merged into BN, and the surviving corporation was renamed The Burlington Northern and Santa Fe Railway Company, *see* Decision No. 67, slip op. at 1 n.3; and, for the period beginning December 31, 1996, the acronym "BNSF," as used in this decision, shall be understood to refer to the surviving corporation. *See also* Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

Texas Utilities Electric Company is referred to as TUE.

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

[4] TUE also filed: a motion (TUE-22) for leave to file its TUE-23 reply; and a letter (TUE-21) indicating that TUE has no objection to our acceptance of the UP/SP-299 reply provided that we also accept the TUE-23 reply. Both replies will be accepted and considered.

[5] Construction of the 6-mile connection will require expenditures in the $7 to $12.5 million range. These expenditures are not merger-related (i.e., they are not caused by the merger).

BNSF-KCS-SP-BNSF joint-line routing (with a BNSF-KCS junction at Kansas City, a KCS-SP junction at Shreveport, and an SP-BNSF junction at Tenaha); or a 1,510-mile UP single-line routing (via Kansas City and Little Rock). TUE, we noted, feared that the merger would eliminate the BNSF-KCS-SP-BNSF joint-line routing as a competitive alternative because UP/SP would exercise bottleneck power over the Shreveport-Tenaha segment. We further noted that TUE conceded that there were two other possible routings (a 1,749-mile BNSF single-line routing via Denver, Fort Worth, Silsbee, and Tenaha, and a 1,721-mile BNSF-SP-BNSF joint-line routing via Memphis and Tenaha); that TUE claimed, however, that these other routings were extremely circuitous and, therefore, substantially more expensive; and that TUE also claimed that, even aside from the circuity, the merger would effectively eliminate the BNSF-SP-BNSF joint-line routing as a competitive alternative because UP/SP would exercise bottleneck power over the Memphis-Tenaha segment. Finally, we noted that TUE had concluded that, post-merger, its only real competitive options for PRB coal transport would be the 1,510-mile UP single-line routing and the substantially more expensive 1,749-mile BNSF single-line routing. *See* Decision No. 44, slip op. at 58.

We determined that, if the merger were not conditioned, all but one of TUE's PRB routings would involve UP/SP, and the one that would not would be excessively circuitous. We therefore imposed the TUE condition, which allows for the creation of a BNSF-KCS-BNSF joint-line routing by requiring 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. We noted that, although TUE had sought only a Shreveport interchange, we were allowing a Texarkana interchange as well, to allow BNSF's routings of TUE coal trains to connect with the additional BNSF trackage rights provided for in the CMA agreement. We further noted that this would also facilitate BNSF's directional running of these trains. *See* Decision No. 44, slip op. at 154 and 186.[6]

DISCUSSION AND CONCLUSIONS

The parties disagree with respect to four matters: (1) routing options; (2) facilities selection; (3) enforcement rights; and (4) commodity limitations.

Routing Options. The TUE unit trains that are the main focus of TUE's interest in this proceeding will carry coal in a generally southbound direction from the PRB to Martin Lake Station, and will return empty in a generally northbound direction from Martin Lake Station to the PRB. Read literally, the TUE condition would allow BNSF to run these trains: (1) in both directions on the Shreveport-Tenaha line; (2) in both directions on the Texarkana-Longview line; and (3) in accordance with UP/SP's planned directional routing pattern, i.e., southbound on the Shreveport-Tenaha line and northbound on the Texarkana-Longview line. This literal reading

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[6] The CMA agreement, which was entered into by UP/SP, BNSF, and the Chemical Manufacturers Association (CMA), provided, among other things, that the BNSF agreement would be amended to give BNSF overhead trackage rights (for traffic moving from/to points south of Bald Knob and Brinkley, AR) over UP's line between Houston, TX, and Valley Junction, IL, via Palestine, TX. *See* Decision No. 44, slip op. at 18 (general description of the CMA agreement).

The term "directional running" has reference to UP/SP's plans: (a) to run its northbound trains primarily on UP's line between Houston, TX, and Valley Junction, IL, via Palestine, TX; and (b) to run its southbound trains primarily on SP's line between Memphis, TN, and Houston, TX. *See, e.g.*, Decision No. 44, slip op. at 135-37.

The Texarkana-Longview line referenced in the TUE condition is a segment of UP's (northbound) Houston-Valley Junction line. The Shreveport-Tenaha line referenced in the TUE condition is a segment of SP's (southbound) Memphis-Houston line.

reflects the fact that the TUE condition allows BNSF to operate over SP's line "between" Shreveport and Tenaha and over UP's line "between" Texarkana and Longview, Decision No. 44, slip op. at 186. The word "between" clearly means, in this context, "in both directions" and "in either direction." Citation to authority is hardly necessary to establish this point. *But see* TUE-20 at 5-6 (citation to authority).[7]

TUE urges, in this respect, a literal reading of the TUE condition, so as to allow BNSF to run TUE trains either (1) exclusively on the Shreveport-Tenaha line (hereinafter referred to as the Shreveport-Tenaha routing), or (2) exclusively on the Texarkana-Longview line (hereinafter referred to as the Texarkana-Longview routing), or (3) directionally over both lines, i.e., southbound on the Shreveport-Tenaha line and northbound on the Texarkana-Longview line (hereinafter referred to as directional routing).[8] TUE adds that, prior to the commencement of BNSF service, TUE will select one of these routings and inform UP/SP of the selection so that the specific service details can be arranged in advance of the commencement of BNSF service. TUE notes that, whichever routing is selected, substantial facilities improvements will have to be made. By TUE's calculations, the Shreveport-Tenaha routing would require facilities improvement expenditures of approximately $6.7 million;[9] the Texarkana-Longview routing would require facilities improvement expenditures of approximately $6.6 million;[10] and directional routing would require facilities improvement expenditures of approximately $13.3 million.[11]

With respect to the non-directional aspects of the Shreveport-Tenaha and Texarkana-Longview routings, TUE and BNSF claim that operation of TUE trains "against the flow" both on the 85.5-mile Texarkana-Longview line and on the 54.5-mile Shreveport-Tenaha line would be feasible from an operating perspective because there are, on both lines, a sufficient number of passing sidings to facilitate the non-directional running of TUE trains. Applicants agree that

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[7] Read literally, the TUE condition would also allow BNSF to run TUE's coal trains: (4) in a reverse directional pattern, i.e., southbound on the Texarkana-Longview line and northbound on the Shreveport-Tenaha line. Because none of the parties has expressed an interest in a reverse directional pattern, we shall not consider this matter further.

[8] BNSF and KCS agree with TUE that the TUE condition allows a Shreveport-Tenaha routing, a Texarkana-Longview routing, and a directional routing.

[9] The $6.7 million estimate covers: construction of a connection between the KCS and SP lines in Shreveport; rehabilitation of the connection between the SP and BNSF lines at Tenaha; modifications to adjust existing curves on BNSF's line between Tenaha and Tatum; and construction of a loop track connecting the BNSF line with the TUMC line accessing the Martin Lake Station near Tatum. These expenditures, it should be noted, are not merger-related; even without the merger, these expenditures would have been necessitated by the pre-merger 1,480-mile BNSF/KCS/SP/BNSF routing.

[10] The $6.6 million estimate covers: construction of a connection between the KCS and UP lines in Texarkana; construction of a connection between the UP and BNSF lines at Longview; track rehabilitation and bridgework on BNSF's line between Longview and Tatum; and construction of a track connecting the BNSF line with the TUMC line accessing the Martin Lake Station near Tatum. The $6.6 million estimate does not include any expenditures to "straighten out" the Texarkana-Longview line; TUE insists that the Texarkana-Longview line, as it presently exists, is not too "undulating" to handle loaded unit trains of coal.

[11] The facilities improvement expenditures required for directional routing represent the sum of: (a) the facilities improvement expenditures required for the Shreveport-Tenaha routing; and (b) the facilities improvement expenditures required for the Texarkana-Longview routing. Directional routing, TUE notes, would necessitate facilities improvements on both the Shreveport-Tenaha-Tatum line and the Texarkana-Longview-Tatum line.

non-directional running would be feasible on both the Texarkana-Longview line and the Shreveport-Tenaha line. UP/SP-299 at 4-5.

TUE indicates that, because ongoing routing and operating studies have not been completed, no final decision has yet been made with respect to the three routing options. TUE frankly acknowledges, however, that, based on the data presently available, it anticipates that it will select the Texarkana-Longview routing. Directional routing, in TUE's view, would be prohibitively expensive, in that it would impose an unnecessary $6.6 million handicap on the BNSF/KCS/BNSF competitive alternative created by the TUE condition; and that leaves the Shreveport-Tenaha and Texarkana-Longview routings. TUE contends that, as between the two, the Texarkana-Longview routing appears to be preferable because, in TUE's view, the Texarkana-Longview line has a superior siding configuration and is equipped with Centralized Traffic Control. TUE-20 at 13; TUE-20, V.S. Dunn at 12. The TUE condition, TUE notes, was intended "to permit BNSF and KCS to provide an efficient PRB joint-line movement into Martin Lake as an independent competitive alternative" to the UP single-line routing, *see* Decision No. 44, slip op. at 154; and TUE appears to believe that, based on the data presently available, the Texarkana-Longview routing is "the most efficient routing that will keep BNSF/KCS as a viable and efficient competitor for TUE's Martin Lake coal business." TUE-20 at 15-16.[12]

The Texarkana-Longview routing, however, is the one routing that applicants insist TUE cannot be allowed to use. Applicants concede that the Shreveport-Tenaha routing, which would have been available but for the merger, would be appropriate, and that directional routing, which would allow BNSF to go "with the current of flow" on both lines, would also be appropriate. Applicants argue, however, that the Texarkana-Longview routing would not be appropriate, and applicants therefore claim that a literal reading of the TUE condition gives that condition a broader reach than warranted by the evidentiary record. Citing Decision No. 44, slip op. at 145 & n.176, applicants correctly note that when we impose conditions to remedy harms caused by the loss of rail options, our conditions are intended to restore the lost options, not to create altogether new ones; we do not, applicants correctly note, impose conditions that put the recipient in a better position than it occupied before the merger. The Texarkana-Longview routing, applicants argue, fails this test: it improves TUE's pre-merger competitive options by creating a shorter (and therefore more effective) BNSF/KCS/BNSF route than the route TUE would have had absent the merger, which, applicants correctly note, had no effect on the Texarkana-Longview routing's availability as a competitive option for TUE's future PRB coal trains.[13]

The TUE condition need not, and should not, be construed as literally as TUE urges here. When we imposed this condition, we had two purposes in mind. Our primary purpose was to replace the independent BNSF-KCS-SP-BNSF routing that TUE would be losing due to the merger. Our condition permits KCS to replace SP in that routing. A secondary purpose of our condition was to facilitate efficient BNSF operations over trackage rights in this region by permitting a second routing that allows TUE's trains to be handled as a part of a directional running scheme. It now appears that neither BNSF nor TUE anticipates that this traffic will be handled by directional running of trains due to the expense of rehabilitating or upgrading the track that would be needed to handle unit-train traffic. We did not make the Texarkana-Longview routing available in order to give TUE an option of running trains in both directions over that route.

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[12] Applicants apparently agree that the Texarkana-Longview routing would be the most efficient of the three open to TUE, although they suggest that this routing's superiority reflects the fact that the Texarkana-Longview-Tatum routing is approximately 45 or 46 miles shorter than the Texarkana-Shreveport-Tenaha-Tatum routing.

[13] Applicants are concerned that the Texarkana-Longview routing will work to UP/SP's competitive disadvantage in competing for future TUE coal shipments.

The TUE condition should not be read to be any broader than it needs to be to rectify the harm to TUE caused by the merger. We therefore read the TUE condition, not literally as urged by TUE, but rather in accordance with our intention in imposing that condition. Thus read, the TUE condition allows BNSF to run TUE trains both (a) exclusively on the Shreveport-Tenaha line (what is herein referred to as the Shrevenport-Tenaha routing), and also (b) directionally, i.e., southbound over the Shrevenport-Tenaha line and northbound over the Texarkana-Longview line (what is herein referred to as directional routing). The TUE condition, however, does not allow BNSF to run TUE trains exclusively on the Texarkana-Longview line (what is herein referred to as the Texarkana-Longview routing). TUE did not have, prior to the merger, a non-UP Texarkana-Longview routing option; the merger, therefore, did not deprive TUE of a non-UP Texarkana-Longview routing option; and it necessarily follows that the TUE condition could not have been intended to provide TUE with a non-UP Texarkana-Longview routing option.

We therefore direct UP/SP and BNSF to amend Section 6(c) of the BNSF agreement[14] by adding at the end thereof words to the effect that BNSF shall have the right to interchange with KCS (a) at Shreveport, for movements of TUE coal trains to and from TUE's Martin Lake Generating Station, and (b) at Texarkana, for movements of empty TUE coal trains returning from TUE's Martin Lake Generating Station. We also direct UP/SP and BNSF to make a corresponding amendment to Section 2(a)(v) of the related "Houston, Texas to Valley Junction, Illinois Trackage Rights Agreement" (hereinafter referred to as the Houston TRA).[15] We further direct UP/SP and BNSF to add at the end of Section 2(c) of the Houston TRA words to the effect that transportation over the "Joint Trackage" to and from TUE's Martin Lake Generating Station "shall be considered a local move for purposes of this Section."[16]

Facilities Selection. Section 9(b) of the BNSF agreement reads as follows:

> BNSF and UP/SP will conduct a joint inspection to determine necessary connections and sidings or siding extensions associated with connections, necessary to implement the trackage rights granted under this Agreement. The cost of such facilities shall be borne by the party receiving the trackage rights which such facilities are required to implement. Either party shall have the right to cause the other party to construct such facilities. If the owning carrier decides to utilize such facilities constructed by it for the other party, it shall have the right to do so upon payment to the other party of one-half (1/2) the original cost of constructing such facilities.

UP/SP-22 at 331-32.

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[14] *See* Section 5(d) of the second supplemental agreement dated June 27, 1996, which amends Section 6(c) in its entirety.

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

[16] Section 2(c) of the Houston TRA provides that it is, in general, the parties' intent that BNSF traffic shall operate with the current of flow along with UP/SP traffic. Section 2(c) further provides, however, that this provision does not apply to "local or switch" moves by BNSF. We have no need to determine whether Section 2(c), in its present form, should be read to require directional routing of TUE's coal trains. It suffices, for present purposes, merely to observe that Section 2(c), if it must be so read, must yield, in this respect, to the TUE condition we imposed in Decision No. 44; UP/SP and BNSF simply cannot, by agreement among themselves, effectively limit a condition we have imposed in favor of a shipper. This result is made all the more certain by the fact that the Houston TRA was agreed to by BNSF and UP/SP prior to our imposition of the TUE condition.

TUE asks that this provision be amended by adding thereto the following sentence:

> In addition, BNSF, UP/SP, KCS and TU Electric will agree upon the necessary connections and sidings or siding extensions associated with connections, necessary to implement the trackage rights granted BNSF under this Agreement to provide service to TU Electric's Martin Lake Generating Station.

TUE-20 at 18. TUE contends that it should be able to participate in the facilities selection process because it is the party that sought the TUE condition, and because it is the party that has led the efforts to identify the needed trackage rights facilities and that will ultimately (though indirectly) pay for the cost of such facilities.[17]

Applicants oppose, and BNSF has taken no position with respect to, TUE's facilities selection proposal. KCS, though expressing general support for the principles advocated by TUE, has not specifically addressed facilities selection.

We do not think that TUE and KCS should be given a formal contractual right to participate in decisions relating to facilities on the Texarkana-Longview and Shreveport-Tenaha lines, and we are therefore rejecting TUE's facilities selection proposal.

As regards TUE, we believe that facilities selection decisions should be made by UP/SP and BNSF, which are likely to possess superior knowledge and experience respecting matters of railroad engineering and operations, and which must also bear the risks associated with operating over any new facilities. Besides, TUE would not have had a formal contractual right to participate in facilities selection with respect to the pre-merger BNSF/KCS/SP/BNSF routing, and we are not persuaded that there is sufficient reason to provide it with a formal contractual right to participate in facilities selection with respect to the post-merger BNSF/KCS/BNSF routing. In any event, we can think of no good reason to confer upon TUE alone a formal contractual right that has been conferred upon no other shipper in connection with the UP/SP merger.

As regards KCS, it suffices to observe that KCS will have the inherent right to participate in facilities selection decisions to the extent its own trackage is involved, and that, to the extent its own trackage is not involved, new construction on UP/SP's property is not KCS' concern.

Enforcement Rights. Section 17 of the BNSF agreement reads as follows:

> This Agreement is intended for the sole benefit of the signatories to this Agreement [i.e., UP/SP and BNSF]. Nothing in this Agreement is intended or may be construed to give any person, firm, corporation or other entity, other than the signatories hereto, their permitted successors and permitted assigns, and their affiliates any legal or equitable right, remedy or claim under this Agreement.

UP/SP-22 at 339.

We observed, in Decision No. 44, that although we were imposing as a condition the terms of the BNSF agreement, this particular term could not be given a literal reading:

> Section 17 of the BNSF agreement appears to be a standard "no third party beneficiaries" provision; it provides that nothing in the BNSF agreement is intended to give any person other than the signatories any

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[17] TUE has also proposed a similar amendment to the corresponding provision of the Houston TRA.

> legal or equitable right, remedy or claim. This provision may be standard but it is clearly at odds with the logic of the BNSF agreement, and we therefore wish to clarify that we understand that the BNSF agreement does prov de rights and claims (and, by implication, remedies) to persons other than the signatories. We note, by way of illustration, that a shipper at a point opened up to BNSF under the BNSF agreement is such a person; a subsequent UP/SP-BNSF arrangement restricting BNSF's ability to serve that shipper would, among other things, violate that shipper's rights under the BNSF agreement.

Decision No. 44, slip op. at 12 n.15.

TUE now asks that Section 17 be amended by adding thereto the following proviso:

> provided, however, TU Electric and KCS shall be permitted to enforce the rights granted hereunder to BNSF to serve TU Electric's Martin Lake Generating Station in the manner set forth in the Surface Transportation Board's Decision No. 44 in Finance Docket No. 32760.

TUE-20 at 19-20. TUE contends that its suggested proviso would conform Section 17 to Decision No. 44.

Applicants oppose, and BNSF has taken no position with respect to, TUE's enforcement rights proposal. KCS, though expressing general support for the principles advocated by TUE, has not specifically addressed enforcement rights.

We think that it is neither necessary nor appropriate to modify the BNSF agreement to provide that TUE and KCS may enforce the rights granted in that agreement to BNSF, and we are therefore rejecting TUE's enforcement rights proposal. TUE and KCS already have, by virtue of the conditions imposed in Decision No. 44, the right to enforce those conditions insofar as their own interests are implicated. As applicants themselves concede, any beneficiary of the Decision No. 44 conditions has the right to seek relief from the Board[18] if it believes that these conditions have not been implemented in a manner that achieves their competition-preserving objectives. UP/SP-296 at 13.[19]

Commodity Limitations. In its comments filed March 29, 1996, TUE, noting that it was committed to using PRB coal commencing in the year 2000, requested that we order "that KCS be permitted to interchange TU Electric trains with BN/SF at Shreveport" for movement over SP's line between Shreveport and Tenaha. TUE-8 at 2. In its brief filed June 3, 1996, TUE repeated this request. TUE-17 at 2 (requesting that the BNSF agreement be amended to permit BNSF and KCS "to interchange TU Electric trains" at Shreveport). And TUE explicitly stated in its brief that its request was intended to allow BNSF to operate over the Shreveport-Tenaha line "for the sole and limited purpose of transporting TU Electric coal trains between Shreveport and Tenaha." TUE-17 at 11-12.

In Decision No. 44, we required that the BNSF agreement be amended to permit KCS and BNSF to interchange "TUE coal trains" at Shreveport and at Texarkana. Our reference to "TUE coal trains" reflected the evidentiary record. TUE's interest in this proceeding, as far as the

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[18] 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.

[19] TUE has acknowledged that its proposed enforcement rights merely "incorporate, by reference, the rights the [Board] accorded to all similarly situated shippers." TUE-23 at 8.

record indicated, concerned PRB coal that will be used at Martin Lake Station in the years to come; there was no indication in the record that TUE's interests were any broader.

TUE now insists that the TUE condition should be understood to apply not only to TUE coal trains but also to TUE shipments of commodities other than coal. TUE notes: that, prior to the merger, it could have used all or portions of its proposed coal train routings involving UP and SP to transport commodities other than coal; that the merger eliminated this UP vs. SP competition for all commodities; and that, for this reason, the TUE condition should apply to all commodities. TUE adds that even though the City Public Service Board of San Antonio (CPSB), a coal-burning utility like TUE, focused its evidentiary presentation on coal train service, we ultimately approved BNSF trackage rights to CPSB's Elmendorf Station that included BNSF's right to transport all commodities, and not just coal, over its UP/SP trackage rights. *See* Decision No. 44, slip op. at 185-86; Decision No. 52, slip op. at 3 (trackage rights apply to "CPSB traffic").

Applicants oppose, and BNSF has taken no position with respect to, TUE's commodity limitations proposal. KCS, though expressing general support for the principles advocated by TUE, has not specifically addressed commodity limitations.[20]

We think that TUE's request to open up the TUE condition to commodities other than coal has come too late, and we are therefore rejecting TUE's commodity limitations proposal. This request could have been made in the evidentiary phase of this proceeding, and at the very latest, it should have been made in a petition for reconsideration. The due date for filing such a petition, however, was September 3, 1996. *See* 49 CFR 1115.3(e). *See also* Decision No. 67, slip op. at 3 (once the time for seeking reconsideration of a condition adopted in Decision No. 44 has expired, that matter is no longer subject to administrative review).[21]

Additional Matter. In Decision No. 44, we noted that by "BNSF agreement" we mean the agreement dated September 25, 1995 (UP/SP-22 at 318-347), as modified by the supplemental agreement dated November 18, 1995 (UP/SP-22 at 348-359), and as further modified by the second supplemental agreement dated June 27, 1996 (UP/SP-266, Exhibit A). Decision No. 44, slip op. at 12 n.15. Since the August 12, 1996, service date of Decision No. 44, the BNSF agreement has been further modified in various minor respects. *See, e.g.*, Decision No. 52, slip op. at 3 (amendments to the BNSF agreement to satisfy the CPSB conditions).

Because it would be useful to have an updated version of the BNSF agreement that incorporates, in the text thereof, the agreement dated September 25, 1995, and the various modifications thereto made in the supplemental agreement and in the second supplemental agreement, as well as any modifications made subsequent to the second supplemental

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[20] Although TUE has argued strongly that BNSF should, and applicants have argued strongly that BNSF should not, be allowed to carry commodities other than coal over the Texarkana and/or Shreveport interchanges, no party has indicated what these additional commodities might be.

[21] As respects the "CPSB traffic" argument, we think it appropriate to observe that, in view of TUE's explicit statement, in its brief, that the rights it sought were for TUE "coal trains" only, we do not think that we erred in incorporating the "coal trains" limitation into the TUE condition we imposed in Decision No. 44. But if we did err in that respect, TUE was required to object to that error by filing a petition for reconsideration no later than the September 3, 1996, deadline. No such petition having been filed then, TUE cannot raise the matter now. In any event, there is no support in the record for the notion that, as respects TUE, the merger has had an anticompetitive impact concerning commodities other than coal.

agreement,[22] we will direct applicants to submit an updated version of the BNSF agreement no later than July 1, 1997 (the date on which applicants' next progress report is due). If, at the time the updated version is submitted, applicants have reason to believe that any further modifications will or may be made in the relatively near future, applicants should so indicate in as much detail as is practicable.

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

It is ordered:

1. The UP/SP-299 and TUE-23 replies are accepted for filing and made part of the record in this proceeding.

2. As respects routing options, UP/SP and BNSF shall amend the BNSF agreement and the Houston TRA in the manner indicated in this decision.

3. TUE's proposals respecting facilities selection, enforcement rights, and commodity limitations are rejected.

4. Applicants shall submit, no later than July 1, 1997, an updated version of the BNSF agreement.

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

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Vernon A. Williams
Secretary

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[22] We are under the impression that the modifications made in the supplemental agreement and in the second supplemental agreement are the only modifications made through the date of the second supplemental agreement. We expect that applicants will advise us if otherwise.

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SERVICE DATE - OCTOBER 27, 1997

SURFACE TRANSPORTATION BOARD

STB 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. 75]

Decided: October 24, 1997

In Decision No. 44, we approved, subject to various conditions, the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) 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).[1] The conditions we imposed included, among many others: the terms of the BNSF agreement;[2] and a condition, referred to as the "new facilities condition," which requires that BNSF be granted the right to serve new facilities (including transload facilities, and specifically including transload facilities owned or operated by BNSF) on both SP-owned and UP-owned track over which BNSF has received trackage rights in the BNSF agreement. See Decision No. 44, slip op. at 106 (third paragraph) and 145-46 (the "new facilities and transloading facilities" requirement). Insofar as the new facilities condition concerns transload facilities, it is referred to as the "transload condition." See Decision No. 61, slip op. at 2.

In this decision, we address: the joint petition filed August 8, 1997, by BNSF and R.R. Donnelley & Sons Company (Donnelley) for enforcement of the transload condition; and the reply filed August 28, 1997, by applicants.[3]

BACKGROUND

THE TRANSLOAD CONDITION. In Decision No. 44, we imposed, as a component of the new facilities condition to this merger, the transload condition:

> The BNSF agreement, as amended . . . , grants BNSF the right to

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[1] We gave authority for merger and common control of all the carriers controlled by Union Pacific Corporation and by Southern Pacific Rail Corporation. Where we are discussing pre-merger service, references to "UP" include only service by carriers controlled by Union Pacific Corporation. Otherwise, "UP" refers to all of the carriers to which we gave merger authority. "SP" refers to all of the railroads formerly controlled by Southern Pacific Rail Corporation.

[2] In Decision No. 44, Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) were referred to collectively as BNSF. On December 31, 1996, SF merged into BN, and the surviving corporation was renamed The Burlington Northern and Santa Fe Railway Company. Accordingly, in this decision: with respect to the period ending December 31, 1996, the acronym "BNSF" has the meaning it had in Decision No. 44; and, with respect to the period beginning January 1, 1997, the acronym "BNSF" has reference to The Burlington Northern and Santa Fe Railway Company. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

[3] The joint petition is designated "BN/SF-81, RRD-1" and is referred to herein as BN/SF-81. The reply is designated UP/SP-315.

> serve any new facilities located post-merger on any SP-owned line over which BNSF receives trackage rights in the BNSF agreement. The BNSF agreement further provides, however, that the term "new facilities" does not include expansions of or additions to existing facilities or load-outs or transload facilities. We require as a condition that this provision be modified in two respects: first, by requiring that BNSF be granted the right to serve new facilities on both SP-owned and UP-owned track over which BNSF will receive trackage rights; second, by requiring that the term "new facilities" shall include transload facilities, including those owned or operated by BNSF.

Decision No. 44, slip op. at 145-46. We explained that we were imposing "a number of broad based conditions that augment the BNSF agreement to help ensure that the BNSF trackage rights will allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP." Decision No. 44, slip op. at 145.

In Decision No. 61 (STB Served November 20, 1996) slip op. at 12-13, we clarified that only certain types of transload facilities (i.e., only "legitimate transload operations") would qualify for the use of this condition.[4] We further explained that we remained available to resolve controversies if UP believed that BNSF was attempting to expand the transload condition beyond its intended purpose. We have before us now just such a controversy.

Here, UP argues that only a strict, literal interpretation of the transload condition is warranted, and that such a literal interpretation must necessarily restrict BNSF transloading operations under this condition to facilities that are neither expansions of nor additions to existing facilities:

> The Donnelley facility cannot be said to be a "new facility" without doing violence to the English language. This is not a new rail-served facility: the facility pre-dates the merger, and has received rail service in the past.

UP/SP-315 at 3. As explained below, BNSF argues that the proposed Donnelley facility is indeed a "new transloading facility" within the meaning and intent of the transload condition we have imposed.

Our clearly stated intent in imposing the transloading condition was to continue and replicate the indirect competition that would otherwise be lost as SP is absorbed into UP without giving BNSF direct rail access to shippers that only received direct and exclusive rail service from either UP or SP prior to the merger. This balancing requires that we grant BNSF a focused form of access to shippers that would otherwise now be exclusively served by UP along the BNSF trackage rights lines.

THE BN/SF-81 PETITION. BNSF and Donnelley claim: that BNSF has trackage rights over an SP line that passes through Sparks, NV; that, at Sparks, this line connects to a "dormant" spur that runs between the line and a certain facility; that, in the vicinity of this facility, this spur is adjacent to that facility; that Rubbermaid Cleaning Products, Inc. (RCP) previously used this facility to warehouse its products, which were transported to and from that facility solely by truck; and that the RCP facility, although it has physical access to the spur that

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[4] "A legitimate transload operation will necessarily entail *both* the construction of a rail transload facility as that term is used in the industry *and* operating costs above and beyond the costs that would be incurred in providing direct rail service." Decision No. 61, slip op. at 12 (italics in original).

connects with the SP line, has not received or shipped freight by rail for at least the past four or five years.[5] BNSF further claims: that Sprint, Inc. (Sprint) has proposed to lease the RCP facility for use as a transload facility; that Sprint proposes to convert the RCP facility to a transload facility; that this conversion will involve new construction to accommodate rail traffic directly into the facility;[6] that Sprint intends to use the RCP facility to transfer, from rail to truck, rolled paper stock that will be brought to the facility by rail; and that such paper stock, after having been transferred from rail to truck, will be trucked 14 miles from the facility to Donnelley's commercial printing facility at Reno, NV.

BNSF and Donnelley ask that we "enforce" the transload condition by issuing an order stating that the RCP facility would be a new transload facility that could be served by BNSF under the auspices of the transload condition.[7] BNSF and Donnelley contend: that the RCP facility will be used as a transload facility; and that, because the spur leading into the facility has been dormant for several years, and because the facility will require conversion to accommodate its use as a transload facility, the facility should be regarded as a "new" facility for purposes of the transload condition.

BNSF and Donnelley also assert that their plans meet the standard we set for a "legitimate transload operation" in Decision 61[8]: they intend to incur substantial construction costs (approximately $50,000); these costs, once incurred, will transform the facility into a transload facility; and, once the facility is operational, its operating costs will be above and beyond (by about $1,000,000 per year) the costs that would be incurred in providing direct rail service.

Finally, BNSF and Donnelley argue that, because an independent SP could have served the RCP facility (and could thereby have provided indirect competition to the direct UP rail service available at Donnelley's Reno plant), BNSF should now be allowed to serve that facility in place of SP.

DISCUSSION AND CONCLUSIONS

Based on this record, we find that the proposed Donnelley transloading facility can be served by BNSF under our transloading condition. First, we specifically considered the type of competitive harm BNSF is seeking to redress in the deliberations that led us to impose the transload condition. See, e.g., Decision No. 44, slip op. at 124: "[W]hen UP or SP lines run near the plant of an exclusively served shipper, the ability of that shipper to transload or build out to a second carrier can provide important leverage in rate and service negotiations with the carrier providing direct service to the plant. . . ." Here, absent the merger, SP would have been able to offer a transloading alternative in competition with a direct UP movement to the Donnelley

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[5] UP claims that, although the RCP facility has not been rail-served for several years, one other shipper located on the spur is presently rail-served. UP therefore insists that the spur is not "dormant."

[6] BNSF and Donnelley indicate that conversion will involve construction of three new doors for unloading rail cars and the modification of three existing doors to accommodate the delivery of shipments by rail, at a cost of approximately $50,000.

[7] By letter filed October 3, 1997, Donnelley has advised: that the current lease of the RCP facility expires on October 31, 1997; and that the owner of the RCP facility has agreed to honor that option only until October 31, 1997.

[8] See, footnote 4.

plant.[9]

Second, the proposed operation cannot be viewed as a contrivance to obtain a competitive option that was not available to the shipper prior to the merger. Donnelley is not a successor in interest to the previous tenant of the facility. The transloading operation will be entirely different in nature and purpose from that of the facility's prior use. The particular facility has not been served by rail for four to five years (although UP asserts that nearby facilities along a branch of the same rail spur are now receiving rail service). Finally, the proposed operation, which will entail construction and ongoing operational and maintenance costs over and above those that would be incurred for the resumption of rail service, including the costs of a 14-mile truck haul, qualifies as a "legitimate transload operation" as defined in Decision No. 61, slip op. at 12.[10]

The broader issue of what operations qualify as new facilities and new transloading facilities has arisen within the context of our ongoing oversight proceeding, Finance Docket No. 32760 (Sub-No. 21). In our oversight decision[11], issued concurrently with this decision, we decline to determine in advance the exact parameters of the transload condition. We will continue to resolve these issues on a case-by-case basis. Our resolution of this particular dispute should provide the parties with substantial guidance in settling disputes over the application of our new facilities and transload condition. Our finding that BNSF may serve the proposed Donnelley facility is based on the particular facts in this record, as explained in detail above. Most notably, absent the merger, SP would have been able to offer the same service in competition to UP; the facility has not received rail service for a number of years; and, the transloading operation will be entirely different in nature and purpose than the facility's prior use. We reiterate that our clearly stated intent in imposing the new facilities and transload condition was to continue and replicate the indirect competition that would otherwise be lost as SP is absorbed into UP, and to do so in a manner that would not result in direct BNSF access to what were UP's or SP's exclusively served shippers along the trackage rights lines.

It is ordered:

1. BNSF shall be permitted to serve the proposed transload facility.

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[9] We do not find persuasive UP's claim that SP never has been a competitor for handling inbound paper to Donnelley's Reno plant. UP states that the plant now receives paper either via direct service from UP or via BNSF in conjunction with a truck transload from McLoud, CA, some 203 miles away. But BNSF's witness has explained that Donnelley is expanding its printing operations at Reno. The increased production will double Donnelley's inbound paper requirements, and the existing BNSF transload operation at McLoud is not capable of handling the additional paper (up to 1,000 rail cars per year) that is contemplated. See BN/SF-81, V.S. of F.E. Kalb, Jr., at 2-3.

[10] We are less sympathetic to the argument of BNSF and Donnelley that allowing BNSF to serve the RCP facility would help, to some unknown extent, "to enable BNSF to achieve sufficient traffic density on the trackage rights lines, not only in the near future but in the more distant future as well." Decision No. 61, slip op. at 10. BNSF could make exactly the same argument with respect to any facility, new or old, located anywhere on the trackage rights lines. Traffic density is irrelevant to the question of whether this is a "new facility." See Decision No. 57, slip op. at 7 (similar argument respecting the contract modification condition).

[11] UP/SP [Oversight] (STB served Oct. 27, 1997).

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

By the Board, Chairman Morgan and Vice Chairman Owen.

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SERVICE DATE - LATE RELEASE MARCH 19, 2003

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. 100

Decided: March 19, 2003

In Decision No. 98 (served October 22, 2002), the Board directed Union Pacific Railroad Company (UP) and The Burlington Northern and Santa Fe Railway Company (BNSF) to submit, by November 21, 2002, a report respecting: any and all matters pertaining to the implementation of Section 12 of the BNSF Agreement that had been resolved through negotiation or arbitration or that remained outstanding; an analysis of the impact of these changes on the escalation of the fees paid by BNSF for the trackage rights it acquired over the lines of UP in connection with the 1996 UP/SP merger; and proposed revised Section 12 language that incorporated the resolution of these matters. The Board also indicated that interested parties could submit, by December 11, 2002, comments respecting the resolution of these matters and the proposed revision to Section 12.

In Decision No. 99 (served November 12, 2002), a joint UP/BNSF request for a 20-day extension of all applicable filing deadlines with respect to Decision No. 98 was granted. In particular: the deadline for filing petitions for reconsideration of Decision No. 98 was extended to December 2, 2002; the deadline for the submission by UP and BNSF of the Section 12 report was extended to December 11, 2002; and the deadline for the submission by interested parties of comments on the Section 12 report was extended to December 31, 2002.

On December 2, 2002, BNSF filed a petition for reconsideration (designated BNSF-105) of Decision No. 98. BNSF asked that the Board reconsider the weight and effect to be accorded to § 7 of the CMA Agreement[1] and that UP, BNSF, and ACC (the American Chemistry Council, formerly the Chemical Manufacturers Association) be directed to devise an annual adjustment mechanism consistent with the express intent of CMA § 7.

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[1] See Decision No. 98, slip op. at 4-8.

On December 11, 2002, UP and BNSF submitted the Section 12 report (designated UP/SP-398 and BNSF-106) called for by Decision No. 98. UP and BNSF indicate, in the Section 12 report, that the five issues regarding the interpretation of Section 12 that were submitted to arbitration in late 2001 have been resolved. One such issue, UP and BNSF advise, was resolved by the Board in Decision No. 98. The other four issues, UP and BNSF further advise, have been resolved by UP and BNSF through negotiations. As respects the issues resolved through negotiations, UP and BNSF indicate that they have agreed: to develop 1995 and 1996 UP/SP URCS costs by weighting UP and SP URCS costs by the trackage rights miles over each carrier's lines; to calculate the fee adjustment by using the URCS cost categories that are covered by the trackage rights fees; to calculate the dispatching expenses component of maintenance and operating costs using URCS costs; and to base the annual fee adjustment on the difference in URCS costs in the two preceding years. UP and BNSF further indicate that, as a result of Decision No. 98 and the parties' agreements, the BNSF Agreement trackage rights fees as of July 1, 2002, are 2.8 mills per ton-mile (applicable to bulk traffic), 2.9 mills per ton-mile (applicable to carload and intermodal traffic), and 3.29 mills per ton-mile (applicable to carload and intermodal traffic on the Keddie-Stockton/Richmond line). UP and BNSF add that they intend to revise Section 12 of the BNSF Agreement by including as an exhibit an attachment to the Section 12 report that illustrates the calculations that UP and BNSF will use to make adjustments to the trackage rights fees.

On December 19, 2002, BNSF advised, by letter (not designated), that, because UP and BNSF had reached an overall resolution of the issues described in the Section 12 report, BNSF was withdrawing its BNSF-105 petition for reconsideration.

In view of BNSF's withdrawal of its BNSF-105 petition for reconsideration, that petition will be dismissed, with prejudice.

No interested party has objected to the resolution of the trackage rights fee adjustment issues described in the Section 12 report (no comments respecting such report were filed by any party). Neither UP nor BNSF has asked the Board to take any action with respect to the matters addressed in the Section 12 report, and the report raises no issue that requires review by the Board on the Board's own initiative. Therefore, no Board action will be taken with respect to the matters addressed in the Section 12 report.

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

It is ordered:

1. The BNSF-105 petition for reconsideration, filed December 2, 2002, is dismissed with prejudice.

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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STB FD-32760 10-11-96 C 20765

20765

SERVICE DATE

OCT 1 1 1996

SURFACE TRANSPORTATION BOARD

Washington, D.C. 20423

October 7, 1996

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

NOTICE

A court action, entitled as shown below, was instituted on or about September 30, 1996, involving the above-entitled proceeding:

No. 96-1373

Western Coal Traffic League

v.

Surface Transportation Board

United States of America

before the

United States Court of Appeals for the District of Columbia Circuit

VERNON WILLIAMS
Secretary

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STB FD-32760 12-7-95 C DISCOVERY

SERVICE DATE
DEC 7 1995

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 32760

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

December 5, 1995

ORDER ADOPTING DISCOVERY GUIDELINES

The Discovery Guidelines appended hereto have been negotiated by the parties and are hereby adopted to govern this proceeding.

By the Commission, Jerome Nelson, Administrative Law Judge

(SEAL)

Vernon A. Williams
Secretary

APPENDIX

DISCOVERY GUIDELINES

1. In consideration of the expedited procedural schedule that has been adopted by the Commission for this proceeding, all discovery requests must be tailored to be consistent with the procedural schedule in this proceeding. The parties shall avoid any duplicative discovery requests. All objections to discovery requests shall be made within five business days from the date of service of the discovery request by means of a written objection containing a general statement of the basis for the objection. Unless objected to, all discovery requests shall be answered within fifteen days after service of the requests. See 49 C.F.R. §§ 1114.26(a), 1114.27(a). The responding party shall endeavor, to the greatest extent possible, to produce documents with its written discovery responses within the fifteen-day response period. If the responding party is not able to produce such documents with its written discovery responses, it shall contact the propounding party at the earliest possible time within the fifteen-day response period and indicate its best judgment as to the date the documents will be provided. Upon request by the propounding party, the responding party shall produce documents on an "as-available" basis rather than in a lump-sum production. In framing document requests, parties should keep in mind the fact that the Commission has required each party to place all documents relevant to an evidentiary filing in a depository open to all parties on the date of the

evidentiary filing. All discovery requests, responses and objections shall be served in the most expeditious manner possible, by hand delivery in the Washington, D.C. area and by overnight mail outside the Washington, D.C. area, or by facsimile. Written discovery requests and responses shall be labeled and numbered in a manner consistent with the labeling/numbering requirement for filings (e.g. UP/SP-1).

2. Discovery disputes shall be resolved among the parties whenever possible; otherwise, counsel for the party seeking discovery shall contact Mrs. Mullally, at (202) 219-2552, by 4:00 pm each Monday to request a prehearing discovery conference to be held at 9:00 am on Wednesday of the same week at a hearing room at 888 1st Street, N.E., Washington, D.C. Written notice specifically identifying the discovery request in dispute shall be served by the party requesting the conference by facsimile or hand delivery on all parties on the restricted service list no later than Monday at 6:00 pm; in addition, good faith efforts shall be made to give telephone notice prior to 4:00 pm on Monday to the party objecting to the discovery request. If there is no request for a conference, there will be no conference. At any discovery conference, those parties seeking and resisting discovery are expected to be represented by counsel authorized to speak for the party on the matter at issue. If discovery is ordered, the ALJ shall require its production as soon as production can practicably be accomplished.

3. Immediately upon each evidentiary filing, the

filing party will place all documents relevant to the filing (i.e., workpapers supporting the filing and documents relied upon by the witnesses), other than documents that are privileged or otherwise protected from discovery, in a depository open to all parties. Parties maintaining depositories shall provide suitable indices which identify the general classes of documents in their depositories and which identify with specificity documents relating to each witness statement contained in their evidentiary filings. Such indices shall be made available to any party utilizing the depository. When a party responds to a discovery request by referring to documents in a document depository, the responding party must provide a description that is reasonable in the circumstances of the document's location within the depository.

4. All depositories shall be maintained in the Washington, D.C. area, unless a party requests and receives written permission from the ALJ, after notice to all other parties and for good cause shown, to maintain its depository outside of the Washington, D.C. area. All depositories shall be open to any other party during normal business hours on weekdays and, on notice of a request to visit, Saturdays, and the party operating the depository shall provide staffing assistance reasonable in the circumstances. The party maintaining the depository shall establish reasonable procedures for the operation of the document depository, which may include requirements that notice be provided in advance of a planned

visit and that persons reviewing documents marked "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" first execute an appropriate undertaking pursuant to the protective order entered in this proceeding. Parties maintaining depositories shall provide services for making copies of all documents contained therein, may charge a reasonable amount for reimbursement of duplication expenses, and shall use their best efforts to provide copies of documents in their depositories within two business days of receiving a request from a party for such documents.

5. No written discovery requests shall be served after February 26, 1995, through March 29, 1995.

6. A person who has submitted written testimony in this proceeding shall be made available for deposition on request. Depositions of other persons or of parties on a specified subject matter may be taken on reasonable written notice. Any party objecting to such deposition shall follow the procedures set forth in Paragraph 2 above. Absent agreement among all parties or prior approval from the ALJ, all depositions of persons submitting verified statements shall be conducted in the Washington, D.C. area. Absent agreement among all parties or prior approval from the ALJ for good cause shown, no witness shall be deposed more than one time as to each written statement (initial or rebuttal) submitted by that witness in this proceeding, and no other person shall be deposed more than one time, and parties shall use their best efforts to complete depositions as promptly as practicable, and if possible within

two days. If a deposition is noticed, the party seeking the deposition testimony shall to the extent reasonably practicable advise the party being deposed at least twenty-four hours prior to the scheduled deposition of the documents the questioning will concern.

7. Any discovery response containing confidential information or data as defined in the protective order issued in this proceeding shall be designated and stamped "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY" and shall be handled pursuant to the procedures contained in the protective order. Discovery responses containing information designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" shall be served only in redacted form on parties who have not executed the protective order.

8. Discovery requests are to be served on all parties on the restricted service list, and discovery responses need only be served on the party that propounded the discovery and any party requesting copies of such responses in writing, except that documents produced by a party in response to a discovery request shall be placed in the depository in lieu of being served unless the party propounding the discovery or any other party requests copies, which shall be supplied at a reasonable cost. All discovery responses shall immediately be placed in the depository of the responding party, and that party shall simultaneously provide written notice to all parties on the restricted service list that it has responded to a particular discovery request of

another party (which shall be identified in the notice) and that it has placed its responses in its depository.

9. Within 10 days after service of the decision adopting these guidelines, any party wishing to participate in discovery or to receive service of all discovery requests in the proceeding shall notify Arvid E. Roach II, counsel for UP, at 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044-7566, of its wish to be placed on a restricted service list. Within 5 days thereafter, counsel for UP shall compile and serve the restricted service list on all parties.

10. The Commission's discovery rules set forth at 49 C.F.R. pt. 1114 apply to this proceeding except as modified by Commission decision or by these discovery guidelines. Any of the discovery guidelines contained herein may be varied by agreement between any two or more parties (except if such a variance would adversely affect any third party), and the ALJ may vary any discovery guideline contained herein for good cause.