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October 15, 1996

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th Street & Constitution Ave., NW
Room 2215
Washington, DC 20423

Re: Finance Docket No. 32760, Union Pacific Corp., et al.. -- Control and Merger -- Southern Pacific Rail Corp., et al.

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty (20) copies of Reply of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to Utah Railway Company's Response to Petitions For Clarification (BN/SF-72). Also enclosed is a 3.5-inch disk containing the text of BN/SF-72 in Wordperfect 5.1 format.

I would appreciate it if you would date-stamp the enclosed extra copy of this filing and return it to the messenger for our files.

Sincerely,

Erika Z. Jones

Erika Z. Jones

Enclosures

ORIGINAL 86573

BN/SF-72

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BEFORE THE
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

REPLY OF BURLINGTON NORTHERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY TO UTAH RAILWAY COMPANY'S RESPONSE TO PETITIONS FOR CLARIFICATION

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October 15, 1996

10

BEFORE THE
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

REPLY OF BURLINGTON NORTHERN RAILROAD COMPANY AND
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
TO UTAH RAILWAY COMPANY'S RESPONSE TO
PETITIONS FOR CLARIFICATION

Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (collectively, "BN/Santa Fe")[1/] submit the following reply to the Response of Utah Railway Company ("URC") to Applicants' and BNSF's Petitions for Clarification (UTAH-7). UTAH-7 is denominated as a "Response," but it also contains a request for relief.[2/] Specifically, URC asks the Board to clarify (i) that the new facilities and build-in/build-out provisions of the CMA Agreement, as modified by the Board in Decision No. 44, are not applicable to a segment of joint URC-SP track between Provovo and

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[1/] The acronyms used herein for references to other parties are the same as those in Appendix B to Decision No. 44.

[2/] Under the Board's regulations, replies to replies are not generally permitted. See 49 C.F.R. § 1104.13(c). Because URC has requested affirmative relief in its "Response," however, BN/Santa Fe should be afforded the right to respond to that request for relief under 49 C.F.R. §§ 1104.13(a) and 1115.3(e). To the extent BN/Santa Fe needs leave of the Board to file this Reply, BN/Santa Fe requests such leave.

Utah Railway Junction, UT; and (ii) that BN/Santa Fe cannot serve certain specific shipper facilities located on the Central Corridor lines over which BN/Santa Fe received trackage rights as a condition of the Board's approval of the UP/SP merger.[3/]

As explained below, URC's request would deprive shippers of their pre-merger competitive options, and it would undercut BN/Santa Fe's ability to provide effective and efficient competitive service in the Central Corridor. URC's request should therefore be rejected.

BACKGROUND

Pursuant to the BNSF Agreement, UP/SP granted BN/Santa Fe trackage rights over various UP and SP lines in order to preserve existing competition. In the Central Corridor, this grant of trackage rights included trackage rights over SP's line between

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[3/] Alternatively, URC requests that it be granted what it calls "CMA enhancement" status with respect to the overhead trackage rights between Utah Railway Junction and Grand Junction, CO that UP/SP granted to URC as a part of the URC Agreement. (John E. West, III, in a Verified Statement attached to UTAH-7 asserts without any explanation that this enhanced status should also be applied to the joint track subject to the 1913 Agreement.) Although this request does not directly affect BN/Santa Fe's right to provide service in the Central Corridor, it would affect BN/Santa Fe's ability to develop a traffic base sufficient to enable it to provide fully competitive service. Moreover, the enhanced status that URC requests (i.e., the right to serve new facilities, new transload facilities and build-ins/build-outs) is not necessary to preserve competition on that line segment. The rights that BN/Santa Fe has been granted are intended and expected to enable it to provide full and complete replacement for SP service on the line segment between Provo and Grand Junction. URC's presence might improve the competitive options shippers on that segment would have, but URC's presence is not required to maintain the pre-merger two-carrier competitive situation. URC's presence instead would result in the addition of an unprecedented third carrier to the line.

Denver, CO and Salt Lake City, UT. A portion of that line between Utah Railway Junction (near Helper, UT) and Provo is subject to a 1913 Operating and Trackage Agreement between DRGW and URC (the "1913 Agreement").[4] Under that agreement, SP and URC operate over each other's tracks between those two locations and use their two rail lines as joint double tracks. (The trackage subject to the 1913 Agreement is hereinafter referred to as the "Joint Trackage.") When the BNSF Agreement was announced, URC expressed its position that SP did not have the right to grant trackage rights over the Joint Trackage to BN/Santa Fe without URC's consent. As a result of that dispute, the URC Agreement was executed.

In the URC Agreement,[5] URC authorized UP/SP to grant BN/Santa Fe trackage rights over the Joint Trackage. URC Agreement, § 3. URC did not itself, however, grant any trackage rights to BN/Santa Fe. In return, UP/SP granted URC overhead trackage rights between Utah Railway Junction and Grand Junction.[6] Id., § 1. There were two local access exceptions in UP/SP's grant of overhead trackage rights to URC. The first enabled URC to serve the Savage Industries, Inc. coal loading facility on the so-called CV Spur near Price, UT. Id., § 1(c). The second granted URC access to Cyprus Amax's Willow Creek Mine adjacent to the SP main line near

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[4] A copy of the 1913 Agreement is attached to UTAH-3 as Appendix A to the Verified Statement of Gary L. Barker.

[5] A copy of the URC Agreement is attached to UTAH-3 as Appendix C to the Verified Statement of Gary L. Barker.

[6] These trackage rights were the subject of a Notice of Exemption filed on September 4, 1996. See Notice of Exemption for Trackage Rights, Fin. Dkt. No. 32760 (Sub-No. 18).

Castle Gate, CO, over which URC has operating rights under the 1913 Agreement. Id., § 2(a).

URC has indicated that it also plans to serve two other facilities: an East Carbon Development Company-Environmental ("ECDC") solid waste transload facility at the CV Spur (near the Savage Coal Terminal); and a Moroni Feed transfer facility at Spanish Fork (near Provo).

ARGUMENT

In conditioning its approval of the UP/SP merger on the BNSF Agreement, as modified by the CMA Agreement and the Board's own conditions, the Board acted 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 at 145. The Board found it necessary to modify the BNSF and CMA Agreements in order to address two concerns:

> [W]e have devised specific conditions directly addressing both the competitive problems that have been raised with the BNSF agreement and the CMA agreement and the concerns about whether BNSF will have sufficient traffic to compete effectively.

Id. at 106. Among these conditions were the modifications to the new facilities and build-in/build-out provisions of the CMA Agreement. Id. at 145-46.

URC's challenge to the applicability of these two provisions to BN/Santa Fe's trackage rights over the Joint Trackage is based on a mistaken premise about the circumstances through which BN/Santa Fe obtained those rights. Furthermore, URC's challenge, service rights would deprive BN/Santa Fe of additional traffic that is necessary to ensure that it has a sufficient traffic base in the Central Corridor to compete effectively. For instance, URC proposes that BN/Santa Fe should not have the right to serve several specific shipper facilities located on or near the Joint Trackage. If BN/Santa Fe is not able to serve these facilities, then it will be deprived of the opportunity to add the traffic of those shippers to its traffic base, and its ability to provide fully competitive service would be jeopardized to that extent.

Finally, the denial of URC's proposal to limit BN/Santa Fe's right to serve to shippers located on or near the Joint Trackage and to other specific shippers will not in any way adversely affect URC's right to compete for and provide service to those shippers. Moreover, URC would still be able to function under the URC Agreement as a "competitive safeguard" for coal shippers, such as the SPP/IDPC North Valmy Station plant, that are dependent on originations of Utah/Colorado coal. <u>See</u> Decision No. 44 at 155. The fact that BN/Santa Fe will also be able to serve those shippers only increases the "competitive safeguards" the Board sought to impose.

CONCLUSION

For the foregoing reasons, URC's request for clarification should be denied. Any restriction on BN/Santa Fe's right to provide new facilities (including transloads) and build-in/build-out service on the Joint Trackage or to the specific shippers identified by URC not only would deprive shippers of their pre-merger competitive options, but also would jeopardize the traffic base BN/Santa Fe needs in the Central Corridor to replicate fully and effectively the competitive service previously provided by SP. URC's effort is nothing more than an attempt to protect its own competitive position at the expense of shippers, and the Board should reject it.

Respectfully submitted,

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Attorneys for Burlington Northern Railroad Company
and The Atchison, Topeka and Santa Fe Railway Company

October 15, 1996

CERTIFICATE OF SERVICE

I hereby certify that copies of Reply of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to Utah Railway Company's Response to Petitions For Clarification (BN/SF-72) have been served this 15th day of October, 1996, by first-class mail, postage prepaid on all Parties of Record in Finance Docket No. 32760.

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STB FD 32760 10-11-96 D 86801

86801

REDACTED - To be filed in the public record UP/SP-268

BEFORE THE
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

APPLICANTS' REPLY TO LCRA'S PETITION FOR CLARIFICATION

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October 11, 1996

REDACTED - To be filed in the public record UP/SP-288

BEFORE THE
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

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APPLICANTS' REPLY TO LCRA'S PETITION FOR CLARIFICATION

The primary applicants, UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW,[1] hereby reply to the "Petition for Clarification of the Lower Colorado River Authority and the City of Austin, Texas" (LCRA-4). LCRA's petition, which asks the Board to deem LCRA's Halsted, Texas, facility a "2-to-1" point for purposes of applying Applicants' obligation to make available to BNSF 50% of the volume of traffic subject to contracts a "2-to-1" points, should be rejected both as a clearly insufficient petition to reopen Decision No. 44 and as a naked attempt to obtain a windfall.

LCRA's petition, while titled a petition for "clarification," in fact asks the Board to reconsider Decision No. 44. In Decision No. 44, the Board conditioned the merger on Applicants' extending a provision of the CMA agreement, which required Applicants to modify contracts with shippers in Texas and Louisiana to allow BNSF access to at least 50% of the volume, "to shippers at all 2-to-1 points incorporated

[1] The acronyms used herein are the same as those in Appendix B to Decision No. 44.

within the BNSF agreement, not just 2-to-1 points in Texas and Louisiana." Decision No. 44, p. 146. Applicants had clearly indicated prior to Decision No. 44 that LCRA's Halsted, Texas, facility was not included among the Texas and Louisiana points opened to competition as a result of the CMA agreement. As Applicants' witness Peterson explained:

UP/SP-231, Peterson, p. 196 n.63. The Board's extension of the 50% Obligation in Decision No. 44 did not purport to alter the effect of the agreement within Texas and Louisiana. The Board's decision thus does not require the "clarification" LCRA requests. LCRA's attempt to bring its Halsted facility within the 50% Obligation can only be viewed as a petition for reopening.

If LCRA's petition is viewed as a petition to reopen, it is out of time. The deadline for such petitions was September 3, twenty days before LCRA's filing. 49 C.F.R. § 1115.3(e).

Further, even if it had been timely, LCRA's petition would not come close to satisfying the Board's rigorous standards for reopening a final decision. Petitions to reopen are granted "only in the most extraordinary circumstances." Docket No. AB-33 (Sub-No. 55), Union Pacific R.R. --

Abandonment -- Between Echo & Park City & Between Keetley Junction & Phoston, In Summit & Wasatch Counties, UT, Decision served July 11, 1990, p. 2. The Board will reconsider a final decision only upon a showing of material error, new evidence or changed circumstances. 49 C.F.R. § 1115.3(b). LCRA does not attempt to allege material error, new evidence or changed circumstances, and LCRA's petition should be denied on this ground alone. See Finance Docket No. 31231, IC Industries, Inc. -- Securities Notice of Exemption Under 49 CFR 1175, Decision served Apr. 3, 1989, p. 1 n.3.

Moreover, the exclusion of LCRA's Halsted facility from the 50% Obligation is consistent with the factual distinction between the Halsted facility and "2-to-1" points, and with the rationale behind the 50% Obligation. Applicants' settlement agreement with BNSF guarantees that every shipper that enjoyed rail competition prior to the UP/SP merger will continue to enjoy rail competition after the merger is consummated. Unlike other shippers whose competitive options were protected by the settlement agreement, LCRA's Halsted facility did not have rail competition prior to the merger; it is presently a UP-exclusive facility. At the time LCRA entered into its current transportation contract with UP, however, it also entered into a trackage rights agreement that would have provided LCRA with competitive rail service when the trackage rights agreement became effective

In structuring their settlement agreement with BNSF, Applicants recognized that, while LCRA was not like other "2-to-1" shippers, the merger would foreclose LCRA's ability to benefit from the competition that would have been created in the future when its trackage rights agreement became effective. To ensure that LCRA would not lose the benefit of this future two-railroad competition, Applicants therefore included LCRA's Halsted facility in the list of points to which BNSF would be granted access under the settlement agreement.

As explained above, Applicants have consistently maintained that LCRA is to be treated differently from shippers that would lose existing two-railroad competition. Applicants clearly expressed their intent to exclude this Texas facility from the scope of the CMA agreement's 50% provision -- the provision the Board extended to non-Texas and Louisiana points in Decision No. 44, p. 146. See UP/SP-231, Peterson, p. 196 n.63.

In support of its argument that it should be treated the same way as shippers for whom the merger eliminated a presently existing rail option, LCRA tries to gain a windfall release from its contract with UP by distorting Applicants' assurances that its Halsted facility would, when its trackage rights agreement became effective, benefit from two-railroad competition. LCRA cites the deposition of UP's John Rebensdorf, but a review of LCRA's questions and Mr. Rebensdorf's answers demonstrates that LCRA was merely seeking, and Mr. Rebensdorf was merely providing, assurance that the BNSF settlement agreement would preserve LCRA's future competitive option. The transcript in fact demonstrates that LCRA's counsel recognized that LCRA was different from other "2-to-1" points. See Rebensdorf Dep., Jan. 23, 1966, p. 344-45 ("But the language of 8i says presently served by both UP and SP and so does 4b. And I just want it clear that it's covered even whether it's presently served or not?"). LCRA's efforts to make Mr. Rebensdorf's comments into something more than a sincere attempt to allay the concerns of LCRA's counsel regarding whether BNSF would obtain trackage rights to serve LCRA are simply misguided. The deposition was not and could not have been the admission that LCRA makes it out to be, since it took place several months before Applicants' settlement with CMA even brought the notion of the 50% Obligation into play.

On a more basic level, LCRA's request bears no relation to the rationale behind the 50% Obligation. LCRA's request has nothing to do with the reason that Applicants and CMA agreed to open up certain contracts, which was to address claims that Applicants had attempted to "lock up" traffic at

"2-to-1" points so that BNSF would not have access to that traffic despite its trackage rights. This concern did not apply to LCRA's Halsted facility for two reasons: first, UP's contract with LCRA dates to 1988 -- long before the UP/SP merger was contemplated; and second, it was clear that LCRA's Halsted facility could not have benefited from two-railroad competition until the effective date of its trackage rights.

Also, LCRA's request has nothing to do with the Board's purpose in expanding the 50% provision -- to ensure BNSF's immediate access to a sufficient traffic base to support operations. As LCRA explains, its Halsted facility receives coal transported in unit train service. LCRA-4, p. 2. Allowing BNSF to move separate unit trains of coal to LCRA will do nothing to allow BNSF to build sufficient volumes of traffic to support regular carload train service over the trackage rights lines. LCRA's petition is purely an opportunistic attempt to help itself.

The opportunistic nature of LCRA's petition becomes even more apparent in LCRA's second request. At the same time LCRA is seeking a release from its contractual commitments to UP for half its traffic, it is seeking the right to retain all of the volume-related benefits of that contract. Even if the Board were to find that LCRA's contract must be opened according to the 50% Obligation, LCRA's argument that it should be allowed to enjoy the benefit of its volume incentive rates without meeting its contractual volume requirements must be rejected.

UP's volume incentive agreement with LCRA reflects the efficiencies of shipping large volumes of coal and an arm's-length agreement between UP and LCRA regarding how to divide the benefits of those efficiencies. It would thus be extraordinarily unfair to require Applicants to provide LCRA with service under the incentive rate at the same time they lose the efficiencies of high-volume moves.

Finally, LCRA is mistaken in its contention that failure to adjust the volume incentive in its contract with UP would put BNSF at a competitive disadvantage. LCRA repeats the same flawed arguments that others have raised in this regard. BNSF can compete on a level footing with UP and bid on the volume of traffic that is available to it, if LCRA is prepared to give up its share of the efficiency gains from moving all of its traffic with UP. The only impediment to BNSF's ability to compete is that LCRA wants to have its cake and eat it too, while UP/SP picks up the check.

* * *

LCRA's petition for clarification should be rejected on procedural grounds. It is untimely, and it seeks reconsideration of the Board's decision without purporting to satisfy the stringent requirements for reconsideration. On the merits, moreover, LCRA's position is wrong and should be rejected.

Respectfully submitted,

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Attorneys for Applicants

October 11, 1996

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 11th day of October, 1996, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

Director of Operations Antitrust Division Suite 500 Department of Justice Washington, D.C. 20530	Premerger Notification Office Bureau of Competition Room 303 Federal Trade Commission Washington, D.C. 20580

Michael L. Rosenthal

STB FD 32760 10-11-96 D 86800

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LAW OFFICES

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RICHARD A. ALLEN

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October 11, 1996

Vernon A. Williams
Secretary
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Washington, D.C. 20423

Re: Union Pacific Corp., Union Pacific RR. Co. and Missouri Pacific RR Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Rw. Co., SPCSL Corp. and The Denver and Rio Grande Western RR Co., Finance Docket No. 32760

Dear Secretary Williams:

Enclosed for filing are an original and twenty copies of TM-48, The Reply of The Texas Mexican Railway Company to the Progress Report and Operating Plan of BNSF. Also enclosed is a 3.5" floppy computer disc containing a copy of the filing in Wordperfect 5.1 format.

BNSF served its Progress Report and Operating Plan on all parties on the restricted service list and notified all other parties that they would be furnished copies on request. We are therefore also serving TM-48 on all parties on the restricted service list in this proceeding, and a copy of this transmittal letter on all other parties to this proceeding. If any party not on the restricted service list wants to receive a copy of TM-48, we would gladly send it to them. Requests for a copy of TM-48 should be directed to me.

Sincerely,

Richard A. Allen

Enclosures

86800

TM-48

BEFORE THE
SURFACE TRANSPORTATION BOARD

Union Pacific Corp., Union Pacific RR. Co. and Missouri Pacific RR Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Trans. Co., St. Louis Southwestern Rw. Co., SPCSL Corp. and The Denver and Rio Grande Western Corp.	Finance Docket No. 32760

REPLY OF THE TEXAS MEXICAN RAILWAY COMPANY TO THE PROGRESS REPORT AND OPERATING PLAN OF BNSF

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Attorneys for
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Dated: October 11, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

Union Pacific Corp., Union Pacific RR. Co. and Missouri Pacific RR Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Trans. Co., St. Louis Southwestern Rw. Co., SPCSL Corp. and The Denver and Rio Grande Western Corp.	Finance Docket No. 32760

REPLY OF THE TEXAS MEXICAN RAILWAY COMPANY TO THE PROGRESS REPORT AND OPERATING PLAN OF BNSF

The Texas Mexican Railway Company ("Tex Mex") wishes to respond to certain inaccurate statements made about Tex Mex in the "Progress Report and Operating Plan" filed by BNSF in this proceeding on October 1, 1996 (hereafter "Progress Report").[1/] These statements suggest that Tex Mex has refused to negotiate rates and divisions that will allow BNSF to compete effectively for U.S.-Mexican rail traffic with BNSF. Since there is no basis whatever for that suggestion, a reply setting the record straight is warranted.[2/] BNSF has also used its Progress Report and

1/ All abbreviations and acronyms used in this reply are the same as those used by the Board in Decision No. 44.

2/ Tex Mex believes that a reply to BNSF's Progress Report and Operating Plan is authorized by 49 C.F.R. § 1104.13. If Tex Mex is incorrect, it hereby moves for leave to file this reply.

Operating Plan to reiterate certain groundless arguments against Tex Mex's pending petition to reopen decision No. 44, and a brief response to those arguments is also appropriate.

1. Tex Mex's Negotiations with BNSF

At page 22 of the Progress Report, BNSF asserts that it "has been working with Tex Mex to negotiate terms and a neutral division arrangement for rates on traffic interchanged at Robstown between the two carriers. . . ." It also states:

> Unfortunately, as of the date of this Report, BN/Santa Fe has been unable to reach agreement with Tex Mex on terms that will permit BN/Santa Fe to offer Laredo service to shippers in a manner that is fully competitive with the newly merged UP/SP. At present, it appears that Tex Mex intends to establish rates that will favor traffic interchanged with its affiliate, KCS, rather than rates that will ensure vigorous competition for Laredo-bound traffic for the benefit of shippers. BN/Santa Fe will continue to work with Tex Mex to establish terms that will allow such competition, and will, if necessary, ask the Board to intervene as appropriate to assure viable competition for Mexico-bound traffic through the rights that were granted by the Board.

These statements are groundless, and the fact that they were made causes Tex Mex considerable concern. As the Board well knows, Tex Mex is a small railroad that will be very dependent on the much larger BN/Santa Fe. Notwithstanding the trackage rights that were granted to Tex Mex, BN/Santa Fe will be Tex Mex's principal connection for interchanged traffic for the foreseeable

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Permitting parties to comment on BNSF's Progress Report and Operating Plan and to correct inaccuracies in it is certainly consistent with the Board's basic purpose in requiring BNSF to file such a report -- to keep the Board fully informed about the implementation of its decision.

future, and it is vital to Tex Mex that it establish the best possible working relationship with BN/Santa Fe in order to move as much Laredo and Mexico-bound traffic as possible with BN/Santa Fe in competition with UP/SP. Tex Mex has been working hard to do so and has been encouraged with the progress of negotiations so far. Tex Mex hopes that the statements in BN/Santa Fe's Progress Report do not signal an effort by BN/Santa Fe to manufacture an excuse in advance for not moving traffic to Tex Mex.

There is no basis for BNSF's suggestion that Tex Mex has prevented BNSF from offering fully competitive Laredo service to shippers. As described in the attached verified statement of Tex Mex's president, Larry Fields, Mr. Fields has had two face-to-face meetings and numerous telephone conversations with BNSF representatives to discuss rates and divisions for traffic interchanged between the two railroads at Robstown. The first such meeting was on September 4, 1996, with BNSF's Senior Vice President and Chief of Staff, Douglas Babb, and Senior Vice President-Merchandise Business Unit, Matthew Rose. Having heard that some BNSF marketing representatives had told shippers that they were unable to quote any rates to Laredo via Tex Mex, Mr. Fields provided copies of 29 existing tariffs containing Tex Mex rates for different commodities which Mr. Fields said BN/Santa Fe could use to quote interline rates to shippers.

In response to Mr. Rose's stated desire for a more simplified approach, Mr. Fields met again on September 19 with

Mr. Rose. After lengthy discussion, Mr. Fields proposed a percentage division that would apply to all BNSF-Tex Mex interline traffic except chemical traffic and traffic on which BNSF and Tex Mex compete directly. The through rates to which this division would apply would be set by BNSF and Tex Mex would concur with those rates. Fields VS at 4-5.[3/]

Tex Mex believes the division it has proposed is entirely reasonable, and BNSF has not disputed this. In fact, on October 1, 1996 Tex Mex and BNSF concluded an agreement applicable to grain traffic using that division. Fields VS at 5. Furthermore, inasmuch as the through rate under Tex Mex's proposals will be set by BNSF, any suggestion that Tex Mex is preventing the parties from establishing fully competitive rates on interline traffic through Laredo is completely groundless.

The only major objection that BNSF has voiced with respect to Tex Mex's proposals is that Tex Mex has not agreed to what BNSF terms "junction neutral rates" (Fields VS at 3-6) or "neutral division arrangement[s]." Progress Report at 22. By this, BNSF appears to want Tex Mex to agree that the rates and divisions on traffic interchanged with BNSF will be the same as the rates and divisions Tex Mex has agreed to with respect to

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3/ In this meeting Mr. Rose advised Mr. Fields that BNSF would not be opposing the petition to reopen that Tex Mex filed on September 3, 1996 requesting removal of the routing restriction the Board imposed on Tex Mex's trackage rights (TM-44). Mr. Fields was encouraged to regard this as a sign of BNSF's desire to work with Tex Mex. Tex Mex was therefore extremely surprised to learn that four days later BNSF filed a lengthy opposition to Tex Mex's petition, contrary to the representation made to Tex Mex in the course of negotiating rates and divisions.

traffic interchanged with other railroads, particularly KCS. Tex Mex's unwillingness to agree to such terms appears to be the basis for BNSF's claim that "Tex Mex intends to establish rates that will favor traffic interchanged with its affiliate, KCS, rather than rates that will ensure vigorous competition for Laredo-bound traffic for the benefit of shippers." Id.

BNSF's asserted desire for "junction neutral rates" has a number of problems, which Tex Mex has explained to BNSF. The first is legal. A proposal that two connecting carriers agree that their interline rates and divisions shall be tied to and the same as the rates and divisions that one of those carriers maintains with other connecting railroads raises serious competitive and antitrust concerns. See, e.g., Florida East Coast Ry. Co. v. CSX Transp. Inc., No. 91-C-7063, slip op. at 27 (N.D. Ill. March 4, 1993), aff'd, 42 F.3d 1125 (7th Cir. 1994); Seaboard Air Line Railroad Company -- Merger -- Atlantic Coast Line Railroad Company; Petition to Remove Traffic Protective Conditions, F.D. 21215 (Sub-No.5), served March 27, 1995.

Although these concerns were conveyed to BNSF's attorneys after Mr. Babb wrote Mr. Fields on September 9, 1996 regarding BNSF's desire to agree upon "junction neutral proportional or joint rates", BNSF has persisted in pressing Tex Mex for such an agreement. Fields VS at 5-6. Despite Tex Mex's dependence on BNSF and BNSF's tremendous market power with respect to Tex Mex (especially in light of the routing restriction placed on the trackage rights granted in Decision No. 44), Tex Mex has felt obliged to resist that pressure. Tex Mex's most recent response to BNSF on this point was stated in a letter from Mr. Fields to Mr. Babb on October 1, 1996 as follows:

> Although you acknowledge that the division we propose will help BNSF compete for business interchanged with Tex Mex through Laredo, you state that you need a commitment from Tex Mex for "junction neutral rates," apparently with reference to KCS. Doug, Tex Mex simply does not believe it is appropriate to establish interline rates and divisions with one interline connection on the basis of the rates and divisions it negotiates with another interline connection. I do not believe that BNSF establishes many, if any, of its own rates and divisions on that basis. In any event, I do not think it is proper for Tex Mex to do so. The appropriate rates and divisions in each instance must be based on the cost and marketing considerations appropriate to the movement in question. In some instances, what we establish with BNSF will be lower than what we establish with other interline connections; in other instances, it will be higher. Furthermore, as our attorney told Rick Weicher several weeks ago, we have serious legal concerns about any proposal to tie interline rates with one connection to the rates with another connection, particularly on routes and traffic that could be competitive with each other.

Exhibit D to Fields VS.

A second problem with BNSF's proposal to equalize rates and divisions as between BNSF and KCS is that it makes little sense in this context. Tex Mex's connections with BNSF are at Robstown and Corpus Christi, Texas. Tex Mex's connection with KCS is more than 350 miles further north, at Beaumont. Tex Mex has asked BNSF to explain how it is supposed to equalize its rates and divisions as between those two interchanges, but BNSF has not done so. Fields VS at 5-6.

Third, BNSF's suggestion that BNSF needs an agreement, or even Board intervention, to prevent Tex Mex from "establish[ing] rates that will favor traffic interchanged with its affiliate, KCS, rather than rates that will ensure vigorous competition," (Progress Report at 22) is farfetched, to say the least. Putting aside the fact that the ICC frequently noted the anticompetitive effects of rate equalization agreements or regulatory requirements (e.g., Seaboard Air Line Railroad, supra), BNSF in effect is advancing the improbable claim that without such a requirement it will be impeded from competing for Laredo and Mexico-bound traffic against a KCS-Tex Mex route that is 50 miles longer (from Houston) than the BNSF-Tex Mex route.

More importantly, BNSF's claim ignores the two most relevant facts: first, that the shippers select the routes and carriers they wish to use, and, second, that BNSF's main competitor for this traffic will not be KCS-Tex Mex but will be the merged UPSP. Since BNSF, KCS and Tex Mex will all have to work hard to compete for Laredo-bound traffic with UPSP, there is little risk that Tex Mex could or would maintain uncompetitive rates or divisions on BNSF-Tex Mex traffic just to protect KCS-Tex Mex traffic. As Mr. Fields wrote in his October 1, 1996 letter to Mr. Babb:

> The market ultimately will determine which route the shippers will select. Within that market is not only BNSF and, to a certain extent, KCS but, to even greater extent, UP/SP. After all, Doug, it was to compete against UP/SP that your trackage rights were given you. Whether we consider joint BNSF/Tex Mex or joint KCS/Tex Mex routes, the UP/SP single line route to Laredo should keep either route from maintaining an artificial floor.

Finally, there is simply no basis for BNSF's claim that "Tex Mex intends to establish rates that will favor traffic interchanged with its affiliate, KCS." As Mr. Fields states, Tex Mex has not as yet established any rates or divisions with KCS. Fields VS at 7.[4/] Moreover, as Mr. Fields noted in his letter to Mr. Babo, Tex Mex will establish its rates and divisions in each case on the basis of the costs and market considerations involved in the particular movement.

In sum, BNSF's suggestion that Tex Mex is impeding the establishment of fully competitive rates is not correct.

2. <u>Arguments Regarding Tex Mex's Petition to Reopen</u>

BNSF has also used its Progress Report as an occasion to reiterate arguments made earlier in BN/SF-69 in opposition to Tex Mex's pending petition to reopen Decision No. 44 to remove the limitation imposed on Tex Mex's trackage rights that restricts those rights to the movement of freight having a prior or subsequent movement on Tex Mex's line. BNSF's basic argument is that the petition should be denied because granting it would dilute BNSF's traffic base on the lines over which BNSF will have trackage rights. BNSF argues that BNSF's traffic base should be protected and Tex Mex's should not because BNSF's trackage rights were negotiated voluntarily and because, according to BNSF, the

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4/ In this regard, we note that BNSF's assertion regarding Tex Mex's alleged intentions is not supported by any evidence. The verified statement of Richard W. Brown, attached to BNSF's Progress Report, merely states that the negotiations with Tex Mex "have not yet been concluded" (Brown VS at 8), but it makes no claims regarding Tex Mex's position or intentions.

Board has anointed it as the "principal competitor" to UPSP in this corridor. Progress Report at 20-21.

These arguments are both arrogant and specious. First, while the additional traffic that Tex Mex hopes and expects to gain if the routing restriction is removed is extremely significant to the Tex Mex, it represents a minuscule portion of the Houston traffic of either UPSP or BNSF. As discussed in Tex Mex's petition to reopen (TM-44 at 15), the additional traffic projected for Tex Mex averages approximately one carload and nine intermodal units per day.5/ Furthermore, all of the projected additional intermodal traffic is traffic moving to, from or through Kansas City, which is served directly by UPSP and BNSF.6/ Accordingly, none of that traffic would move over BNSF's trackage rights in any event, because it could move directly over UPSP's or BNSF's own lines. As to that traffic, therefore, granting Tex Mex's petition to reopen would cause no dilution to the traffic base on the lines over which BNSF will have trackage rights.7/

There is also no basis for BNSF's claim to status as a preferred competitor to UPSP. The fact that UPSP selected BNSF

5/ See Ellebracht workpapers and UP/SP-231, Peterson RVS at 118-119. In comparison, BNSF's Operating Plan states that BNSF will operate three full trains in each direction every day between Houston and New Orleans in addition to various local trains it plans to operate on various segments of that route. Progress Report, Exhibit A at 5-6.

6/ See Ellebracht workpapers.

7/ The same can be said for much of the carload traffic as well.

as the recipient of trackage rights to solve certain problems, whereas the Board granted Tex Mex rights to solve other problems, in no way justifies conferring any preferential status to BNSF. Nor does it make BNSF's traffic base any worthier of consideration and protection than Tex Mex's.

Respectfully submitted,

Richard A. Allen
Andrew R. Plump
John V. Edwards
ZUCKERT, SCOUTT & RASENBERGER, LLP
888 Seventeenth Street, NW
Suite 600
Washington, DC 20006-3939
202/298-8660

Attorneys for Texas Mexican Railway

Dated: October 11, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served the foregoing TM-48, "Reply of The Texas Mexican Railway Company to the Progress Report and Operating Plan of BNSF" by hand delivery upon the following persons:

Erika Z. Jones
Adrian L. Steel, Jr.
Roy T. Englert, Jr.
Kathryn Kusske
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Suite 6500
Washington, D.C. 20006

I have also caused TM-48 to be served by first-class mail, postage prepaid on all other persons on the restricted service list in Finance Docket No. 32760. All other persons on the official service list in that docket have been informed that they may obtain a copy of TM-48 upon request.

John V. Edwards
Zuckert, Scoutt
& Rasenberger, L.L.P.
Brawner Building
888 17th Street, N.W.
Washington, D.C. 20006-3939
(202) 298-8660

Dated: October 11, 1996

VERIFIED STATEMENT

OF

LARRY FIELDS

My name is Larry Fields. I am the President of the Texas Mexican Railway Company ("Tex Mex"), headquartered at 1200 Washington Street, Laredo, Texas 78042. I am submitting this statement to correct certain statements about Tex Mex made in the Progress Report and Operating Plan ("Progress Report") filed by Burlington Northern Railroad Company and the Atchison, Topeka and Santa Fe Railway Company ("BNSF") in Finance Docket 32760 on October 1, 1996. Specifically, BNSF states at page 22 of the Progress Report:

> Unfortunately, as of the date of this Report, BN/Santa Fe has been unable to reach agreement with Tex Mex on terms that will permit BN/Santa Fe to offer Laredo service to shippers in a manner that is fully competitive with the newly merged UP/SP. At present, it appears that Tex Mex intends to establish rates that will favor traffic interchanged with its affiliate, KCS, rather than rates that will ensure vigorous competition for Laredo-bound traffic for the benefit of shippers.

To the extent that this statement suggests that Tex Mex has been an impediment to the establishment of rates with BNSF that will be competitive for Laredo-bound traffic, that suggestion is completely incorrect.

We at Tex Mex have been trying as hard as we can to work with BNSF and to establish rates and divisions that will move as much traffic as possible between BNSF and Tex Mex. We have been doing so because we know the success of our business will depend very heavily on the traffic we interchange with BNSF at Robstown and Corpus Christi, Texas. Notwithstanding the trackage rights that the Surface Transportation Board granted us in this proceeding, we anticipate that BNSF will be our largest interline connection by far for the foreseeable future. Tex Mex therefore has every incentive to establish the best possible working relationship with BNSF to maximize the flow of traffic between Tex Mex and BNSF.

Contrary to the implication of BNSF's Progress Report, I believe the results of our efforts and discussions with BNSF have been encouraging, notwithstanding some points of disagreement. I have had two face-to-face meetings with BNSF representatives to discuss rates and divisions as well as many telephone conversations and exchanges of correspondence. I, together with other Tex Mex representatives, met first on September 4, 1996 with BNSF's Senior Vice President and Chief of Staff, Douglas Babb, and BNSF's Senior Vice President-Merchandise Business Unit, Matthew Rose. Because I had heard that some BNSF marketing representatives had stated that they were unable to quote interline rates to Laredo to shippers, at that meeting I provided copies of 29 currently effective tariffs setting forth interline rates over Tex Mex to Laredo covering a wide variety of products and origins. I indicated that these provided an ample basis for quoting rates to shippers.

Mr. Rose indicated that BNSF wanted a simpler approach. We discussed the commercial opportunities, and I requested information from BNSF about their anticipated traffic volumes from various origins and gateways. Both parties agreed to exchange information and develop rate and division proposals and to get back together as soon as possible after September 12. I was very satisfied with the progress of the meeting and believed that Mr. Babb and Mr. Rose were as well.

I was therefore surprised to receive a letter from Mr. Babb on September 9, 1996, expressing his "great disappointment over the lack of progress in our recent meetings to discuss the establishment of joint rates for U.S.-Mexican traffic moving over Robstown to the Laredo gateway." Exhibit A to this Statement. Mr. Babb's basic complaint appeared to be that Tex Mex would not agree to establish what he termed "junction-neutral proportional or joint rates." He asserted that "Tex Mex has now made it clear that it does not intend to establish neutral rates over Robstown, but rather that it intends to favor and protect traffic moving through interchanges at Meridian and Kansas City, in conjunction with KCS."

This letter and the basis for the complaint was unclear to me, as I indicated in my September 12, 1996 response. Exhibit B. Since Tex Mex will interchange traffic with BNSF at Robstown and Corpus Christi and will interchange with KCS at Beaumont, 350 miles further north, I did not, and still do not, understand what Mr. Babb meant by "junction neutral" rates. Although I have since asked, Mr. Babb has not yet explained how we are supposed to establish and apply "neutral" rates and divisions to traffic interchanged at different places. I also recall nothing said at our meeting that suggested that Tex Mex intends "to favor and protect traffic moving through interchanges at Meridian and Kansas City, in conjunction with KCS." In my response, I merely concluded that "Tex Mex and its executive committee is ready to sit down and work out agreements that are mutually beneficial to all parties."

In addition, based on discussions with our attorney, Richard Allen, I had serious concerns from a legal and antitrust standpoint about Mr. Babb's pressing Tex Mex for an agreement that would somehow equalize rates that Tex Mex establishes with one interline connection with the rates it establishes with another connection. At my request, Mr. Allen called BNSF's Assistant General Counsel, Richard Weicher, on September 12 to discuss these concerns.

On September 19, 1996 I, Tex Mex's Vice President for Marketing, Dan Beers, and Tex Mex's Vice President for Transportation, Patrick Watts, met with Mr. Rose and Mr. Rollin Bredenberg. We had a long and, I believed, productive discussion of the commercial opportunities for both railroads. Although BNSF never did provide us with the information regarding anticipated traffic volumes by commodities and gateways that we had asked for in our September 4 meeting, Mr. Rose's estimates of the total volumes BNSF expects to interchange with Tex Mex were encouraging. Based on those estimates and his earlier stated desire for a simplified approach, I proposed a single percentage division that would apply to all traffic interchanged between Tex Mex and BNSF at Robstown with the exception of chemicals and traffic for which BNSF and Tex Mex would compete directly, such as traffic to and from Houston and Amelia, Texas. The through rates to which that division would apply would be rates established by BNSF, in which Tex Mex would concur.

I stated my belief that the division I proposed was entirely reasonable in light of the traffic volumes anticipated. Mr. Rose and Mr. Bredenberg indicated that BNSF would consider my proposal. They did not indicate any belief that the proposal was unreasonable, would prevent BNSF from being competitive or was not worthy of serious consideration. In fact, on October 1, 1996 Tex Mex and BNSF executed an agreement applicable to grain and grain products using this percentage division, subject to certain agreed upon minimum and maximum dollar amounts per car. In this meeting, Mr. Rose also advised me that BNSF would not be opposing the petition Tex Mex filed with the STB to remove the routing restriction placed on our trackage rights. I was very encouraged by this, because I regarded it as a sign of BNSF's sincere desire to reach agreements with Tex Mex quickly that will move traffic.

I was extremely surprised and disappointed, therefore, to learn that four days later BNSF filed a lengthy opposition to Tex Mex's petition to remove the routing restriction. Not wishing to undermine our efforts to reach a working arrangement with BNSF, however, I kept my disappointment to myself.

I was further disappointed when I received a telephone call from Mr. Babb on September 27 in which he reiterated the demand made in his letter of September 9 for "junction neutral rates." Although I asked him to explain what he meant by junction neutral rates and how we could establish and apply them to traffic moving through different interchange points and between different origins and destinations, he did not. I also told him that I had thought from our September 19 meeting with Mr. Rose and Mr. Bredenberg that we were very close to an agreement regarding rates and divisions on BNSF interline traffic.

Mr. Babb confirmed this conversation and this demand in a letter dated September 30, 1996. Exhibit C. In that letter, Mr. Babb acknowledged that "your proposals to date provide rates which may permit us to compete for certain Mexican business," but he nevertheless insisted that "we must have <u>junction neutral rates</u>." (Emphasis in original.)

I responded to this letter on October 1, 1996. Exhibit D. In this response, I repeated my belief that the proposals we have made "will make us both very competitive for business interchanged between Tex Mex and BNSF at Robstown." I also repeated our sincere desire to work cooperatively with BNSF. As to Mr. Babb's demand for "junction neutral rates," I stated as follows:

> Doug, Tex Mex simply does not believe it is appropriate to establish interline rates and divisions with one interline connection on the basis of the rates and divisions it negotiates with another interline connection. I do not believe that BNSF establishes many, if any, of its own rates and divisions on that basis. In any event, I do not think it is proper for Tex Mex to do so. The appropriate rates and divisions in each instance must be based on the cost and marketing considerations appropriate to the movement in question. In some instances, what we establish with BNSF will be lower than what we establish with other interline connections; in other instances, it will be higher. Furthermore, as our attorney told Rick Weicher several weeks ago, we have serious legal concerns about any proposal to tie interline rates with one connection to the rates with another connection, particularly on

routes and traffic that could be competitive with each other.

> The market ultimately will determine which route the shippers will select. Within that market is not only BNSF and, to a certain extent, KCS but, to even greater extent, UP/SP. After all, Doug, it was to compete against UP/SP that your trackage rights were given you. Whether we consider joint BNSF/Tex Mex or joint KCS/Tex Mex routes, the UP/SP single line route to Laredo should keep either route from maintaining an artificial floor.

I believe the foregoing facts show that there is no basis whatever for the suggestion in BNSF's Progress Report that Tex Mex has failed to negotiate rates and divisions that will permit BNSF and Tex Mex to be fully competitive with UPSP for traffic to and through Laredo. In fact, since Tex Mex's proposal allows BNSF to establish the through rates, such a suggestion is plainly groundless.

There is also no basis for BNSF's claim that Tex Mex intends to favor KCS to the disadvantage of BNSF. In fact, Tex Mex has not yet established <u>any</u> rates or divisions with KCS. Furthermore, as I noted to Mr. Babb, the main competitor to BNSF, Tex Mex and KCS for this traffic will be UPSP, and that fact provides ample assurance that Tex Mex will not and could not maintain artificially high rates for the purpose of favoring or disadvantaging any of its connecting carriers.

VERIFICATION

I, LARRY FIELDS, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on October 11th, 1996

Larry Fields

LARRY FIELDS

BNSF

Douglas J. Babb
Senior Vice President
and Chief of Staff

Burlington Northern Santa Fe
Corporation

PO Box 961052
Fort Worth TX 76161-0052
2650 Lou Menk Drive 2nd Floor
Fort Worth TX 76131-2830
817-352-6404
817-352-7111 Fax

EXHIBIT A

VIA OVERNIGHT DELIVERY

September 9, 1996

Mario Mohar
CEO
Transportacion Ferroviaria Mexicana
Genova No. 2 Despacho No. 203, Piso No. 2
Colonia Juarez Mexico D.F. 06600

Brad Skinner
Chief Operating Officer-Intermodal
Transportacion Ferroviaria Mexicana
Genova No. 2 Despacho No. 203, Piso No. 2
Colonia Juarez Mexico D.F. 06600

Larry D. Fields
President and CEO
The Texas Mexican Railway Company
1200 Washington St.
Laredo, TX 78040

Joe Monello
Chief Financial Officer
KCSI Industries
114 West 11th Street
Kansas City, MO 64105-1804

Gentlemen:

I am writing to express my great disappointment over the lack of progress in our recent meetings to discuss the establishment of joint rates for U.S.-Mexican traffic moving over Robstown to the Laredo gateway.

At our first meeting, attended only by representatives of Tex Mex and BNSF, we were assured that Tex Mex wished to do business with BNSF as a partner serving Laredo, and would do so on the basis of junction-neutral proportional or joint rates that would allow BNSF, with Tex Mex as its partner, to compete effectively to serve shippers desiring service over Laredo.

At the subsequent meetings, the Tex Mex representatives were joined by senior officials of its 49% shareholder, KCS. Unfortunately, it now appears that Tex Mex does not really wish to work as a partner with BNSF to serve many of these shippers. Tex Mex has now made it clear that it does not intend to establish neutral rates over Robstown, but rather that it intends to favor and protect traffic moving through interchanges at Meridian and Kansas City, in conjunction with KCS. That approach is contrary to the interest of many shippers, and contrary to the interest of the United States in expanding trade with Mexico because in many cases the Chicago, St. Louis, Memphis and New Orleans gateways would be more efficient and less costly. BNSF, in conjunction with Tex Mex, will be able to use those gateways to provide efficient service through Laredo to Mexico, if the rates offered by Tex Mex allow a level playing field.

When the United States entered into NAFTA, it intended to remove artificial barriers to efficient trade between the United States and Mexico. The Surface Transportation Board stated in Decision No. 44 (at 147) that it was "particularly sensitive to [its] responsibility to ensure that this merger [UP/SP] will foster the goal of North American economic integration embodied in NAFTA." Tex Mex's negotiating stance, however, greatly threatens the efficiency and economic integration goals of NAFTA by offering rates that arbitrarily favor KCS, to the disadvantage of the shipper community. This would inevitably hurt U.S.-Mexican trade.

We have concluded that we have no choice but to promptly bring this situation to the attention of the STB. We expect to advise the STB that Tex Mex intends to establish rates that will discriminate against traffic that is interchanged directly between Tex Mex and BNSF at Robstown. Because such discrimination would seriously affect BNSF's ability to compete effectively with UP/SP for traffic that will move through Laredo, we will ask the STB to take all appropriate steps to restore the competition that your rates would thwart. With the UP/SP merger scheduled to close imminently, we cannot stand by while shippers look for efficient alternatives.

Sincerely,

BURLINGTON NORTHERN SANTA FE CORPORATION

Douglas J Babb

Douglas J. Babb
Senior Vice President
and Chief of Staff

DJB0167

EXHIBIT B

THE TEXAS MEXICAN RAILWAY COMPANY

P.O. BOX 419
LAREDO, TEXAS 78042-0419

LARRY D. FIELDS
PRESIDENT AND
CHIEF EXECUTIVE OFFICER

TEL. NO. 210-728-6700
FAX: 210-723-7406

September 11, 1996

Mr. Doug Babb, Sr. Vice President
& Chief of Staff
Burlington Northern Santa Fe
MKTG-2
2600 Lou Menk Drive
Ft. Worth, Texas 76161-0034

Dear Doug:

I was surprised, and also a little confused, by your letter of September 9, 1996. When we left your office on September 4, you and Matt seemed satisfied with the progress we had made. As you may recall the intent of the meeting was to talk and build upon commercial opportunities. We said we would work on some numbers and get back together as soon as feasible after September 12.

Tex Mex and its Executive Committee is ready to sit down and work out agreements that are mutually beneficial to all parties.

Sincerely,

Larry D. Fields

LARRY D. FIELDS

sew

cc: Mr. Ab Rees, Member, Tex Mex Executive Committee
Mr. Brad Skinner, Member, Tex Mex Executive Committee

BNSF

DOUGLAS J. BABB
Senior Vice President
and Chief of Staff

Burlington Northern Santa Fe
Corporation

PO Box 961052
Fort Worth TX 76161-0052
2650 Lou Menk Drive 2nd Floor
Fort Worth TX 76131-2830
817-352-6404
817-352-7111 Fax

EXHIBIT C

VIA OVERNIGHT DELIVERY
and Fax No. 210-723-7406

September 30, 1996

Mr. Larry D. Fields
President and Chief Executive Officer
The Texas Mexican Railway Company
1200 Washington Street
Laredo, TX 78040

Dear Larry:

This responds to your September 19, 1996, letter to Matt Rose and confirms our discussion late in the day on Friday, September 27, 1996.

First, I want to thank you for your personal attention to our ongoing discussions to establish junction-neutral proportional or joint rates that would allow BNSF to compete effectively in close co-operation with Tex Mex to serve shippers over the Laredo gateway.

Since September 9, Matt Rose and you have made progress toward the goal of neutral treatment of Tex Mex connecting carriers. Your September 19 letter to Matt indicates movement toward a division arrangement which could make it more likely BNSF could compete for business interchanged with Tex Mex through the Laredo gateway. Unfortunately, however, the discussions have not yet produced the commitment BNSF needs from Tex Mex to be competitive. Simply stated, we must have junction neutral rates. While your proposals to date provide rates which may permit us to compete for certain Mexican business, if Tex Mex extends preferred treatment to Kansas City Southern, numerous shippers will remain significantly disadvantaged. This could severely handicap BNSF efforts to provide competitive service for customers who will benefit from the Mexican gateway access granted BNSF in the UP-SP merger.

On Friday, September 27, I called to again request that Tex Mex afford BNSF junction neutral rates for traffic through the Laredo gateway. Larry, as you know, our competition report to the STB is due October 1. We really would like to report that we have reached agreement with Tex

DJB0173

Mex on rates which will allow the two of us to be fully competitive for business interchanged between the Tex Mex and BNSF at Robstown. I look forward to hearing from you.

Sincerely yours,

Doug Babb

DJB/kf

EXHIBIT D

THE TEXAS MEXICAN RAILWAY COMPANY
P.O. BOX 419
LAREDO, TEXAS 78042-0419

LARRY D. FIELDS
PRESIDENT AND
CHIEF EXECUTIVE OFFICER

TEL. NO. 210-728-6700
FAX: 210-723-7406

October 1, 1996

Mr. Doug Babb
Burlington Northern/Santa Fe
P. O. Box 961065
Ft. Worth, Texas 76161-0065

Dear Doug:

This responds to your September 30, 1996, letter. I was somewhat surprised by it, because I have been under the impression from my discussions with Matt Rose that we are very close to an agreement regarding rates and divisions on Tex Mex-BNSF interline traffic.

As to your specific points, Tex Mex has made proposals to BNSF that I believe will make us both very competitive for business interchanged between Tex Mex and BNSF at Robstown. As I wrote to Matt on September 19, I think the divisions we are considering are warranted by the amount of traffic both of us anticipate.

Although you acknowledge that the division we propose will help BNSF compete for business interchanged with Tex Mex through Laredo, you state that you need a commitment from Tex Mex for "junction neutral rates," apparently with reference to KCS. Doug, Tex Mex simply does not believe it is appropriate to establish interline rates and divisions with one interline connection on the basis of the rates and divisions it negotiates with another interline connection. I do not believe that BNSF establishes many, if any, of its own rates and divisions on that basis. In any event, I do not think it is proper for Tex Mex to do so. The appropriate rates and divisions in each instance must be based on the cost and marketing considerations appropriate to the movement in question. In some instances, what we establish with BNSF will be lower than what we establish with other interline connections; in other instances, it may be higher. Furthermore, as our attorney told Rick Weicher several weeks ago, we have serious legal concerns about any proposal to tie interline rates with one connection to the rates with another connection, particularly on routes and traffic that could be competitive with each other.

The market ultimately will determine which route the shippers will select. Within that market is not only BNSF and, to a certain extent, KCS but, to an even greater extent, UP/SP. After all, Doug, it was to compete against UP/SP that your trackage rights were given you. Whether we consider joint BNSF/Tex Mex or joint KCS/Tex Mex routes, the UP/SP single line route to Laredo should keep either route from maintaining an artificial price floor.

Doug, I sincerely want to work cooperatively with BNSF, and I do believe we have made good progress to that end. There is no basis for any suggestion that Tex Mex is hindering our two railroad's ability to establish competitive rates through Robstown and the inference that Tex Mex is somehow acting improperly is flatly rejected.

Sincerely,

LARRY D. FIELDS

CC: Mr. Matt Rose

BNSF

J B Elliott
Assistant Vice President
Agricultural Commodities Business Unit
Burlington Northern Santa Fe

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October 1, 1996

Mr. Larry D. Fields
President and Chief Executive Officer
The Texas Mexican Railway Company
P O Box 419
Laredo, TX 78042-0419

VIA FAX: 210-723-7406

Dear Mr. Fields:

Confirming our telephone conversation today concerning division with the Tex Mex on grain and grain products (STCC to be provided) between Robstown and Laredo, we agreed to the following:

- On single line cars the Tex Mex will receive a 16% division of BNSF's total line haul revenue for its portion of haul between Robstown and Laredo. Tex Mex would receive a minimum rate of $260 per car and a maximum rate of $575 per car.

- Unit trains with a minimum of 26 cars Tex Mex would receive a maximum rate of $350 per car. Unit trains with a minimum of 52 cars Tex Mex would receive a maximum rate of $330 per car.

- These divisions will remain in effect for the months of October, November and December, 1996 and may be extended upon mutual agreement by both parties.

Yours truly,

J B Elliott

ACCEPTED

Larry D. Fields

STB FD 32760 10-11-96 D 86799

66799

TROUTMAN SANDERS LLP

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A LIMITED LIABILITY PARTNERSHIP

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October 11, 1996

HAND DELIVERED

Mr. Vernon A. Williams
Surface Transportation Board
Case Control Branch
Room 2215
1201 Constitution Avenue, N.W.
Washington, D.C. 20423

RECEIVED
OCT 11 1996
MAIL MANAGEMENT
I.C.C.

Re: Finance Docket No. 32760, *Union Pacific Corporation, et al. -- Control & Merger -- Southern Pacific Rail Corporation, et al.*

Dear Secretary Williams:

Enclosed for filing in the above referenced proceeding are the original and twenty copies of KCS-68, Reply of The Kansas City Southern Railway to Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company's Progress Report and Operating Plan.

Also enclosed is a 3.5 inch Word Perfect diskette containing the text of KCS-68.

Sincerely yours,

William A. Mullins
Attorney for Kansas City Southern
Railway Company

cc: All Parties of Record

ENTERED
Office of the Secretary

OCT 16 1996

Part of
Public Record

BEFORE THE
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

REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY TO BNSF'S PROGRESS REPORT AND OPERATING PLAN

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October 11, 1996

Attorneys for The Kansas City
Southern Railway Company

RECEIVED
OCT 11 1996
MAIL MANAGEMENT
I.C.C.

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY TO BNSF'S PROGRESS REPORT AND OPERATING PLAN

PREFACE

On September 3, The Kansas City Southern Railway Company ("KCS") petitioned the Surface Transportation Board ("Board" or "STB") to reopen the above captioned proceeding and to reconsider portions of Decision No. 44 served August 12, 1996 (KCS-65). On September 23, Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company ("BNSF") replied to KCS's filing (BN/SF-70). As any further reply by KCS to BNSF's arguments would have been inconsistent with the Board's regulations,[1] KCS did not respond to BNSF's arguments.

Subsequently, on October 1, BNSF filed its Progress Report and Operating Plan. In its October 1 filing, BNSF essentially reargues the precise points made in BN/SF-70 with respect to KCS's petition to reopen. The October 1 filing was not made in reply to any other parties' comments or pleading, and it constitutes a separate new pleading. KCS therefore files this reply to BNSF's October 1 filing, at least to the extent that filing addresses BNSF's

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[1] 49 C.F.R. § 1104.13(c); (A reply to a reply is not permitted).

access to the Lake Charles area.[2] Accordingly, this is the first opportunity for KCS to address the arguments raised in BNSF's September 23 reply and repeated in its October 1 filing. KCS files this reply pursuant to 49 C.F.R. § 1104.13(a).[3]

Instead of addressing the merits of KCS's arguments, BNSF, in both its September 23 reply and its October 1 filing, makes two procedural attacks. BNSF first argues that KCS's petition to reopen should be rejected because the arguments could have been made in an earlier filing or raised at oral argument. Second, BNSF claims that the condition was a "voluntary" condition and thus is not subject to the precedents cited by the STB for the imposition of "involuntary" conditions. BNSF's arguments are wrong on both counts and should be rejected.

I. KCS'S PETITION TO REOPEN WAS BOTH TIMELY AND CONSISTENT WITH STB PRECEDENT

Pursuant to 49 U.S.C. § 10327(g)(1) and Section 1115.3 of the Commission's Rules of Practice, 49 C.F.R. § 1115.3(b)(1) and (3), any party to a proceeding may petition the Board to reconsider an initial decision of the entire Commission.[4] The petition will be

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[2] The "Lake Charles area" refers to Lake Charles, Westlake and West Lake Charles, Louisiana as more completely described in KCS-65 at p. 2.

[3] If the Board declines to accept this reply, KCS hereby requests that this filing be treated as a motion for leave to file a reply to a reply, or in the alternative, a motion to strike pursuant to 49 C.F.R. §§ 1104.8 and 1103.27(d). BNSF's attempt to get a "second bite at the apple" should not be condoned. The discussion contained at pages 22-24 in BNSF's October 1 filing is clearly "redundant" and is merely introduced to reargue it points without an opportunity for KCS to respond. See Pittsburgh & Lake Erie R.R. v. ICC, 796 F.2d 1534, 1544 (D.C. Cir. 1986).

[4] As long as the petition is filed within 20 days of the issuance of the initial decision by the Board, the Board has an obligation to hear the appeal and consider the arguments made therein. KCS's petition was filed within the 20 day period. While the petition is styled as a "Petition To (continued...)

competitive and operational aspects of the CMA agreement.[6] The Board twice denied KCS's request.[7] Instead, the Board allowed KCS to take the depositions of witnesses who submitted verified statements on behalf of BNSF, UP/SP, and CMA, and to submit "information gained" in the June 3 brief. Decision No. 35 at 3 and Decision No. 37 at 5.

As a result of these decisions, KCS's only real opportunity to address the limited access given to BNSF in the original CMA agreement was its June 3 brief; however, even if KCS had been able to develop a clearer idea of BNSF's access by June 3, KCS could not have submitted such new evidence and analysis in its June 3 brief. The Board had made it clear that KCS was being allowed to depose Applicants' and BNSF's witnesses after the April 29 deadline only because those parties had consented to making their witnesses available. Decision No. 35 at 3. Further, KCS was not granted carte blanche permission to present "new evidence" such as those verified statements KCS submitted with its petition for reconsideration. Rather, the Board limited the material KCS could include in its brief to "information gained in such depositions." Id.; see also Decision No. 37 at 5.[8] If KCS had

---

[6] See KCS-49 and KCS-53.

[7] Decisions Nos. 35 and 37.

[8] Even if KCS had full information available to it by the June 3 brief, which it did not, the briefs were limited to 50 pages. As a result, many issues that involved hundreds of pages of discovery and argument were reduced to one or two paragraphs, sometimes sentences. Even if KCS could have submitted the necessary evidence and argument in its brief, this page limitation alone prevented KCS from submitting the "evidence" that KCS needed to submit (and did submit in its petition to reopen) in order to fully address BNSF's access to the Lake Charles area.

submitted any "new evidence," it no doubt would have been met with a motion to strike, as was the evidence Conrail attempted to submit in its brief. See UP/SP-262 at 4-10.[9]

Of utmost importance to this discussion, Applicants' June 3 brief, filed at the same time KCS was filing its June 3 brief, was the first time that Applicants revealed that West Lake Charles had been added to the scope of BNSF's access. Even at that late date, it remained unclear how and by what means UP/SP intended to give BNSF access to the Lake Charles area pursuant to its commitments to CMA. Such additional information, minimal though it was, was not submitted and disclosed to KCS until the June 28 submission, well after the filing of the final briefs in this proceeding. Significantly, it was only after issuance of the August 12 decision that BNSF began informing KCS how it intended to access the Lake Charles area traffic, which information was not disclosed to the Board until the October 1 filing.

Even though BNSF itself acknowledges that KCS was unaware that access to West Lake Charles had been granted to BNSF until after the filing of the briefs, it asserts that KCS should have raised these issues during oral argument. BN/SF-70 at 13. Surely, BNSF does not contend that the July 1 oral argument was an evidentiary hearing where parties, even if time allowed,[10] would have been able to introduce new evidence. It is well settled

[9] The Board had earlier made it clear that, "briefs may not contain new evidence in the proceeding. The purpose of briefs is for parties to present legal arguments succinctly and to marshal previously filed evidence favorable to their position." Decision No. 31 at 3.

[10] While KCS could have mentioned BNSF's access to the Lake Charles area in its July 1 oral argument, given that KCS had only 10 minutes to address the hundreds of thousands of pages of discovery and evidence, such mention might have gotten one or two sentences -- hardly an opportunity to provide the Board with a full briefing of the issues surrounding BNSF's Lake Charles area access.

Finally, even if BNSF's argument as to KCS's ability to address this issue on those dates is correct, which it is not, there is nothing in the statutes, the regulations or ICC/STB precedent that would require the Board to dismiss KCS's petition simply because KCS may have had an earlier opportunity to address the same arguments. In neither its September 23 reply nor its October 1 filing did BNSF cite to even one Commission proceeding, one statute or one regulation supporting that position. Indeed, Section 1115.3(c) actually stands for the exact opposite proposition, i.e., a party may introduce "evidence" in its petition to reopen as long as such "evidence" is not cumulative, is briefly stated, and is accompanied by an explanation as to why it was not previously given. Nothing in that or any other regulation requires dismissal of a petition to reopen simply because some of the arguments raised by KCS could have been presented earlier in the proceeding. To the contrary, Section 1115.3(c) specifically invites the submission of any evidence as long as such evidence meets the three criteria, all of which were satisfied in KCS's petition for reconsideration. Additionally, the evidence submitted by KCS is entirely new evidence and new analysis and in no way is "cumulative" of evidence previously submitted by any party in this proceeding.

It is clear that the submission of the new evidence and analysis that KCS submitted with its petition for reconsideration is precisely the type of material that the petition for reconsideration process was intended to provide. Rather than making frivolous arguments over the alleged "timing" of KCS's arguments, BNSF should have addressed the merits of KCS's arguments; yet, it has not done so. Accordingly, BNSF's argument that KCS's evidence was not timely filed is without merit.

Institute. These modified conditions imposed by the Board had not been agreed to by the Applicants, BNSF, and CMA, and thus were not the result of voluntary negotiations. Accordingly the Board's action must meet the tests set forth in Decision No. 44 at 100, 144-145, n. 176, 157-158. As explained in KCS-65, the Board's action does not meet those tests.

Furthermore, BNSF's arguments ignore the fact that the access granted to BNSF contained solely within ¶ 8 of the CMA agreement (thus not considering the Board's actions), while a product of voluntary negotiation between BNSF, UP, SP, and CMA, actually involves KCS track and facilities and KCS originated and terminated traffic. KCS-65 at 13-18. KCS was not a party to the CMA agreement. KCS has not acquiesced in the access granted to BNSF, and KCS did not have access to this information until at least June 28. See discussion at p. 6. This fact alone distinguishes this case from the cases cited by BNSF, where the settlement terms did not involve a non-consenting third party. Simply put, while the original condition may have been voluntary as to Applicants and BNSF, the condition is not "voluntary" as to KCS, and that condition cannot be implemented without some involuntary obligation imposed upon KCS.[14]

To condone an action whereby two carriers agree to something that imposes an obligation on a third carrier, when that third carrier is not part of the agreement, and to then have a governmental body impose that obligation upon the non-consenting third party in the

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[14] Indeed, in the NS/NW case the ICC made it clear that it was only because the "private parties involved [had] reached an agreement satisfactory to the parties" that the ICC applied the public interest test. NS/NW, 366 I.C.C. at 241 (1982). Because KCS is not a party to any arrangement allowing BNSF access to Lake Charles area, the agreement is not "satisfactory to the parties."

name of "free market" and "voluntary negotiations" is the worse form of regulation, government intervention, and government confiscation of private property, completely violating several long-standing policies of this Board and its predecessor. See 49 U.S.C. §10101(2)("to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decision when regulation is required"); 126 Cong. Rec. H6409-12 (daily ed. July 24, 1980)(suggesting that the purpose of the Staggers Act is deregulation not reregulation); Brae Corp. v. United States, 740 F.2d 1023 (1984)("The notion behind deregulation is that parties should be allowed to work out their economic relationships as they see fit, free from government oversight."). To impose a voluntarily negotiated settlement agreement, such as the original CMA agreement, is one thing. To significantly expand upon that agreement at considerable expense to a non-consenting party is another. This is especially true in this case because KCS had no opportunity to fully address those issues until after issuance of the August 12 decision.

BNSF's arguments also ignore the fact that once the Board imposes a condition, the condition becomes a Board imposed condition that must be consistent with ICC/STB precedent, even if that condition was originally part of a privately negotiated settlement. This principle was made clear in the Burlington Northern/Santa Fe merger proceeding:

> [W]e have explained that we impose pro-competitive conditions [contained within settlement agreements] . . . only upon a finding that the conditions will ameliorate what would otherwise be the anticompetitive impacts of the transaction. The practical effect, is that, in general, we will impose as a condition an operative provision of a settlement agreement only if we would have imposed that condition (or a similar condition) even without the settlement agreement.

Burlington Northern Inc. & Burlington Northern R.R. -- Control and Merger -- Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry., Finance Docket No. 32549, Decision No. 38 at 83 (ICC served Mar. 7, 1995). In other words, in order to be imposed as a condition to a merger, any pro-competitive provision of a privately negotiated settlement agreement, such as ¶ 8 of the CMA agreement, must be capable of meeting the otherwise applicable requirements for imposing conditions to alleviate anticompetitive effects of the transaction. As fully explained in KCS-65, the imposition of ¶ 8 of the CMA agreement and especially the Board's expansion of that access, far exceeded those conditions necessary to ameliorate the anticompetitive effects of the transaction upon Lake Charles area shippers.[15] BNSF has not suggested any reasons why the Board's action with respect to the Lake Charles area was consistent with the standards for alleviating the anticompetitive effects of the transaction. Instead, BNSF relies upon incorrect and fallacious procedural and legal arguments. The Board therefore should reject BNSF's arguments as to this issue.

III. BNSF MUST FILE A TERMINAL TRACKAGE RIGHTS APPLICATION TO IMPLEMENT ANY ACCESS TO THE LAKE CHARLES AREA

As discussed above and in KCS-65, various contracts between KCS, UP and SP governing the operations in the Lake Charles area prohibit Applicants from granting BNSF direct access over KCS trackage in the Lake Charles area or to enter into a reciprocal switching arrangement with UP/SP without first obtaining KCS's consent. Again, rather than argue the merits of this issue, BNSF simply contends, without citation to any authority, that

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[15] The fact that UP/SP has not attacked or otherwise commented on KCS's petition for reconsideration may indicate that Applicants themselves realize that they did not have the authority to provide BNSF access to the Lake Charles area or that the Board may have inadvertently violated its long standing precedent by imposing, and expanding, upon that access.

it is too late to file a terminal trackage rights application. However, because most of the traffic in the Lake Charles area is subject to contracts that will not expire in the next year or so, few shippers, if any, will be harmed by any delay associated with the filing of a terminal trackage rights application. In other words, even if BNSF could access the traffic tomorrow, shippers would not be able to tender traffic to BNSF until their contracts with KCS and UP/SP expire. Thus, the filing of a terminal trackage rights application, and the associated time delay, would result in little or no harm to BNSF or to the shippers.

BNSF next argues that no terminal trackage rights application is necessary because the Board can simply invoke the immunity provision of 49 U.S.C. § 11341(a) (now, § 11321(a)) to override the contractual provisions found in the joint facility agreements in the absence a terminal trackage rights application under § 11103. Although § 11341 provides that a carrier participating in an approved railroad merger is "exempt from antitrust laws and from all other law . . . as necessary to let that carrier . . . carry out the transaction," this section cannot be interpreted to deprive another carrier of the use of its property without adequate due process of law, adequate compensation, and without an opportunity to resolve operational problems. Furthermore, this provision is limited by the language "as necessary" to carry out an approved transaction. Norfolk & Western Railway Company v. American Train Dispatchers' Association, 499 U.S. 117, 127 (1991). Neither the Applicants nor BNSF have ever argued that the imposition of ¶ 8 of the CMA agreement or the expansion of that paragraph by the Board's August 12 decision is a "necessary" part of the overall transaction. Thus, even if former § 11341(a) can be invoked in lieu of a terminal trackage rights application, which it cannot, the access granted to BNSF in the Lake Charles area is not a "necessary" part of the transaction. If BNSF wishes to gain trackage rights or the right to require KCS to perform reciprocal switching for BNSF in the face of contractual provisions to the contrary, even in the context of a merger proceeding, BNSF must file an application for terminal trackage rights under § 11103.[16]

CONCLUSION

BNSF's arguments that KCS's petition to reopen should be rejected because the arguments and evidence could have been made in an earlier filing or raised at oral argument are without basis in law or fact. Similarly, its arguments that the granting of access to BNSF, and more importantly, the expansion of that access by the Board, was a "voluntary" condition, and thus not subject to the precedents cited by the STB for the imposition of "involuntary" conditions, also lack merit and should be rejected. By imposing ¶ 8 of the CMA agreement as a condition to approval of the proposed merger, but more importantly, by further expanding upon BNSF's access granted in ¶ 8, the Board violated long standing precedent regarding the criteria for the imposition of conditions in merger proceedings. The Board thus should modify its August 12 decision insofar as it relates to BNSF's access to the Lake Charles area and substitute the conditions proposed in KCS-65, i.e., (1) removing BNSF's direct access to the Lake Charles area, or at a minimum, eliminating the Board's expansion of that access and requiring BNSF to file a terminal trackage rights application; and (2) establishing new KCS/BNSF interchanges at Texarkana, Beaumont, and Lake Charles. These conditions would resolve both the monopoly bottleneck problem and the

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[16] The Board itself explicitly stated this proposition when it said "we have no authority to impose conditions (a) on non-terminal trackage of a nonapplicant carrier." Decision No. 44 at 183.

concern over BNSF's ability to compete for plastics shipments in the least intrusive way and without violating Commission precedent.

Respectfully submitted this 11th day of October, 1996.

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Railway Company
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Attorneys for The Kansas City Southern
Railway Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY TO BNSF'S PROGRESS REPORT AND OPERATING PLAN" was served this 11th day of October, 1996, by hand delivery or by depositing a copy in the United States mail in a properly addressed envelope with adequate postage thereon addressed to all parties of record.

Attorney for The Kansas City Southern
Railway Company

STB FD 32760 10-10-96 D 86707

85727

PEPPER, HAMILTON & SCHEETZ

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WRITER'S DIRECT NUMBER

(202) 828-1220

October 10, 1996

RECEIVED OCT 10 1996 MAIL MANAGEMENT I.C.C.

Via Hand-Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1201 Constitution Avenue, N.W.
Washington, D.C. 20549

Re: Finance Docket No. 32760

Dear Mr. Williams:

Enclosed for filing in the above referenced proceeding are the original and 20 copies of the Reply of Geneva Steel Company To UP/SP-286 (GS-9). Also, enclosed is a 3.5 inch diskette containing the Reply in WordPerfect 5.1.

In addition, an extra copy of the Reply is enclosed. Please date stamp this additional copy and return it to our messenger.

Thank you for your assistance.

Sincerely,

Michelle J Morris

Michelle J. Morris

cc: All parties of record

Enclosure

RECEIVED OCT 10 1996 GUARD DESK

Office of the Secretary
OCT 1 1 1996
4 Part of Public Record

BEFORE THE

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

REPLY OF GENEVA STEEL COMPANY TO UP/SP-286

By filing their Motion for Leave to File Reply to GS-7, Applicants earnestly seek to have the last word on the issues which have been already raised concerning the application of the 50% Obligation to Geneva's rail transportation contract. Rather than perpetuate the pleading cycle on these issues, Geneva is content to stand on its prior pleadings.

Geneva does, however, wish to respond to a new point injected by Applicants who assert the "Board unquestionably has the authority to alter contract rights under the pre-emption provision of former 49 U.S.C. § 11341(a)." Applicants' Reply to GS-7, at 2 n.3. To the extent they seek to apply the statutory pre-emption provision to contracts impacted by the 50% Obligation, Applicants' assertion is demonstrably wrong.

Even if the necessary conditions for application of the pre-emption provision in the manner suggested by the Applicants were present -- and Geneva does not believe they are -- the pre-emption provision simply does not reach the Geneva/UP contract. The pre-emption provision in former 49 U.S.C. § 11341(a) is now codified in 49 U.S.C. § 11321(a) -- one of the sections in Part A of Subtitle IV of Title 49. The March 29, 1996 rail transportation contract between Geneva and UP is a rail transportation contract authorized by 49 U.S.C. § 10709. As such, the Geneva/UP rail transportation contract "shall not be subject to" the "part" in which the pre-emption provision is found. 49 U.S.C. § 10709(c)(1). Therefore, the pre-emption provision is itself pre-empted as to rail transportation contracts. Accordingly, the pre-emption provision could in no event be applied to Geneva's rail transportation contract.

Respectfully submitted,

John Will Ongman
Marc D. Machlin
Michelle J. Morris
PEPPER, HAMILTON & SCHEETZ
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200

Counsel for Geneva Steel Company

Date: October 10, 1996

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply of Geneva Steel Company to UP/SP-286 (GS-9) was served on the following parties via hand delivery this 10th day of October, 1996:

Paul A. Cunningham
Richard B. Herzog
James M. Guinivan
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Washington, D.C. 20036

Arvid E. Roach, II
J. Michael Hemmer
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COVINGTON & BURLING
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Judge Jerome Nelson
Administrative Law Judge
FEDERAL ENERGY REGULATORY COMMISSION
825 North Capitol Street, N.E.
Washington, D.C. 20426

Erika Z. Jones
Adrian L. Steel, Jr.
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

A copy of the foregoing pleading was also sent by first class mail to all parties of record.

Michelle J. Morris

Michelle J. Morris

STB FD 32760 9-26-96 D 86388

86388

PEPPER, HAMILTON & SCHEETZ

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ID-86388

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September 26, 1996

Via Hand-Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1201 Constitution Avenue, N.W.
Washington, D.C. 20549

Confidential

Re: Finance Docket No. 32760

Dear Mr. Williams:

Enclosed for filing in the above referenced proceeding are the original and 20 copies of the Reply of Geneva Steel Company To Applicants' Petition for Clarification (GS-7). In addition, we are simultaneously filing the original and 20 copies of the highly confidential Exhibit to the Reply (GS-8) to be filed under seal. Also, enclosed is a 3.5 inch diskette containing the Reply in WordPerfect 5.1.

Geneva Steel ("Geneva") has served the highly confidential Exhibit to the Reply only on outside counsel where Geneva is aware that such counsel have executed the highly confidential undertaking issued in Decision No. 2 in the above referenced docket. The unrestricted Reply of Geneva Steel Company To Applicants' Petition for Clarification has been served on all parties of record.

Geneva Steel will provide the Highly Confidential Exhibit to the outside counsel of any party who is eligible to receive highly confidential material and who provides Geneva with copies of an executed highly confidential undertaking. In order to receive such copies, please contact Michelle Morris at (202) 828-1220.

An extra copy of the Reply and the Exhibit is also enclosed. Please date stamp this additional copy and return it to our messenger.

Thank you for your assistance.

Sincerely,

Michelle J. Morris

Michelle J. Morris

cc: All parties of record

Enclosure

STB FD 32760 9-26-96 D 86387

86387

PEPPER, HAMILTON & SCHEETZ

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WRITER'S DIRECT NUMBER

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September 26, 1996

ID-86387

Via Hand-Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1201 Constitution Avenue, N.W.
Washington, D.C. 20549

RECEIVED
SEP 26 1996
MAIL MANAGEMENT
I.C.C.

Re: Finance Docket No. 32760

Dear Mr. Williams:

Enclosed for filing in the above referenced proceeding are the original and 20 copies of the Reply of Geneva Steel Company To Applicants' Petition for Clarification (GS-7). In addition, we are simultaneously filing the original and 20 copies of the highly confidential Exhibit to the Reply (GS-8) to be filed under seal. Also, enclosed is a 3.5 inch diskette containing the Reply in WordPerfect 5.1.

Geneva Steel ("Geneva") has served the highly confidential Exhibit to the Reply only on outside counsel where Geneva is aware that such counsel have executed the highly confidential undertaking issued in Decision No. 2 in the above referenced docket. The unrestricted Reply of Geneva Steel Company To Applicants' Petition for Clarification has been served on all parties of record.

Geneva Steel will provide the Highly Confidential Exhibit to the outside counsel of any party who is eligible to receive highly confidential material and who provides Geneva with copies of an executed highly confidential undertaking. In order to receive such copies, please contact Michelle Morris at (202) 828-1220.

An extra copy of the Reply and the Exhibit is also enclosed. Please date stamp this additional copy and return it to our messenger.

Thank you for your assistance.

Sincerely,

Michelle J. Morris

Michelle J. Morris

cc: All parties of record

Enclosure

RECEIVED
SEP 26 1996
MAIL MANAGEMENT I.C.C.

GS-7

BEFORE THE

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

REPLY OF GENEVA STEEL COMPANY TO APPLICANTS' PETITION FOR CLARIFICATION

On September 3, 1996, Geneva Steel Company ("Geneva") asked the Surface Transportation Board to clarify that under the "contract modification condition" (Applicants call this the "50% Obligation") that

(1) a shipper must bear no negative consequences as a result of accepting a bid from BNSF for at least 50 percent of its volume;

(2) a shipper must be free to specify which portion of its contract volume, up to 50 percent of its total rail traffic, will be granted to BNSF; and

(3) a shipper must be free to specify when the bid proposal from BNSF may be entertained.

On September 23, 1996, Applicants replied to Geneva's clarification requests. UP/SP-280. Applicants in reply do not object to Geneva's requests stating as to Request No. 1 their "approach to implementing the 50% Obligation does not impose any such 'negative consequences'" (UP/SP-280 at 15), as to Request No. 2 that they "do not object to this proposition" (id. at 17) and as to Request No. 3 that "Applicants agree that a shipper is free to exercise its rights under the 50% obligation at any time" (id. at 18).

However, UP/SP-280 goes beyond merely replying to Geneva's petition for clarification. Applicants go on affirmatively to seek clarification of the 50% Obligation themselves. Geneva hereby replies to Applicants' clarification request contained in UP/SP-280.[1] Specifically, Geneva replies in opposition to Applicants' request that the STB "recognize[] that UP/SP have the option to terminate a contract in its entirety where the shipper seeks to have UP/SP handle 50% of the business on rate and service terms that were economic solely as applied to the higher volume that the contract required the shipper to tender." UP/SP-280 at 17.[2]

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1. Because Applicants seek clarification themselves rather than merely replying to Geneva's petition, this reply is not contrary to the STB's rules of practice. Compare 49 C.F.R. § 1104.13(a) with § 1104.13(c). Indeed, the rules of practice must be "construed liberally to secure just, speedy and inexpensive determination of the issues presented." 49 C.F.R. § 1100.3.

2. Applicants' state their clarification request as it applies generally in a slightly different form (UP/SP-280 at 6-7) (emphasis in original):

> "UP/SP must have the option, where price and/or service terms were specially tailored to volumes committed by the shipper during

(continued...)

ARGUMENT

I. THE STB HAS NO AUTHORITY TO GRANT THE "OPTION" SOUGHT BY UP.

The rail transportation contract between Geneva and UP was executed on March 29, 1996. It is a contract authorized by 49 U.S.C. § 10709. As a result, "transportation under such contract, shall not be subject to this [Part A of Subtitle IV of Title 49]." 49 U.S.C. § 10709(c)(1). Consequently, the STB has no authority to issue an order relating to transportation under the Geneva rail transportation contract.

The STB's authority to impose the 50% Obligation on UP derives from its power to condition a rail merger. 49 U.S.C. § 11344(c) (1995). As a condition to its grant of approval of Applicants' primary transaction, the STB imposed the 50% Obligation on the Applicants -- not on the shippers. By closing its transaction on September 11, 1996, UP is now bound by the 50% Obligation.[3]

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2. (...continued)
arm's-length negotiations prior to the merger and would be uneconomic with lower volumes, to release the entire volume under the contract, in lieu of releasing 50% and being held to price and/or service terms that cannot fairly be enforced against UP/SP if it receives only 50% of the volume."

3. UP has, as a matter of law, waived any of its contractual rights needed to implement the 50% Obligation. UP's contract shippers may or may not choose to accept UP's waiver. Those shippers have contractual rights which are beyond the authority of the STB; any attempt to grant UP's option would, therefore, be without statutory basis.

II. UP'S "OPTION" WOULD UNDERCUT THE PURPOSE OF THE 50% OBLIGATION.

As set forth in the verified statement of Ralph D. Rupp in Exhibit A, UP's option would undercut the purpose of the 50% Obligation.[4] The principal purpose of the 50% Obligation articulated by the STB is to "directly address[] both the competitive problems that have been raised with the BNSF agreement and the CMA agreement and concerns about whether BNSF will have "sufficient traffic to compete effectively." Decision No. 44, at 106. A core concern expressed by BNSF was that it must have "sufficient density to keep service competition in the Central Corridor 'alive and well.'" BN/SF-54, April 29, 1996, V.S. Owen at 15. For BNSF to have the beneficial competitive impact on all of the shippers in the Central Corridor that the STB meant for it to have, the 50% Obligation condition must be applied according to its plain meaning without granting UP an "option" to avoid the legal obligation it assumed by closing its transaction.

CONCLUSION

For the foregoing reasons -- and "because so much depends on BNSF's performance" -- the STB should deny UP's

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4. Mr. Rupp's verified statement set forth in Exhibit A hereto is highly confidential and is being filed under seal and served only on outside counsel for parties who are known to have executed the Highly Confidential undertaking of the protective order in this case.

petition for clarification insofar as it seeks the "option" requested by UP. Decision No. 44 at 134.

Respectfully submitted,

John Will Ongman
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Washington, D.C. 20036
(202) 828-1200

Counsel for Geneva Steel Company

Date: September 26, 1996

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply of Geneva Steel Company to Applicants' Petition for Clarification (GS-7) and Highly Confidential Exhibit (GS-8) was served on the following parties via hand delivery this 26th day of September, 1996:

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A copy of the foregoing Reply was also sent by first class mail to all parties of record. The Highly Confidential Exhibit was also sent by first class mail to select outside counsel and consultants in accordance with the terms of the protective order issued in Decision No. 2.

Michelle J. Morris

Michelle J. Morris

86388

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Confidential

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An extra copy of the Reply and the Exhibit is also enclosed. Please date stamp this additional copy and return it to our messenger.

Thank you for your assistance.

Sincerely,

Michelle J. Morris

Michelle J. Morris

cc: All parties of record

Enclosure

STB FD 32760 9-23-96 D 86270

86270

ORIGINAL

BN/SF-70

BEFORE THE
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

REPLY OF BURLINGTON NORTHERN RAILROAD COMPANY AND
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
TO KCS'S PETITION TO REOPEN/RECONSIDER

RECEIVED SEP 23 1996 MAIL MANAGEMENT I.C.C.

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ENTERED
Office of the Secretary
SEP 24 1996
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Public Record

September 23, 1996

BEFORE THE
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

REPLY OF BURLINGTON NORTHERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY TO KCS'S PETITION TO REOPEN/RECONSIDER

Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (collectively, "BN/Santa Fe")[1/] submit the following reply to KCS's Petition to Reopen/Reconsider (KCS-65) filed on September 3, 1996, in this proceeding. In its Petition, KCS asserts that the Board "inadvertently" violated longstanding precedent on the imposition of merger-related conditions when it imposed ¶ 8 of the CMA Agreement as a condition to its approval of the proposed UP/SP merger. KCS also asserts that UP lacked the contractual authority to grant BN/Santa Fe access to Lake Charles, LA area shippers over certain KCS/SP joint trackage and that a terminal trackage rights application under 49 U.S.C. § 11102 (formerly § 11103) is required in order for BN/Santa Fe to access

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1/ The acronyms used herein for references to other parties are the same as those in Appendix B to Decision No. 44.

that trackage. As established below, however, KCS's arguments are without merit and untimely.

Initially, KCS bases its argument that the Board improperly imposed ¶ 8 of the CMA Agreement as a condition of merger approval on the premise that the Board was acting to impose an involuntary condition on the Applicants. As the Board is well aware, however, the CMA Agreement was submitted to the Board as a settlement agreement between the Applicants and other parties to the proceeding. Thus, the CMA Agreement did not need to satisfy the criteria for the imposition of involuntary conditions. Rather, the Board properly evaluated the CMA Agreement under the public interest standard applied in prior decisions to voluntary settlements and found that, as modified by the Board, it met that standard.

Further, KCS has misstated the rationale behind the Board's decision to remove the geographic route restrictions that were a part of the CMA Agreement Lake Charles area access provision. Contrary to KCS's assertion, those restrictions were not removed by the Board in order to provide BN/Santa Fe with additional storage-in-transit yard ("SIT") capacity, but rather they were removed to ensure that BN/Santa Fe could fully compete for traffic from plastics shippers in the Lake Charles area who use SIT for much of their traffic without knowing at the time their cars are put into storage what the cars' final destination will be.

Moreover, while a terminal trackage rights application could have been filed to secure the Board's approval for BN/Santa Fe's access to the joint trackage at issue had KCS raised its concern about UP/SP's contractual authority to grant such access to BN/Santa Fe in a timely manner, such an application is not necessary under the former 49 U.S.C. § 11341(a) (now § 11321(a)). As the Board recognized in Decision No. 44, the immunity provision of Section 11341(a) would override any restrictions requiring KCS's consent to BN/Santa Fe access that may be contained in the underlying contractual documents. Decision No. 44, at 169-70.

Finally, KCS could have -- and should have -- raised many of the concerns it now raises several months ago. For example, KCS was aware of UP/SP's grant of access to BN/Santa Fe to Lake Charles area shippers as far back as April 19, 1996; yet it waited for more than 3½ months to raise its concerns about that access with the Board. The Board's rules do not permit KCS to raise those concerns at this late date in an effort to prevent BN/Santa Fe from competing at Lake Charles in accordance with the Board's decision.

BACKGROUND

As the Board is aware, UP/SP first agreed to grant BN/Santa Fe access to shippers in the Lake Charles area in ¶ 8 of the CMA Agreement executed on April 18, 1996, among UP/SP, BN/Santa Fe and CMA. That Agreement, which limited BN/Santa Fe's access to shippers served by all of UP, SP and KCS at Westlake and Lake Charles[2/] and which imposed certain geographic route

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[2/] Specifically, ¶ 8 of the CMA Agreement required that the BNSF Agreement be amended to give BN/Santa Fe "the right to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and West Lake (sic), Louisiana". Section 5b of the BNSF Agreement was subsequently amended to reflect this requirement. See Ex. A to UP/SP-266. BN/Santa Fe's right includes the right to handle such (continued...)

restrictions,[3] was filed with the Board and served on all parties of record on April 19, 1996. See UP/SP-219. Thereafter, ¶ 8 of the CMA Agreement was modified to provide BN/Santa Fe with access to shippers served by SP and KCS at West Lake Charles with the same route restrictions. All parties were given notice of this modification in UP/SP's June 3, 1996 brief (UP/SP-260) and in a separate filing with the Board on June 11, 1996 (UP/SP-263).

In Decision No. 44, the Board determined that this voluntarily granted access was not adequate to preserve competition in the Lake Charles area in three respects. First, the Board held that, because any KCS routing to and from St. Louis or Chicago would still need to include a connection with UP/SP at Shreveport, UP/SP would have control of a "bottleneck" for movements in and out of the Lake Charles area.[4] Accordingly, the Board ordered that BN/Santa Fe could use its Houston-to-Memphis trackage rights to

[2] (...continued)
traffic by reciprocal switch or direct service via trackage rights. See Decision No. 44, at 153 ("It appears * * * that BNSF will have direct access to [Lake Charles area] shippers when it begins to operate under its trackage rights arrangement".)

[3] The route restrictions limited BN/Santa Fe's right of access at Lake Charles and Westlake to traffic moving (a) from, to and via New Orleans, and (b) to or from points in Mexico via the Texas border crossings at Eagle Pass, Laredo or Brownsville.

[4] This was so because the only other viable routing out of the Lake Charles area is SP's line between Houston and New Orleans, and the combined UP/SP would have control over both routes to and from the Lake Charles area.

interline with KCS at Shreveport and Texarkana.[5] Decision No. 44, at 152-153.

Second, the Board found that the geographic route restrictions undercut BN/Santa Fe's ability to be fully competitive in the Lake Charles area. This was so because of the "key role" that SIT facilities play for plastics shippers. As the Board noted, much of a plastics plant's output is initially assigned to storage, and it is often only after a car has been in storage that its contents are sold and a delivery destination determined. Decision No. 44, at 153. If BN/Santa Fe service to Lake Charles area plastics shippers were limited to only certain geographic areas, shippers would be reluctant to use BN/Santa Fe and its SIT facilities since they might have to return the cars from storage to their plants in order to have the cars transported by a different carrier that could serve the final destination. Ibid. Thus, the Board removed the geographic route restrictions so that BN/Santa Fe could offer SIT facilities (and thus transportation service) for a full range of destinations. Ibid. Nothing in the Board's rationale for removing the route restrictions related to any alleged shortage of SIT capacity, as KCS asserts was the case.

Third, the Board ordered that what has been referred to as a "phantom haulage charge" be removed from the CMA Agreement, since it appeared that UP/SP was attempting to charge BN/Santa Fe for services it would not actually perform if BN/Santa Fe served the

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[5] As the Board noted, this access would have the principal effect of substituting a KCS-BN/Santa Fe routing through Shreveport or Texarkana for the existing KCS-UP movement via Texarkana.

Lake Charles area facilities directly via trackage rights. Decision No. 44, at 153.

In its Petition, KCS has challenged not only these three modifications to ¶ 8 of the CMA Agreement,[6] but also the underlying access granted to BN/Santa Fe by the Applicants in the Lake Charles area.

ARGUMENT

KCS's primary argument is that the Board should not have granted BN/Santa Fe access to the Lake Charles area as a condition to the merger and should not have expanded upon that access in Decision No. 44. See KCS-65, at 2. As shown below, however, that argument rests on several fundamental errors and misconceptions about the applicable Board precedent and the Board's rationale for deciding as it did. KCS's Petition should therefore be denied.

A. The Board Properly Approved The Voluntary Settlement Granting BN/Santa Fe Access To Lake Charles Area Shippers

The first fundamental flaw in KCS's argument relates to its mistaken premise that the underlying access granted to BN/Santa Fe in the Lake Charles area was granted by the Board as an involuntary condition to approval of the proposed merger. In this regard, KCS cites numerous precedents and authority that are applicable only in the situation where an involuntary condition is being considered.

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[6] KCS's Petition asserts a claim that the Board improperly removed the "phantom haulage charge" from the CMA Agreement, but it advances no argument in support of that position. Further, since the charge was to be paid to UP/SP, it is unclear what standing KCS has to challenge the removal of the charge other than its self-motivated interest in making it more expensive for BN/Santa Fe to compete at Lake Charles.

Here, however, the granting of BN/Santa Fe's access to the Lake Charles area was a part of the overall CMA Agreement. In such a situation, the Board has recognized that its standard of approval is different:

> Settlement terms, having been agreed to by the primary applicants, need not satisfy our criteria for the imposition of involuntary conditions.

Union Pacific Corporation, et al. -- Control -- Missouri Pacific Corporation, et al., 366 I.C.C. 462, 601-602 (1992) ("UP/MP"), citing Norfolk Southern Corp. -- Control -- Norfolk & Western Railway Co., 366 I.C.C. 173, 240 (1982) ("Norfolk Southern"). The Board will approve a proposed settlement if its terms are shown to be consistent with the public interest.[7] Id. at 601. In making that determination, the Board employs a balancing test and weighs the public benefits against the public harms possibly arising from the approval of the settlement terms. Id. at 605.

Here, it is clear that approval of ¶ 8 of the CMA Agreement is in the public interest. The Board found that, absent BN/Santa Fe access as provided in that paragraph, UP/SP would retain control of a "bottleneck" on traffic to and from the Lake Charles area. Decision No. 44, at 152 ("an unconditioned merger would place all [of the Lake Charles area shippers'] efficient rail routings under

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7/ "[O]ur review is only to determine whether approval of the proposed [settlement] agreement is consistent with the public interest as opposed to our review of requested involuntary conditions where it must be shown that the public interest requires imposition of the condition prior to approval of the primary transaction." Norfolk Southern, 366 I.C.C. at 240.

applicants' control"). KCS -- applying the wrong standard[8] -- has cited to no countervailing public harm that would occur from approval of the CMA Agreement.

Moreover, the fact that KCS has proposed other alternative solutions to the "bottleneck" problem at Lake Charles that may (or may not) be in the public interest does not justify the rejection of the proposed settlement submitted by UP/SP, BN/Santa Fe and CMA. In approving a settlement agreement, the Board is not required to consider whether some other solution to a potential competitive problem might also resolve the problem in a way that is different or perhaps arguably better than the proposed solution before it.[9] See Burlington Northern, Inc., et al. -- Control & Merger -- Santa Fe Pacific Corp., et al., Fin. Dkt. 32549, slip op. at 88 (served

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[8] KCS's argument that the Board's decision is in error because it enhances competition, rather than merely preserves competition, is misdirected since it relies on precedent applicable to involuntary conditions. It was UP/SP -- not the Board -- that determined to grant BN/Santa Fe access to Lake Charles area shippers. Moreover, even if that access has the effect of improving the competitive options of those shippers, there is no reason for the Board -- particularly in response to a petition to reopen -- to deny such access as long as the proposed settlement is in the overall public interest, which the Board found the settlement, as modified, clearly to be.

[9] Thus, KCS's argument that joint KCS-BN/Santa Fe moves with interchanges at Lake Charles (for traffic to New Orleans) and at Beaumont (for traffic to Houston) or a KCS-Tex Mex joint-line move over Beaumont would have been less intrusive alternative solutions to the "bottleneck" problem is not relevant. Similarly, KCS's claimed "new evidence" (evidence that it had available to it on April 29, June 3 and July 1) that the potential "bottleneck" traffic is "only $11.7 million of the Lake Charles area traffic" is also irrelevant since it does nothing to detract from the Board's conclusion that BN/Santa Fe access to the Lake Charles area provided for in ¶ 8 of the CMA Agreement, as modified by the Board, is in the public interest.

Aug. 23, 1995) ("'[W]here the opposing parties have reached a voluntary agreement on trackage rights in a rail consolidation proceeding, our role * * * is a limited one. In this context, we will approve any reasonable terms agreed to by the parties.'") (quoting Union Pacific Corp., et al. -- Control -- Missouri-Kansas-Texas Railroad Co., et al., 4 I.C.C.2d 409, 468 (1988)); Norfolk Southern, 366 I.C.C. at 243 (in reviewing a settlement agreement, the Commission's "concern is only that the agreement itself is consistent with the public interest.").

It is particularly inappropriate to consider KCS's proposed alternative solutions here since they are highly intrusive. They would override voluntarily agreed-to settlement terms and thereby seriously undercut the Board's long-established policy of encouraging private settlements to resolve potential competitive problems. See, e.g., UP/MP, 366 I.C.C. at 601; Norfolk Southern, 366 I.C.C. at 240. It is especially disruptive of the administrative process for KCS to propose those "solutions" now, for the first time, in a petition to reopen without having even hinted at those "solutions" (or even the problems they supposedly solve) in its evidence, brief or oral argument.

Accordingly, KCS's challenge to BN/Santa Fe's access to the Lake Charles area on this ground should be denied.

B. The Board Correctly Removed The Route Restrictions On BN/Santa Fe's Access To Lake Charles Area Shippers In Order To Ensure That BN/Santa Fe Would Be Fully Competitive

KCS complains that the Board improperly expanded BN/Santa Fe's access to Lake Charles area shippers by removing the geographic route restrictions that had been included in ¶ 8 of the CMA Agreement. KCS bases its argument, however, on a complete misreading of the Board's rationale for removing those restrictions.

As discussed above, the Board removed the route restrictions in order to ensure that BN/Santa Fe would have the ability to serve plastics shippers in the Lake Charles area unhampered by any concerns on the part of the shippers that they would have to return their cars from BN/Santa Fe's SIT facilities to their plants to make arrangements to use a different carrier if the final delivery destination of the cars was one that BN/Santa Fe could not serve under the ¶ 8 route restrictions. Decision No. 44, at 153. There is simply no language at all in the Board's discussion concerning the removal of the route restrictions that gives any indication that the Board's decision was in any way based on a concern over a lack of sufficient SIT capacity. Thus, all of KCS's arguments challenging the removal of the route restrictions on the ground that BN/Santa Fe has sufficient SIT capacity to handle the Lake Charles area traffic are irrelevant.

C. KCS's Consent Is Not Required For BN/Santa Fe Access To Lake Charles Area Shippers

KCS's final argument seeking to overturn the Board's decision is a claim that UP/SP lacked the contractual authority to grant BN/Santa Fe access to four segments of track necessary to serve shippers at Westlake and West Lake Charles. KCS further claims that UP/SP and BN/Santa Fe should have been required to file a terminal trackage rights application under 49 U.S.C. § 11102 (formerly § 11103) to obtain such access. KCS's claims are without merit.

First, even assuming that BN/Santa Fe would need to use portions of the Lake Charles area trackage covered by the four SP-KCS joint facilities agreements KCS cites to serve shippers directly, KCS's consent is not required for such BN/Santa Fe access.[10] As the Board held in Decision No. 44, an override of the consent restrictions in the underlying contractual agreements is appropriate and necessary if a terminal trackage rights application is not available. Decision No. 44, at 169-170.

Here, a terminal trackage rights application could not have been filed at the time the primary application was filed since BN/Santa Fe's access to the Lake Charles area was granted as a part of a settlement agreement executed more than four months after the primary application was filed. Moreover, as discussed below, had KCS raised its concerns as to UP/SP's alleged lack of contractual authority to grant BN/Santa Fe access in April when the CMA Agreement was first announced, there might have been time for a terminal trackage rights application to have been filed and processed along with the primary application. By not timely raising its concerns about UP/SP's contractual authority to grant BN/Santa Fe access to the trackage, KCS has itself made the

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[10] Indeed, if BN/Santa Fe chooses to access the various Lake Charles area shippers by reciprocal switch rather than by direct service via trackage rights, then KCS's argument concerning UP/SP's contractual authority to grant BN/Santa Fe access to the joint trackage facilities would be moot, since BN/Santa Fe's right to serve the Lake Charles area shippers by reciprocal switch is in no way affected by the joint facilities agreements KCS cites.

alternative of a terminal trackage rights application unavailable, and the override authority of § 11341(a) should be held to be applicable.[11]

D. KCS's Petition Should Be Denied As Untimely

Finally, KCS's challenge to BN/Santa Fe access to the Lake Charles area is untimely. KCS was aware of UP/SP's grant of that access to BN/Santa Fe pursuant to the CMA Agreement as early as April 19, 1996, when the Agreement was filed with the Board and served on all parties. Although KCS asserts that the Board precluded it from submitting evidence and argument on the CMA Agreement, that is simply not true. In both Decision No. 35 (at 3) and Decision No. 38 (at 5), the Board made it clear that KCS could take the depositions of UP/SP and BN/Santa Fe personnel regarding the CMA Agreement and include information gained in such depositions in its brief.[12] Further, previously in Decision No. 31 (at 3), the Board had stated that non-applicant parties (such as KCS) that believed that they would be harmed by a condition proposed by another party could submit evidence in their April 29, 1996 filings in response to the requested condition. Since ¶ 8 of the CMA Agreement required the BNSF Agreement to be amended and the

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[11] In this regard, if KCS remains of the view that UP/SP has in some way violated the provisions of the four joint facilities agreements at issue, then KCS may pursue any contractual remedies it may have against UP/SP.

[12] Counsel for KCS attended the deposition of George R. Speight, Jr. of CMA (May 14, 1996) as well as the depositions of Richard B. Peterson of UP (May 8, 1996) and Carl R. Ice of BN/Santa Fe (May 10, 1996). At each such deposition, KCS's counsel asked a number of questions about the CMA Agreement, but none of those questions were directed to the issues KCS has raised in its Petition.

BNSF Agreement was a condition requested by the Applicants, KCS could have submitted evidence on BN/Santa Fe's proposed access to the Lake Charles area in its April 29 filing.[13]

Thus, KCS had an opportunity to challenge UP/SP's grant to BN/Santa Fe of access to the Lake Charles area on several occasions (in its April 29 filing, in its June 3 brief, and during its July 1 oral argument). It could have raised its concerns relating to the operational and switching problems that it believes would occur if BN/Santa Fe has such access, and it could have raised its concerns relating to UP/SP's contractual authority to grant BN/Santa Fe access at that time as well.[14] It did not do so, nor did it raise any of the other concerns it has expressed in its Petition at oral argument. Furthermore, KCS could have submitted a <u>focused</u> request to be permitted an additional opportunity to submit evidence, rather than the <u>general</u> requests that KCS filed, which left the Board and the parties completely in the dark about the

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[13] The 10 days between service of the CMA Agreement on all parties of record and the April 29 filings proved sufficient for parties other than KCS to raise their concerns with the agreement. Several parties (Conrail (CR-37), Dow (DOW-20), Montell (MONT-5), SPI (SPI-16), and Quantum Chemical (QCC-4)) addressed the CMA Agreement in their April 29 filings. KCS could have done likewise. For instance, it easily could have submitted evidence concerning UP/SP's alleged lack of contractual authority to grant BN/Santa Fe access to Westlake at that time. It could also have presented its "new evidence" concerning the relative percentage of traffic volumes in the Lake Charles area which are subject to the "bottleneck" at that time as well.

[14] While it is true that KCS was not aware that access to West Lake Charles had been granted to BN/Santa Fe until after its brief was filed, KCS could have raised the issue of access to that additional location during oral argument before the Board. It did not do so.

nature of the objections that KCS now belatedly seeks to raise. Not having raised any of these concerns until now, KCS should not be heard to complain that the Board failed to consider those concerns in its decision.

CONCLUSION

Accordingly, for the reasons set forth above, KCS's Petition to Reopen/Reconsider should be denied.

Respectfully submitted,

Erika Z. Jones /KEU

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Attorneys for Burlington Northern Railroad Company
and The Atchison, Topeka and Santa Fe Railway Company

September 23, 1996

CERTIFICATE OF SERVICE

I hereby certify that copies of Reply of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to KCS's Petition to Reopen/Reconsider (BN/SF-70) have been served this 23rd day of September, 1996, by hand-delivery or first-class mail, postage prepaid on all Parties of Record in Finance Docket No. 32760.

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BN/SF-68

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BEFORE THE
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

REPLY OF BURLINGTON NORTHERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY TO APPLICANTS' PETITION FOR CLARIFICATION

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Attorneys for Burlington Northern Railroad Company
and The Atchison, Topeka and Santa Fe Railway Company

September 23, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

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UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
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REPLY OF BURLINGTON NORTHERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY TO APPLICANTS' PETITION FOR CLARIFICATION

INTRODUCTION

Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (collectively, "BN/Santa Fe")[1] submit the following reply to the Applicants' Petition for Clarification (UP/SP-275) filed on August 29, 1996, in this proceeding. In their Petition, the Applicants ask the Board to "clarify" certain aspects of Decision No. 44 relating to BN/Santa Fe's right to serve new facilities and transload facilities on the UP and SP lines over which the Board has ordered that BN/Santa Fe receive trackage rights.

Nothing in the Board's language concerning BN/Santa Fe's right to serve such facilities needs to be clarified. The Applicants concede that, "read literally," the Board's decision precludes

[1] The acronyms used herein for references to other parties are the same as those in Appendix B to Decision No. 44.

their preferred result.[2] Petition for Clarification at 3. The Applicants fervently contend that the Board could not have meant what it said in Decision No. 44, and really must have said what it did through carelessness or lack of full consideration. The Applicants, however, are far more supportive of the thoroughness of the Board's decision in other settings, such as the following press statement: "UP Corp. Chairman Drew Lewis celebrated the release of the final decision: '* * * The 290-page document reflects the careful and extensive consideration the [B]oard gave to this historic event.'" Jack Burke, Appeal-Proof Decision?, Traffic World, Aug. 19, 1996, at 47.

The Board's language is clear and precise: the Applicants must grant BN/Santa Fe "the right to serve new facilities [including transload facilities] on both SP-owned and UP-owned track over which BNSF will receive trackage rights" in the BNSF Agreement. Decision No. 44, at 145-146. It is this "literal[]" condition and its ample support in the Board's reasoning, not any ambiguity, that occasions the Applicants' Petition. Moreover, the Applicants' proposed restrictions would, as is explained below, effectively eliminate the competitive benefits of all existing transload options on the lines over which BN/Santa Fe received

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[2] Recognizing that their interpretation contradicts the plain meaning of the Board's language, the Applicants have alternatively requested the Board to treat their Petition as a petition to reopen pursuant to 49 C.F.R. § 1115.3 on the ground of material error (Petition for Clarification at 1 n.2). As we explain below, the Board did not err at all, much less materially, in formulating the challenged condition.

trackage rights under the Board's decision. Accordingly, the Applicants' Petition should be denied.

ARGUMENT

A. The Board Properly Granted BN/Santa Fe The Right To Serve New Transload Facilities On All Trackage Rights Lines

The Applicants first assert that the Board should "clarify" BN/Santa Fe's right to serve new transload facilities. The Applicants urge an interpretation that the condition is solely for the purpose of enabling BN/Santa Fe to handle traffic transloaded from or to points on the other merging carrier's line. The Applicants can point to nothing in the Board's decision to support that limitation on the Board's express language, and with good reason. The Board was crystal clear in mandating that the Applicants "make available all points on their lines (over which BNSF receives trackage rights) to [new] transload facilities, wherever BNSF or some third party chooses to establish them." Decision No. 44, at 106 (emphasis added). The Board then reiterated that BN/Santa Fe or third parties should be allowed "to locate transloading facilities anywhere on the lines where BNSF will receive trackage rights." Id. at 124 (emphasis added).

The Applicants seek to avoid this unambiguous language by ascribing an artificially narrow purpose to the Board's decision to expand the new facilities provision contained in the CMA agreement to include UP-owned lines and new transload facilities. In particular, they assert that the Board required the expansion of the provision solely in order to address situations where a shipper on the line over which BN/Santa Fe has no access would lose the competitive benefit of an existing transload option as the result of the UP/SP merger. Petition for Clarification at 2. The Board's decision was not so narrow.

The Board's purpose in granting this condition, as with the other conditions it imposed, was to protect both the direct and indirect benefits that shippers derived from the competition between UP and SP. Shippers on both UP and SP lines had transload options to the parallel lines of the competing carrier. In the Applicants' view, however, the Board's transload condition provides a remedy only to shippers on the line where BN/Santa Fe did not receive trackage rights. Those shippers, the Applicants maintain, and those shippers alone, should have the option to use BN/Santa Fe service through a transload point. Under this constricted interpretation, there would be no remedy at all for the loss of transload options by shippers on the BN/Santa Fe trackage rights lines that previously had the ability to threaten or develop transloads on the parallel UP or SP route.

As the attached Verified Statements of Matthew K. Rose and Richard W. Brown establish (Exhibits A and B, respectively), this loss of competition is real. Mr. Rose explains how the loss of competition will occur, and Mr. Brown provides specific instances of where such losses of competition will result, including in several key corridors (Houston-New Orleans, Houston-St. Louis, and the Central Corridor) and in the critical south Texas/Mexican market. For example:

- Shippers located in south Texas and along the Mexican border, including many shippers located in Mexico, had a pre-merger option to transload their goods to Eagle Pass, TX (SP), Laredo, TX (UP), or Brownsville, TX (UP and SP). The distances between the three cities are such that many shippers had a transload option to two or even all three of these border stations. Under the Applicants' proposed restrictions, however, many of these shippers could lose one or more of their transload options if they happen to be located on one of the BN/Santa Fe trackage rights lines or if, under the Applicants' proposal for off-rail shippers, the relative mileages do not qualify the shippers for transload service.

- Between Dayton and Baytown, TX, near Houston, shippers on the SP line over which BN/Santa Fe has trackage rights (such as Engineered Carbons at Eldon, TX and Enterprise Inc. and Diamond Shamrock at Mont Belvieu, TX) will lose their pre-merger transload options to the UP line at Baytown.

- Between Houston and Lake Charles, LA, shippers on the SP line over which BN/Santa Fe has trackage rights will lose their transload options to the parallel UP line if the Applicants' restrictions are imposed. A similar situation exists on the UP line between Houston and Valley Junction, IL, where the Applicants contend that BN/Santa Fe should not even have the right to serve new facilities.

- In the Central Corridor, shippers on a UP or SP line over which BN/Santa Fe has trackage rights will lose the ability to transload to the other merging carrier's lines. Although the distances may be somewhat greater, shippers do transload their products (e.g., grain, soda ash) in that corridor. In fact, since many shippers already transload their products in that corridor, the only effective cost of a longer transload would be the costs associated with the marginal distance involved.

V.S. Brown at 3 to 5.[3/]

The Board gave no indication that it intended to abandon these and other shippers in the face of their loss of acknowledged "competitive leverage." Decision No. 44, at 106. To the contrary, the Board carefully crafted its condition to "preserve [the] competition" that shippers otherwise would lose by authorizing BN/Santa Fe or third parties "to locate transloading facilities anywhere on the lines where BNSF will receive trackage rights."[4/]

[3/] Mr. Rose and Mr. Brown also describe how the Applicants' proposed restriction would limit BN/Santa Fe's ability to locate new transload facilities at the optimal location from an economic and efficiency point of view. Instead of siting such facilities at locations that could best serve all possible transload shippers, BN/Santa Fe would have to position the facilities where they would draw only from shippers on lines over which BN/Santa Fe did not have trackage rights. Further, the inability of BN/Santa Fe to draw transload volumes from shippers on its trackage rights lines could preclude or delay the building of such facilities. If BN/Santa Fe lacks sufficient volumes, then it may not be able to justify the building of a new transload facility. Finally, transload facilities need to offer a full range of value-added services such as warehousing, inventory management, and packaging and repackaging to be competitive. The Applicants' proposed restrictions would preclude BN/Santa Fe from offering such value-added services to shippers located on BN/Santa Fe trackage rights lines even if those shippers want to utilize transloading in lieu of direct service by UP or SP.

These same considerations -- inability to locate transload facilities at the optimal site, a shortfall in the volumes necessary to justify a new facility, and inability to offer a full range of value-added services -- are also relevant to transload facilities that might be built by third parties.

[4/] See also Decision No. 44, at 106 ("The potential for exercising such options [including a transload option] does give shippers competitive leverage. * * * [W]e believe that maintaining these options is important to shippers who use them as leverage in their negotiations with carriers.")

Id. at 124. The Board pointedly rejected any limitation on the ability of shippers or BN/Santa Fe to establish transloading facilities.

Rather, the Board carefully limited its condition to accomplish no more than was necessary to preserve lost competitive options. In order to preserve the competitive transload options of shippers located on the lines over which BN/Santa Fe has overhead trackage rights, the Board could have broadened the overhead rights to allow BN/Santa Fe to serve those shippers directly, or the Board could have required that BN/Santa Fe receive trackage rights over both the UP and SP lines so that shippers on one line could receive competitive service through transloads on the other line. Instead, the Board carefully crafted its condition to take the middle ground between those broader possibilities and the narrow construction that the Applicants now propose, which is to leave shippers on the trackage rights lines with no transload options at all. The Board's decision to allow same-line transloading access is the best reasonably practical solution to ensure that competition is preserved for all shippers.[5/]

[5/] In this regard, the Board's clear mandate that BN/Santa Fe be allowed to serve new transload facilities on all lines over which it was receiving trackage rights is consistent with the Applicants' grant to BN/Santa Fe of the right to serve new transload facilities located within the geographical limits of 2-to-1 points specified in the BNSF Agreement. In the Second Supplemental Agreement dated June 27, 1996 (Ex. A to UP/SP-266), the Applicants granted BN/Santa Fe the right to serve "any existing or future transloading facility" at 2-to-1 points. There is no indication in that supplemental agreement that BN/Santa Fe's right to serve such future transload facilities was limited to only those shippers whose facilities are located on lines other than lines over which BN/Santa Fe acquired trackage rights.

Additionally, the Board's purpose in imposing the transloading condition went beyond the protection of shippers that stand to lose a competitive option directly. The Board also acted to address concerns that had been expressed by several parties (NITL, SPI, KCS, Conrail, DOJ, DOT, and USDA, among others) that BN/Santa Fe would lack sufficient traffic density on its trackage rights lines to enable it to compete effectively. As the Board recognized, BN/Santa Fe's ability to provide effective competition depends not only on mere access to 2-to-1 points and points where shippers have transload options, but also more broadly on its ability to achieve density in the traffic corridors in which it is receiving trackage rights. Unless BN/Santa Fe has a sufficient traffic base in each of those corridors, it will not be able to compete effectively at the 2-to-1 points, the transload points, or elsewhere in the corridor.[6]

The Board augmented the Applicants' proposed conditions in a variety of ways to ensure that BN/Santa Fe would have sufficient traffic density. See Decision No. 44, at 133. The Board ultimately concluded that BN/Santa Fe would have sufficient traffic to make its trackage rights operations run efficiently, expressly

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[6] Contrary to the Applicants' assertion (Petition for Clarification at 5 n.8), the Board did not find that BN/Santa Fe would have access to more than enough traffic to be fully competitive without access to additional traffic. While the Board recognized that the agreements the Applicants had entered into enabled BN/Santa Fe to compete for a substantial amount of traffic, it nevertheless imposed the various additional conditions, including the new transload facilities requirement, expressly to ensure that BN/Santa Fe would have a sufficient traffic base. Decision No. 44, at 133.

relying on the protections set forth in the BNSF and CMA Agreements "and the additional conditions we are imposing." Ibid. And the Board specifically identified its order "expanding the new facilities and transloading provisions" to support its judgment that BN/Santa Fe would have sufficient density to compete vigorously. Ibid. ("[A]ll of these factors taken together should result in BNSF having sufficient traffic to make [its] operations run efficiently.").

Accordingly, the Board should reject the Applicants' effort to narrow the unambiguous language of Decision No. 44 granting BN/Santa Fe the right to serve all new transload facilities on any UP-owned or SP-owned line over which BN/Santa Fe is to receive trackage rights. That access is needed not only to preserve existing competition but also to ensure that BN/Santa Fe has a sufficient traffic base on each of its trackage rights lines to provide competitive service effectively and efficiently.

B. The New Facilities Condition Was Properly Expanded By The Board To Apply To All UP/SP Lines Over Which BN/Santa Fe Has Trackage Rights

The Applicants also assert that the condition expanding BN/Santa Fe's right to serve new facilities should not apply to certain UP lines because BN/Santa Fe's access to those lines allegedly is not needed to preserve competition or was granted solely for operating convenience. Specifically, they maintain that BN/Santa Fe should not have the right to serve new facilities on the UP line between Placedo and Harlingen, Texas, because SP operates via overhead trackage rights on that line and there is no competition between SP and UP for the location of new industries along the line. They also argue that BN/Santa Fe should not be entitled to serve new facilities on three other UP lines -- between Houston and Valley Junction, Illinois; Fair Oaks and Bald Knob, Arkansas; and Craig Jct. and SP Jct. near San Antonio, Texas -- because trackage rights on those lines were allegedly granted solely for operating convenience. (The line between Craig Jct. and SP Jct. has already been discussed in two filings made on August 30, 1996, BN/SF-63 and UP/SP-276, and one filing on September 9, 1996, BN/SF-66. We do not agree with the Applicants' view that access to that line, which is the only viable way to serve the CPSB plants at Elmendorf, was granted solely for operational convenience. See also CPSB-11, filed September 4, 1996.)[7]

Once again, the Applicants, in an effort to restrict competition, overlook the plain language of the Board's decision. The Board identified one of the principal purposes of the new facilities condition as ensuring that BN/Santa Fe has a sufficient traffic base to compete effectively. Decision No. 44, at 133. The Applicants advance various reasons why the Board's decision should

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[7] In Decision No. 52 (served Sept. 10, 1996), the Board reserved judgment on the issue of the Applicants' proposed restriction on BN/Santa Fe's use of the Track No. 2 routing pending the filing of the replies to the Applicants' Petition here. Decision No. 52, at 5. In this regard, BN/Santa Fe adopts and incorporates herein by reference its filing made on September 9, 1996 (BN/SF-66), on that issue. That filing makes it clear that the Track No. 2 routing is the only operationally viable routing for BN/Santa Fe to serve CPSB's plants, and thus BN/Santa Fe should have the full benefit of the new facilities and transload facilities provisions on that routing.

not be interpreted in that manner, but they simply ignore this aspect of the Board's reasoning in so doing.

Moreover, the clear line that, the Applicants profess, separates "competitive" trackage rights from "operating convenience" trackage rights is illusory. All of the trackage rights that BN/Santa Fe received were granted for the purpose of enabling BN/Santa Fe to compete, even if the reason why BN/Santa Fe would not be competitive without those lines is "operational."

Further, the Applicants' claim that there would be no loss of competition on the UP Placedo-Harlingen line is incorrect. As Mr. Brown explains in his Verified Statement, shippers on SP lines at both ends and at the middle of that UP segment would lose not only their existing transload options to the UP line if the Applicants' proposed restrictions are adopted, but also their existing new facilities options.[8] An example of such a situation exists at Sinton, TX, where du Pont, Reynolds Aluminum, and Occidental Chemical all have major facilities on an SP branch line from Sinton east to the Gulf Coast. All three of these shippers will lose their pre-merger new facilities and transload options to the UP Placedo-Harlingen, TX line unless BN/Santa Fe can serve those shippers from new facilities or transload facilities located on that UP line. Additionally, current UP shippers on the Placedo-

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[8] The Applicants appear not to challenge the applicability of the build-in/build-out provision to the UP Placedo-Harlingen line; if their Petition can be read as doing so, then the reasoning discussed above would be fully applicable to such a challenge, and the Board should make it clear that BN/Santa Fe can serve build-ins/build-outs on that line.

Harlingen line such as BP Chemical at Green Lake, TX and du Pont at Bloomington, TX will lose their pre-merger options to construct new facilities on or transload to the nearby SP line between Victoria and Port Lavaca, TX.

The Applicants' Petition (and the various parties' filings concerning CPSB) amply demonstrate that the Board would become embroiled in a potentially endless series of disputes if the Board agreed to engage in an ongoing examination of whether competition exists on a particular UP or SP line segment today, or whether trackage rights over a particular UP or SP line are needed for operating convenience alone.[9] The more direct and appropriate manner for the Board to address the Applicants' claims is simply to restate the obvious: the Board meant what it said in Decision No. 44 when it required the Applicants to allow BN/Santa Fe to serve new facilities (including new transload facilities) on any UP-owned or SP-owned lines over which BN/Santa Fe receives trackage rights.

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[9] The Applicants' proposed solution for addressing the trans-loading options of off-rail shippers is another example of the kind of disputes the Board would be forced to resolve if it accepted the Applicants' proposed limitations. See Petition for Clarification at 6 n.10. The Applicants' proposal would require the Board to resolve any disputes that may arise concerning the distance from a shipper to the new BN/Santa Fe-served transloading facility on one of the merging railroads and the distance from the shipper to the nearest point on the other merging railroad. The Board can be certain that disputes would arise concerning the proper way to measure the distances, the operational feasibility of facilities at the designated points, the distinction between transloads and new distribution facilities, and similar issues.

CONCLUSION

Accordingly, for the reasons set forth above, the Applicants' Petition for Clarification (UP/SP-275) should be denied in its entirety.

Respectfully submitted,

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September 23, 1996

CERTIFICATE OF SERVICE

I hereby certify that copies of Reply of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to Applicants' Petition For Clarification (BN/SF-68) have been served this 23rd day of September, 1996, by hand-delivery or first-class mail, postage prepaid on all Parties of Record in Finance Docket No. 32760.

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Exhibit A

SECOND SUPPLEMENTAL VERIFIED STATEMENT OF MATTHEW K. ROSE

My name is Matthew K. Rose, Senior Vice President, Merchandise Business Unit for Burlington Northern Railroad Company ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") (collectively, "BN/Santa Fe") with offices at 2650 Lou Menk Drive, Fort Worth, Texas 76131. I submitted a Verified Statement in support of BN/Santa Fe's Response to Inconsistent and Responsive Applications, Response to Comments and Rebuttal on April 29, 1996. My credentials and experience are correctly summarized in that statement as of that date. I was appointed to my present position on May 3, 1996, and prior to that date, I was Vice President, Chemicals for BN/Santa Fe. I also submitted a Supplemental Verified Statement in support of BN/Santa Fe's Petition for Clarification filed September 3, 1996.

The purpose of this Second Supplemental Verified Statement is to describe how the restrictions proposed by the Applicants on BN/Santa Fe's right to serve new facilities, including new transload facilities, would affect BN/Santa Fe's ability to provide competitive service. In this regard, I understand that, as a condition of its approval of the UP/SP merger, the Surface Transportation Board required that BN/Santa Fe be granted the right to serve new facilities, including transload facilities, on all UP/SP lines over which BN/Santa Fe is to receive trackage rights. I also understand that UP/SP has proposed that BN/Santa Fe's right to serve new transload facilities on such lines should be restricted to traffic transloaded to or from points on the other merging carrier's line and not on the line over which BN/Santa Fe has received trackage rights. If UP/SP's proposed restriction is adopted by the Board, a shipper on a UP or SP line over which BN/Santa Fe has trackage rights will lose a transload option.

For example, assume that a shipper has a plant located on a UP line over which BN/Santa Fe has received trackage rights and that there is an SP line sufficiently close to the plant that the shipper had an option to transload its shipments to that SP line. Under UP/SP's proposed restriction, the shipper would lose that transload option unless BN/Santa Fe has the ability to serve the shipper at a new transload facility on UP's line. The only alternatives to preserving the shipper's transload option would be to permit BN/Santa Fe to serve the shipper directly on UP's line or to provide BN/Santa Fe with trackage rights on the SP line.

Moreover, UP/SP's proposed restriction would artificially limit BN/Santa Fe's flexibility in locating any new transload facilities that it might build. Instead of locating such facilities where it would best serve all shippers from an economic and efficiency point of view, BN/Santa Fe would be constrained to locate the facilities at sites which would be positioned to serve transloads from only UP or SP lines on which BN/Santa Fe did not receive trackage rights.

I also understand that UP/SP has proposed that BN/Santa Fe's right to serve new facilities on the UP/SP lines over which BN/Santa Fe is to receive trackage rights should not apply to certain UP lines where BN/Santa Fe's access is allegedly not needed to preserve competition or was granted solely for operational convenience. However, all of the trackage rights that BN/Santa Fe received were granted for the purpose of enabling BN/Santa Fe to compete with the merged UP/SP and, even if the reason why we would not be competitive without those lines is "operational," we still need the lines in order to compete effectively.

In conclusion, if UP/SP's proposed restrictions on BN/Santa Fe's right to serve new facilities, including new transload facilities, are adopted, then our ability to serve shippers and maintain their competitive options will be harmed. In addition to failing to preserve shippers' existing competitive options, UP/SP's proposal ignores what I understand to be one of the principal purposes of the new facilities condition -- i.e., ensuring that BN/Santa Fe would have a sufficient traffic base to compete effectively. Accordingly, I urge the Board to reject UP/SP's proposed restrictions.

VERIFICATION

THE STATE OF TEXAS)
)
COUNTY OF TARRANT)

Matthew K. Rose, being duly sworn, deposes and says that he has read the foregoing statement, and that the contents thereof are true and correct to the best of his knowledge and belief.

Matthew K. Rose

Matthew K. Rose

Subscribed and sworn to before me on this 19th day of September, 1996.

Linn M. Cole

Notary Public

My commission expires:

LINN M. COLE
MY COMMISSION EXPIRES
October 27, 1997

Exhibit B

VERIFIED STATEMENT OF

RICHARD W. BROWN

My name is Richard W. Brown, and I am General Director of the Chemicals Business Unit of Burlington Northern Railroad Company ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") (collectively, "BN/Santa Fe"). I have been working for either Santa Fe or BN/Santa Fe continuously since 1971, when I joined the Pricing Department at Santa Fe. From 1993 until the merger of BN and Santa Fe in 1995, I was Assistant Vice President of the Carload Business Unit of Santa Fe, with responsibility for strategic planning and development for the carload business, including chemicals, plastics, metals, forest products, and consumer goods. In that position, I also had responsibility for Santa Fe's transload program. From 1988 to 1993, I was Assistant Vice President Chemicals for Santa Fe. I received a B.S. degree in economics from Syracuse University in 1967 and an M.B.A. from Northwestern University in 1971.

As General Director of the Chemicals Business Unit of BN/Santa Fe, I am responsible for strategic planning and new business development for chemicals. Currently, however, I am on special assignment with responsibility for all commercial activities with respect to implementation of BN/Santa Fe's settlement agreement with UP and SP in connection with their merger, including implementation of the conditions that the Board imposed to augment that settlement agreement.

The purpose of this Verified Statement is to describe for the Board instances in which the Applicants' proposed restrictions on BN/Santa Fe's right to serve new facilities, including new transload facilities, would affect BN/Santa Fe's ability to provide competitive service. I know from my experience that transloads can be a useful competitive tool to draw business, but their usefulness diminishes greatly if they are hampered by complex or artificial restrictions.

I understand that the Applicants have proposed that BN/Santa Fe's right to serve new facilities, including transload facilities, on the UP/SP lines over which BN/Santa Fe is to receive trackage rights should be limited to traffic transloaded to or from points on the other merging carrier's line and not on the line over which BN/Santa Fe has received trackage rights. I also understand that the Applicants have further proposed that BN/Santa Fe's right to serve new facilities on those trackage rights lines should not apply to certain UP lines where BN/Santa Fe's access is allegedly not needed to preserve competition or was granted solely for operational convenience.

As I describe below, these proposed restrictions would deprive many shippers of existing competitive options that they now possess. They would also hamper BN/Santa Fe's ability to provide efficient and competitive service not only to those shippers but to all shippers in the traffic corridors where we are receiving trackage rights.

A.

One critical area in which the Applicants' proposed restrictions would adversely affect shippers' competitive options is in south Texas and along the Mexican border. There, shippers, including many shippers located in Mexico, had a pre-merger option to transload their goods to Eagle Pass, TX (SP), Laredo, TX (UP), or Brownsville, TX (UP and SP). The distances between the three cities are such that many shippers had a transload option to two or even all three of these border stations. Under the Applicants' proposed restrictions, however, many of these shippers could lose one or more of their transload options if they happen to be located on one of the BN/Santa Fe trackage rights lines or if, under the Applicants' proposal for off-rail shippers, the relative mileages do not qualify the shippers for transload service.

Further with respect to Texas, the Applicants have proposed that the new facilities provision should not be applied to the UP line between Placedo, TX and Harlingen, TX because SP operated only via trackage rights over that line and there is allegedly no competition between SP and UP for the location of new industries along the line. However, SP had lines that intersected or were near the UP Placedo-Harlingen line at both ends and at the middle of that line. Thus, shippers on those SP lines would lose their competitive options to the UP line (in this case both new facilities and transload options) unless BN/Santa Fe can serve new facilities, including transload facilities, on the UP line.

A specific example of this situation is at Sinton, TX, just north of Corpus Christi, TX. There, du Pont, Reynolds Aluminum, and Occidental Chemical all have major facilities on an SP branch line from Sinton eastward to the Gulf Coast. Each of those facilities had both a pre-merger new facilities option and a pre-merger transload option to the UP Placedo-Harlingen line. Unless BN/Santa Fe has the right to serve new facilities and receive transloads from those shippers on that UP line, all of those current SP shippers will lose those competitive options.

UP shippers as well would lose competitive options unless BN/Santa Fe can serve new facilities and receive transloads from shippers on the UP Placedo-Harlingen line. Such current UP shippers on that line as BP Chemical at Green Lake, TX and du Pont at Bloomington, TX would lose their pre-merger options to construct new facilities on or transload to the nearby SP line between Victoria, TX and Port Lavaca, TX.

A final example in Texas of how shippers will be harmed if the Applicants' restrictions are adopted is on SP's line from Dayton, TX to Baytown, TX near Houston. In that case, shippers on the SP line between Dayton and Baytown over which BN/Santa Fe has trackage rights (such as Engineered Carbons at Eldon, TX and Enterprise Inc. and Diamond Shamrock at Mont Belvieu, TX) will lose their pre-merger transload option to the UP line at Baytown.

Shippers will lose competitive new facilities and transload options in other key traffic corridors as well if the Applicants' restrictions are adopted. For instance, between Houston and Lake Charles, LA, UP and SP had roughly parallel lines. Shippers on the SP line over which BN/Santa Fe has trackage rights will lose their option to transload their products to the UP line under the

Applicants' restrictions. Similarly, between Houston and St. Louis, where the Applicants have asserted that BN/Santa Fe should not even have the right to serve new facilities on the UP line in that corridor, shippers will once again lose competitive options under the Applicants' proposed restrictions.

Similarly, although the distances involved may be somewhat greater, many shippers in the critical Central Corridor had viable pre-merger transload options. For instance, SP established two transload facilities at Salt Lake City to handle soda ash from Green River, Wyoming, a distance of over 125 miles. Wheat is also transloaded over 50 miles from southern Idaho to SP at Ogden, UT. Likewise, customers in the Salt Lake Valley between Provo and Ogden who are located on BN/Santa Fe trackage rights lines will be deprived of their transload options to the other merging carrier's line under the Applicants' proposed restrictions. Moreover, since many shippers already transload their products in the Central Corridor, the only effective costs of a longer transload would be those associated with the marginal distance involved.

B.

In addition to depriving shippers of competitive options, the Applicants' restrictions would limit BN/Santa Fe's flexibility in serving shippers under the new transload facilities provision. Instead of being able to locate such facilities where they would best serve all shippers from an economic and efficiency point of view, we will be required to locate those facilities at sites that would be positioned to serve transloads only from UP or SP lines on which we did not receive trackage rights.

Moreover, our ability to establish new transload facilities in order to serve even the shippers that the Applicants agree we should be able to serve under the provision could be adversely affected by the decreased volumes of traffic we will be able to draw if the Applicants' restrictions are adopted. If we do not have sufficient volumes of traffic, then we may not be able to justify economically building a new transload facility.

Further, to be successful, transload facilities need to offer a full range of value-added services such as warehousing, inventory management, and packaging and repackaging. In some cases, a rail carrier will serve customers by transload rather than by direct service so that the customers can avail themselves of these value-added services. The Applicants' proposed restrictions would preclude BN/Santa Fe from offering such value-added services to shippers located on BN/Santa Fe trackage rights lines even if those shippers want to utilize transloading in lieu of direct service by UP or SP.

VERIFICATION

DISTRICT OF COLUMBIA)

Richard W. Brown, being duly sworn, deposes and says that he has read the foregoing statement, and that the contents thereof are true and correct to the best of his knowledge and belief.

Richard W. Brown

Subscribed and sworn to before me on this 20th day of September, 1996.

Notary Public

My commission expires:

My Commission Expires August 14, 2001

STB FD 32760 9-23-96 D 86268

86268

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September 23, 1996

VIA HAND DELIVERY

RECEIVED SEP 23 1996 MAIL MANAGEMENT I.C.C.

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
12th Street & Constitution Ave., NW
Room 2215
Washington, DC 20423

Re: Finance Docket No. 32760, Union Pacific Corp., et al.. -- Control and Merger -- Southern Pacific Rail Corp., et al.

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket are the original and twenty (20) copies of (1) Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company's and The Kansas City Southern Railway Company's Request For Extension of Time to Reach Agreement on Compensation Issues; (2) Reply of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to Applicants' Petition For Clarification (BN/SF-68); (3) Reply of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to the Petition of the Texas-Mexican Railway Company to Reopen Decision No. 44 (BN/SF-69); (4) Reply of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to KCS's Petition to Reopen/Reconsider (BN/SF-70). Also enclosed are 3.5-inch disks containing the text of BN/SF-67 - BN/SF-70 in Wordperfect 5.1 format.

I would appreciate it if you would date-stamp the enclosed extra copies and return them to the messenger for our files.

ENTERED
Office of the Secretary
SEP 24 1996
5 Part of Public Record

Sincerely,

Erika Z. Jones

Erika Z. Jones

Enclosures

ORIGINAL

BN/SF-69

BEFORE THE
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

REPLY OF BURLINGTON NORTHERN RAILROAD COMPANY
AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
TO THE PETITION OF THE TEXAS-MEXICAN RAILWAY COMPANY
TO REOPEN DECISION NO. 44

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September 23, 1996

BEFORE THE
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

REPLY OF BURLINGTON NORTHERN RAILROAD COMPANY
AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
TO THE PETITION OF THE TEXAS-MEXICAN RAILWAY COMPANY
TO REOPEN DECISION NO. 44

Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (collectively, "BN/Santa Fe") submit the following reply to the September 3, 1996 petition of the Texas Mexican Railway Company ("Tex Mex") to reopen Decision No. 44 (TM-44). Tex Mex and its indirect 49% owner, Kansas City Southern Railway Company ("KCS"), make little secret of the fact that what they are requesting is *not* necessary to replicate pre-merger levels of competition. Instead, they come to the Board for a straightforward commercial subsidy. The subsidy request is totally unjustified under established Board precedents and under policies that the Board reaffirmed in Decision No. 44.

The Board overlaid Tex Mex as a third carrier on the Beaumont-Houston-Robstown/Corpus Christi line where only two carriers previously operated. The Board included full access for KCS/Tex

Mex as a third carrier to all points on that line that formerly had service from only UP and SP and that now have service from UP/SP and BN/Santa Fe.[1]

Tex Mex now contends that the Board materially erred because it did not vastly expand the access granted to KCS/Tex Mex. According to Tex Mex, the Board should have allowed KCS/Tex Mex to serve *not only* as an unprecedented third carrier between Beaumont and Houston on the one hand, and the Port of Corpus Christi and the interchanges for Laredo on the other, but *also* as a third carrier for traffic heading north from Houston and other points served by UP/SP and BN/Santa Fe. The Tex Mex petition to reopen should be denied.

THE REQUEST OF TEX MEX FOR AN EXPANDED REGULATORY SUBSIDY IS UNJUSTIFIED

In Decision No. 44, the Board awarded extensive trackage rights to Tex Mex, relying on two points. First, the Board suggested, with little explanation, that providing a connection between KCS and Tex Mex, *in addition to* the new BN/Santa Fe-Tex Mex connection negotiated between BN/Santa Fe and Applicants, "is required to ensure the continuation of an effective competitive

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[1] The Board allowed KCS to interchange traffic with Tex Mex at Beaumont, so long as it has a prior or subsequent movement of the Laredo-Robstown-Corpus Christi line, and gave Tex Mex trackage rights up to Beaumont for that purpose. KCS is a wholly owned subsidiary of Kansas City Southern Industries, Inc. which owns 49% of the holding company that owns Tex Mex, and in that sense KCS itself is an indirect 49% owner of Tex Mex. We refer at times to "KCS/Tex Mex" not only because of the partial ownership relationship between the two carriers, but also because the traffic at issue is all or virtually all traffic that Tex Mex proposes to interline with KCS.

alternative to UP's routing into the border crossing at Laredo." Dec. No. 44, at 149. Second, the Board also found "persuasive" Tex Mex's argument that the merger *might* "endanger the essential service [Tex Mex] provides to the more than 30 shippers located on its line." *Id.* at 148. For reasons BN/Santa Fe explained in its evidence, briefs, and oral argument, neither of these grounds supports even the conditions that the Board found appropriate. One ground unjustifiably presumes BN/Santa Fe's lack of interest in competing vigorously, in cooperation with Tex Mex, for Laredo-bound traffic, and the other relies on the unjustifiably presumed lack of interest of BN/Santa Fe (or a successful shortline carrier) in purchasing at liquidation value and operating the rail assets of an insolvent Tex Mex.[2]

Although BN/Santa Fe does not agree that these arguments are well grounded in the record, and reserves its right to challenge them through judicial review or other procedurally appropriate mechanisms, BN/Santa Fe nonetheless accepts the Board's conclusions on these points for present purposes. Still, these two points have

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[2] In other words, as the Board's predecessor has said many times, there is *not* a cognizable danger of a loss of essential services unless the affected *rail assets* can be expected to leave the market; it is not enough for the present owner of those assets to show that *it* cannot make a go of those assets. See, *e.g.*, *Union Pacific Corp., et al. – Control – Missouri Pacific Corp., et al.*, *("UP/MP/WP")*, 366 I.C.C. 459, 546 (1982). Curiously, Decision No. 44 treats Tex Mex's claimed revenue losses from the UP/SP merger (which, as Applicants showed, were wildly inflated to begin with) as if they were sufficient to make out an essential-services case without regard to whether such losses would cause Tex Mex's rail assets to exit the market.

nothing to do with the expanded access that Tex Mex now requests for itself and KCS.

A. There Is No Competitive Justification For Expanding KCS/Tex Mex Trackage Rights

The Board rightly continues to insist that conditions must be "narrowly tailored to remedy [competitive] effects." Dec. No. 44, at 145. The Board also "will not ordinarily impose a condition that would put its proponent in a better position than it occupied before the consolidation." Dec. No. 44, at 145. See *Union Pacific Corp., et al. – Control – Chicago & North Western Transportation Co., et al. ("UP/CNW")*, F.D. No. 32133 (served March 7, 1995) at 97; *Milwaukee – Reorganization – Acquisition by GTC ("Soo/Milwaukee II")*, 2 I.C.C.2d 427, 455 (1985).[3] And the Board rightly expresses adherence to its tradition that "conditions are not warranted to offset competitors' revenue losses." Dec. No. 44, at 145 n.176 (citing *Burlington Northern, Inc. – Control and Merger – St. Louis-San Francisco Ry. ("BN/Frisco")*, 360 I.C.C 788, 951 (1980)).

Enlarging the KCS/Tex Mex trackage rights condition fails all of those tests. Tex Mex requests rights that do not address any cognizable anticompetitive effect. Those rights would provide KCS and Tex Mex with a windfall above and beyond anything contemplated in Decision No. 44. And Tex Mex makes quite clear that its comfort, not its survival, drives the request for this windfall. See TM-44, at 3. Obviously emboldened by its success in Decisions

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[3] In accordance with Board practice, we treat ICC precedents that are consistent with the ICC Termination Act of 1995 as Board precedents. See Dec. No. 44, at 98 n.90.

44 and 47, however, Tex Mex justifies its quest for expanded access by assuming that it, and not BN/Santa Fe, must provide the principal competition with UP/SP. Tex Mex is wrong.

1. The Voluntarily Negotiated Trackage Rights Between BN/Santa Fe and UP/SP Are Superior to Involuntary Conditions

Trackage rights allowing BN/Santa Fe to serve Laredo (in partnership with Tex Mex) were negotiated *voluntarily* between UP/SP and BN/Santa Fe. The clear general thrust of Decision No. 44 is that such voluntary settlements remain favored, just as they were under such prior ICC decisions as *UP/MP/WP* at 565. The equally clear general thrust of Decision No. 44 is that BN/Santa Fe *can* be counted on to compete vigorously with UP/SP. Despite those points, Tex Mex seeks to promote itself and its partner KCS as UP/SP's primary competitor, not only to and from Mexico but throughout the Texas Gulf Coast for traffic moving in all directions – at least so long as the traffic can be forced over Kansas City, Shreveport, or Meridian, Mississippi, the only major points that KCS serves outside of Texas.[4] Tex Mex seeks this condition as an *involuntary* requirement that, having been rejected once by the Board, would now be attached to the consummated UP/SP merger. The Board was correct to deny Tex Mex's request for expanded access in Decision No. 44, and Tex Mex has not offered any new justification for the requested regulatory overreaching by the Board.

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[4] Several of the support letters that Tex Mex submitted on September 20 (TM-46) echo Tex Mex's misimpression that the Board *in general* – rather than merely for Mexico-bound traffic – intended Tex Mex to provide a strong competitive alternative to UP. *E.g.*, U.S. Rep. Lloyd Doggett Letter; U.S. Rep. John Bryant Letter at 2.

Throughout this proceeding the Board recognized that BN/Santa Fe was a full competitive replacement for SP, and indeed a competitive improvement. *E.g.*, Dec. No. 44, at 103, 124, 148, 157, 163. Within its discussion of the Tex Mex trackage rights, the Board reiterated: "[T]he BNSF agreement will permit BNSF effectively to replace the competition that will be lost when SP is absorbed into UP, and thus protect shippers at 2-to-1 points from facing higher prices or deteriorated service." Dec. No. 44, at 148. And, in recognizing that BN/Santa Fe provided an effective competitive replacement for SP throughout the SP system, the Board included the observation that BN/Santa Fe will be a "replacement for SP for Laredo traffic routed over Tex Mex." Dec. No. 44, App. D, at 261.

The Board justified giving Tex Mex layered-on trackage rights, however, by referring to unsubstantiated "reservations about BNSF's willingness and ability to attract sufficient traffic over the Laredo gateway." Dec. No. 44, at 138. Those reservations appear to stem from the fact that "the BNSF agreement has created a new potential single-line movement for BNSF into Mexico via Eagle Pass," and, apparently, the speculation that BN/Santa Fe will divert substantial traffic from Laredo to Eagle Pass. Dec. No. 44, at 149. We respectfully disagree with the Board's assessment of the significance of BN/Santa Fe's Eagle Pass access, but even if the Board's concern was fully justified it has *nothing* to do with Tex Mex's present request to be added on to the two-carrier competition that exists for traffic that does *not* go to Mexico at all.[5]

Board policy forbids providing a "'windfall to [particular] railroads' in conditioning merger approvals." *Union Pacific Corp. – Control – Missouri-Kansas-Texas R.R. ("UP/MKT")*, 4 I.C.C.2d 409, 458 (1988) (quoting *BN/Frisco*, 360 I.C.C at 952). Once the competition that would be lost through a merger has been replaced, there is no room for other carriers to insist that *more* or *better* competition would ensue if alternative or additional conditions were imposed. *UP/MP/WP* at 562-563; *UP/MKT* at 461-463. The Commission repeatedly emphasized that conditions must be "narrowly tailored" to remedy particular adverse effects of a transaction. *Burlington Northern Inc. and Burlington Northern R.R. – Control & Merger – Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Ry. ("BN/Santa Fe"), F.D. No. 32549 (served August 23, 1995) at 56; UP/CNW* at 97; *Soo/Milwaukee II* at 455. The Board in this case has already determined that the proper "narrow tailoring" of its grant of Tex Mex trackage rights requires a focus on Mexico-bound

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[5] In this regard, several of the letters that Tex Mex submitted to the Board on September 20 (TM-43) simply miss the point. They argue Tex Mex's importance *to trade with Mexico* but fail to recognize that the Board's condition requiring a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line (*i.e.* the line that reaches Mexico) gives Tex Mex access to Mexico-originated or -destined traffic, and that Tex Mex's request to remove that restriction would affect only traffic that will *not* reach Mexico. See, *e.g.*, U.S. Rep. Lloyd Doggett Letter ("I know you are interested in maintaining a reasonable level of rail competition in Texas, particularly as rail traffic across the Texas-Mexico border continues to increase"); Dixie Plywood & Lumber Co. Letter ("Our Houston branch is situated on the Santa Fe and the Tex Mex connection is a natural for moving our goods from Mexico to Houston").

traffic and that it is only with respect to such traffic that there exists a competitive problem requiring the imposition of an involuntary condition. The expanded trackage rights that Tex Mex now requests fall short of meeting the Board's criteria for imposing involuntary conditions. Rather, the expanded Tex Mex trackage rights would "risk diluting the traffic base for all the competitors and jeopardizing the success" of the principal competitor to "the merged system" in this corridor. *Santa Fe Southern Pacific Corp. — Control — Southern Pacific Transportation Co. ("SFSP I")*, 2 I.C.C.2d 709, 827 (1986).

2. Professor Grimm's Analysis Adds Nothing New

The Board found nothing at all of competitive concern in the post-merger *northbound* options of Houston and other Texas shippers. To support its claim that these shippers somehow would be harmed by the loss of SP, despite vigorous competition between two carriers far stronger than SP, KCS/Tex Mex once again offers Prof. Grimm.[6]

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[6] In a last-minute effort to bolster Prof. Grimm's claim that a reduction in the number of rail carriers from 3 to 2 will result in a diminution in competition, Tex Mex filed on September 20, 1996, 83 letters of shippers and public officials supporting its petition to reopen. TM-46. The vast majority of those letters (many of which are form letters) assert — without analysis — that Houston will not enjoy the benefits of competition unless there is a "viable third rail competitor in Houston." *E.g.*, State Rep. Beverly Woolley Letter; Aeropres Corp. Letter; Akrochem Corp. Letter; American Shipping and Chartering Letter; Ameripol Synpol Corp. Letter; Argosy Shipping Letter; Aristech Letter; Arizona Chemical Letter; Avenue Intermodal Letter; Axis International Letter; see also, *e.g.*, State Rep. John R. Cook Letter (arguing 3-to-2 point without using form-letter terminology); Air Liquide Letter (same); Bamberger Polymers Letter (same). It is hardly surprising that shippers would support having more rather than fewer carriers at a particular point of interest to them, but an actual reopening of the Board's decision would require persuasive
(continued...)

Undaunted by the Board's meticulous rejection of his unsupported speculations (*e.g.*, Dec. No. 44, at 119-120) and by the overwhelming recent experience that contradicts those speculations, Prof. Grimm continues to insist that shippers are harmed when the number of major rail carriers serving a market decreases from 3 to 2. As the Board recognized, although "*pervasive* reduction of the major rail carriers across the West from three to two carriers *could* be grounds for concern," careful examination of "the circumstances surrounding this case" revealed that those concerns were too insubstantial to warrant regulatory action. *Id.* at 119 (emphasis added). The Board never hinted that it harbored any concern about a reduction in the number of carriers from three to two at a single location such as Houston, particularly a location so well served by truck and water transportation.

Using the same analysis that the Board has already rejected, however, Prof. Grimm now insists that Houston has a special need for northbound service from KCS/Tex Mex. Prof. Grimm provides no reason why his assessments and predictions on this score should be more reliable than his prior efforts. In particular, he continues

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[6] (...continued)
analysis showing that the Board erred in thinking that a reduction from three to two carriers in Houston would not cause competitive harm (and additional analysis showing that the introduction of KCS/Tex Mex as a third competitor would be an appropriate condition). Prof. Grimm does not succeed in supplying such analysis, and the shippers do not even try. In this regard, it is noteworthy that some of the Tex Mex supporters whose letters were submitted on September 20 do not have their facts straight. *E.g.*, U.S. Rep. John Bryant Letter (asserting that Board's decision results in "the loss of one of three current competitors (Tex Mex)" at Houston). Tex Mex, of course, did *not* serve Houston at all before the UP/SP merger.

not to recognize that prices have been lower when UP is forced to compete with BN/Santa Fe than when SP has provided the only competition. As the Board recognized, SP has had a "limited role * * * as the third carrier in * * * markets" affected by the UP/SP merger. Dec. No. 44, at 121. Prof. Grimm's recycled argument again disregards both "the dramatic cost reductions" made possible by the UP/SP merger and the BN/Santa Fe agreements, and "the deteriorating condition of SP, and the effect this would have on rail pricing." *Id.* at 120.

Tex Mex relies on Prof. Grimm for its claim that BN/Santa Fe's allegedly "small market share" would preclude it from providing "an effective competitive replacement for SP" (TM-44, at 11), but never explains why KCS/Tex Mex, with its current *zero* market share, should be able to do anything but reduce density on non-UP/SP movements. And, to the extent that many shippers in Houston actually were served only by UP and SP, BN/Santa Fe access to the points formerly served only by UP and SP preserves the competitive balance. Far from showing that "the Houston market is significantly different from other 3-to-2 markets discussed in the Board's decision," Prof. Grimm's latest statement provides no reason for the Board to revisit its conclusion not to impose an involuntary condition designed to maintain a third carrier in markets formerly served by both UP and SP.

B. What Tex Mex Truly Seeks Is Not to Preserve Pre-Merger Levels of Competition, But to Receive a Subsidy

Even Tex Mex does not truly advance a serious competitive justification for the trackage rights it seeks, nor does it hide its true motivations. Tex Mex makes clear at the outset: "granting unrestricted rights will produce $822,000 more in revenues and $250,000 more in net income to Tex Mex in the first year of operation" (TM-44 at 3) — a healthy boost indeed for a shortline that anticipated 1995 revenues of less than $15 million and that, in the 1990s, has lost money on operations more often than it has had an operating ratio below 95%. See TM-23, Krick V.S. 195. Of course, protecting the financial welfare of KCS and Tex Mex is no ground for the imposition of an involuntary condition under this Board's precedents. See, *e.g.*, Dec. No. 44, at 145 n.176; *BN/Frisco*, 360 I.C.C at 951.[7]

Tex Mex fares no better if it packages its subsidy request under an "essential services" rubric. It is simply not necessary to Tex Mex's survival — let alone to the continuation of Tex Mex's assets in rail service under *someone's* ownership — for the Board to

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[7] Nevertheless, some of the support letters that Tex Mex submitted on September 20 (in TM-46) reiterate Tex Mex's desire for greater revenues as a basis for granting Tex Mex's requested reopening. *E.g.*, U.S. Rep. John Bryant Letter at 2. Notably, *none* of the letters that Tex Mex submitted on September 20 suggests that Tex Mex cannot be profitable in a normal year without a grant of the rights requested in its petition to reopen, and none makes out an essential-services case.

expand Tex Mex's trackage rights beyond those given in Decision No. 44.

1. Tex Mex Cannot Justify Its Request on the Basis of Storage-in-Transit Facilities

Despite obtaining substantial new rights, Tex Mex now complains that the restrictions on the Tex Mex trackage rights might produce operational difficulties. These problems could arise, Tex Mex claims, if Tex Mex accepts plastics traffic for storage-in-transit, and then the shipper decides to route some of the traffic to locations off Tex Mex's own line between Corpus Christi and Laredo. (Although Tex Mex claims that similar problems could arise in other industries, it musters no examples.) In any event, Tex Mex provides no basis for believing that any shipper would give traffic of uncertain destination to a carrier that could transport freight on a 300-mile stretch only to or from its Corpus Christi-Laredo line. Shippers in the real world will lose nothing here, and Tex Mex has not submitted (in its petition to reopen or in its September 20 supplement (TM-46)) any shipper statements that support this aspect of its argument.[8]

KCS shippers, of course, could use KCS storage-in-transit facilities while awaiting the final decision where to send their freight cars. KCS/Tex Mex does not attempt to quantify the traffic that it might lose as the result of this supposed operational problem (as opposed to the traffic that KCS might gain if its

[8] Among the statements submitted on September 20, those of C & D Warehouse, Inc., Condea Vista Company, Solvay Polymers and Westlake Polymers are particularly noteworthy for their silence on this point.

affiliate were given unrestricted access as a third carrier between Beaumont/Houston and Robstown/Corpus Christi). To estimate that traffic as "*de minimis*" probably would overstate the matter.

2. Tex Mex Cannot Justify Its Request on the Basis of Density

KCS/Tex Mex also claims that it needs vastly expanded rights in order to provide the tripled Tex Mex segment with sufficient density to compete over its trackage rights. But the Board's only reason for giving Tex Mex *any* trackage rights was to preserve density over the *current* Tex Mex. Only that route provides an alternative route to Laredo and provides the exclusive local rail service to a handful of shippers that (in the absence of service by Tex Mex or a successor on that line) might have to truck freight on a divided highway for up to 36 miles to reach the nearest railhead at Robstown. See Dec. No. 44, at 148; Dec. No. 47, at 16. The Board never hinted that Tex Mex's ability to provide a *third* alternative between Beaumont/Houston and Robstown/Corpus Christi for freight not originated from or destined to the Tex Mex Corpus Christi-Laredo line warranted any regulatory concern at all. So long as density on *that* line is preserved, the Board's goals are met.

In fact, although the Board found Tex Mex's argument that the merger *might* "endanger the essential service [Tex Mex] provides to the more than 30 shippers located on its line" sufficiently "persuasive" to justify giving KCS/Tex Mex access as a third carrier to points that otherwise would be 2-to-2 points in light of the BN/Santa Fe agreements (Dec. No. 44, at 149; Dec. No. 47, at

15-16), we respectfully submit that the Board's findings fell far short of justifying a trackage rights condition to preserve essential services at all. By the Board's longstanding measures, the record in this case fails to support a cognizable — much less a credible — argument for the imposition of an involuntary condition on that ground.

The Board has recognized that an "essential service" warranting preservation must meet a "sufficient public need" for which "adequate alternative transportation is not available." Dec. No. 44, at 101 (citing 49 C.F.R. § 1180.1(c)(2)(ii)). It is the "preservation of essential services, not the survival of particular carriers," that justifies the imposition of a condition on this ground:

> It is not [the Board's] duty to ensure preconsolidation levels of traffic or the survival of competitors; [it is] concerned *only* with the preservation of the essential *services* they provide.

Id. at 101 (emphasis added). Indeed, where the survival of a particular carrier is threatened, *and* the services to be lost cannot be replaced by alternative transportation by rail or other modes, the question becomes whether the rail *assets* will remain in use even if the current *operator* exits the market. See *UP/MP/WP*, 366 I.C.C. at 546.

Tex Mex's showing failed to present a case for the use of regulation to preserve the Tex Mex corporate entity at all, much less to triple the length of its route. Tex Mex utterly failed to show that its services could be considered essential. Of Tex Mex shippers that are not in locations served by one or more additional rail carriers (and, in the case of Corpus Christi, by water carriers as well), Tex Mex could solicit only a single unsworn letter to the effect that Tex Mex service, despite the lack of rail competition to constrain Tex Mex's prices, was essential to a single scrap-metal business. Letter of Barr Iron and Metal Co., TM-23, Ex. 25, No. 15. And that letter's claim that "[t]here is no way to truck our salvage to and from various points" – that is, that scrap metal cannot be trucked economically for 26 miles of divided highway from Alice, Texas, to the railhead at Robstown – would certainly come as a surprise to the scrap industry. As UP witness Peterson correctly observed (R.V.S. 135 n.52), the suggestion "that scrap cannot be shipped economically by truck is contrary to well-known marketplace realities, especially for the short distance" to a railhead. See also, *e.g.*, *Rising Rail Freight Costs Leave Users Discontent, Looking For Alternatives*, American Metal Market, Aug. 24, 1995, at 1 (predicting "increased reliance on trucks" in response to higher rates on CSX); *Company Tries Again For Steel Scrap Yard*, Des Moines Register, July 24, 1996, at 10 (truck rates were 2% higher than rail rates for 140-mile haul of scrap metal from Des Moines to Wilton, IA); *Joint Venture Lifting Perlman To Top Of Scrap Heap*, Memphis Bus. J., Nov. 21, 1994, § 1, at 34 (Memphis scrap processor relying on truck fleet to ship scrap metal 50 miles to Blytheville, AR, and farther). The same shipper also claimed that "this merger would probably close our operations down" (TM-23, Ex. 25, No. 15), but it is difficult to see (and the shipper never explained) why the need to truck scrap metal for 26 miles over a divided highway would have such dire results when competitors routinely use trucks for far longer distances.

3. Tex Mex's Marginal Profitability Is not a Result of the UP/SP Merger

Tex Mex did not show that the UP/SP *merger*, rather than its own recent history of marginal operations, would threaten its continued survival. The Board could credit Tex Mex's claims of incrementally lost revenue, despite BN/Santa Fe's ability to shift to Tex Mex the substantial traffic that BN/Santa Fe delivers to UP for transportation to Laredo, only by agreeing with the same assumptions and the same studies that the Board rejected in every other context in this proceeding — studies that assume that BN/Santa Fe will capture only a tiny fraction of the traffic now carried by SP at 2-to-1 points, and that BN/Santa Fe will not comply with shippers' recognized preference to use Laredo. But the Board explicitly, repeatedly, and correctly rejected those contentions; even within the discussion of the Tex Mex trackage rights, the Board reiterated: "[T]he BNSF agreement will permit BNSF effectively to replace the competition that will be lost when SP is absorbed into UP." Dec. No. 44, at 148. Indeed, BN/Santa Fe has access (in competition with UP) to even greater volumes of traffic now moving over Laredo on UP.

It is likely that a more direct, more efficient move over Laredo — the pre-eminent gateway to Mexico — will make Mexican import/export shipping far more attractive to many BN/Santa Fe shippers that have not had effective access to Mexico in the past. This development will *improve* Tex Mex's business prospects, not diminish them. Nonetheless, the Board in Decision No. 44 came to the conclusion that a limited grant of trackage rights to Tex Mex was appropriate. On the other hand, Tex Mex's *current* request for greatly expanded *domestic U.S.* operations in conjunction with KCS is wholly unjustified.

* * * * *

Even if preventing the distant prospect that one small shipper would have to haul scrap metal 26 miles by truck suffices to justify tripling the size of Tex Mex and installing it as an unprecedented third option south from Houston to Corpus Christi — rather than simply requiring UP/SP or BN/Santa Fe to commit to serve Alice, TX, in the event of an interruption or termination of service by Tex Mex — providing a massive additional windfall that Tex Mex requests for itself and for KCS cannot be justified at all as protection for essential services. Tex Mex admits that it does not need the windfall to survive in its current form, much less for its assets to remain in service. Because we have shown above that no competition-related ground supports expanding the trackage rights of KCS/Tex Mex, the petition to reopen should be denied.

CONCLUSION

For the foregoing reasons, the Board should deny the petition of Tex Mex to reopen Decision No. 44.

Respectfully submitted,

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September 23, 1996

CERTIFICATE OF SERVICE

I hereby certify that copies of Reply of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company to the Petition of the Texas-Mexican Railway Company to Reopen Decision No. 44 (BN/SF-69) have been served this 23rd day of September, 1996, by hand-delivery or first-class mail, postage prepaid on all Parties of Record in Finance Docket No. 32760.

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STB FD 32760 9-23-96 D 86255

86255

DOW-28

BEFORE THE
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

RECEIVED SEP 23 1996 MAIL MANAGEMENT I.C.C.

REPLY OF THE DOW CHEMICAL COMPANY IN OPPOSITION TO APPLICANTS' PETITION FOR CLARIFICATION

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Office of the Secretary
SEP 24 1996
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September 23, 1996

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BEFORE THE
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

REPLY OF THE DOW CHEMICAL COMPANY IN OPPOSITION TO APPLICANTS' PETITION FOR CLARIFICATION

The Dow Chemical Company ("Dow") hereby replies in opposition to "Applicants' Petition for Clarification," filed with the Surface Transportation Board ("STB" or "Board") on August 29, 1996 in the above-captioned proceeding. Dow believes that the clarification sought by the Applicants is contrary to the relief the Board did provide and intended to provide shippers, and will greatly undermine that relief.

The Applicants have asked the Board to "clarify" certain aspects of Decision No. 44, which imposed conditions upon Applicants' merger to preserve competition for rail services over the merged lines. The main clarification sought by Applicants would restrict severely the rights granted to Burlington Northern Santa Fe ("BNSF") to serve new transload facilities located on UP or SP lines over which BNSF has been granted trackage rights.

First of all, the Board's decision is <u>not</u> ambiguous on this matter and needs no clarification. The Board very clearly required "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 . . . [and] . . . that the term 'new facilities' shall include transload facilities, including those owned or operated by BNSF." Decision No. 44 at 146.[1] This text unambiguously, and without limitation, permits BNSF to serve any shippers at newly established facilities, including transload facilities, located on UP and SP owned lines over which BNSF has obtained trackage rights in this merger proceeding.

Although the Applicants concede that the Board's decision, "read literally," supports this interpretation, they protest that the Board could not possibly have meant what it said. Petition at 3. The Board, however, clearly meant what it said and there is ample discussion in the Decision to support this fact. The Applicants' Petition for Clarification must, therefore, be denied.

The Applicants ask the Board to restrict the transload facilities condition to "shippers trucking traffic between a point on one of the merging railroads and a new BNSF transloading facility at a point on the other merging railroad."[2] Petiton at 5. This restriction clearly cannot be what the Board intended because it

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1 *See also, id.* at 106 ("We will require as conditions . . . that the 'new facility' provision of the CMA agreement be extended to require applicants to permit BNSF to serve any new facility at any point on any SP <u>or UP</u> segment over which it has been granted trackage rights; that the term 'new facility' include new transload facilities, and that applicants make available all points on their lines (over which BNSF receives trackage rights) to transload facilities, wherever BNSF or some third party chooses to establish them . . . ." [emphasis in original]).

2 Applicants also attempt to narrowly define transloading as "the movement of a shipper's goods *by truck* between the shipper's facility and a transloading facility, where the goods are transferred between *the truck* and a rail car." Petition at 2 [emphasis added]. Although truck may be the predominant mode of transloading, it is by no means the only mode. The Board should <u>not</u> accept Applicants' definition, which would preclude barge, other modal transload options available today, and yet to be developed transload technologies in the future.. For example, to restrict the term "transload" to truck only would deny a barge transload opportunity such as the Monsanto transload identified by the Board and Applicants. Decision No. 44 at 190; Petition at note 9.

would not preserve certain pre-merger competitive transload options and it would not permit BNSF to obtain sufficient traffic densities to compete effectively. The Board's expectation of strong and efficient competition from BNSF is the fundamental underpinning of its decision.

To justify their interpretation of the transload condition, the Applicants have ascribed a very narrow purpose to the Board's decision. They contend that the Board intended only to preserve transload options for shippers on lines over which BNSF will not have trackage rights. There is nothing in Decision No. 44 that supports Applicants' contention. Moreover, the Board imposed the transload condition precisely because the Applicants "[had] not gone far enough in addressing certain adverse competitive effects," including lost transload options for shippers. Decision No. 44 at 123-24.

In the first place, Applicants' position would deny transloading opportunities to shippers who may have had a transload option pre-merger. For example, a shipper that is located on a SP-owned line over which BNSF has trackage rights and that had a transload option on a UP-owned line pre-merger, could lose that transload option entirely under the restrictions that the Applicants have asked the Board to impose. This also would be true of shippers located on a UP-owned line over which BNSF has trackage rights and the shipper has a transload option on a nearby SP-owned line. Such a result clearly was never intended by the Board.

Moreover, the Board also clearly had another purpose in imposing the transload condition. Many parties in this proceeding protested that "BNSF will lack the traffic density or sufficient incentive to operate these [trackage rights] lines competitively." Decision No. 44 at 132. The Board clearly recognized this problem and sought to remedy it through various means, including providing BNSF with the opportunity to compete for traffic at new facilities, including transload traffic. *Id.* at 132-33. Thus, the Board intended to remedy obstacles to BNSF's ability and opportunity to compete over the trackage rights lines by increasing the potential traffic densities available to BNSF.

Applicants argue that the transload condition would create new competition contrary to the Board's precedent. The conditions imposed by the Board, however, are to preserve existing competition. The Board has created the most narrowly tailored remedies to ensure that the lost competition will be replaced to the full extent possible by BNSF. Because the Applicants had granted BNSF only overhead trackage rights between 2 to 1 points, the Board recognized that the abilitiy to obtain traffic density over these lines would be a significant obstacle to BNSF competitiveness, an obstacle squarely addressed by the Board in its decision. The Board devised a multi-part solution to this problem.

The transload condition is one important part of that solution. Other parts include opening up 50% of all contract traffic at 2 to 1 points to the BNSF; allowing BNSF to directly serve all new facilities constructed along the trackage rights lines; and allowing BNSF to connect with buildouts. Each of these remedies is narrowly tailored and yet they all give some shippers certain potential benefits that would not otherwise exist. For example, shippers who signed contracts with either the SP or UP had no contractual "right" to rebid 50% of their traffic before the end of the contract term. But, the Board correctly recognized that the density problem was so significant that serious competitive harm would result to shippers overall if the BNSF was not provided with the opportunity to obtain sufficient traffic densities to enable it to compete effectively. Hence, the Board ordered the Applicants to permit shippers to rebid at least 50% of their contract volume. Decision No. 44 at 146. Similarly, the transload condition was crafted in part to permit BNSF to obtain sufficient traffic densities for competitive operations. The Applicants' interpretation, however, would severely restrict BNSF's ability and opportunity to obtain the necessary traffic densities to permit it to compete effectively.

The new facilities/transload condition is clearly and intentionally a broad derivative of the provisions in the BNSF and CMA settlement agreements. In promoting these cornerstone agreements throughout this proceeding, the Applicants themselves variously have suggested that BNSF was expected to provide that level of meaningful and efficient competition that would obviate the need for track divestiture. A competitive BNSF had been Applicants' main theme leading up to the Board's decision.

However, in lieu of ordering divestiture, the Board required much more from Applicants' theme. One such additional requirement was expansion of the new facilities and transload provisions of the CMA agreement. Dow suggests that the condition, as imposed, is appropriate to permit BNSF to offer itself to shippers as a meaningful competitive option now and in the future. As new facilities are established in the future, BNSF will have the opportunity to compete for traffic if it chooses. To now deny such opportunity would be to increase the market power of Applicants rather than to seek the balance that the Board has attempted to strike.

Thus, the Board, consistent with past precedent, imposed the transload condition as the least intrusive remedy for two anticompetitive effects of the merger. It attempted to remedy the loss of transload options for <u>all</u> affected shippers and it attempted to remedy, in combination with other conditions, the competition and traffic density problem that would have impeded BNSF's ability to be an effective competitor to the Applicants over the trackage rights lines, which were granted by the Applicants themselves.

WHEREFORE, for the foregoing reasons, Dow requests that the Board deny the Applicants' Petition for Clarification.

Respectfully submitted,

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September 23, 1996

Attorneys for The Dow Chemical Company

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of September, 1996, served a copy of the foregoing Reply submitted on behalf of The Dow Chemical Company on all parties of record, by first-class mail, postage prepaid, in accordance with Rules of Practice.

Aimee L. DePew

STB FD 32760 9-23-96 D 86249

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DOW-30

BEFORE THE
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

REPLY OF
THE DOW CHEMICAL COMPANY
IN SUPPORT OF
THE TEXAS MEXICAN RAILWAY COMPANY'S
PETITION TO REOPEN DECISION NO. 44

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September 23, 1996

ORIGINAL

BEFORE THE
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

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REPLY OF THE DOW CHEMICAL COMPANY IN SUPPORT OF THE TEXAS MEXICAN RAILWAY COMPANY'S PETITION TO REOPEN DECISION NO. 44

The Dow Chemical Company ("Dow") hereby replies in support of "The Texas Mexican Railway Company's Petition to Reopen Decision No. 44," filed with the Surface Transportation Board ("STB" or "Board") on September 3, 1996 in the above-captioned proceeding. Dow is an occasional customer of the Texas Mexican Railway ("TexMex") and shares the concerns of the TexMex, particularly with regard to plastics and chemicals traffic moving through Houston.

TexMex has asked the Board to reopen Decision No. 44 to remove the limitation imposed on the trackage rights granted to TexMex in Sub-Nos. 13 and 14, which restrict TexMex's use of such rights to "the transportation of freight having a prior or subsequent movement on [TexMex's] Laredo-Robstown-Corpus

Christi line." Decision No. 44 at 150. TexMex has presented several reasons why the Board's imposition of this restriction is material error. Dow's comments are focused upon the serious competitive harm to shippers in the Houston market.

In just two years, the Houston rail market has gone from four to two Class I railroads. First, the merger of the Burlington Northern and Santa Fe railroads reduced rail competition to three carriers and now the merger of the Union Pacific and Southern Pacific railroads has further reduced competition to only two carriers. This reduction in competing carriers at Houston is particularly significant to chemicals and plastics shippers, who are heavily concentrated in Houston and along the Texas Gulf Coast and a majority of whose traffic passes through and/or is switched at Houston.

The restriction that the Board has imposed upon TexMex's use of its trackage rights prevents the TexMex from serving shippers, directly or via interchange, at Houston over these trackage rights unless there is also a prior or subsequent movement over TexMex's own lines. Removal of this restriction, however, will allow TexMex to serve these shippers and thereby restore the three carrier competition that existed prior to the merger.

Although the Board found *generally* that the reduction of carriers from 3 to 2 as a result of this merger will not substantially reduce competition, it did not conclude that a reduction from 3 to 2 carriers is never a cause for concern. In fact, the Board recognized that there can be grounds for concern in 3 to 2 situations (Decision No. 44 at 119) and that substantial rate increases could result from 3 to 2 impacts (*Id.* at 121). Nevertheless, the Board concluded that the SP's poor financial condition and its minor role in service-sensitive automotive and intermodal traffic diminished SP's competitiveness and, therefore, diminished the potential adverse effects of a reduction from 3 carriers to 2 in the West. *Id.*

However, as the TexMex explains, the Houston market is unlike the rest of the Western market for rail transportation service. It is heavily oriented towards plastics and chemicals traffic, which do not have significant intermodal options and in which the SP is an aggressive competitor with large market share. Petition at 10. Furthermore, the Houston rail market is made up of very little automotive or intermodal traffic. *Id.* BNSF has been a very minor participant in the plastics and chemicals traffic compared to the UP and SP. Thus, the circumstances that the Board found to mitigate the 3 to 2 effects *generally* in the West do not exist *specifically* in the Houston market.

TexMex also has argued that the Board's routing restrictions will impede TexMex's ability to compete even for the traffic that it is entitled to transport. Most of this traffic is plastics and chemicals commodities. However, a unique feature of the plastics market, in particular, will discourage shippers from tendering their traffic to the TexMex. Plastics producers usually produce large batches of a single grade of plastic pellet and load them into railcars. These loaded railcars are then tendered to a carrier long before the final destination is known. The carriers store these loaded cars at storage-in-transit ("SIT") yards until they receive routing instructions from the producer. If the carrier is TexMex, however, it will be permitted only to handle traffic at Houston that has a prior or subsequent movement over its own lines. As a consequence, when a producer routes cars from a SIT yard to a non-TexMex destination, the TexMex will have to switch that car to another carrier, causing delay and additional charges for the producer. Thus, a plastics producer is more likely not to tender its loaded railcars to TexMex in the first instance in order to avoid such costs.

The cleanest solution to these problems is to remove the routing restrictions upon TexMex's trackage rights. This will preserve effective competition at Houston that has been lost as a result of the merger by allowing

TexMex to compete for all Houston traffic. It also will untie TexMex's hands to permit it to effectively compete for plastics traffic, which makes up a significant portion of all traffic transported both over the TexMex and through Houston.

WHEREFORE, for the foregoing reasons, Dow requests that the Board grant the TexMex Petition to Reopen.

Respectfully submitted,

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September 23, 1996

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CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of September, 1996, served a copy of the foregoing Reply submitted on behalf of The Dow Chemical Company on all parties of record, by first-class mail, postage prepaid, in accordance with Rules of Practice.

Aimee L. DePew

STB FD 32760 9-23-96 D 86247

86247

DOW-29

BEFORE THE
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

ORIGINAL

REPLY OF
THE DOW CHEMICAL COMPANY
IN SUPPORT OF
THE PETITION OF BURLINGTON NORTHERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY FOR CLARIFICATION OF DECISION NO. 44

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SEP 24 1996
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September 23, 1996

BEFORE THE
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

REPLY OF THE DOW CHEMICAL COMPANY IN SUPPORT OF THE PETITION OF BURLINGTON NORTHERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY FOR CLARIFICATION OF DECISION NO. 44

The Dow Chemical Company ("Dow") hereby replies to "Petition of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company for Clarification of Decision No. 44," filed with the Surface Transportation Board ("STB" or "Board") on September 3, 1996 in the above-captioned proceeding. Dow believes that the clarification sought by the Burlington Northern Railroad Company and the Atchison, Topeka and Santa Fe Railway Company ("BNSF") is necessary to ensure that the relief granted to shippers by the Board will permit BNSF to be an effective competitor to the Applicants over the trackage rights that BNSF has been granted by the Board as a condition of the merger.

BNSF has asked the Board to clarify the condition that requires the Applicants to modify any contracts with shippers at 2 to 1 points to allow BNSF access to at least 50% of the volume. BNSF and other parties have obtained information that the Applicants are interpreting this condition extremely narrowly. In addition, BNSF has recognized the potential for further overly narrow interpretations of this "contract condition" by Applicants that would thwart the Board's very purpose in imposing the condition.

Specifically, BNSF is concerned that, without clarification, the Applicants could contend that this "contract condition" does not modify volume incentives in existing contracts, including minimum volume penalties. Because so many contracts contain such minimum volume incentives (or penalties for not meeting contract minimum volumes), such an interpretation by the Applicants would not enable BNSF to compete for even the minimum 50% of contract traffic that the Board has required Applicants to open to BNSF. This effectively would thwart the entire remedial purpose of the Board's condition.

Therefore, BNSF has asked the Board to require the Applicants to open 100% of contract volumes at 2 to 1 points to BNSF. As a less effective alternative, BNSF has asked the Board to clarify (1) that all contract volume incentives be removed or prorated to 50% volumes, at the shipper's options; (2) that, if Applicants offer to modify any terms of a contract with a 2 to 1 shipper, then all traffic encompassed by the proposed modification must be opened to BNSF; and (3) that shippers, not Applicants, are entitled to designate, on a contract-by-contract basis, which 50% of their traffic shall be open to BNSF competition. These clarifications would restrict the Applicants' opportunities to thwart the purpose of the 50% contract volume condition.

From Dow's perspective as a shipper, the concerns raised by BNSF are significant and very realistic. It is quite common for rail carriers, including the

Applicants, to offer significant savings for the tender of large volumes of traffic, or penalties for failure to transport the promised contract volumes. If the form of the provision is a contract incentive, the contract frequently specifies that lower rates are to be applicable for some or all of the traffic if the shipper transports higher volumes. But if such a provision would remain applicable even in the face of the contract condition ordered by the Board in Decision No. 44, then the shipper will have to pay higher amounts to the merged UP/SP for the "closed" traffic volume if BNSF transports the 50% of the contract volume opened as a result of the Board's contract condition. Similarly, if the form of the provision is a contract penalty, the shipper must pay a specified amount if it fails to ship the promised volume. If such a provision could remain applicable even in the face of the contract condition ordered by the Board in Decision No. 44, then the shipper will have to pay a penalty to the merged UP/SP if BNSF transports the 50% of the contract volume opened as a result of the Board's contract condition. In either case, most contract shippers would be unable to take advantage of the condition opening up 50% of their contract volumes with Applicants to BNSF because the lost discounts or penalties would destroy the value of the contracts with Applicants for the remaining 50% of traffic that would still be under contract.

Such an interpretation clearly would be overreaching. When the Board in Decision No. 44 ordered the the Applicants to "open at least 50% of existing contract volume at all . . . 2-to-1 points served by BNSF's trackage rights," it clearly intended that the contract condition would enable BNSF to compete for the open traffic on equal terms with the merged UP/SP. Decision No. 44 at 133.

An interpretation that would preserve, without modification, the contract volume incentives or penalties on 100% of the volume would render the Board's contract condition nugatory because BNSF could not compete on equal terms, since payments -- either in the form of higher rates or penalties on the remaining volume -- would have to be made to the UP/SP. In evaluating BNSF's offer for 50% of the traffic, these payments would be "charged" against the BNSF, since they would be incurred only if the shipper would accept the BNSF's offer.

It should be noted that if the BNSF's clarification is not adopted, the Board would not even have needed to impose a contract condition at all. Even if the Board had not ordered a contract condition in Decision No. 44, shippers could always have chosen to tender less volume to the UP/SP under their existing contract (and pay higher rates on the remaining volume, if the contract contained volume incentives); or could have chosen to pay UP/SP the penalty specified in the contract for failure to ship the minimum volumes (if the contract contained a volume penalty). But since the Board did order its contract condition in Decision No. 44, it must be interpreted in a meaningful and substantive manner.

The cleanest way to resolve this problem is to open up 100% of contract traffic for all 2 to 1 shippers. In the alternative, however, the Board should, at a minimum, adopt BNSF's suggestion that all contract volume incentives either be removed (in a way that does not leave the shipper worse off) or prorated to 50% volumes, at the shipper's option.

Moreover, even in contracts where no volume incentives currently exist, the Applicants could offer to modify these contracts to include volume incentives on the shipper's total volume if the shipper would choose to transport all its tonnage with the UP/SP. The economic effect of such an offer by the Applicants would be precisely the same as a preexisting volume incentive or penalty in the contract. BNSF would be unable to match these discounts because it would be spreading its offer across just half the traffic base. Thus, there is also a need for the second part of BNSF's alternative clarification that would open up all contract traffic volumes for which the Applicants offer to modify the contract terms.

Finally, BNSF and other parties apparently have obtained evidence that the Applicants are contending that they, and not the shippers, get to choose which 50% of contract volumes will be open to competition from BNSF. Furthermore, the Applicants apparently contend that they need only open 50% of total contract traffic at a 2 to 1 point, not 50% of each contract. The Board should clarify that the shippers, not the Applicants, should be the party to choose which 50% of contract volume will be open to competition from BNSF and that the 50% level is to be measured on a shipper-by-shipper, contract-by-contract basis rather than a 2 to 1 point as a whole.

These clarifications will prevent potential attempts by Applicants to circumvent the Board's condition. Without them, the Applicants could selectively release only the least profitable traffic or traffic that BNSF has the least chance of winning. The consequence would be that BNSF would be denied sufficient traffic densities to be an effective competitor over the trackage rights lines.

The Board clearly adopted the 50% contract volume condition in response to concerns that BNSF would not be able to obtain sufficient traffic densities to compete with Applicants over the vast distances of trackage rights that also were imposed as a condition on the merger. Decision No. 44 at 132-33. The Board must now adopt the BNSF clarifications if this original condition is to be effective.

WHEREFORE, for the foregoing reasons, Dow requests that the Board grant the BNSF Petition for Clarification.

Respectfully submitted,

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September 23, 1996

Attorneys for The Dow Chemical Company

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of September, 1996, served a copy of the foregoing Reply submitted on behalf of The Dow Chemical Company on all parties of record, by first-class mail, postage prepaid, in accordance with Rules of Practice.

Aimee L. DePew

STB FD 32760 9-23-96 D 86244

84244

UP/SP-282

BEFORE THE
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

ORIGINAL

APPLICANTS' REPLY TO
PETITION TO REOPEN OF CHARLES W. DOWNEY

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BEFORE THE
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Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
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TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

APPLICANTS' REPLY TO
PETITION TO REOPEN OF CHARLES W. DOWNEY

Applicants UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW[1] hereby respond to the Petition to Reopen filed on September 3, 1996 by Charles W. Downey for and on behalf of the General Committee of Adjustment for the United Transportation Union on lines of SPCSL, GWWR and IC (CDW-3). Alleging material error, Mr. Downey asks the Board to impose New York Dock conditions on the settlement agreement between Applicants and GWWR.

BACKGROUND

On May 10, 1996, Mr. Downey filed a petition to intervene and submit late-filed comments on the settlement agreement between Applicants and GWWR, which had been submitted to the Board in UP/SP-204 (CWD-1). Mr. Downey asked

[1] The acronyms used herein are the same as those in Appendix B of Decision No. 44.

the Board to impose "the full reach of the New York Dock conditions" on the agreement. Because Mr. Downey appeared to have good reasons for filing late, Applicants did not oppose his petition to intervene, but in UP/SP-250 objected to his request for New York Dock conditions. Mr. Downey renewed his arguments in a brief (CWD-2).

In Decision No. 44, the Board rejected Mr. Downey's request for labor protection. Decision No. 44, p. 175 & n.222. The Board held, correctly, that it lacked jurisdiction over the GWWR settlement agreement and that, in keeping with a long line of precedent, it would not extend New York Dock conditions to employees of non-applicant carriers. Mr. Downey challenges both conclusions, accusing the Board of acting without "a rational explanation." CWD-3, p. 3.

ARGUMENT

I. MR. DOWNEY OFFERS NO BASIS FOR PROVIDING NEW YORK DOCK PROTECTION TO GWWR EMPLOYEES

Mr. Downey does not challenge the Board's conclusion that "the arrangements provided for in the GWWR agreement are 'non-jurisdictional'" and "do not require our approval." Decision No. 44, p. 175 n. 222. He does not contend that the GWWR agreement is subject to former 49 U.S.C. §§ 11341, et seq., or that Board approval is required under any other provision of law. Given those concessions, there is no basis for the Board to impose either mandatory or discretionary labor protective conditions on the settlement agreement.

Mr. Downey argues that Board should award New York Dock labor protection because the settlement agreement "facilitates" approval of the UP/SP consolidation. CWD-3, p. 3. Mr. Downey cites neither statutory basis nor precedential authority for this novel theory. Neither the ICC nor the Board has asserted jurisdiction over settlements merely because they satisfy the concerns of a potential merger opponent.

Citing the Commission's UP/MP/WP decision, Mr. Downey contends that the Board may impose labor protection "where a settlement agreement is involved." CWD-3, pp. 3-4. Neither UP/MP/WP nor any other Commission or Board decision establishes such a rule. The settlement in UP/MP/WP created a pooling agreement, which required Commission approval under former 49 U.S.C. § 11342, giving the Commission the power to impose labor protective conditions. Moreover, because the pooling was "a substitute for the trackage rights originally sought," the applicants voluntarily accepted labor conditions applicable to trackage rights. UP/MP/WP, 366 I.C.C. at 618. Had the Commission lacked jurisdiction over that settlement, as in this case, it could not have imposed any form of labor protection.

Lacking jurisdiction over the GWWR settlement agreement, the Board could have provided labor protection for GWWR employees only by extending protection to employees of a non-applicant carrier. That it refused to do. The Board's decision not to expand labor protection to GWWR employees followed the Commission's longstanding policy in rail merger cases of rejecting New York Dock protection for non-applicant-carrier employees. Decision No. 44, p. 175 n.222; see also, e.g., UP/CNW, Slip Op., p. 96; UP/MP/WP, 366 I.C.C. at 621 ("We have rejected such requests in the past and we reaffirm that policy"). As the United States Court of Appeals for the District of Columbia Circuit has held, this policy "is firmly supported by previous decisions in this and other circuits." RLEA v. ICC, 914 F.2d 276, 280 (1990), cert. denied, 499 U.S. 959 (1991). Neither Mr. Downey's prior filings nor his petition offers any basis for overturning this longstanding policy.

Mr. Downey cites several cases for the proposition that, in exceptional situations, the Commission may grant labor protection to non-applicant employees. That exception applies, however, only where the non-applicant employees qualify as "joint employees" of the applicant and the non-applicant carrier. E.g., Black v. ICC, 814 F.2d 769, 772 (D.C. Cir. 1987). Mr. Downey does not contend that GWWR employees are "joint employees" of any Applicant here. These authorities are therefore inapposite.

The Board's decision to reject New York Dock coverage for the GWWR settlement was in accord with well-established law and should not be reopened.

II. THE BOARD'S RATE REDUCTION FINDINGS ARE VALID

Mr. Downey suggests that his request for New York Dock protection was rejected in part on the basis of the Board's finding that average rail rates have declined since the Staggers Act. CWD-3, p. 2. There is no hint in Decision No. 44 of such a link. Accordingly, Mr. Downey's attacks on the Board's rate reduction finding have no nexus with the labor protection relief he seeks. Mr. Downey nevertheless wants the Board to disavow that finding. CWD-3, p. 8.[2]

The Board's finding that rail rates have fallen since 1980 clearly is correct and is confirmed by all reliable studies of rail prices. For example, the Association of American Railroads in 1994 performed an in-depth study of the effects of deregulation on the rail industry, finding that rail rates had fallen 50% in real dollars during the preceding 12-year period. The study found that rail rates had fallen sharply using any plausible measure. AAR, Railroad Freight Rates Since Deregulation (1994). See also, e.g., DOE Energy Information Agency, Energy Policy Act Transportation Rate Study: Interim Report on Coal Transportation, pp. 18-20 (1995) (average contract rail rate for coal fell by 19% from 1988 to 1993, even though the average distance shipped

---

[2] Mr. Downey casts a particularly jaundiced eye on the 1995 Office of Economic and Environmental Analysis report entitled Rail Rates Continue Multi-Year Decline, which he claims was not generally available to the public. CWD-3, p. 6.

increased); U.S. General Accounting Office, Railroad Regulation: Economic and Financial Impacts of the Staggers Rail Act of 1980, pp. 4, 52-53 (1990) ("Since 1980, rail rates, adjusted for inflation, have declined an average of almost 22 percent.").

Mr. Downey's suggestion that the AAR has published contrary information in its annual Railroad Facts publication (CWD-3, App. 2, p. 7) is not correct. Each post-Staggers Act edition of Railroad Facts, spanning more than a decade, has included a chart showing changes in railroad freight charges per ton-mile in constant dollars. E.g., AAR, Railroad Facts, 1995 Edition, p. 31 (1995). Those charts trace a steady decline since shortly after the Staggers Act passed. Attached as Exhibit A is the newest chart, from the soon-to-be-released Railroad Facts, 1996 Edition, which shows that revenue per ton-mile has dropped sharply in both current and constant dollars, declining over 38% in constant dollars since 1986.

Mr. Downey's suggestion that AAR data show a different trend is based on the fact that the AAR publications also show revenue per ton. See CWD-3, App. 2, p. 7. But the Railroad Facts publications clearly state that revenue per ton-mile, not revenue per ton, is the meaningful indicator of rates. As Mr. Downey acknowledges, revenue per ton does not take distance or any other measure of productive work into account. Revenue per ton depends mainly on how far a ton moves: the longer the haul, the higher the revenue per ton.

For example, as railroads have successfully expanded the market for Western coals using longer rail hauls into the Midwest and Southeast, their revenue per ton has risen, but their <u>rates</u> have continued to fall.

Mr. Downey also cites the Bureau of Labor Statistics Producer Price Index, which supposedly shows that nominal rail rates increased by over 10% since deregulation. But the PPI measurement of rail transportation prices is not performed on a reliable basis and needs to be reformed. (The AAR has raised this issue with BLS, which is investigating.)

Among other significant defects, the PPI is based on a substantial component of "paper" rates that do not move any traffic but that nevertheless escalate with the Rail Cost Adjustment Factor. The PPI survey also frequently ignores rail transportation contracts, which reduce the prices shippers pay below tariff levels. It also fails to reflect changes in traffic flows, so the movements on which it focuses have become increasingly disconnected from transportation patterns. These defects do <u>not</u> afflict the other studies cited above.

Grain transportation prices demonstrate this inaccuracy in the PPI. According to the PPI, railroad grain rates increased steadily after the Staggers Act. When grain rates were studied by the AAR using reasonable methods, however, the opposite pattern emerged.[3] When the U.S. Department of Agriculture independently studied grain rates, it also concluded that "grain rates have generally fallen during the 1980's."[4]

CONCLUSION

For the foregoing reasons, Mr. Downey's petition should be denied.

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[3] AAR, Railroad Freight Rates Since Deregulation, p. 4 ("A 1989 AAR study of actual railroad grain rates showed that rates for these commodities had declined from 1981 to 1988 in current dollar terms by 27 percent and by 45 percent in real terms.").

[4] J.M. MacDonald, USDA Economic Research Service, Effects of Railroad Deregulation on Grain Transportation, p. 39 (1989).

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September 23, 1996

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 23rd day of September, 1996, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

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Suite 500
Department of Justice
Washington, D.C. 20530

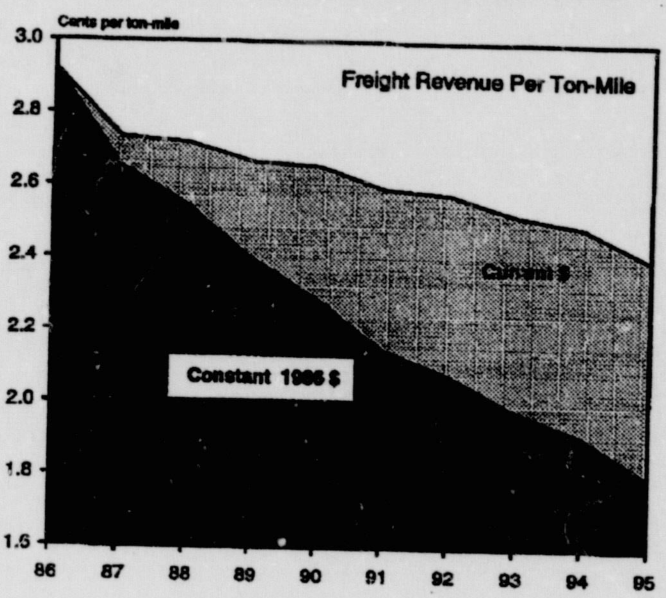
Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

Michael L. Rosenthal

FREIGHT REVENUE PER TON-MILE IN CURRENT AND CONSTANT 1986 DOLLARS

Year	Current	Constant
1986	2.921 ¢	2.921 ¢
1987	2.733	2.651
1988	2.720	2.546
1989	2.669	2.398
1990	2.657	2.288
1991	2.594	2.149
1992	2.579	2.079
1993	2.533	1.982
1994	2.493	1.914
1995	2.401	1.801

Note: Constant dollar figures are derived using the chain-based GDP price index



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BEFORE THE
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

APPLICANTS' REPLY TO PETITIONS FOR CLARIFICATION
OF ENTERGY, BNSF AND GENEVA STEEL, AND "LETTER PETITION"
OF THE TEXAS RAILROAD COMMISSION

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September 23, 1996

UP/SP-280

BEFORE THE
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
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APPLICANTS' REPLY TO PETITIONS FOR CLARIFICATION
OF ENTERGY, BNSF AND GENEVA STEEL, AND "LETTER PETITION"
OF THE TEXAS RAILROAD COMMISSION

Applicants UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW[1/] hereby reply to the petitions for clarification of Decision No. 44 filed by Entergy, BNSF and Geneva Steel on September 3, 1996 (ESI-27; BN/SF-65; GS-3, -4) and the "letter petition" filed by the Texas Railroad Commission on September 10, 1996 (RCT-8).

These petitions relate to Applicants' obligation to make available to BNSF 50% of the volume of traffic subject to contracts at "2-to-1" points. In their agreement with CMA, Applicants agreed to such an obligation with regard to "2-to-1" points in Texas and Louisiana. In Decision No. 44, the Board required, as a condition to its approval of the merger, that this obligation be expanded to apply to all "2-to-1"

1/ The acronyms used herein are the same as those in Appendix B of Decision No. 44.

points, wherever located. For convenience, we shall refer to this obligation as the "50% Obligation."

As we show herein, all of the petitions should be denied. A number of the points of clarification that they raise are moot, because Applicants are following the condition in the manner desired by the petitioners. Other clarifications sought by the petitioners are, as we shall explain without merit.[2/]

BACKGROUND

The relevant background can be stated briefly.

In the opposition filings submitted in March, various parties expressed concerns about whether BNSF would have access to sufficient traffic to be competitive, and over whether the Applicants had "locked up" traffic at "2-to-1" points by signing long-term contracts with the shippers. Applicants responded, in their April rebuttal, with extensive evidence establishing that BNSF would be in a position to carry more than enough traffic over its various trackage rights segments to be fully competitive, and that traffic had

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[2/] Applicants do not contest the appropriateness of the Board's resolving the matters raised by these petitions through a clarification of Decision No. 44. The 50% Obligation is not part of the BNSF settlement agreement, and thus is not subject to the arbitration clause in that agreement. And while arbitration by special agreement may well be appropriate, even where an arbitration clause is not in place, for resolving disputes over the details of implementing particular merger conditions, Applicants believe (as, evidently, do the petitioners) that the Board is best situated to address the issues presented here.

not been "locked up" through contracts at "2-to-1" points. The traffic evidence showed that, with access to the "2-to-1" traffic, plus major new marketing opportunities, plus substantial reroutes of its own traffic that was moving more circuitously, BNSF would have ample traffic to run multiple, competitive daily train services in the relevant corridors. UP/SP-230, pp. 108-17; UP/SP-231, Peterson, pp. 161-85. And the contract evidence showed that UP and SP had not "locked up" volume at "2-to-1" points in order to frustrate BNSF's competitiveness, and that in fact some three-fourths of the traffic at those points would be available to BNSF this year, and some 90% within the first year after consummation of the merger. UP/SP-230, pp. 117-18; UP/SP-231, Gray, pp. 41-43; UP/SP-231, Peterson, pp. 191-94.

Given these facts, Applicants saw no basis for reopening existing contracts at "2-to-1" points. Nonetheless, as has previously been explained, Applicants sought to "bend over backward" to address, through a settlement with CMA, as many of the issues that merger opponents had raised as could reasonably be addressed and mooted. One of the provisions agreed to with CMA provided for opening to BNSF 50% of the volume of traffic subject to contracts at "2-to-1" points in Texas and Louisiana at the time of consummation of the merger:

> "Effective upon consummation of the UP/SP merger, UP/SP shall modify any contracts with shippers at '2-to-1' points in Texas and Louisiana so that at least 50% of the volume is open to BN/Santa Fe."

CMA Settlement Agreement, Apr. 18, 1996, ¶ 3 (included as an appendix to UP/SP-230). This provided further assurance that BNSF would have prompt access to traffic at "2-to-1" points in the Gulf Coast chemical area and thus could quickly institute competitive service at those points.

In Decision No. 44, as a further guarantee of BNSF's competitive capability, the Board required that the 50% Obligation be extended to all "2-to-1" points. See Decision No. 44, pp. 106, 133, 146.

As discussed in the attached Verified Statement of James A. Shattuck, UP's Executive Vice President-Marketing & Sales, the Applicants have acted promptly and carefully to comply with this condition. Notwithstanding the uninformed press speculation on which some of the petitioners rely, Applicants are applying the condition fairly and reasonably, and in compliance with its plain terms. Specifically:

1. Applicants have identified, to the best of their ability, all shippers with outstanding contracts at "2-to-1" points, and have written to those shippers to advise them that they are covered by the condition and that Applicants stand ready to release to immediate competition by BNSF 50% of their traffic which would otherwise be subject to the contract. Applicants have written two letters to each shipper. One was sent before the effective date of the merger decision to advise the shipper of the condition, which was

quoted verbatim in the letter. The second was sent after consummation of the merger. This letter enclosed a definitive list of all affected contracts involving that shipper (which could only be compiled once the UP and SP databases could be combined), advised the shipper that UP/SP was prepared to act immediately to modify the contracts in accordance with the condition, and invited the shipper to discuss the matter further. Copies of both letters are attached to Mr. Shattuck's statement.

2. Contrary to petitioners' speculation, Applicants are following the condition on a contract-by-contract basis, and not in some sort of aggregated form by location or region.

3. Contrary to petitioners' speculation, Applicants are not asserting any right unilaterally to select which movements under a contract will be opened to BNSF competition. Rather, Applicants have asked each shipper that wishes to modify its contract to discuss with UP/SP how the shipper wishes to proceed, with an eye to revising the contract in a mutually agreeable fashion. Applicants hope to resolve all of these issues on an amicable basis, but in no event will UP/SP insist on imposing its preferences or suggestions on the shipper.

4. Contrary to petitioners' speculation, Applicants are not claiming any right to dictate when a

shipper must secure bids from BNSF for 50% of the traffic. Applicants position is that the shipper may do so at any time during the course of a contract that was in effect when the merger was consummated.

5. Finally, Applicants have taken a straightforward approach with respect to the effect of releasing 50% of the volume on the various terms of a contract:

- Clearly, the obligation of the shipper to ship a particular percentage of his total traffic under the contract is waived to the extent that percentage exceeds 50%.
- The 50% figure is to be calculated using whatever units of physical volume are specified in the particular contract (e.g., cars, tons).
- Price and service terms continue to apply as written. Thus, if a contract has a tiered rate based on different levels of volume shipped, those rates continue to apply. If the contract has a single rate, that rate continues to apply. If the contract obligates the railroad to supply cars for UP/SP shipments, that obligation remains. However, UP/SP must have the option, where price and/or service terms were specially tailored to volumes committed by the shipper during arm's-length negotiations prior to the merger and would be uneconomic with lower volumes, to release the entire volume under the contract, in lieu of releasing 50% and being held to

price and/or service terms that cannot fairly be enforced against UP/SP if it receives only 50% of the volume. If UP/SP elects to release the entire contract volume, this will of course allow the shipper to enjoy immediately a new opportunity to discuss complete contract packages with both UP/SP and BNSF, and will give BNSF an even broader range of opportunities to compete for business.

ARGUMENT

The petitions for clarification should be denied. A number of the arguments presented in the petitions are mooted by the positions being taken by the Applicants in implementing the 50% Obligation. The remaining arguments are without merit.

A. Entergy

Entergy presents two arguments. The first should be rejected and the second is moot.

Entergy's first argument is that shippers that are exclusively served by one of the merging railroads and have the potential of building out to the other should be considered "2-to-1" shippers for purposes of the 50% Obligation. Entergy thereby hopes to secure the ability to rebid immediately large volumes of coal that are contractually committed to move via UP to Entergy's plant at White Bluff, Arkansas, for years into the future. This argument should be rejected. The condition expressly speaks in terms of "'2-to-

1' points." White Bluff is not a "2-to-1" point, and the mere possibility of a 20-mile build-out to SP at Pine Bluff (the feasibility of which was hotly contested during the merger proceedings) does not convert this solely-served location into a "2-to-1" point. Entergy entered into a contract for the transportation of this coal years ago, and coal rates have significantly fallen since. Entergy would of course like to rebid half of these large volumes long before the contract expires, in the hope that it will realize a reduction in the rate that it negotiated at arm's-length when it entered into contract. But this desire for a windfall lacks any competitive justification,[3/] and has nothing to do with the Applicants' and CMA's reason for agreeing upon this condition -- which was to address claims that Applicants had "locked up" traffic at "2-to-1" points, not at exclusively-served points -- or the Board's purpose in expanding it -- which, again, was to ensure BNSF's immediate access to traffic at "2-to-1" points, not exclusively-served traffic.[4/]

[3/] Entergy acknowledged, throughout the litigation of its responsive application, that any potential competitive leverage it might receive from a build-in would occur in the future, when its contract expired, not today. *E.g.*, ESI-12, p. 12; ESI-12, Giangrosso, pp. 8, 14, 28; ESI-12, Weishaar, p. 7. And the existing, agreed-upon, rate already reflects the parties' assessments at to the practicability of a build-in.

[4/] Entergy also argues that because, as it happens, Entergy would be building out to a "2-to-1" point (Pine Bluff), it should be regarded as (in the words of the condition) "at" a "2-to-1" point. ESI-27, p. 6. This argument is plainly

(continued...)

Entergy's second argument is that the 50% Obligation should apply to "50% of the contract volume of each shipper at any 2-to-1 point," and not "merely 50% of the aggregate contract volume of all shippers, collectively, at a 2-to-1 point." ESI-27, p. 2. That is how Applicants are applying the condition, and there is accordingly no need to clarify Decision No. 44 in this regard.

B. <u>BNSF</u>

BNSF's primary argument is that the 50% Obligation should be "clarified" to be a <u>100%</u> obligation. BN/SF-65, pp. 2-3. This Orwellian suggestion refutes itself. The meaning of 50% is obviously 50%, not 100%, and no amount of "clarification" can change that fact.[5] BNSF argues that opening 100% of the contract traffic would allow it to compete more effectively for that traffic, but that tautological proposition hardly constitutes a reason to sweep aside a limitation agreed upon between Applicants and CMA and adhered

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[4] (...continued) spurious. The BNSF settlement agreement addresses traffic to and from competitively-served shippers <u>at</u> "2-to-1" points, not traffic moving <u>via</u> "2-to-1" points.

[5] An observer new to the case might wonder why BNSF couched this argument in the transparently invalid terms of seeking "clarification" of the merger decision, rather than openly asking that the decision be changed and more onerous conditions imposed on the merger. The answer, quite clearly, is that BNSF promised, in settling with the Applicants, not to seek or support additional conditions, and presented sworn testimony that it did not need additional conditions to be fully competitive. <u>See</u> UP/SP-22, p. 338; BN/SF-1.

to by the Board. The 50% limitation represents a reasonable balancing of competing considerations -- on the one hand, to expand BNSF's (already very substantial) access to traffic in order to provide a further assurance of BNSF's competitiveness, but on the other hand, not unnecessarily to confer windfalls on shippers and deprive Applicants of the benefit of the bargains that UP and SP entered into with those shippers. These contracts, after all, reflect the consideration that UP or SP received from shippers in exchange for committing, after competing vigorously with each other, to handle the shippers' business, and it is inherently unfair and prejudicial to allow shippers the one-way opportunity to secure better terms before the contract expires, while retaining the option of enforcing the contract in total. Any reopening of contracts is inherently unfair to UP/SP, which will often, for example, have committed to offsetting backhauls that cannot be renegotiated. BNSF offers no justification -- other than a sheer desire for more traffic -- for changing the reasonable balance that is struck by the 50% Obligation.

As a fallback, BNSF argues that if the 50% Obligation is retained, three requirements should be imposed. BNSF argues that (a) all volume incentives under the "2-to-1" contracts should be "removed or prorated to 50% volumes, at the shipper's option," (b) if UP/SP offers "to modify any of the terms of a contract with a 2-to-1 shipper (such as offering to lower rates on volumes remaining closed as well as on volumes opened to BN/Santa Fe in compliance with the Board's order), then the shipper must be permitted to solicit a competitive bid from BN/Santa Fe on all volumes to which Applicants' offer to modify applies," and (c) the shipper, not UP/SP, should have the right to designate the 50% of its traffic that is to be open to BNSF. BN/SF-65, p. 3. The first two of these proposed requirements should be rejected, as explained below. The third is best approached through amicable discussions between each shipper and UP/SP. The proposed requirement is unobjectionable so long as UP/SP can opt to release 100% of the traffic if a shipper seeks to hold UP/SP to service or rate commitments that are economically unsustainable as applied to the 50% of the traffic that the shipper wishes to leave under the contract. This decision should be UP/SP's alone.

BNSF's argument that volume incentives should be "removed or prorated to 50% volumes"[6/] is similar to its 100%

[6/] It is not at all clear what BNSF means by this. In describing the removal option, BNSF says that it must be done "in a way that does not leave the shipper worse off." BN/SF-65, p. 9. But this is incoherent. If a contract provides a special, lower per-unit rate which is available only if the shipper tenders 95% of its volume to the contracting railroad, there is no "way" to "remove" this incentive that "does not leave the shipper worse off," unless the notion is that UP/SP must give the shipper the special low rate, or pay the shipper a refund, even if the high volumes that provided the economic (continued...)

argument, in that its only apparent rationale is to increase BNSF's prospects of securing traffic. If a contract provides a rate that becomes increasingly attractive the more volume is shipped via the particular railroad, that incentive reflects the benefits of competition and the real efficiencies of shipping higher volumes via a single carrier. Giving BNSF the opportunity to compete for 50% of the business under a contract is very different from, in effect, subsidizing BNSF by overriding rational, pro-competitive volume incentives to increase BNSF's chances of capturing traffic. If the shipper thinks it can do better placing half its business with BNSF and the other half with UP/SP at the rate originally set in arm's-length, competitive negotiations for shipping that volume of business via UP or SP, that is exactly what the 50% Obligation permits. And that is all that it should permit, given the balancing of equitable considerations discussed above.

A shipper and UP/SP should also be free to renegotiate a contract in its entirety, without the imposition of a requirement that BNSF be allowed to bid on the part of

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[6] (...continued)
rationale for the low rate are not shipped via UP/SP. The proration option is equally mysterious. If it is intended to mean that UP/SP should be required to make a specially-discounted rate which the contract specifically limits to very high volumes available to the shipper for much lower volumes, then it is not "proration," but, again, economically irrational subsidization at UP/SP's expense.

the volume that is not subject to the 50% Obligation. Such a shipper is perfectly free to give 50% of the traffic to BNSF, and BNSF is perfectly free to compete for it. If, after giving effect to that competition, which will surely have an impact on the rates and service offered by UP/SP, the shipper elects to enter into an entirely new contract with UP/SP for all the traffic, the condition will have had exactly the salutary effect it was intended to have -- to give BNSF an opportunity to compete for half the business, and the shipper the benefit of that competition. BNSF contends that in these circumstances UP/SP would have some sort of undue advantage because it could "allocate" further discounts over the "unreleased" 50% of the traffic as well as the "released" 50%,[7] but this is nonsense. Money is fungible, and it makes no difference whether a discount is attributed to one segment or another of the total traffic. The point is that UP/SP should be free -- and it would be anticompetitive for UP/SP not to be free -- to offer a better deal to a shipper for a new, superseding contract, after the shipper and BNSF have had every opportunity to discuss the possible placement with BNSF of the 50% of the business for which the condition allows BNSF to compete.

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[7] Part of BNSF's argument here seems to be that UP/SP would "cherry-pick" the most attractive traffic to be reserved to itself, but we have already made clear that UP/SP does not claim such a right.

Finally, it should be noted that BNSF offers not a shred of evidence that the supposed problems it hypothesizes have any existence in the real world. Applicants are confident that the 50% Obligation can and will be implemented smoothly and cooperatively, and will afford BNSF a very real opportunity to compete for the affected traffic. The condition should be given an opportunity to function. If, after that has happened, a shipper or BNSF demonstrates that in some actual situation some concrete problem has prevented meaningful competition for 50% of the shipper's contract traffic, nothing will prevent the Board from imposing a further remedy.

C. Geneva Steel

[material redacted]

[material redacted]

Geneva argues, first, that "a shipper must bear no negative consequences as a result of accepting a bid from BNSF for at least 50 percent of its volume." GS-3, p. 1. Applicants approach to implementing the 50% Obligation does not impose any such "negative consequences." It simply applies the terms of the contract, subject to the partial release of the shipper's volume commitment. To the extent that Geneva is suggesting that it is a "negative consequence" that special high-volume incentives will not be made available to the shipper for tendering much lower volumes, Geneva's argument should be rejected, for the reasons already explained in our response to BNSF.

[footnote redacted]

[material redacted]

[footnote redacted]

[material redacted]

Geneva argues, second, that "a shipper must be free to specify which portion of its contract volume, up to 50 percent of its total rail traffic, will be granted to BNSF." GS-3, p. 2. As already stated, Applicants do not object to this proposition, so long as it is recognized that UP/SP have the option to terminate a contract in its entirety where the shipper seeks to have UP/SP handle 50% of the business on rate and service terms that were economic solely as applied to the higher volume that the contract required the shipper to tender. As stated, Applicants hope, and are confident, that they can arrive at amicable and voluntary agreements with each shipper as to the traffic to be released. Applicants are not claiming the right to dictate which 50% of the traffic is released.

Geneva argues, finally, that "a shipper must be free to specify when the bid proposal from BNSF may be entertained." GS-3, p. 2. Applicants agree that a shipper is free to exercise its rights under the 50% obligation at any time, and there is no need for clarification of Decision No. 44 in this regard.

D. Texas Railroad Commission

The Texas Railroad Commission's "letter petition" repeats arguments that have already been addressed. Applicants are applying the 50% obligation on a contract-by-contract basis, and are measuring volume in the units specified in each contract; there is thus no need to clarify Decision No. 44 with regard to the meaning of "50% of the volume" (Letter Petition, p. 2). And the suggestion that 100% of the volume under each contract should be opened to BNSF (id., pp. 2-3) echoes the similar argument of BNSF, refuted above.

CONCLUSION

For the reasons stated above, the petitions for clarification of Entergy, BNSF and Geneva Steel, and the "letter petition" of the Texas Railroad Commission, should be denied.

Respectfully submitted,

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September 23, 1996

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 23rd day of September, 1996, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

Director of Operations Antitrust Division Suite 500 Department of Justice Washington, D.C. 20530	Premerger Notification Office Bureau of Competition Room 303 Federal Trade Commission Washington, D.C. 20580

Michael L. Rosenthal

VERIFIED STATEMENT

OF

JAMES A. SHATTUCK

My name is James A. Shattuck. I am UP's Executive Vice President-Marketing & Sales. My educational and employment background is set forth in the joint verified statement that I submitted with John Gray in UP/SP-231.

In this statement, I shall describe the steps that the Applicants have taken to comply with the merger condition requiring that 50% of traffic under contract at "2-to-1" points be made available to BNSF. Notwithstanding uninformed press speculation, Applicants are applying this condition fairly and reasonably, and in compliance with its plain terms.

- We have identified, to the best of our ability, all shippers with outstanding contracts at "2-to-1" points, and have written to those shippers to advise them that they are covered by the condition and that we stand ready to release to immediate competition by BNSF 50% of their traffic which would otherwise be subject to the contract. Two letters have been sent to each shipper. The first, signed by me and by Don Orris of SP, was sent on September 6, five days before the effective date of the merger decision, to advise the shipper of the condition, which was quoted verbatim in the letter. A copy of that letter is Exhibit A hereto. The second, signed by me, was sent last Thursday, September 19, following the consummation of the merger on September 11. It enclosed a definitive list of all affected contracts involving that shipper (which could only be compiled once the UP and SP databases could be combined), advised the shipper that we were prepared to act immediately to modify the contracts in accordance with the condition, and invited the shipper to discuss the matter further. A copy of that letter is Exhibit B hereto.

- Contrary to petitioners' speculation, we are following the condition on a contract-by-contract basis, and not in some sort of aggregated form by location or region.

- Also contrary to petitioners' speculation, we are not asserting any right unilaterally to select which movements under a contract will be opened to BNSF competition. Rather, we have asked each shipper that wishes to modify its contract to discuss with us how that shipper wishes to proceed, with an eye to revising the contract in a mutually agreeable fashion. We hope to resolve all of these issues on an amicable basis, but in no event will we insist on imposing our preferences or suggestions on the shipper.

- Yet again contrary to petitioners' speculation, we are not claiming any right to dictate when a shipper must secure bids from BNSF for 50% of the traffic. Our position is that the shipper may do so at any time during the term of a contract that was in effect when the merger was consummated.

- We have taken a straightforward approach about the effect of releasing 50% of the volume on the various terms of a contract:

First, the obligation of the shipper to ship a particular percentage of his total traffic under the contract is waived so that the shipper is free to make 50% of the traffic available to BNSF. This is obviously the fundamental requirement of the condition.

Second, the 50% figure is to be calculated using whatever units of physical volume are specified in the particular contract (e.g., cars, tons).

Third, price and service terms continue to apply as written. Thus, if a contract has a tiered rate based on different levels of volume shipped, those rates continue to apply. If the contract has a single rate, that rate continues to apply. If the contract obligates the railroad to supply cars for UP/SP shipments, that obligation remains. However, UP/SP must have the option, where price and/or service terms were specially tailored to the volumes committed by the shipper and would be uneconomic with lower volumes, to release the entire volume under the contract, in lieu of releasing 50% and being held to price and/or service terms that cannot fairly be enforced against us if we receive only 50% of the volume. If UP/SP elects to release the entire contract volume, this will of course allow the shipper to enjoy immediately a new opportunity to discuss complete contract packages with both UP/SP and BNSF.

[material redacted]

[material redacted]

VERIFICATION

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

I, JAMES A. SHATTUCK, being duly sworn, state that I have read the foregoing statement, that I know its contents, and that those contents are true as stated.

James A. Shattuck
JAMES A. SHATTUCK

SUBSCRIBED AND SWORN TO before me this 18th day of September, 1996.

Ellen Smith
NOTARY PUBLIC

My Commission Expires:

GENERAL NOTARY-State of Nebraska
ELLEN SMITH
My Comm. Exp. July 19, 2000

September 6, 1996

FIELD(Contact)
FIELD(Customer)
FIELD(Address)
FIELD(City), FIELD(State) FIELD(Zip)

Dear FIELD(FName):

The Surface Transportation Board approved the Union Pacific/Southern Pacific merger in a decision published on August 12. The approval is subject to a number of conditions. One of those conditions provides that UP/SP must modify rail transportation contracts with all "2-to-1" shippers at points covered by the Burlington Northern Santa Fe (BNSF) Settlement Agreement. As the STB stated:

> *Opening contracts at 2-to-1 points* . The CMA agreement provides that, immediately upon consummation of the merger, applicants must modify any contracts with shippers at 2-to-1 points in Texas and Louisiana to allow BNSF access to at least 50% of the volume. We require as a condition that this provision be modified by extending it to shippers at all 2-to-1 points incorporated within the BNSF agreement, not just 2-to-1 points in Texas and Louisiana.

We have identified your company as a "2-to-1" shipper to whom the contract condition applies. UP and SP may not share or exchange confidential contract information until the STBs decision is effective and UP has assumed control of SP. That is scheduled to occur on September 11. UP and SP are separately gathering contract information pertaining to your rail transportation contracts at "2-to-1" points. We will be contacting you again shortly after the effective date of the STBs decision when we will be able to aggregate this information on your business.

If you have any questions in the meantime, please contact your current UP or SP sales representative. Please notify your UP or SP sales representative if you wish future information about the contract condition to be directed to someone else in your organization.

Sincerely,

Jim — Don

Jim Shattuck — Don Orris

EXHIBIT B

September 19, 1996

FIELD(Name)
FIELD(Title)
FIELD(Company)
FIELD(Address)
FIELD(City), FIELD(ST) FIELD(Zip)

FIELD(Greeting):

Union Pacific/Southern Pacific previously notified you that as a contract customer of UP and/or SP who ships to or from a "2-to-1" location served only by UP and SP your contracts are subject to a condition imposed by the Surface Transportation Board (STB) when it approved the UP/SP merger. The STB's condition requires UPSP to modify contracts with shippers at "2-to-1" locations so that 50% of the volume under contract is available to bidding by BNSF. The STB's decision became effective on September 11, 1996. UP now owns and controls SP.

We have attempted to identify those rail transportation contracts which are covered by the STB decision. Your contracts with UP and/or SP that we believe are affected are listed in the attachment. We ask you to review this list and provide your UPSP representative with any corrections or changes.

UPSP is prepared to modify immediately each of the contracts listed on the attachment so that you may direct to BNSF 50% of the traffic volume covered by a minimum volume requirement to or from a "2-to-1" shipping location. Volume is measured in the traffic units specified in our contract with you.

Your UPSP representative will be calling you shortly to arrange a meeting to discuss implementation of the STB condition with respect to your contracts. If you and your company want UPSP to proceed with contract modification in the manner described above without any additional discussion, please advise us in writing. While the modification of these contracts will be done quickly, we want to be sure that the condition is applied in a way that suits your needs consistent with our transportation commitment to you.

Sincerely,

Jim

Jim Shattuck

STB FD 32760 9-23-96 D 86240

86240

UP/SP-281

BEFORE THE
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

APPLICANTS' REPLY TO PETITION
FOR RECONSIDERATION OF DOW CHEMICAL COMPANY

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September 23, 1996

BEFORE THE
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

APPLICANTS' REPLY TO PETITION FOR RECONSIDERATION OF DOW CHEMICAL COMPANY

Applicants UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW[1/] hereby reply to the petition for reconsideration of Decision No. 44 filed by Dow Chemical Company on September 3, 1996 (DOW-27).

The Board will reconsider a final decision only upon a showing of material error, new evidence or changed circumstances. 49 C.F.R. § 1115.3(b). One searches Dow's petition in vain for any allegation of material error, new evidence or changed circumstances, and Dow's petition should be denied on this ground alone. See Finance Docket No. 31231, IC Industries, Inc. -- Securities Notice of Exemption Under 49 CFR 1175, Decision served Apr. 3, 1989, p. 1 n.3.

Even if one assumes that Dow is alleging material error, Dow's allegation does not withstand the strict scrutiny the Board applies to this type of petition. Petitions for

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1/ The acronyms used herein are the same as those in Appendix B of Decision No. 44.

review of final orders are granted "only in the most extraordinary circumstances" so that administrative finality is not undermined. See Docket No. AB-33 (Sub-No. 55), Union Pacific R.R. -- Abandonment -- Between Echo & Park City & Between Keetley Junction & Phoston, In Summit & Wasatch Counties, UT, Decision served July 11, 1990, p. 2. Dow's petition does not show that the Board committed material error; it is merely a reiteration of Dow's prior arguments.

In Decision No. 44, the Board provided Dow all the relief to which Dow was entitled, if not more. Dow claimed that, pre-merger, it could have built out from its UP-served facility in Freeport, Texas, to either BNSF or SP in the vicinity of Texas City, Texas, and that the UP/SP merger would deprive it of its SP build-out option. DOW-11, p. 24. Dow asked the Board to condition the merger on trackage rights for a carrier other than BNSF to reach the same build-out point that SP would have used, and trackage rights to New Orleans and Memphis to duplicate SP's route structure. DOW-11, pp. 3-4.[2]

In Decision No. 44, the Board preserved Dow's build-out opportunities to two Class I carriers by requiring UP/SP to grant trackage rights to a carrier chosen by Dow. Decision

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[2] Dow also asked the Board to impose a condition that would have required Applicants to provide both BNSF and another rail carrier trackage rights to a point of build-out that would greatly improve Dow's pre-merger competitive position. The Board rejected this request, which Dow does not renew in its petition. Decision No. 44, p. 188.

No. 44, p. 188. However, the Board rejected as "overreaching" Dow's request that the new carrier be given additional trackage rights to New Orleans and Memphis. Id. The Board found that "Dow's claim that the benefits of a Texas City build-out to SP exceed the benefits of a Texas City build-out to any other carrier is not justified by the evidence of record" and that "preservation of Dow's build-out option requires only that trackage rights run from the build-out point to a connection with an independent Class I carrier." Id. The Board thus required Applicants to grant trackage rights to a carrier to be named by Dow from the build-out point to Houston, and thence to connections with KCS and BNSF at Beaumont, Texas. Id.

The condition imposed by the Board in favor of Dow provided Dow with more than was necessary to preserve Dow's pre-merger competitive position. Dow makes no attempt to explain how the Board's decision constitutes material error or to challenge the Board's factual findings; rather, Dow merely offers a different remedy that, it says, "will more effectively preserve Dow's build-out option." DOW-27, p. 1.

Dow's petition offers no more than a rehash of arguments that the Board rejected in Decision No. 44. First, Dow repeats its argument that BNSF will not have the same level of interest in a build-out that supposedly SP had. DOW-27, p. 3. See also DOW-11, pp. 26-29. Dow then complains that the new carrier, which it assumes will be KCS, "will not be in a competitive position comparable to the SP's pre-merger position" and thus that the pre-merger status quo would not be preserved. DOW-27, pp. 3-4.

In renewing these arguments, Dow ignores the Board's explicit findings in Decision No. 44 that "Dow's claim that the benefits of a Texas City build-out to SP exceed the benefits of a Texas City build-out to any other carrier is not justified by the evidence of record," and that "preservation of Dow's build-out option requires only that trackage rights run from the build-out point to a connection with an independent Class I carrier." Decision No. 44, p. 188. In other words, the Board has already found that there was nothing superior about SP's pre-merger position in relation to BNSF's post-merger position, and that any Class I carrier could serve the same function as SP in providing Dow with a second build-out option. Dow makes no attempt to demonstrate why the Board's findings are in error or to offer new evidence to rebut these findings.

In fact, the record clearly supports the Board's conclusions. Applicants presented substantial evidence demonstrating that Dow's ability to build out to BNSF, post-merger, would have even greater benefits for Dow than Dow's pre-merger ability to build out to SP, and that the opportunity to build out to yet another carrier would have no effect on Dow's competitive position. See UP/SP-231, Gehring, pp. 3-4; UP/SP-231, Gray, pp. 64-65; UP/SP-231, Peterson, pp. 54-56; UP/SP-231, Spero, pp. 12-16.

In suggesting that BNSF is not a potential build-out partner and that the new carrier will not have a route structure comparable to SP's, particularly with respect to New Orleans access, Dow continues to ignore the new routes that BNSF obtained as a result of its settlement agreement with Applicants. Dow's arguments simply repeat its original request that the new carrier receive trackage rights to New Orleans and Memphis. The Board described that original request as overreaching because the merger and settlement agreement provided BNSF, which pre-merger had no route from Houston to New Orleans and a much more circuitous route than UP or SP from Houston to Memphis, with a new route to New Orleans and a vastly improved route to Memphis. Thus, the Board correctly rejected Dow's request that a <u>third</u> carrier receive rights from Houston to New Orleans and from Houston to Memphis where, pre-merger, only two carriers had such rights. Dow's reargument of this point in its petition, and particularly its argument that the new carrier should receive rights to Baton Rouge so that it will have a direct route to New Orleans, DOW-27, p. 4, once again ignores BNSF's new routes to New Orleans.[3]

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[3] Dow repeats in passing its request that the railroad of its choice receive trackage rights from Houston to Memphis, again ignoring the fact that Applicants' settlement agreement with BNSF provided BNSF with a route to Memphis comparable to (continued...)

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 23rd day of September, 1996, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

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Dow's petition for reconsideration merely rehashes arguments that the Board has already rejected, and Dow offers no reason why the Board's holdings amounted to material error. Accordingly, Dow's petition should be denied.

Respectfully submitted,

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September 23, 1996

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[3](...continued)
UP's and SP's route. In addition, Dow for the first time raises concerns about access to Chicago. DOW-27, p. 4. Dow should have raised any such concerns long ago in its initial request for conditions. In any event, both BNSF and UP/SP have excellent routes from Houston to Chicago.

STB FD 32760 9-23-96 D 86264

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September 23, 1996

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BY HAND

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Twelfth Street and Constitution Avenue, N.W.
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Washington, D.C. 20423

Re: Finance Docket No. 32760, Union Pacific Corp., et al. -- Control & Merger -- Southern Pacific Rail Corp., et al.

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket are the original and twenty copies of Applicants' Reply to Petition for Reconsideration of Scott Manatt (UP/SP-279), Applicants' Reply to Petitions for Clarification of Entergy, BNSF and Geneva Steel, and "Letter Petition" of the Texas Railroad Commission (UP/SP-280), Applicant's Reply to Petition for Reconsideration of Dow Chemical Company (UP/SP-281), Applicants' Reply to Petition to Reopen of Charles M. Downey (UP/SP-282), and Applicants' Reply to Tex Mex's Petition to Reopen (UP/SP-283). Also enclosed is a 3.5-inch disk containing the text of these pleading in WordPerfect 5.1 format.

Please note that Applicants' Reply to Petitions for Clarification of Entergy, BNSF and Geneva Steel, and "Letter Petition" of the Texas Railroad Commission (UP/SP-280) and Applicants' Reply to Tex Mex's Petition to Reopen (UP/SP-283) have two versions: one, which is being served on all parties of record, contains material that is redacted for the public file, and the other contains "Highly Confidential" information. The "Highly Confidential" version of each document is clearly marked and is being separately filed with the Board under seal. The Board is being provided with 20 copies of both versions of each document. The "Highly Confidential" versions are also being served on parties on the

Restricted Service List that have indicated that they will adhere to the restrictions of the protective order.

I would appreciate it if you would date-stamp the enclosed extra copies of each document and return them to the messenger for our files.

Sincerely,

Michael L. Rosenthal

Enclosures

UP/SP-279

BEFORE THE
SURFACE TRANSPORTATION BOARD

ORIGINAL

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

APPLICANTS' REPLY TO PETITION FOR RECONSIDERATION OF SCOTT MANATT

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September 23, 1996

UP/SP-279

BEFORE THE
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

APPLICANTS' REPLY TO PETITION
FOR RECONSIDERATION OF SCOTT MANATT

Applicants UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL and DRGW[1/] hereby reply to the petition for reconsideration of Decision No. 44 filed by Scott Manatt on September 3, 1996.

The Board will reconsider a final decision only upon a showing of material error, new evidence or changed circumstances. 49 C.F.R. § 1115.3(b). Petitions to reopen are granted "only in the most extraordinary circumstances." Docket No. AB-33 (Sub-No. 55), Union Pacific R.R. -- Abandonment -- Between Echo & Park City & Between Keetley Junction & Phoston, In Summit & Wasatch Counties, UT, Decision served July 11, 1990, p. 2.

Mr. Manatt does not point to any new evidence or changed circumstances. Nor does he cite any material error in Decision No. 44. His brief paper simply refers in conclusory terms to the existing evidentiary record and to arguments that

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1/ The acronyms used herein are the same as those in Appendix B of Decision No. 44.

terms to the existing evidentiary record and to arguments that he and other parties made prior to the issuance of Decision No. 44. In Decision No. 44, the Board carefully reviewed the evidence and arguments of all the parties, and Mr. Manatt identifies no material error in the Board's determinations.

With specific regard to rail safety, the financial strength that UP will bring to SP as a result of the merger will promote safety, and the Board also imposed numerous environmental mitigation conditions that will enhance the safety of rail operations. See Decision No. 44, p. 220 n.261. Also, contrary to Mr. Manatt's contention, the Board carefully considered the impacts of the merger on employment (id., pp. 170-75) and the environment (id., pp. 218-25, 276-89), and the effects -- which will be beneficial -- of the directional operation of various UP and SP lines (id., p. 104).

Accordingly, Mr. Manatt's petition should be denied.

Respectfully submitted,

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September 23, 1996

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 23rd day of September, 1996, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760, and on

Director of Operations
Antitrust Division
Suite 500
Department of Justice
Washington, D.C. 20530

Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

Michael L. Rosenthal

STB FD 32760 9-23-96 D 86227

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September 23, 1996

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Vernon A. Williams
Secretary
Surface Transportation Board
Room 2215
1201 Constitution Avenue, NW
Washington, DC 20423

Re: Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Corporation, et al.

Dear Mr. Williams:

Enclosed for filing in the above-captioned docket proceeding, please find an original and twenty (20) copies of the Reply to Petition of the Kansas City Southern Railway Company to Reopen/Reconsider (MONT-11, OLIN-5, PPG-4) on behalf of Montell USA, Inc., Olin Corporation and PPG Industries, Inc. Also enclosed is a 3.5" disk containing the text of the pleading in Word Perfect 5.1.

Copies of the enclosed Reply are being served on All Parties of Record.

Very truly yours,

Martin W. Bercovici

Enclosures

MONT-11
OLIN-5
PPG-4

BEFORE THE

Surface Transportation Board

WASHINGTON, D.C. 20423

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

REPLY TO PETITION OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY TO REOPEN/RECONSIDER

Montell USA Inc., Olin Corporation and PPG Industries, Inc. (hereinafter sometimes referred to as "Lake Charles Area Shippers") respectfully submit this Reply to the Petition of the Kansas City Southern Railway Company ("KCS") seeking to reopen and reconsider STB Decision No. 44 regarding the conditions imposed by the Board to preserve rail competition available to the Lake Charles Area[1] as a consequence of the UP/SP merger, KCS-65.

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[1] As identified in the KCS Petition, the Lake Charles Area consists of three railroad stations: Lake Charles, Westlake and West Lake Charles. KCS Petition at p. 1. The various rail stations are within 10-12 miles of each other. See MONT-9 at pp. 3-4.

I. Background

As relevant to Lake Charles Area Shippers concerning the KCS Petition, Westlake and West Lake Charles both were served pre-merger by the KCS and the SP; and pursuant to reciprocal switching arrangements, Westlake also was served by the UP.[2] Due to its route structure, the KCS provided effective competition to SP routing for the majority of the traffic of interest to Lake Charles Area Shippers only through joint-line routing with the UP.[3] Consequently, merger of the UP and SP threatened the competitive routing alternatives of Lake Charles Area Shippers, absent the imposition of protective conditions.

In comments concerning the UP/SP merger application, the competitive loss to Lake Charles Area Shippers was addressed not only by Montell, Olin and PPG, but also by KCS. In its comments concerning the proposed merger, KCS specifically referenced the Lake Charles Area; and it illustrated the potential loss of competitive rail service by reference to Montell and cited to "the filing of Montel Plastics (sic) for a complete discussion of Montel's (sic) competitive situation." See KCS-33 at p. 18.

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[2] See KCS Petition at p. 3; MONT-2/OLIN-2; Verified Statement of PPG.

[3] Rail access to Lake Charles, while embraced within the broad terms of the KCS Petition, does not appear to be at issue inasmuch as Lake Charles, pre-merger, was served by the UP, and by the KCS only by reciprocal switching agreement. Lake Charles Area Shippers do not understand that KCS is objecting to Applicants granting BNSF rights to serve points on the line serving Lake Charles which is solely controlled by UP/SP.

As a consequence of complaints concerning "3-to-2" situations that in reality are "2-to-1" points due to the routing limitations of the independent carrier and its reliance upon a "friendly connection" with one of the merging carriers, Applicants provided for BNSF access to Lake Charles and Westlake in their settlement agreement with CMA. That agreement, however, did not cure the problems faced by Lake Charles Area Shippers for three reasons: (i) the de facto "2-to-1" reduction at West Lake Charles was not addressed in the CMA settlement, (ii) the BNSF's access at Lake Charles and Westlake was restricted to shipments moving between those points and either New Orleans or Mexico, and (iii) BNSF was subjected to payment to UP/SP of a phantom haulage fee for Westlake traffic as a condition of access. In subsequent pleadings to the Board, the inadequacy of the CMA settlement to resolve the potential loss of rail competition in the Lake Charles Area due to these limitations and conditions was addressed by Lake Charles Area Shippers,[4] and also by KCS.[5] Applicants thereafter supplemented the CMA agreement by granting BNSF access to West Lake Charles, albeit subject to the same service limitations and phantom haulage fee conditions as existed in the original CMA settlement for Westlake.[6]

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[4] See Further Comments of Montell, MONT-5, Brief of Montell, MONT-9, and Further Comments of PPG Industries (May 24, 1996).

[5] See Brief of KCS at p. 22, KCS-60.

[6] See UP/SP-266.

In its decision approving the UP/SP merger, the Board accepted the arguments of the Lake Charles Area Shippers and KCS; and the Board adopted conditions to preserve competitive rail service opportunities. First, the Board accepted, and imposed as a condition, the BNSF access granted by Applicants to the Lake Charles Area, subject to striking both the geographic limitations on BNSF service and the phantom haulage fee. Additionally, the Board granted interchange privileges between KCS and BNSF at Texarkana and Shreveport, allowing BNSF the right to handle traffic interchanged with KCS along the trackage rights lines in the Houston-St. Louis corridor, in order to ameliorate the loss of KCS' "friendly connection" with the UP.

KCS, having recognized the potential loss of competitive rail service in the Lake Charles Area from the merger as originally proposed, having been critical that the CMA agreement did not resolve the concerns raised, having endorsed the Comments and the Further Comments of Montell,[7] and having offered no suggestions for remedying the loss of competitive service to the Lake Charles Area other than divestiture or denial, now argues that the Board adopted inappropriate remedies to protect competitive rail service in the Lake Charles Area . The Lake Charles Area Shippers respectfully submit that the KCS arguments both are untimely and inaccurate and urge the Board to DENY the KCS petition to reopen.

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[7] See KCS-33 at p. 18; KCS-60 at p. 22, n. 44.

II. KCS' Challenge to BNSF Access to the Lake Charles Area in the CMA Agreement Is Untimely.

KCS alleges that its petition for reconsideration is warranted "for the reason that the Commission's (sic) decision has been affected materially by new evidence and contains material error,"[8] and KCS asserts that it was "not allowed to submit argument and evidence on the CMA agreement . . . [and] this is the first opportunity that KCS has to submit argument and evidence on these issues."[9] KCS is wrong on all three grounds asserted for consideration of its petition.

All issues now raised by KCS concerning BNSF access to the Lake Charles Area squarely were presented by the CMA agreement, submitted to the Board on April 19, 1996.[10] While Applicants did not provide for BNSF access to West Lake Charles until the supplemental CMA agreement, filed June 27, 1996,[11] BNSF access to Westlake and West Lake Charles is virtually identical, as detailed by KCS in its petition. Both Westlake and West Lake Charles pre-merger were served jointly by KCS and SP on lines subject to joint ownership and/or joint facilities agreements.[12] As described by KCS, 39% of the total area traffic is generated

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[8] KCS Petition at p. 1.

[9] KCS Petition at p. 2, n. 4.

[10] See UP/SP-219.

[11] UP/SP-266.

[12] The rail line serving West Lake Charles passes through Westlake. See KCS Petition at Ex. A, Attach. A; see also MONT-9 at p. 4.

at Westlake; and 63% of the traffic which KCS originates is from Westlake shippers.[13] Accordingly, notwithstanding that BNSF access to West Lake Charles was not added until late June, KCS well was apprised of the proposed BNSF access along the line to which it now claims to exercise dominion and control. KCS also cites to the Board's removal of the geographic restriction on BNSF service to the Lake Charles Area as grounds for reconsideration. The fact that BNSF access was restricted to serving traffic moving between the Lake Charles Area and New Orleans or Mexico is irrelevant to the issue of whether BNSF access to Westlake and West Lake Charles is appropriate or inappropriate, and particularly so inasmuch as KCS endorsed the criticism of the CMA settlement by Montell and others related to the limitations and conditions imposed.[14]

KCS further is erroneous in asserting that it was precluded from submitting argument and evidence on the CMA agreement. In Decision No. 31, served April 19, 1996, the Board interpreted its procedural orders to permit a non-applicant party to file responsive evidence and comments to conditions proposed by another party and to the comments of other parties. The due date for such responsive evidence and argument was April 29. Considering that the CMA settlement was filed on April 19, KCS had ten days in which to file comments on the CMA settlement. Montell filed comments on the CMA settlement, as did a number of

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[13] KCS Petition at pp. 3-4.

[14] <u>See</u> KCS-60 at p. 22, n. 44.

other parties.[15] Rather than file comments on the CMA settlement, KCS elected to submit a Motion to Require Amendment to Application or in the Alternative to Allow Parties to Conduct Discovery and Submit Evidence Relating to Applicants' Settlement Agreement with CMA.[16] This Motion was filed on April 29, the due date for the submission of further comments.

The Board denied the KCS Motion; however in doing so, the Board specifically stated that its denial "does not preclude additional information on the CMA settlement agreement from being filed. ... [A]pplicants have stated that their witnesses and BN/Santa Fe's witnesses who address the CMA settlement agreement in the April 29, 1996 filings may be deposed. Such discovery may take place, and information gained in such depositions may be included in the briefs, due June 3, 1996."[17] KCS' response to the Board's invitation to address the CMA settlement was met with a petition to reopen Decision No. 35.[18]

In its Petition to Reopen Decision No. 35, KCS discussed the UP/SP and BNSF rebuttal evidence and the deposition testimony of those witnesses concerning the CMA settlement. Under the heading "Effects Upon Competition," the petition specifically addressed both the omission from the CMA agreement of West Lake Charles and the geographic restrictions on BNSF service--the very elements

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[15] See MONT-5, SPI-16, CR-37, DOW-20 and QCC-4.

[16] KCS-49.

[17] Decision No. 35, at p. 3 (May 9, 1996).

[18] KCS-57.

KCS now claims it did not have the prior opportunity to confront through evidence and argument. The Board denied the request to reconsider Decision No. 35, and in doing so it reiterated that KCS could submit information garnered through deposition in its brief.[19] The brief filed by KCS, while challenging the BNSF/CMA trackage rights agreements, does not address any of the issues raised in the Petition to Reopen; rather, as discussed above, the brief endorsed the arguments critical of the limitations on BNSF access to the Lake Charles Area, which led to the conditions which KCS now challenges.[20]

The issues concerning the trackage rights granted to the BNSF to serve Westlake and West Lake Charles were well identified and argued before the Board between April 19 and June 3, 1996. Accordingly, such issues do not constitute new or changed circumstances, and may not form the basis for reopening Decision No. 44. See Chicago and Northwestern Trans. Co. - Construction and Operation Exemption - City of Superior, Douglas County, WI - Petition for Issuance and Order Pursuant to 49 U.S.C. 10901(d), F.D. No. 32433 (Sub-No. 1), served January 12, 1995 ("UP's recent acquisition of control of CNW has no bearing on the disposition of these proceedings [because their relationship] was public

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[19] Decision No. 38 at p. 5 (served May 31, 1996).

[20] On brief, KCS does challenge the request that BNSF be accorded terminal trackage rights over KCS lines at Beaumont and Shreveport, and so was very aware of the trackage rights issues. KCS-60 at pp. 41-43.

knowledge when these proceedings were initiated and therefore may not be used as a reason to reopen these cases").

III. KCS' Position Regarding Lake Charles Area Access Is Erroneous and Is Inconsistent with KCS' Position on the UP/SP Merger.

KCS argues that the Board imposed the conditions of which it now complains in response to arguments concerning the "so-called 'monopoly bottleneck' problem [and a] second argument, made mainly by SPI, [which] addressed the plastics shippers' need for adequate storage facilities." KCS characterizes the second argument as being "related to the Dayton area and not to the adequacy of storage facilities in the Lake Charles area."[21] Building on these faulty premises, KCS argues that the conditions imposed in Decision No. 44 consequently will benefit "even those that will suffer no competitive harm from the merger."[22]

First and foremost, *all* Lake Charles Area shippers would have suffered harm from the merger as initially proposed, and even as modified by the CMA settlement. Through reciprocal switching, Lake Charles and Westlake pre-merger were served by the UP, SP and KCS; and West Lake Charles was served by the SP and KCS. Notwithstanding its service to the Lake Charles Area, KCS' route structure was non-competitive with the UP and SP in many corridors on a stand-alone basis. In its Petition to Reopen, KCS acknowledges its need to interline traffic destined

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21/ KCS Petition at pp. 6-7 and n. 7.

22/ KCS Petition at p. 9.

to points such as New Orleans, Houston and the Laredo Mexican gateway. However, the loss of competition was not limited to the routes discussed by KCS in its Petition; in addition, KCS must interline to offer competitive service to the highly important St. Louis gateway.[23] Consequently, all Lake Charles Area Shippers would suffer competitive harm in the absence of effective, ameliorating conditions.

Even conceding that there may be some few routes, e.g., Lake Charles to Kansas City, which would not be materially and adversely affected by the merger as proposed, KCS itself argued vociferously in the merger that reduction of competition from three carriers to two carriers constituted substantial harm.[24] Moreover, the TexMex, in which KCS owns a 49% interest, has petitioned the Board to reopen Decision No. 44 based upon concerns about routing restrictions, similar to those the Board struck in the CMA settlement applicable to BNSF access to the Lake Charles area points, and due to reduction in competition in the Houston market from three carriers to two.[25] Certainly, the

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[23] See Decision No. 44 at p. 152. For many Lake Charles Area shippers the St. Louis and other eastern gateways are equally, if not more, important than New Orleans, Houston, etc. See MONT-2/OLIN-2, Verified Statement of R. Granatelli at ¶ 7 (54% to Chicago/Memphis/St. Louis vs. 4% to New Orleans of 1995 outbound shipments for Montell); and Verified Statement of J. Badger at ¶ 8 (48% to St. Louis vs. 32% to New Orleans for Olin). See also Montell Brief, MONT-9 at pp. 10-11, and Badger Verified Statement at ¶ 9 regarding the ineffectiveness of the MidSouth route as a competitive alternative.

[24] See KCS-33 at pp. 35-42.

[25] See TM-44.

it states that it "has constructed and provides extensive storage for plastics and other products . . ."[28]

The conditions imposed by the Board fully are consistent with governing principles. The circumstances of which KCS complains arise from the confluence of two separate elements. First, the Board was attempting to protect KCS against the loss of its "friendly connection" and so granted BNSF interchange rights with KCS at Shreveport and Texarkana in order that KCS would have the opportunity to participate in the traffic flows between the Lake Charles area and St. Louis or Chicago.[29] Separately, the Board gave recognition to the voluntary settlement entered into by Applicants with CMA, but concurrently recognized that certain of the conditions on BNSF access to the Lake Charles Area effectively rendered the voluntary settlement agreement a nullity for BNSF and Lake Charles Area Shippers. The Board accordingly struck those conditions. Reaching principled decisions on two separate elements affecting the Lake Charles Area traffic does not render the Board's action inconsistent with its enunciated decisional standards.

IV. The Board Has Full Power to Impose the Conditions Adopted.

KCS argues that the Board does not have authority to adopt the conditions imposed absent KCS' consent or a terminal trackage rights application. Contrary to KCS' argument, the Board has

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28/ KCS Petition at p. 12.

29/ Decision at p. 152.

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86221

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September 23, 1996

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Hon. Vernon A. Williams, Secretary
Surface Transportation Board
Room 2215
1201 Constitution Avenue, N.W.
Washington, DC 20423

Re: Finance Docket No. 32760

Dear Mr. Williams:

Enclosed for filing please find an original and 20 copies of Chemical Manufacturers Association's Comments in Response to Petitions for Clarification and Reconsideration ("CMA-14"). Also enclosed is a diskette with the document in WordPerfect 5.1.

Sincerely,

Scott N. Stone

Counsel for Chemical Manufacturers Association

ENTERED
Office of the Secretary
SEP 23 1996
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cc: Thomas E. Schick, Esq.

CMA-14

BEFORE THE
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 CORPORATION AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

CHEMICAL MANUFACTURERS ASSOCIATION'S COMMENTS IN RESPONSE TO PETITIONS FOR CLARIFICATION AND RECONSIDERATION

The Chemical Manufacturers Association ("CMA") submits these comments in response to the petitions for clarification filed by Applicants, Burlington Northern/Santa Fe ("BNSF") and Geneva Steel and the petition for reconsideration filed by Kansas City Southern ("KCS"). The subject matter of the BNSF and Geneva Steel petitions is echoed with variations in the petitions filed by, among others, Entergy Services, et al., and CMA's comments in response to the BNSF and Geneva Steel petitions are to that extent applicable also to the latter petitions.

Summary of CMA's Position

The Board in Decision No. 44 approved the merger here only after imposing carefully balanced conditions designed to ensure, in large part, that the BNSF would have access to, and sufficient incentives to compete for, traffic that would otherwise suffer a diminution of actual or potential rail competition following the merger. Those conditions went beyond simply giving BNSF access to traffic at 2-to-1 points. For example, BNSF was given access to traffic at designated 3-to-2 points (including points in Lake Charles and Shreveport, Louisiana) where the third carrier, because of route limitations, could not effectively compete with the merged system over some or all routes. BNSF was also given access to new industries and to traffic moving to and from BNSF by means of build-ins/build-outs and transloading points, in part expressly to remedy the loss of potential competition that would otherwise be suffered by shippers at solely served ("1-to-1") points. In addition, the Board mandated BNSF access to at least a portion of traffic presently moving under contract with Applicants by opening at least 50% of Applicants' contract volume to BNSF at 2-to-1 points.

Each of these important conditions is now under question. CMA submits that, to the extent any clarification of those conditions is required, it should not undermine the fundamental thrust of the conditions to ensure that rail-to-rail competition continues unimpaired following the merger, and in particular that the BNSF is given the means and incentives (in terms of traffic densities) to enter the new markets available to it after the merger and compete aggressively for the traffic. Efforts to roll back or begin to unravel these Board-imposed conditions should be firmly rejected.

CMA wishes to comment specifically on the following points:

(1) Applicants' request that the new transloading facilities via which traffic will move to and from BNSF's trackage rights lines not be allowed to handle traffic originating or terminating on the trackage rights line itself;

(2) KCS's request that the Board rescind the condition granting BNSF access to traffic at points in Lake Charles, West Lake Charles and Westlake, Louisiana; and

(3) BNSF's and Geneva Steel's requests that the condition giving BNSF access to 50% of contract volumes be clarified and expanded.

CMA's position on these points may be summarized as follows:

(1) CMA opposes restricting BNSF's access to traffic at new transloading facilities;

(2) CMA opposes rescinding BNSF's access to traffic at points in the vicinity of Lake Charles, Louisiana; and

(3) CMA supports giving shippers the responsibility for designating which 50% of their contract volume is opened to BNSF, and the position that in opening volume to BNSF, shippers should not be subjected by Applicants' merged system to any negative consequences. CMA is concerned that the other various suggested clarifications to the 50% condition are excessively complex and prescriptive, and therefore does not endorse them.

CMA's position on these points is set out in more detail below.

I. Traffic To and From New Transloading Facilities Should Not Be Restricted.

The Board, in imposing conditions, expanded on a provision in the CMA settlement agreement by stating that BNSF post-merger would have access to new facilities on its trackage rights lines, regardless of whether the trackage rights were over UP system or former SP lines, and that those new facilities would specifically include transloading facilities. Dec. No. 44 at 124, 145-46. In imposing this and other broad-based conditions to augment the BNSF and CMA agreements, the Board's guiding principle was "to allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP." Id. at 145. The Board made clear that its new facility condition, like its build-in/build out condition, was designed to enable the BNSF to be an effective replacement for lost rail competition at both 2-to-1 and affected 1-to-1 points. Dec. No. 44 at 124.

UP suggests that while the Board ordered that BNSF may serve new transloading facilities anywhere it has trackage rights, such transloading facilities should be restricted from handling traffic originating or terminating on the BNSF trackage rights line itself.

However, restricting the traffic that could potentially use new transloading facilities would not permit BNSF to replicate the competition otherwise lost as a result of the merger, as intended by the Board. One of the ways in which the merger (absent conditions) would diminish competition is by eliminating the threat of build-ins or build-outs, which often provides a very real constraint upon railroad pricing even at solely served (1-to-1) points. Indeed, regarding build-ins and build-outs, the Board expanded on the CMA agreement in several respects, including the provision for future build-ins/build-outs to or from lines over which BNSF has trackage rights regardless of whether the BNSF trackage rights are over UP or SP lines. The Board thereby in effect imposed "symmetry" as between shippers who happened to be located on UP lines pre-merger and those who happened to be located on SP lines. This effort to impose symmetry extended as well to the Board's condition giving BNSF access to new facilities: BNSF is to be able to serve new facilities (including transloading facilities) regardless of whether the trackage rights lines on which those facilities are located happen to fall on UP or former SP lines. Dec. No. 44 at 124.

This symmetry would be lost if the traffic which BNSF is allowed to serve via transloading facilities were restricted as requested by Applicants. That is, if Applicants' request were granted, solely-served shippers who happen to be located on the lines over which BNSF is granted trackage rights (as opposed to being located on the parallel lines of the other merger partner) would not have the benefit of competition that would in any way replicate the competitive effect of potential build-ins or build-outs. Post-merger, they cannot build out to the parallel lines, because BNSF will not have trackage rights on those parallel lines. The only way in which BNSF's service will, in the words of the Board, "replicate the competition that would otherwise be lost when SP is absorbed into UP," is for BNSF to be allowed to serve new transloading facilities that would be open to any traffic, including traffic to and from the lines over which BNSF has trackage rights.

II. <u>BNSF Access to Points in the Lake Charles Area Should Be Affirmed.</u>

KCS's petition seeks to justify removing a key element of the BNSF and CMA agreements -- access by BNSF to shippers at points in Lake Charles, West Lake Charles, and Westlake Louisiana. KCS complains that the remedy chosen by the Board should have been more narrowly tailored and that the Board should have undertaken certain procedural steps (including a formal application under §11103 with respect to terminal facilities in West Lake Charles).

The portion of the Board's decision dealing with post-merger conditions in the Lake Charles area (Dec. No. 44 at 152-53) is one of the most detailed and thoroughly articulated sections of the decision. Plainly, the Board has already carefully considered the issues raised by KCS, including what points and routings need to be opened to the BNSF to ensure that it has access to a full range of destinations and can otherwise offer fully effective competition to the merged system. Efforts by the KCS to begin to unravel that balanced and carefully-thought-through set of remedies must be rejected.

Regarding KCS's procedural objections, CMA is confident that the Board can assist the involved railroads in crafting whatever compensation terms may be fair and lawful. To the extent additional procedural steps may be necessary, the Board should implement them in a manner consistent with the spirit of Decision No. 44.

III. The 50% of Contract Volume Open to BNSF Should Be Selected by the Shipper, and the Shipper Should Not Suffer Negative Consequences From Opening the Traffic.

CMA supports the concept advanced by BNSF, Geneva Steel and others that the 50% of each shipper's traffic that is opened to competition by the BNSF should be determined by the shipper itself, and the proposal of Geneva Steel that states succinctly that shippers, in opening volume to BNSF, should not be subjected by the Applicants to any negative consequences. CMA supports these positions in large part because CMA believes that several of the other proposals advanced by BNSF and others for interpreting the 50% provision -- however well intentioned and potentially beneficial to shippers -- are excessively cumbersome and prescriptive, and do not comport with the spirit of the CMA agreement to leave the details of contract negotiation to the parties themselves. Rather than imposing detailed rules -- such as that suggested by BNSF to prohibit UP from offering any contract modification or concession without causing the entire contract to be put up for bid by the BNSF -- CMA believes it would be far simpler and more equitable to leave to each shipper the decision about what contract traffic to open to BNSF, and caution the parties that shippers opening traffic to the BNSF should not be subjected to negative consequences.

BNSF and others have raised credible evidence that some clarification of the 50% rule is necessary to ensure that it permits meaningful and immediate access by BNSF to a critical mass of traffic. Certainly, if the Applicant railroads were to have the unilateral right to select the traffic to be opened to the BNSF, and were to "open" to BNSF only traffic for which BNSF could not effectively compete, the benefit of the 50% rule would be lost. Similarly, if Applicants were to exact economic penalties for shippers' decisions to open volume to the BNSF, the spirit underlying the 50% condition would be thwarted. Allowing shippers to choose which traffic to open, free from negative commercial consequences for their remaining volume shipped via the Applicants' merged system, would ensure that BNSF in fact has both the ability and economic incentive to enter and compete vigorously in the new markets open to it under the conditions imposed by the Board.

Conclusion

For the foregoing reasons, CMA respectfully asks that the Board:

(1) Deny Applicants' request to clarify Decision No. 44 to restrict the traffic available to new transloading facilities on the BNSF trackage rights lines;

(2) Deny KCS's petition to reconsider and rescind the condition granting BNSF access to traffic at points in the vicinity of Lake Charles, Louisiana; and

(3) Grant the portions of BNSF's and Geneva Steel's petitions that would clarify that shippers have the responsibility for designating which 50% of their contract volume is opened to BNSF, and the portion of Geneva Steel's petition that would clarify that in opening volume to BNSF, shippers should not be subjected by Applicants' merged system to any negative consequences.

Respectfully submitted,

Scott N. Stone
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, DC 20037
(202) 457-6335

Outside counsel for Chemical
Manufacturers Association

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Thomas E. Schick, Assistant
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(703) 741-5172

Inside counsel for Chemical
Manufacturers Association

CERTIFICATE OF SERVICE

I hereby certify that copies of Chemical Manufacturers Association's Comments in Response to Petitions for Clarification and Reconsideration have been served this 23rd day of September, 1996, by hand to counsel for Applicants and by first-class mail, postage prepaid on all parties of record in Finance Docket No. 32760.

Scott N. Stone
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STB FD 32760 9-16-96 D 86125

84125

Corning Incorporated
Corporate Transportation & Distribution
HP AB 02 10
Corning, New York 14831
607 974-9000
fax 607-974-6310

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SEP 16 1996
MAIL MANAGEMENT
I.C.C.

September 13, 1996

CORNING

Honorable Vernon A. Williams
Secretary,
Surface Transportation Board
12th St. & Constitution Ave. NW
Room 2215
Washington, DC 20423
Attention: Finance Docket 32760

Dear Mr. Williams:

Corning Incorporated respectfully requests clarification of the Surface Transportation Board's decision permitting the merger of the Union Pacific and the Southern Pacific in two ways:

(1) To allow shippers to solicit a competitive bid from the BN/Santa Fe for all traffic affected by an offer from the Union Pacific/Southern Pacific to modify any of the terms of existing contracts where the merger results in a reduction in rail service from two carriers to one, and

(2) Grant the BN/Santa Fe the right to serve any new facilities, including new transload facilities, located on any UP or SP line over which BN/Santa Fe is to receive trackage rights.

Corning believes that these two provisions will not only preserve the competitive situation which existed prior to the merger, but will also promote additional competition for possible future moves. It is only through competition that we can maintain our costs for transporting raw materials necessary for the economic manufacturing of our products.

Thank you for your consideration of this request.

Sincerely,

Edward C. Hunkele

Edward C. Hunkele
Manager, Domestic Distribution

ENTERED
Office of the Secretary

SEP 18 1996

5 Part of Public Record

STB FD 32760 9-11-96 D 85993

Luria Brothers

20521 Chagrin Blvd.
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Fax: 216 752 4462
email wilmots@aol.com

A Division of Connell Limited Partnership

Dennis E. Wilmot
Manager, Transportation

85993

Luria Brothers

September 5, 1996

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MAIL MANAGEMENT
I.C.C.

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
12th Street & Constitution Avenue, N.W.
Washington, DC 20423

Dear Secretary Williams: FD 32760

I am writing to address concerns about the STB decision to approve the Union Pacific-Southern Pacific merger. Luria Brothers believes that decision limits competition in Texas, Houston in particular, to a degree harmful to the general shipping public.

As the Manager of Transportation for Luria Brothers, I am responsible for all rate, service, and operations issues related to rail transportation. Luria is a major broker throughout North America and Mexico of scrap iron and steel with significant business shipped from and through the Houston area. Competitive rail service and rates is essential to our success and survival.

Over the past decade our competitive options will have been reduced 60% to just two (2) rail carriers. These mega-carriers will control the vast majority of scrap marketed throughout the entire West, including Texas. All ferrous metals commodities are exempt from ICCTA regulations. Only competition can prevent the giant carriers from dictating their market at the expense of the entire industry.

One of the conditions in the STB decision grants the Texas-Mexican Railway (TM) trackage rights between its line in Corpus Christi and Beaumont but with restricted access at Houston. I strongly urge the STB to lift all service restrictions on the TM giving it full local service access in the Greater Houston area. Full access would provide for a viable third competitor that could connect with other carriers in Beaumont including the UP/SP, BNSF, and the KCS. That competition is crucial to the future survival of metals commerce in and through Texas.

Respectfully Submitted,

Dennis E. Wilmot

Dennis E. Wilmot
Manager, Transportation

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Office of the Secretary
SEP 12 1996
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STB FD 32760 9-11-96 D 85977

85977

RIVERWOOD
INTERNATIONAL

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MAIL
MANAGEMENT
STB

September 3, 1996

Mr. Vernon A. Williams
Secretary, Surface Transportation Board
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20035

Dear Secretary Williams:

I am writing in response to the recent decision by the Surface Transportation Board approving the Union Pacific-Southern Pacific merger. My company does not believe the decision provides for adequate competitive rail options in the Greater Houston area, even with the conditions imposed in the decision.

As the Vice President, Purchasing & Logistics for Riverwood International Corporation, I am responsible for all transportation and distribution. Riverwood is a major producer of coated board primarily used in the beverage business. We ship this board out of the Gulf to all parts of the world. We currently ship out of Houston to Australia and the Asia Pacific markets. We also purchase chemicals and raw materials from producers located along the ship channel. Securing competitive rail service is essential to our ability to effectively service our customers as well as develop our market opportunities.

Just eight years ago five rail carriers served the Greater Houston area. In less than 10 years, shippers competitive options will be reduced to just two carriers. With the recently completed BNSF merger and the upcoming UP-SP merger, these two giant carriers will control 88 percent of the petro-chemical rail carloads to and from Texas and 100 percent of the petro-chemical rail carloads originating or terminating in the Houston area. These limited rail options do not provide adequate competition to keep service levels high and rates low.

One of the conditions outlined in the STB's UP-SP decision grants the Texas Mexican Railway (Tex Mex) trackage rights between its line in Corpus Christi and Beaumont but with restricted access at Houston. I strongly urge the STB to lift all service restrictions on the Tex Mex giving it full local service access in the Greater Houston area. Full access would provide for a viable third rail competitor in Houston that could connect with other carriers in Beaumont including the Union Pacific, BNSF and the Kansas City Southern Railway.

ENTERED
Office of the Secretary
SEP 11 1996
5 Part of Public Record

Respectfully yours,

D R Tieken

Donald R. Tieken
Vice President, Purchasing & Logistics

DRT/kh

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STB FD 32760 9-13-97 D 88924

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January 13, 1997

RECEIVED
JAN 13 1997
I.C.C. BUILDING
GUARD DESK

BY HAND

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Twelfth Street and Constitution Ave., N.W.
Washington, D.C. 20423

-88924 -88925

Re: **Finance Docket Nos. 32760 & 32760 (Sub-No. 10)**

Dear Secretary Williams:

Enclosed for filing in the above-captioned dockets are the original and 20 copies of Applicants' Reply to Longhorn's Request for Extension of Time (UP/SP-293). Kindly date stamp the extra copy of this filing and return it with our waiting messenger.

Sincerely,

David L. Meyer

David L. Meyer

cc: Counsel for CMTA,
BNSF and Longhorn

ENTERED
Office of the Secretary
JAN 14 1997
5 Part of
Public Record

UP/SP-293

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 - 88974

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, SPSCL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

Finance Docket No. 32760 (Sub-No. 10) - 88975

RESPONSIVE APPLICATION -- CAPITAL METROPOLITAN
TRANSPORTATION AUTHORITY

APPLICANTS' REPLY TO LONGHORN'S
REQUEST FOR EXTENSION OF TIME

In Decision No. 44, the Board ordered the interested parties (CMTA, Longhorn, UP/SP and BNSF)[1/] to submit agreed-upon terms or separate proposals respecting the precise details for implementation of the CMTA condition by December 10, 1996. In Decision No. 65, at the request of CMTA, BNSF and Longhorn, the Board extended this deadline to January 9, 1997. Decision No. 65, p. 2. CMTA, BNSF and Applicants each filed such submissions on January 9. See

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1/ The acronyms used herein are the same as those in Appendix B to Decision No. 44.

CMTA-14/BNSF-75; UP/SP-292. Longhorn, the current operator of CMTA's Giddings-Llano line, did not. Instead, in an unnumbered pleading dated January 6, 1997 and entitled "Longhorn Railway Company's First Request for Extension of Time,"[2] Longhorn has requested an additional thirty days "in order to prepare and file a brief containing a comprehensive objection" to CMTA's election of Elgin as the point of interchange between BNSF and the Giddings-Llano line. See Longhorn Request, pp. 1-2.

The primary applicants, UPC, UPRR, SPR, SPT, SSW, SPSCL and DRGW,[3] oppose Longhorn's new request for an extension. Most fundamentally, Longhorn provides no valid excuse for its failure to comply with the deadline established by Decision No. 65. There is no reason Longhorn could not have prepared and filed a "brief" setting forth its position, together with any information it might believe supports that position, by January 9.

Longhorn's position, apparently, is that interchange between Longhorn and BNSF at Elgin is inferior and that CMTA should not be permitted to choose it over Giddings as the point of interchange between BNSF and the Giddings-Llano

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[2] Longhorn's cover letter erroneously suggests that the document is "CMTA-13, BNSF-74, LHRR-1," which was Longhorn's first extension request (joined by CMTA and BNSF) filed on December 10, 1996. This pleading is Longhorn's second extension request, filed on behalf of Longhorn alone.

Moreover, although the document is dated January 6, its certificate of service indicates that it was not served until January 7, and the copy received by Applicants (not until January 13) was not post-marked until January 8.

[3] MPRR merged into UPRR on January 1, 1997.

line. See Longhorn Request, p. 2. Yet Longhorn has been aware since August 12, 1996, when Decision No. 44 was served, that Elgin was one of the interchange points that CMTA might choose in the exercise of its unilateral choice between Elgin and Giddings. Decision No. 44, pp. 182-83. Moreover, Longhorn has been on express notice since no later than December 2, 1996 (before the first deadline established by Decision No. 44), that CMTA was inclined toward the selection of Elgin as the interchange point.[4/] There is absolutely no reason Longhorn could not have submitted a "brief" or other filing setting forth its position regarding the Elgin interchange by January 9, 1996, if not much earlier.

Moreover, for the reasons summarized in Applicants' January 9 Submission (UP/SP-292), Longhorn's position is irrelevant to the issues to be addressed by the Board in implementing CMTA's choice of Elgin.[5/] The Board gave CMTA the unilateral right to choose Elgin or Giddings, but not both,[6/] and CMTA has now chosen Elgin after careful deliberations -- including consultations with Longhorn -- and taking into account the factors relevant to the well-being of Giddings-Llano shippers -- not just the short-run interests of the line's current operator. See CMTA-14/BNSF-75, pp. 2-3; UP/SP-292, pp. 2 & n.3, 6.

[4/] See Letter from Monica Palko to David Meyer (for UP/SP), Adrian Steel (for BNSF) and Donald Cheatham (for CMTA), Dec. 2, 1996.

[5/] Applicants are also prepared to demonstrate, with evidence if necessary, that Longhorn's apparent views regarding Elgin are also entirely lacking in merit. See UP/SP-293, pp. 4-8.

[6/] Decision No. 44, p. 183; Decision No. 65, p. 1.

As explained in Applicants' Submission Respecting Implementation of CMTA Condition (UP/SP-292), there is no justification for further delay in the implementation of that condition. Accordingly, Longhorn's request for a further extension of time should be denied.

Respectfully submitted,

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Attorneys for Applicants

January 13, 1997

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Decision No. 65, I have this 13th day of January, 1997, served the foregoing document by hand to:

Albert B. Krachman, Esq.
Monica J. Palko, Esq.
Bracewell & Patterson, L.L.P.
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<u>Attorneys for CMTA</u>

Erika Z. Jones, Esq.
Adrian L. Steel, Esq.
Mayer, Brown & Platt
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<u>Attorneys for BNSF</u>

and by Federal Express to:

Donald Cheatham
The Longhorn Railway Company
3007 Longhorn Boulevard
Suite 105
Austin, TX 78758-7632

David L. Meyer

David L. Meyer