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SERVICE DATE - LATE RELEASE DECEMBER 21, 1998

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32760 (Sub-No. 21)

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

[GENERAL OVERSIGHT]

(Decision No. 13)

Decided: December 18, 1998

We discuss, in this decision, the conclusions we have reached in the second annual round of the UP/SP general oversight proceeding.<sup>1</sup> We also discuss, in this decision, the conclusions we have reached with respect to certain related matters.

**BACKGROUND**

UP/SP Merger Proceeding. In Merger Dec. No. 44 (served August 12, 1996),<sup>2</sup> we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) subject to various conditions, including, among many others, a 5-year oversight

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<sup>1</sup> We will refer to the STB Finance Docket No. 32760 (Sub-No. 21) proceeding as the “general oversight” proceeding to distinguish it from the STB Finance Docket No. 32760 (Sub-No. 26) “Houston/Gulf Coast oversight” proceeding.

<sup>2</sup> Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 44 (STB served Aug. 12, 1996) (Merger Dec. No. 44).

condition<sup>3</sup> and the terms of the BNSF agreement.<sup>4</sup> The common control authorized in Merger Dec. No. 44 was consummated on September 11, 1996, and the mergers authorized in Merger Dec. No. 44 were completed on February 1, 1998.

First Annual Round Of General Oversight Proceeding. In General Oversight Dec. No. 10 (served October 27, 1997),<sup>5</sup> we addressed the issues that had been raised in the first annual round of the general oversight proceeding. We concluded that the UP/SP merger, subject to the conditions we had imposed, had not caused any substantial competitive problems, and that there was no necessity, at that time, for any major adjustments in the imposed conditions. See General Oversight Dec. No. 10, slip op. at 2-3.

Ex Parte No. 573 and Service Order No. 1518 Proceedings. Although we concluded that the UP/SP merger had not produced, as of mid-1997, any substantial competitive problems, it had become, by that time, evident that the UP rail system was experiencing serious service problems. In response to these problems, we took, in the STB Ex Parte No. 573 and STB Service Order No. 1518 proceedings, a range of actions, the most prominent of which were these: (1) we held, on October 27, 1997, a public hearing, at which interested persons reported on the status of UP rail service and discussed proposals for solving UP's service problems;<sup>6</sup> (2) we issued, on October 31, 1997, a 30-day emergency service order (which went into effect on November 5, 1997), that, among

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<sup>3</sup> “[W]e are establishing oversight for 5 years to examine whether the various conditions we have imposed have effectively addressed the competitive issues they were intended to address, and we are retaining jurisdiction to impose additional remedial conditions if, and to the extent, we determine that the conditions already imposed have not effectively addressed the competitive harms caused by the merger.” Merger Dec. No. 44, slip op. at 13.

<sup>4</sup> BNSF refers to The Burlington Northern and Santa Fe Railway Company and its predecessor corporations.

<sup>5</sup> 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 [Oversight], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 10 (STB served Oct. 27, 1997) (General Oversight Dec. No. 10).

<sup>6</sup> Rail Service In The Western United States, STB Ex Parte No. 573 (STB served Oct. 2, 1997) (published in the Federal Register on October 7, 1997, at 62 FR 52373) (announcing that a public hearing would be held on October 27, 1997). See also Rail Service In The Western United States, STB Ex Parte No. 573 (STB served Oct. 16, 1997) (to provide benchmarks to measure overall western service conditions and the extent to which service might be improving, we ordered UP to file weekly reports setting out information in numerous operational categories).

other things, authorized The Texas Mexican Railway Company (Tex Mex), an affiliate of The Kansas City Southern Railway Company (KCS), to provide expanded service in the Houston area, and directed UP and BNSF to take specific steps to facilitate the operations of other carriers in that area;<sup>7</sup> (3) we issued, on December 4, 1997, a decision extending the emergency service order to March 15, 1998, and modifying that order to address four additional matters (service involving Texas, California, western coal, and midwest agricultural shippers);<sup>8</sup> (4) we issued, on February 25, 1998, a decision extending the emergency service order, as previously modified, to August 2, 1998 (the maximum time permissible under 49 U.S.C. 11123);<sup>9</sup> and (5) we issued, on July 31, 1998, a decision that, by denying a request that the emergency service order be continued or that a new one be issued, allowed the emergency service order to expire on August 2, 1998 (subject, however, to certain “wind down” arrangements that continued until September 17, 1998).<sup>10</sup>

Houston/Gulf Coast Oversight Proceeding. By decision served March 31, 1998, we instituted a proceeding to consider long-term proposals for additional remedial conditions pertaining to rail service in the Houston/Gulf Coast region.<sup>11</sup> In that proceeding and related proceedings:

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<sup>7</sup> Joint Petition For Service Order, STB Service Order No. 1518 (STB served Oct. 31, 1997). We took this action after concluding that there was a transportation emergency in the West and that the exercise of our 49 U.S.C. 11123 authority would facilitate the resolution of that emergency.

<sup>8</sup> Joint Petition For Service Order, Supplemental Order No. 1 to STB Service Order No. 1518 (STB served Dec. 4, 1997).

<sup>9</sup> Joint Petition For Service Order, STB Service Order No. 1518 (STB served Feb. 25, 1998). We also required UP to augment its weekly reports.

<sup>10</sup> Joint Petition For A Further Service Order, STB Service Order No. 1518 (Sub-No. 1) (STB served July 31, 1998) (we also directed UP and, to a lesser extent, BNSF to continue to file, in the STB Ex Parte No. 573 docket, the periodic reports that had been required under the emergency service order).

<sup>11</sup> The Houston/Gulf Coast oversight proceeding was initially instituted within the STB Finance Docket No. 32760 (Sub-No. 21) sub-docket. See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company [Oversight], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 12 (STB served Mar. 31, 1998; published in the Federal Register on April 3, 1998, at 63 FR 16628) (General Oversight Dec. No. 12). Subsequently, however, the Houston/Gulf Coast oversight proceeding was transferred to the STB Finance Docket No. 32760 (Sub-No. 26) sub-docket. See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern

(continued...)

requests for new remedial conditions were filed on or about July 8, 1998; we accepted these requests by decision served August 4, 1998;<sup>12</sup> comments with respect to these requests were filed on or about September 18, 1998; rebuttal evidence in support of these requests was filed on or about October 16, 1998; and oral argument was held on December 15, 1998.

This Decision: Comments Filed In The Second Annual Round Of The General Oversight Proceeding. We have considered, in this decision, the issues raised in the following pleadings that were filed in, or that should have been filed in, the second annual round of the general oversight proceeding:<sup>13</sup> the UP/SP-344 “second annual report on merger and condition implementation” and the UP/SP-345 confidential appendices, both filed July 1, 1998, by UP; the BNSF-PR-8 quarterly progress report, filed July 1, 1998, by BNSF; the undesignated letter in the nature of comments, filed August 12, 1998, by the County Sanitation Districts of Los Angeles County (LACSD);<sup>14</sup> the

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<sup>11</sup>(...continued)

Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company [Houston/Gulf Coast Oversight], STB Finance Docket No. 32760 (Sub-No. 26), Decision No. 1 (STB served May 19, 1998; published in the Federal Register on May 22, 1998, at 63 FR 28444) (Houston/Gulf Coast Oversight Dec. No. 1).

<sup>12</sup> 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 [Houston/Gulf Coast Oversight], STB Finance Docket No. 32760 (Sub-No. 26), Decision No. 6 (STB served Aug. 4, 1998; published in the Federal Register on August 7, 1998, at 63 FR 42482) (Houston/Gulf Coast Oversight Dec. No. 6).

<sup>13</sup> In our decision addressing the issues that had been raised in the first annual round of the general oversight proceeding, we indicated: that UP and BNSF were to include comprehensive summary presentations in their progress reports due on July 1, 1998; that comments of interested parties concerning oversight would be due on August 14, 1998; and that any replies to such comments would be due on September 1, 1998. See General Oversight Dec. No. 10, slip op. at 19. We later extended the reply date to September 30, 1998. See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company [Oversight], STB Finance Docket No. 32760 (Sub-No. 21) (STB served Aug. 27, 1998).

<sup>14</sup> This letter, which was addressed to the Board’s Secretary, was not actually filed in the STB Finance Docket No. 32760 (Sub-No. 21) proceeding, but will be addressed in this decision.

BNSF-7 comments filed August 14, 1998, by BNSF;<sup>15</sup> the AFPA-2 comments filed August 14, 1998, by the American Forest & Paper Association (AF&PA); the PSC-9 comments filed August 14, 1998, by Public Service Company of Colorado (PSCo); the undesignated comments filed August 14, 1998, by the Colorado, Kansas & Pacific Railway Company (CK&PR); the undesignated comments filed August 14, 1998, by Cemex USA Management, Inc. (Cemex);<sup>16</sup> the DOT-3 reply filed September 1, 1998, by the United States Department of Transportation (DOT); the CIC-2 comments filed September 17, 1998, by Champion International Corporation on behalf of itself and its Moscow, Camden & San Augustine Railroad (MC&SA) subsidiary; the A&NR-2 comments filed September 21, 1998, by Angelina & Neches River Railroad Company (A&NR);<sup>17</sup> and the UP/SP-361 reply filed September 30, 1998, by UP. The matters discussed in these pleadings are summarized in Appendix A.

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<sup>15</sup> In an undesignated letter filed August 19, 1998, in STB Finance Docket No. 32760 (Sub-No. 21) and in STB Ex Parte No. 573, UP advised: that it would address, in its submissions in the Houston/Gulf Coast oversight proceeding, those portions of the comments filed by BNSF in the general oversight proceeding that covered the same ground as BNSF's condition request in the Houston/Gulf Coast oversight proceeding; and that it would address, in its submissions in the general oversight proceeding, all other points in the comments filed by BNSF in the general oversight proceeding. By decision served August 27, 1998, we indicated that "[w]e do not object to UP's proposed approach in this regard." 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 [Oversight], STB Finance Docket No. 32760 (Sub-No. 21) (STB served Aug. 27, 1998) (slip op. at 2 n.1).

<sup>16</sup> In an undesignated letter filed August 19, 1998, in STB Finance Docket No. 32760 (Sub-No. 21) and in STB Ex Parte No. 573, UP advised that it intended to address, in its submissions in the Houston/Gulf Coast oversight proceeding, the comments filed by Cemex in the general oversight proceeding. By decision served August 27, 1998, we indicated that we preferred to consider, in the general oversight proceeding, the issues raised by Cemex in its comments filed in that proceeding. 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 [Oversight], STB Finance Docket No. 32760 (Sub-No. 21) (STB served Aug. 27, 1998) (slip op. at 2; second full paragraph).

<sup>17</sup> The CIC-2 comments and the A&NR-2 comments were filed in STB Finance Docket No. 32760 (Sub-No. 26). We are considering these comments here insofar as these comments concern matters properly considered in the second annual round of the general oversight proceeding.

This Decision: Related Matters. We have also considered, in this decision, issues respecting three related matters that were raised in the following pleadings: (1) the ESI-28 petition for modification of Merger Dec. No. 44 or, in the alternative, for an additional condition, filed October 23, 1997, by Entergy Services, Inc., and Entergy Arkansas, Inc. (referred to collectively as Entergy);<sup>18</sup> and the UP/SP-328 reply to the ESI-28 petition, filed November 12, 1997, by UP;<sup>19</sup> (2) the undesignated petition (hereinafter referred to as the AL&M Petition) for an additional remedial condition, filed May 12, 1998, by the Arkansas, Louisiana and Mississippi Railroad Company (AL&M);<sup>20</sup> the BNSF-6 reply to the AL&M Petition, filed June 1, 1998, by BNSF; the undesignated reply to the AL&M Petition, filed June 1, 1998, by KCS; the two undesignated replies to the AL&M Petition, filed June 1, 1998, by Georgia-Pacific Corporation (G-P);<sup>21</sup> the IP-21 reply to the AL&M Petition, filed June 1, 1998, by International Paper Company (IP);<sup>22</sup> the UP/SP-343 reply to the AL&M Petition, filed June 2, 1998, by UP;<sup>23</sup> the undesignated supplement to the AL&M Petition (hereinafter referred to as the AL&M Supplement), filed June 26, 1998, by AL&M; the UP/SP-347 reply to the AL&M Supplement, filed July 16, 1998, by UP;<sup>24</sup> the undesignated motion to strike the AL&M Supplement, filed July 16, 1998, by KCS; and the undesignated reply to

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<sup>18</sup> Entergy submitted two versions of this petition: a confidential version (designated ESI-28); and a public, redacted version (designated ESI-29).

<sup>19</sup> The ESI-28 petition was filed in STB Finance Docket No. 32760 and in STB Finance Docket No. 32760 (Sub-No. 21). The UP/SP-328 reply was filed in STB Finance Docket No. 32760 (Sub-No. 21). We have previously indicated our intention to address, in this decision, the ESI-28 petition. See Joint Petition For A Further Service Order, STB Service Order No. 1518 (Sub-No. 1) (STB served July 31, 1998), slip op. at 7 n.13.

<sup>20</sup> The AL&M Petition and all related pleadings were filed in STB Finance Docket No. 32760 (Sub-No. 21).

<sup>21</sup> One reply was submitted by Norman Langberg, the Director of Logistics, Paper for G-P. The other reply was submitted by Robert T. Pugh, the Director, Logistics Services for G-P's Building Products Group.

<sup>22</sup> We have noted, but have not otherwise considered, the letters expressing support for the AL&M Petition that were filed in June 1998 by Century Ready-Mix Corporation and Abell Corporation. These letters, which are in the nature of correspondence, do not appear to have been served on interested parties.

<sup>23</sup> UP also filed, on June 2, 1998, an undesignated motion for leave to file its UP/SP-343 reply a day late. We will grant the motion.

<sup>24</sup> UP, noting that the AL&M Supplement is an impermissible reply to a reply, see 49 CFR 1104.13(c), asks that we accept the UP/SP-347 reply if we accept the AL&M Supplement.

the motion to strike, filed July 20, 1998, by AL&M;<sup>25</sup> and (3) the undesignated petition for reconsideration filed August 20, 1998, by Cemex in STB Ex Parte No. 573 and in STB Service Order No. 1518;<sup>26</sup> and the undesignated reply to the Cemex petition, filed September 11, 1998, by UP in STB Service Order No. 1518.<sup>27</sup> The matters discussed in these pleadings are also summarized in Appendix A.

This Decision: Matters Not Considered. We have already addressed, and therefore we will not consider in this decision, the issues raised in: the undesignated comments urging revisions to the STB Ex Parte No. 573 reporting requirements, filed in STB Finance Docket No. 32760 (Sub-No. 21) on August 14, 1998, by The National Industrial Transportation League (NITL); the undesignated letter in the nature of a reply to such comments, filed August 19, 1998, by UP in STB Finance Docket No. 32760 (Sub-No. 21) and in STB Ex Parte No. 573; and the undesignated supplemental comments, accompanied by an undesignated petition to file said supplemental comments, filed September 3, 1998, by NITL in STB Finance Docket No. 32760 (Sub-No. 21).<sup>28</sup>

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<sup>25</sup> The AL&M Supplement is a reply to a reply, which is prohibited by 49 CFR 1104.13(c) and which is not permitted by any procedural order applicable to the STB Finance Docket No. 32760 (Sub-No. 21) proceeding. We will not strike it, however, because, by making explicit that AL&M's principal grievance is KCS's lack of single-line access to most AL&M destinations, the AL&M Supplement has served to better frame the issues raised in the AL&M Petition. And, given our resolution of those issues, there is no need to grant KCS's alternative request that it be allowed more time to file a response to the AL&M Supplement.

<sup>26</sup> Cemex seeks reconsideration of our denial of its request for emergency service relief. See Rail Service In The Western United States, STB Ex Parte No. 573 (STB served July 31, 1998).

<sup>27</sup> Cemex also filed, on September 24, 1998, an undesignated motion to strike portions of the UP reply; and UP filed, on September 28, 1998, an undesignated letter in the nature of a reply to the motion to strike. The motion to strike assails three categories of material: (1) references to information upon which we did not rely in Rail Service In The Western United States, STB Ex Parte No. 573 (STB served July 31, 1998); (2) a statement that has assertedly been misrepresented and taken out of context; and (3) a reference to the comments filed August 14, 1998, by Cemex in STB Finance Docket No. 32760 (Sub-No. 21). The motion to strike will be denied. Cemex's objections to the material in the first and third categories would require us to take a static look at UP's service problems, and to grant or deny emergency service relief today based on a state of affairs that existed many months ago; but we think it is preferable that our decisions with respect to UP's service problems be based on present realities. And Cemex's objections to the material in the second category go not to admissibility but to weight.

<sup>28</sup> See Rail Service In The Western United States, STB Ex Parte No. 573 (STB served Sept. 22, (continued...))

Nor will we consider in this decision the undesignated request for a new remedial condition, filed July 8, 1998, by the Western Coal Traffic League (WCTL) in STB Finance Docket No. 32760 (Sub-No. 26), which we transferred to STB Finance Docket No. 32760 (Sub-No. 21)<sup>29</sup> but which WCTL has since withdrawn.<sup>30</sup>

## DISCUSSION AND CONCLUSIONS

The merger, while it has not proceeded as smoothly as we had hoped it would, has produced and will continue to produce benefits for the shipping public.<sup>31</sup> Nevertheless, we knew when we approved the merger that it would have potential competitive impacts, and so we imposed remedial conditions and a 5-year oversight requirement so that we could ensure that our conditions in fact ameliorated potential competitive harm. We will now address whether our conditions have achieved their purpose, and will then turn to various other issues that were raised during this phase of the oversight proceeding.

**COMPETITIVE IMPACTS.** We recognize that the service problems in the West have competitively injured a variety of shippers and carriers, including UP. However, the reports, comments, and replies that were filed in the second annual round of the general oversight proceeding establish that, notwithstanding from the effects of the service crisis, the UP/SP merger has not thus far caused any substantial competitive harm. The UP vs. SP competition that existed prior to the merger no longer exists; but, in its place, there now exists UP vs. BNSF competition, which appears to be at least as effective as the pre-merger UP vs. SP competition. The reports submitted July 1, 1998, by UP and BNSF demonstrate that BNSF is providing fully competitive train service in every

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<sup>28</sup>(...continued)  
1998) (addressing the issues raised in the pleadings noted in the text).

<sup>29</sup> See Houston/Gulf Coast Oversight Dec. No. 6, slip op. at 6 n.11.

<sup>30</sup> See WCTL's undesignated "notice of withdrawal without prejudice," filed September 9, 1998, in STB Finance Docket No. 32760 (Sub-No. 21).

<sup>31</sup> In addition to the expansion of the number of single-line services and shorter routings, better equipment supply, reduced access fees, and broadened service coverage and competitive benefits for 2-1 shippers now being served by BNSF, UP estimates that the eliminations and reductions of switch charges that were produced by the UP/SP merger and by the BNSF agreement, as augmented by the CMA (Chemical Manufacturers Association) agreement, will amount to some \$56 million during the first 2 post-merger years. UP also notes that, in February 1998, UP and BNSF entered into a new systemwide reciprocal switch fee agreement that superseded seven earlier agreements involving former constituent railroads of UP and BNSF, that produced further overall reductions in switch fees, and that greatly simplified switch fee administration on UP and BNSF. See UP/SP-344 at 53.

major trackage rights corridor, and is handling large and continually increasing volumes of business using the rights it acquired in connection with the merger. The confidential appendices submitted with the UP report contain numerous examples of BNSF's success in gaining 2-to-1 traffic using its rights, and numerous examples too of the rate and service improvements UP has had to provide to shippers to retain a share of the 2-to-1 traffic.<sup>32</sup> The confidential appendices also document post-merger reductions in UP's rates for 2-to-1 traffic, 3-to-2 traffic, Eastern Mexico gateway traffic, coal traffic, chemical traffic, plastics traffic, and grain traffic. The service problems that have occurred during implementation of the merger are well known, but they do not change the fact that there have been no discernible purely competitive problems caused by the merger.<sup>33</sup>

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<sup>32</sup> BNSF claims that most of the growth in its trackage rights traffic has come either from overhead business, from business moving to and from 2-to-1 shortlines, or from business where BNSF has had to commence its own switching operations for 2-to-1 customers. At the Houston/Gulf Coast oral argument, however, BNSF, although it indicated that it wanted to intensify its competitive presence, stated: "We think we have established a major presence at the 2-to-1 points. . . . We believe competition is working." Transcript at 66-67. In any event, the 2-to-1 shippers to which BNSF has access are shippers that, prior to the merger, had access both to UP and to SP (and to no other railroad); but such access did not necessarily mean that any such shipper actually enjoyed, day in and day out, simultaneous two-carrier service before the merger. One bar to simultaneous post-merger, two-carrier service cited by BNSF (the inability of many shippers to accommodate physical switches by two carriers in a 24-hour period) would also have barred pre-merger, two-carrier service. And the other bar cited by BNSF (duplication of scarce resources, i.e., power, crews, and infrastructure) would appear to be transitional in nature; if there is sufficient traffic to support simultaneous two-carrier service, BNSF should have an incentive to develop and make available the necessary resources.

<sup>33</sup> BNSF suggests that the rights it received have been rendered less effective than initially expected by unanticipated service and related problems, which, it states, have had a disproportionate effect on it. We agree that the service problems that the post-merger UP has experienced have indeed had a negative impact on the operations conducted by BNSF under the rights it secured in the BNSF agreement. The evidence we have seen, however, does not indicate that the impact on BNSF has been disproportionately greater than the impact on UP, and in any case, we anticipate that UP's service problems will prove to have been transitional, and that the negative impacts on BNSF's operations will likewise prove to have been transitional.

BNSF, of course, would like to be even more of a competitive force,<sup>34</sup> but we conclude, based upon the reports, comments, and replies filed in the second annual round of the general oversight proceeding, that, at this time, no adjustment in the general conditions imposed in connection with the UP/SP merger is necessary.<sup>35</sup>

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<sup>34</sup> BNSF's complaints concerning cooperation, discrimination, neglect, and manipulation appear to be linked to BNSF proposals to alter existing arrangements in ways that BNSF argues would improve its ability to offer a more competitive service. See, e.g., BNSF-PR-8 at 21 (proposal for coordinated dispatching control of the lines between Denver and Pueblo, CO), at 27-28 (proposal for a joint dispatching facility for the Tehachapi line), and at 63 (proposal for the establishment of service standards for areas where UP provides reciprocal switch and haulage service for BNSF). However, BNSF does not show that it is unable to compete, or that its existing rights do not restore competitive options that existed before the merger and that would have continued but for the merger; rather, its point appears to be that, notwithstanding its arms length settlement reached with UP, it now could compete even better if certain adjustments to its arrangements were made. BNSF's complaints have not been substantiated and its proposals have not been developed at any length, and we therefore see no justification, at this time, for taking additional steps of the sort that BNSF suggests. Moreover, as UP notes, it has had and continues to have its own problems with some BNSF switching and dispatching practices; switching and dispatching differences are inevitable for carriers that work together; but railroads regularly work out arrangements with each other concerning dispatching and switching without requiring government intervention. We share BNSF's sense (with which UP does not disagree) that it and UP ought to have joint dispatching facilities in addition to the one they currently maintain at Spring, TX, and indeed the testimony at the Houston/Gulf Coast oral argument confirmed that the two carriers are considering expanding their joint dispatching capabilities. However, we see no reason why BNSF and UP should not be able to work out these sorts of issues privately. If for some reason BNSF continues to have complaints, however, and wants us to intervene, it should submit pleadings: (1) that demonstrate, with as much evidentiary detail as necessary, the existence of the problems it alleges, and that further demonstrate that these problems were either created or exacerbated by the merger; (2) that set forth, at length, the precise remedies it would have us impose; and (3) that explain, with as much detail as circumstances require, why it is that the desired remedies are necessary. Pursuit of this approach, of course, could open the door to efforts by UP to have us address comparable complaints about BNSF.

<sup>35</sup> We have made some adjustments to our conditions for the Houston/Gulf Coast area in our decision in Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company [Houston/Gulf Coast Oversight], STB Finance Docket No. 32760 (Sub-No. 26), Decision No. 10 (STB served Dec. 21, 1998) (Houston/Gulf Coast Oversight Final Decision).

**SERVICE PROBLEMS.** The UP service situation, although still not perfect, has improved considerably and all indications are that it will continue to improve. There is every reason to believe that the service problems will prove to have been a transitional phenomenon. Based on the record, we therefore see no reason to impose additional conditions on the merger, outside of the Houston/Gulf Coast area, that arise from the service problems. Of course, we will continue to retain jurisdiction over the merger, and to ensure through our periodic reporting requirements that our conditions are effective.

In another decision served simultaneously with this one, we have adopted rules to address service inadequacies by establishing expedited procedures for shippers to obtain alternative rail service from another carrier when the incumbent carrier cannot properly serve shippers. See Expedited Relief for Service Inadequacies, STB Ex Parte No. 628 (STB served Dec. 21, 1998). Specific conditions that would fundamentally change the structure of the merger, however, are neither necessary nor appropriate.

**SAFETY PROBLEMS.** Although UP and DOT have interacted in a variety of ways concerning safety, DOT states that there are, at this time, no safety problems requiring action on our part in the context of the general oversight proceeding. See DOT-3 at 2-5.

**PAPER BARRIERS.** The paper barrier issues<sup>36</sup> raised by AF&PA are among the issues addressed in the broad “Railroad Industry Agreement” (the RIA) that was recently entered into by the Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA). See Association of American Railroads and American Short Line and Regional Railroad Association--Agreement--Application Under 49 U.S.C. 10706, STB Docket No. S5R 100 (STB served Sept. 22, 1998 and published in the Federal Register on Sept. 25, 1998, at 63 FR 51398; STB served Dec. 18, 1998). Although the comprehensive agreement on the issue of paper barriers reached in the RIA did not eliminate all limitations on the scope of the services that can be provided by small railroads, it did provide new opportunities for smaller railroads to address some of the concerns that have been expressed over the past year by shippers. In any event, the “paper barrier” issues raised by AF&PA have no connection to the UP/SP merger, which neither rendered any shortline captive to UP<sup>37</sup> nor created or extended any paper barrier.

**ENTERGY/CEMEX.** Entergy and Cemex are 1-to-1 shippers, each of which was rail-served prior to the merger by a single railroad (the pre-merger UP) and each of which is

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<sup>36</sup> A “paper barrier” is a contractual provision constraining the ability of a small railroad to interchange traffic with carriers other than the carrier from which its lines were originally purchased.

<sup>37</sup> The BNSF agreement protects 2-to-1 shortlines.

rail-served today by a single railroad (the post-merger UP). The merger, therefore, had no adverse impact on the rail service options available to Entergy and Cemex.<sup>38</sup>

Entergy and Cemex insist, however, that, as a practical matter, the merger has had an adverse impact on their rail service options. Prior to the merger, they claim, UP rail service was adequate; subsequent to the merger, they argue, UP rail service has been inadequate. Entergy and Cemex, invoking both our UP/SP oversight jurisdiction and our 49 U.S.C. 11123 “directed service” authority, have asked that we remedy their problems by granting BNSF access to their facilities.

We will deny their requests. The service problems so many shippers have experienced have proven to be, for the most part, transitional problems that occurred in connection with merger implementation and that reflected, to a large degree, the inadequate state of the pre-merger SP infrastructure. These are problems that do not call for permanent solutions of the sort suggested here. We would not hesitate to grant relief to Entergy and Cemex, and to other similarly situated shippers, if, and to the extent that, we believed that UP’s service problems were structural, i.e., had been created by the merger and were likely to endure as long as the merger endured. But all the evidence we have seen leads us to believe that UP’s rapidly diminishing service problems are transitional and therefore temporary, not structural and therefore not permanent. Indeed, UP’s recent, substantial infrastructure improvements to its lines in the New Braunfels, TX, area, and in the “Central Corridor” — lines over which Cemex and Entergy traffic moves — have spurred service improvements throughout the UP system.

We do not mean to suggest that UP’s service has yet reached its optimal levels. Merger implementation is a process, not an event; rehabilitation of inadequate infrastructure is similarly a process, not an event; and, in the nature of things, each such process is likely to take time. The problems that have arisen, and that have been and are continuing to be mitigated, might have been delayed if there had been no UP/SP merger. That alternative, however, would almost certainly have resulted, sooner or later, in the destruction of SP. See Merger Dec. No. 44, slip op. at 114-16. The evidence indicated that SP’s competitive, financial, and physical condition had been eroding for several years, and would continue to erode, because of SP’s chronic inability to generate sufficient capital from its railroad operations.

We do not mean to trivialize the transitional problems that Entergy and Cemex faced during the admittedly serious but now-over service emergency. Those problems have been serious, but no more serious than the problems faced by many other shippers. Yet, as we reviewed the service emergency, we concluded that we could not grant all allegedly adversely impacted 1-to-1 shippers access to another carrier, because to do so would surely have interfered with UP’s own service

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<sup>38</sup> The merger, had it not been properly conditioned, might have had an adverse impact on Entergy’s pre-merger build-out option. There has been no such impact, however, because we imposed a condition that preserved the pre-merger build-out status quo.

recovery efforts, could have stressed the system of the carrier recruited to provide alternative service, and would ultimately have aggravated rather than ameliorated the service problems. Given the transitional nature of the service problems, which are abating, we see no basis on which to grant such access as a merger condition.<sup>39</sup>

We are today issuing regulations that provide expedited procedures for obtaining access to another carrier to remedy service failures by the incumbent carrier. Regardless of how the new procedures, had they been in effect during the service emergency, might have applied to the situations of Entergy or Cemex, or how they might apply to the situations of Entergy or Cemex in the future, it is clear that relief under either the service order or as a merger condition would have been inappropriate.

**CIC/A&NR.** The directional running patterns instituted by UP have increased the carrying capacity of UP's (formerly SP's) Houston-Fair Oaks line. CIC and A&NR do not suggest otherwise, but they insist that this directional running pattern (both UP and BNSF operate southbound trains on the Houston-Fair Oaks line), and the increased traffic thereby made possible, have impaired local service provided by UP to shippers like CIC and shortlines like A&NR. UP concedes that local service has not been entirely satisfactory, but contends that it has taken a number of steps to improve such service.

We have previously said that "there is no reason to believe that new post-merger traffic flows will cause service problems [on the Houston-Fair Oaks line]." See Merger Dec. No. 44, slip op. at 193. We cannot now say for certain whether we were right or wrong. There has been no way to separate the local effects of UP's systemwide service problems from the local effects of directional running patterns. And, making matters more complicated, there appears to be no way to distinguish impacts of directional running from those that can be remedied without interfering with directional running.

On the other hand, the service crisis has ended, and UP has indicated its intention to address local service issues. However, if it turns out that directional running does impair local service, it may be the kind of problem for which there is no easy solution. The first remedy suggested by CIC and A&NR (open interchange) would seem to be far too broad. See Merger Dec. No. 44, slip op. at 193 ("Direct access to BNSF, as sought by CIC, would vastly improve, not merely preserve, the competitive status quo."). The second remedy suggested by CIC and A&NR (requirements that affected shortlines receive daily local service and that local crews receive priority when on or crossing mainlines) is more narrowly tailored, but no less objectionable. A daily local service

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<sup>39</sup> We note that Cemex has filed a petition disputing many of our factual findings in our decision denying it emergency service relief. We find no merit to its allegations of factual error, and, in any case, we find that, even if Cemex's factual arguments were correct, they would not be material to the result.

requirement might well require UP to engage in inefficient operations; and a local crew priority requirement would involve our micromanagement of operating decisions best left to the railroads.

The best solution, for now, is to give UP's directional running arrangements time to develop and to permit UP, now that its systemwide service appears sustainably improved, to turn its full attention to correcting such local service problems. We are, however, prepared to entertain, in the third and subsequent annual rounds of the general oversight proceeding, renewed claims that the local service provided by UP to shippers such as CIC and shortlines such as A&NR remains adversely affected by the directional running patterns established by UP (and BNSF) in connection with the merger.

**NEW FACILITIES CONDITION.** We do not agree with A&NR's claim that the new facilities condition<sup>40</sup> has created, for shortlines like A&NR, a disadvantage that we have an obligation to correct. The disadvantage cited by A&NR existed prior to the merger because, at that time, shippers could elect to locate new facilities at points served by both UP and SP, while an exclusively served shortline like A&NR (i.e., a shortline with only a single Class I connection) might not be able to offer a site open to rail competition. And, in any event, even if the merger did create the harm cited by A&NR, that harm is not the kind of harm that our conditioning power was meant to rectify. A&NR, after all, is not claiming that it has been made less competitive but that its Class I competitors have been made more competitive. Cf. Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 38, slip op. at 99 (ICC served Aug. 23, 1995) (the Bunge precedent).

**AL&M.** AL&M is a 3-to-2 shortline that claims, in essence, that it should be regarded as a "2½-to-1½" shortline. UP, SP, and KCS were AL&M's pre-merger Class I connections; UP and KCS are AL&M's post-merger Class I connections. AL&M insists, however, that, with respect to traffic that is originated on AL&M's Fordyce-Monroe line,<sup>41</sup> KCS is not, and cannot be, a fully competitive Class I connection. AL&M contends, in particular, that KCS has single-line access to a limited number of AL&M destinations, and that KCS's joint-line routings to all other AL&M destinations are not competitive with the single-line routings of the post-merger UP.

In Merger Dec. No. 44, we granted relief only in limited circumstances where a shipper had pre-merger access to three railroads. See Merger Dec. No. 44, slip op. at 152-53 (respecting the Lake Charles area). Similarly, we have accorded relief in limited circumstances where a merger

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<sup>40</sup> See Merger Dec. No. 44, slip op. at 145-46.

<sup>41</sup> AL&M's arguments are equally applicable with respect to the small portion of its traffic that is terminated on AL&M's Fordyce-Monroe line. For convenience, however, we will refer to AL&M's traffic as if all of it moved outbound from points on the Fordyce-Monroe line.

reduces the number of Class I connections for a shortline railroad, and hence the shippers it serves, from three to two. See Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 38, slip op. at 94-95 (ICC served Aug. 23, 1995).

AL&M did not previously participate in the UP/SP merger proceeding or request that we impose a special condition for its benefit. Nor has it persuaded us that there is any reason for us to reopen the proceeding now for the purpose of imposing such a condition. It has been over 2 years since we approved the merger, and AL&M has failed to present any convincing, concrete evidence that the merger has resulted in competitive harm to shippers located on its line.<sup>42</sup> It merely presents speculative evidence that it will be disadvantaged because KCS, one of its two remaining connections, will not be an effective competitor. This is not an appropriate basis for imposing additional relief in conjunction with this oversight process.

Moreover, AL&M's arguments are without merit. KCS appears to be a fully effective Class I connection for traffic originated on AL&M's line. AL&M concedes the competitiveness of KCS's single-line routings to the AL&M destinations that are located on KCS's system and that are conveniently accessible in KCS single-line service, and the evidence of record demonstrates the competitiveness of KCS's joint-line routings (KCS-BNSF, KCS-IC, KCS-CSX, and KCS-NS)<sup>43</sup> to the AL&M destinations that are located beyond KCS's system or that, though located on KCS's system, are not conveniently accessible in KCS single-line service. The KCS-BNSF, KCS-IC, KCS-CSX, and KCS-NS joint-line routings provide, for traffic originated by AL&M and interchanged with KCS at Monroe, non-circuitous access to destinations located throughout the United States, and the evidence we have seen indicates that these joint-line routings are indeed competitive with the single-line routings of the post-merger UP.<sup>44</sup>

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<sup>42</sup> AL&M and G-P, a shipper on AL&M's line, have presented evidence indicating that UP is charging higher rates to serve G-P's facilities. UP notes, however, that the rates in question are pursuant to a confidential contract recently negotiated between UP and G-P. UP points out that, under this contract, the rates for some G-P movements have been reduced, while rates for other movements have been increased, but that, overall, rates to G-P are not higher.

<sup>43</sup> Illinois Central Railroad Company is referred to as IC. CSX Transportation, Inc., is referred to as CSX. Norfolk Southern Railway Company is referred to as NS.

<sup>44</sup> By and large, traffic that UP (but not KCS) can efficiently handle in single-line service to a destination not exclusively served by UP would be routed, by KCS, either KCS-BNSF or KCS-IC. KCS-BNSF and KCS-IC joint-line routings do not appear to be unduly circuitous vis-à-vis UP single-line routings. Some KCS-BNSF joint-line routings, in fact, appear to be even shorter than the

(continued...)

AL&M's principal grievance respecting KCS's joint-line routings, and respecting in particular KCS-BNSF joint-line routings, is neither undue circuitry (KCS-BNSF routings, as we have said, are not unduly circuitous) nor a UP bottleneck (UP is not a participant in any KCS-BNSF routings).<sup>45</sup> AL&M's principal grievance, rather, is that the KCS-BNSF routings are joint-line routings, and, therefore, in AL&M's view, are, by their very nature, not fully competitive with UP single-line routings. "It is the limited single system reach of the KCS that is the principal reason the Board should extend the Lake Charles condition to permit BNSF access to the AL&M at Fordyce." AL&M Supplement at 12. AL&M is arguing, in essence, that, at least with respect to traffic moving to certain points in the Far West, it has been adversely affected by the merger because, whereas it previously had two single-line options (UP and SP), it now has only one (UP). This argument, though of somewhat more force than a similar argument previously made by SPP/IDPC,<sup>46</sup> is not sufficiently compelling. The KCS-BNSF joint-line routing should be,<sup>47</sup> and indeed the traffic statistics cited by KCS and UP demonstrate that the KCS-BNSF joint-line routing is, quite competitive with the UP single-line routing.

We realize that UP's service problems have adversely affected AL&M, not only with respect to traffic routed AL&M-UP but also, because of UP's delays in returning AL&M's cars, with respect to traffic routed AL&M-KCS. We expect, however, that UP's service problems will prove to have been a transitional phenomenon, and we think that, in these circumstances, and given the strength of the KCS competitive option now available to AL&M, the establishment of a permanent AL&M-BNSF interchange at Fordyce would not be an appropriate response.<sup>48</sup>

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<sup>44</sup>(...continued)  
comparable UP single-line routings.

<sup>45</sup> Compare Merger Dec. No. 44, slip op. at 152 (we noted, in our discussion of the Lake Charles situation, that "any KCS routing to and from St. Louis or Chicago must still include a connection with applicants at Shreveport or Texarkana, giving applicants control of a 'bottleneck' for these movements.").

<sup>46</sup> The argument now made by AL&M might be more compelling than the argument previously made by Sierra Pacific Power and Idaho Power Company (referred to collectively as SPP/IDPC) because "the difference between single-line service and joint-line service is less important in the coal unit train context." See Merger Dec. No. 44, slip op. at 187.

<sup>47</sup> Because BNSF cannot now interline traffic with AL&M, BNSF has every incentive to participate in an AL&M-KCS-BNSF routing.

<sup>48</sup> The AL&M argument that, if the existing KCS competitive option were really effective, AL&M would not have been adversely impacted by UP's service problems, is not well taken. Because American railroads interchange cars, UP's service problems were not, and could not have been, confined  
(continued...)

Finally, we recognize AL&M's argument, which G-P supports, that UP has raised certain rates from the levels charged by SP. Neither AL&M nor G-P, however, has shown that the rate structure that G-P negotiated with UP reflects any abuse of market power. Moreover, we should point out that SP's rate structure, which had to be at least one of the factors associated with the carrier's downward spiral, was not necessarily a model to which UP was forever bound. Indeed, in the underlying merger proceeding, there was substantial evidence that SP cut rates to attract new business, but that the strategy was unsuccessful because many shippers were unwilling to ship with a carrier in a weakened condition at unremunerative rates.<sup>49</sup>

**PSCo/CK&PR.** The conditions requested by PSCo and CK&PR have largely been mooted by UP's decision to preserve the Tennessee Pass line and its continuity as a through route. Abandonment of this line has ceased to be a UP objective, and, if abandonment should ever again become a UP objective, UP will have to seek, outside the merger context, either approval or exemption for that abandonment.<sup>50</sup> Particularly given the need for infrastructure in the railroad industry, which UP recognizes, we strongly encourage UP, if it ultimately determines that it does not intend to use this line, to make efforts to sell it to an entity that will use it in the transportation system. We will be vigilant as to this issue.

**LACSD.** The service problems complained of by LACSD appear to have been resolved, and, for this reason, further action on our part appears unnecessary.

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<sup>48</sup>(...continued)  
to the UP system itself.

<sup>49</sup> In Merger Dec. No. 44, at 272, we described "lower rate levels offered by SP in certain examples as indicative of the lower quality product it has been constrained to offer." We noted that "SP cannot continue to maintain its existing competitive presence in the long run because the revenues generated from its current pricing structure are not sufficient for it to maintain or replace its capital." Finally, we noted that, where SP did provide the low bid and receive a contract, "often . . . it runs out of equipment for a move, and other carriers are relied on for the balance of the business."

<sup>50</sup> (1) PSCo's request that we revisit, in the next annual round of the general oversight proceeding, the issue of UP service on the Moffat Tunnel route is at odds with the structure of the general oversight proceeding. This issue will be revisited only if the reports, comments, and/or replies filed in 1999 indicate that this issue remains a matter of concern. (2) We see no need to intervene in any aspect of the CK&PR/UP dispute respecting CK&PR's efforts to acquire UP lines in Colorado; these disputes, including but not limited to UP's actions vis-à-vis the \$100,000 deposit, appear to be beyond our jurisdiction. We note, however, that there is no discernible logic in CK&PR's argument that UP is willing to suffer the degradation of service over its remaining Central Corridor routes if necessary to eradicate the competitive option once offered by the former DRGW/MRR route.

**GENERAL OVERSIGHT CONTINUED.** The third annual round of the general oversight proceeding will be conducted in mid-1999, in accordance with the schedule indicated in the ordering paragraphs below. We anticipate that, following a review of the reports, comments, and replies filed in 1999, we will issue another decision concerning oversight issues. We reserve the right, however, to alter the filing schedule and/or to modify the reporting requirements, if and to the extent circumstances warrant.

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

It is ordered:

1. Except as otherwise indicated,<sup>51</sup> all requests for relief discussed in this decision, including but not limited to the requests contained in Entergy's ESI-28 petition filed October 23, 1997, AL&M's undesignated petition filed May 12, 1998, and Cemex's undesignated petition filed August 20, 1998, are denied.

2. As respects certain procedural matters discussed in this decision: (a) UP's undesignated motion filed June 2, 1998, for leave to file its UP/SP-343 reply a day late is granted, and the UP/SP-343 reply is accepted for filing and made part of the record; (b) KCS's undesignated motion filed July 16, 1998, to strike the AL&M Supplement is denied; and (c) Cemex's undesignated motion filed September 24, 1998, to strike portions of UP's reply to the Cemex petition is denied.

3. UP and BNSF shall continue to report quarterly, with comprehensive summary presentations included in their progress reports due on July 1, 1999. UP and BNSF shall make their 100% traffic tapes available by July 15, 1999.

4. Comments of interested parties concerning oversight will be due on August 16, 1999.

5. Replies will be due on September 3, 1999.

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<sup>51</sup> We have, as a practical matter, granted the PSCo request, and the similar (though differently worded) CK&PR request, that we continue in effect the "condition," see Merger Dec. No. 44, slip op. at 155-56, that permitted UP to discontinue service on, but not to abandon, the Tennessee Pass line. We have also, as a practical matter, granted the request, made by various parties, that we continue to maintain oversight of the UP/SP merger.

STB Finance Docket No. 32760 (Sub-No. 21)

6. This decision is effective immediately.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary

**APPENDIX A: SUMMARY OF PLEADINGS**

TABLE OF CONTENTS

THE UP/SP-344 REPORT .....	<u>21</u>
THE BNSF-PR-8 REPORT AND THE BNSF-7 COMMENTS .....	<u>21</u>
UP/SP-361 Reply .....	<u>24</u>
THE AFPA-2 COMMENTS .....	<u>26</u>
DOT-3 Reply .....	<u>27</u>
UP/SP-361 Reply .....	<u>27</u>
THE PSC-9 COMMENTS .....	<u>28</u>
UP/SP-361 Reply .....	<u>29</u>
THE CK&PR COMMENTS .....	<u>29</u>
UP/SP-361 Reply .....	<u>30</u>
THE CEMEX COMMENTS AND PETITION .....	<u>31</u>
Prior Decision .....	<u>31</u>
Cemex's Comments .....	<u>32</u>
Cemex's Petition .....	<u>33</u>
UP's Reply To Cemex's Petition .....	<u>34</u>
UP/SP-361 Reply .....	<u>34</u>
THE LACSD COMMENTS .....	<u>35</u>
UP/SP-361 Reply .....	<u>35</u>
THE DOT-3 REPLY .....	<u>36</u>
UP/SP-361 Reply .....	<u>37</u>
THE CIC-2 AND A&NR-2 COMMENTS .....	<u>37</u>
UP/SP-361 Reply .....	<u>38</u>
THE ESI-28 PETITION .....	<u>39</u>
UP/SP-328 Reply .....	<u>40</u>
Decision Served July 31, 1998 .....	<u>41</u>
THE AL&M PETITION .....	<u>42</u>
BNSF-6 Reply .....	<u>44</u>
KCS Reply .....	<u>44</u>
G-P Replies .....	<u>46</u>
IP-21 Reply .....	<u>47</u>
UP/SP-343 Reply .....	<u>48</u>
AL&M Supplement .....	<u>49</u>
UP/SP-347 Reply .....	<u>51</u>
KCS Motion To Strike .....	<u>51</u>
AL&M Reply To KCS Motion .....	<u>51</u>
UP/SP-361 Reply .....	<u>51</u>

**THE UP/SP-344 REPORT.** The evidence, UP argues, demonstrates that, notwithstanding the congestion problems that have afflicted UP in the past year, both the UP/SP merger and the competitive conditions we imposed in Merger Dec. No. 44 have strengthened, and are continuing to strengthen, transport competition in the West. UP contends, in particular: that the merged UP/SP system is continuing to enhance its competitiveness by providing new single-line service and shorter routings,<sup>52</sup> better equipment supply,<sup>53</sup> and reduced switch charges; and that 2-to-1 shippers are continuing to benefit both from access to the comprehensive and expanded BNSF system<sup>54</sup> and from the rate and service initiatives UP has had to undertake to meet BNSF competition.<sup>55</sup> UP further contends that, as it has always predicted, the merger has not had adverse competitive effects on 3-to-2 traffic or on Utah and Colorado coal, Gulf Coast chemicals, or grain.<sup>56</sup>

**THE BNSF-PR-8 REPORT AND THE BNSF-7 COMMENTS.** BNSF contends that, although it is working aggressively to compete and to increase its volumes to the point where it can maintain viable long-term operations, its ability to provide effective and competitive service over the UP lines to which it gained access in connection with the merger is being thwarted both by certain “structural deficiencies” in the rights it received<sup>57</sup> and by the “disproportionate impact, whether

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<sup>52</sup> UP has submitted numerous examples to demonstrate that, within the past year, new single-line service and shorter routings made possible by the merger have brought shippers lower rates and better service. See UP/SP-345, Confidential Appendix A.

<sup>53</sup> UP claims that, among other things, the UP/SP merger has opened up numerous opportunities for backhauls, triangulation, and more efficient equipment repositioning, which in turn have allowed UP to provide its shippers with more competitive rates and service.

<sup>54</sup> UP has submitted numerous examples of traffic handled by BNSF pursuant to the conditions imposed in Merger Dec. No. 44. See UP/SP-345, Confidential Appendix B.

<sup>55</sup> UP has submitted numerous examples of rate and service initiatives it has had to undertake to retain 2-to-1 traffic. See UP/SP-345, Confidential Appendix C.

<sup>56</sup> The UP/SP-344 report also provides an update on merger implementation. UP claims that it has made progress during the past year: in installing its Transportation Control System (TCS) and other support systems; in integrating workforces; in hiring additional employees; in pursuing merger-related capital investments; in consolidating and improving terminals and shops; in implementing directional running; and in enhancing the safety of the merged system’s operations.

<sup>57</sup> BNSF uses the term “structural deficiencies” to express the thought that the rights it received, though sound when originally conceived, have degraded substantially as a result of unanticipated service and related problems and other post-merger events and circumstances.

intentional or not,”<sup>58</sup> of UP’s congestion and service problems.<sup>59</sup> BNSF further contends: that, on numerous occasions, UP operating practices have led to UP’s trains being favored over BNSF’s trains; that, on far too many occasions, UP has created blockages adverse to BNSF by dispatching a UP train over a trackage rights line when the crew for that train did not have sufficient time to allow it to complete the movement; that, in a number of lanes, BNSF trains have been handled more slowly than their UP counterparts; and that, in general, UP, by lack of cooperation,<sup>60</sup> by discrimination,<sup>61</sup> by neglect,<sup>62</sup> and by manipulation of existing agreements,<sup>63</sup> has forced BNSF into an inferior competitive position that fails to provide 2-to-1 shippers the competitive options they had prior to the merger. BNSF concedes that its traffic moved via the trackage rights lines has continued to grow,<sup>64</sup> but insists that most of the growth has come either from overhead business, from business moving to and from 2-to-1 shortlines, or from business where BNSF has had to commence its own switching operations for 2-to-1 customers.<sup>65</sup>

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<sup>58</sup> BNSF-PR-8 at 65.

<sup>59</sup> BNSF suggests that, “[w]hile UP has taken the position in its discussions with BNSF that the service problems BNSF is facing are no worse than the service problems UP itself has to deal with, that is not a sufficient answer because, even if true, shippers are still not receiving the effective competitive service envisioned by the Board when it approved the UP/SP merger.” BNSF-PR-8 at 3.

<sup>60</sup> BNSF claims that it has experienced significant difficulties in obtaining UP’s commitment to resolve problems concerning BNSF shipments on the trackage rights lines.

<sup>61</sup> BNSF claims that, whenever there has been a shortage of crews, it has been UP’s practice to crew its own trains first.

<sup>62</sup> BNSF claims that, in certain instances, UP has failed to notify BNSF of impending crew shortages until after they commenced, thus giving BNSF no opportunity to plan for the shortages or to work with UP to try to minimize their impact.

<sup>63</sup> BNSF claims that continued manipulative efforts by UP have precluded BNSF from serving customers clearly within the scope of the Board’s merger conditions.

<sup>64</sup> See BNSF-PR-8 at 60. See also BNSF-PR-8, Attachments 7, 9, 10, 11, 12, 13, and 14.

<sup>65</sup> BNSF contends that, although UP’s service for BNSF has proven erratic and unworkable, BNSF cannot always commence its own switching operations, both because of the duplication of scarce resources (power, crews, and infrastructure) that direct BNSF service would require, and also because many customers cannot accommodate two carriers physically switching their facilities in a 24-hour period.

As respects the Central Corridor, BNSF contends that, given the congestion along UP lines in this corridor, BNSF has been unable to be competitive with UP on a consistent basis. BNSF claims: that its service to and from shippers in Salt Lake City, using Utah Railway as its agent, has been adversely impacted by UP's practice of parking trains and blocking switching leads that are used by Utah Railway to service customers' facilities; that, as long as the Central Corridor remains congested, UP trains will continue to be backed up, consuming track facilities such as the Salt Lake lines intended for use by BNSF; that BNSF trains are also being delayed by a lack of UP crews; and that, in addition, there has been a systemic mishandling by UP of BNSF shipments in haulage service.

As respects the I-5 corridor and California, BNSF claims that there have been, and will continue to be, severe service problems in the Stockton area,<sup>66</sup> in the Sacramento area,<sup>67</sup> in the Los Angeles area,<sup>68</sup> and on the Tehachapi line.<sup>69</sup>

BNSF indicates that, although it will continue to work with UP to resolve the problems it (BNSF) faces in providing competitive service,<sup>70</sup> we may find it necessary to take additional steps to ensure competitive service if UP is unwilling or unable to correct its shortcomings. BNSF suggests, in this respect, that we might: require neutral switching supervision in certain geographic areas; require UP to allocate crews on a basis that would allow both UP and BNSF to provide equally competitive service; require the dispatching protocol to be formally modified to provide that, before a train is dispatched over a line, either the crew has sufficient hours of service to operate over the line or a replacement crew is in place to relieve the original crew; and require the establishment of a joint dispatching facility to dispatch certain lines (e.g., the Tehachapi line).

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<sup>66</sup> BNSF contends that, although BNSF and UP recently completed major track realignment and construction projects to improve the movement of trains between Stockton and Sacramento, serious problems remain, largely due to the time consuming permit process and lack of coordination between the two UP route dispatchers controlling Stockton.

<sup>67</sup> BNSF mentions, in particular, its long-running service problems using UP reciprocal switch and haulage services to provide competitive service to Farmers Rice at West Sacramento.

<sup>68</sup> BNSF contends that there is significant congestion in Southern California and in the Los Angeles Basin.

<sup>69</sup> BNSF claims that, on account of UP's crew shortages and UP's inconsistent, unreliable, and often discriminatory dispatching practices, the service that BNSF has received over the Tehachapi Line between Kern Junction (Bakersfield) and Mojave has deteriorated significantly.

<sup>70</sup> BNSF further indicates that, in an effort to resolve these problems, it is implementing certain operational changes of its own, and is also implementing a plan to provide its own crews for certain of its trains.

**UP/SP-361 Reply.** UP acknowledges that congestion on its lines during its service crisis has adversely affected BNSF service over UP facilities. UP contends, however: that UP service suffered even more; and that BNSF's allegations of a "lack of cooperation and neglect" and "outright discrimination and manipulation of existing agreements" are outrageous falsehoods. The truth, UP insists, is that UP has bent over backwards to provide BNSF one unilateral concession after another, far beyond anything required by the BNSF agreement or the conditions imposed by the Board, to ensure that BNSF would be quickly and fully competitive using the rights it received in connection with the merger. UP contends, among other things: that, even though all of the BNSF trackage rights agreements became effective immediately upon UP's consummation of control on September 11, 1996, UP agreed to allow BNSF to serve shippers for an initial 6-month period pursuant to a blanket interim haulage agreement (which allowed BNSF to establish competitive service far more rapidly and at a much lower cost than it could have under the terms of the BNSF agreement); that, even though the interim haulage agreement contemplated that BNSF would commence trackage rights operations after the initial 6-month haulage period expired, UP, at BNSF's request, entered into still further agreements with BNSF, granting haulage rights in numerous locations for periods of up to 5 years (which have given BNSF a cost advantage in serving 2-to-1 shippers above what the BNSF agreement contemplated); that the haulage arrangements have allowed BNSF to employ trackage rights at the precise time when it was optimal to do so from an economic standpoint (which has enabled BNSF to choose on a case-by-case basis whether and when it was more efficient for it to use UP trains, crews, and facilities, or to mount its own trackage rights operations); that UP has also demonstrated extraordinary flexibility in allowing BNSF to switch between trackage rights and haulage rights without providing the notice expressly required under the parties' agreements; that, when UP instituted directional running over its lines between Houston and Beaumont, it granted BNSF the additional trackage rights that were necessary to allow BNSF too to operate directionally over those lines; and that UP has also gone out of its way to provide BNSF with lower-cost access to New Orleans than it was required to provide under the BNSF agreement.

As respects the Central Corridor, UP concedes that it has indeed experienced congestion in this corridor, but contends: that this congestion was temporary, and resulted from steps that will improve service both for UP and for BNSF;<sup>71</sup> that, in any event, this congestion did not place BNSF at any competitive disadvantage; and that operations are now much more fluid throughout the Central Corridor.<sup>72</sup> UP further contends: that BNSF's own data show that its Central Corridor traffic has been increasing dramatically; that UP has not discriminated against BNSF in dispatching the Central Corridor; and that there is no reason to believe that joint or coordinated dispatching control of the

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<sup>71</sup> UP claims that vital maintenance on Central Corridor lines, the TCS cutover in the Far West, and the rebuilding of the Roseville yard were contributing factors in Central Corridor congestion.

<sup>72</sup> UP concedes, however, that, between Denver and Bond, CO, capacity constraints continue to affect both UP and BNSF operations.

Central Corridor would improve BNSF's ability to compete.<sup>73</sup> And, with regard to BNSF's complaints respecting UP crews, UP insists that, aside from a single occasion in early June,<sup>74</sup> it has consistently provided BNSF with crews in accordance with standard priorities (i.e., high-priority intermodal trains have been crewed ahead of manifest trains); and suggests that, in any event, the matter will soon be moot, in view of BNSF's intention to use its own crews for its Central Corridor operations effective January 1, 1999.<sup>75</sup>

As respects the I-5 corridor and California, UP insists that it has implemented, and will continue to implement, effective methods to resolve problems in the Stockton area,<sup>76</sup> in the Sacramento area,<sup>77</sup> in the Los Angeles area,<sup>78</sup> and on the Tehachapi line.<sup>79</sup>

And, UP adds, if it were inclined to bombard the Board with complaints about BNSF actions that have adversely affected UP service, it could. UP notes, in general, that every railroad using a joint

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<sup>73</sup> UP adds that it would be willing to discuss joint or coordinated dispatching arrangements with BNSF, but would expect BNSF to be equally receptive to coordinated dispatching of BNSF lines used by UP, such as Portland-Tacoma, Chicago-Kansas City, Daggett-Riverside CA, and the Powder River Basin Joint Line.

<sup>74</sup> See UP/SP-361 at 22 n.7.

<sup>75</sup> See UP/SP-361, Exhibit 1.

<sup>76</sup> UP concedes that there have been problems in the Stockton area, but insists that the track realignment project referenced by BNSF has not yet been completed.

<sup>77</sup> UP concedes that there have been haulage problems in Sacramento, which is served via an interchange in Stockton. UP claims, however, that new interchange arrangements agreed to by UP and BNSF appear to be working.

<sup>78</sup> UP concedes that there has been congestion in the Los Angeles area, but insists that this congestion, which was caused by transitory problems principally related to UP's TCS cutover, has been substantially resolved.

<sup>79</sup> UP concedes that the Tehachapi line has been congested, but claims that this congestion was related to essential maintenance and important improvements that have taken place on the line. And, UP adds, a joint dispatching facility will not solve the Tehachapi line's remaining problems. UP insists that the problems that BNSF is facing as UP's tenant on the Tehachapi line are just like those UP is facing as BNSF's tenant on Cajon Pass -- the volume of traffic moving over both lines is too great for the railroads to expect to move their trains without occasional delays. Both railroads, UP suggests, need to look at capacity issues, and, if they decide that improvements are necessary, each railroad must pay its fair share.

facility regularly has issues to raise with its joint-facility partners, and UP notes, in particular, that, in its capacity as a tenant on various BNSF lines, it has its own ongoing menu of grievances with BNSF actions that have affected UP's ability to compete. See UP/SP-361 at 62-76 (itemization of some, though not all, such grievances). UP stresses, however, that it is not asking the Board to address such grievances,<sup>80</sup> and, in particular, that it is not asking the Board to reopen the BN/SF merger proceeding,<sup>81</sup> even though (so UP claims) many of UP's grievances have more nexus to the BN/SF merger than the complaints BNSF has raised have to the UP/SP merger.

**THE AFPA-2 COMMENTS.** AF&PA, the national trade association of the forest products and paper industry, asserts that the UP/SP merger has adversely impacted rail competition and rail service to shippers. AF&PA suggests that, within the context of this proceeding, we should seek to maximize routing options by increasing the opportunities for shortline rail carriers to participate in UP's rail traffic. AF&PA claims that shortlines: can provide reliable and efficient service on lower density rail lines that have been "spun off" by the larger Class I carriers; and, by connecting smaller and often more rural communities to the interstate network of the Class I carriers, can provide a vital service. AF&PA further claims, however, that "paper barriers" instituted in line sales agreements and in the pricing policies of the Class I carriers can severely restrict a shortline's ability to provide competitive, efficient, and profitable service. Paper barriers, AF&PA argues, can limit, either directly or indirectly,<sup>82</sup> a shortline's ability to interchange traffic with other rail carriers, even where such routings and connections may be efficient.

AF&PA therefore contends: that we should evaluate the degree to which "paper barriers" restrict the competitive service opportunities of the shortlines that connect to the UP system; and that, if such restrictions are found to be substantial, we should undertake to eliminate such restrictions, in whole or in part, in order to improve the quality of rail service provided to shippers and to enhance the competitive alternatives available to shippers. AF&PA argues that such action would serve the public interest by providing increased competitive options to shippers, by alleviating some of the burdens on the UP system, and by making available improved economic opportunities to the shortlines.

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<sup>80</sup> UP indicates that it believes that the concerns of railroads using joint facilities should be addressed, and almost always can be addressed, through negotiation and private dispute-resolution mechanisms, not through governmental intervention.

<sup>81</sup> See Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 38 (ICC served Aug. 23, 1995).

<sup>82</sup> The indirect limits referenced by AF&PA include the imposition of substantial financial penalties.

**DOT-3 Reply.** DOT agrees that elimination of “paper barriers” would improve service and competition for shippers served by shortlines now subject to such barriers. DOT notes, however, that, because problems connected with “paper barriers” are not the result of the UP/SP merger, the relationship of the AF&PA proposal to the instant proceeding is unclear. DOT therefore suggests that it would be better to consider in the Ex Parte No. 575 proceeding the “competitive access” concerns raised by AF&PA in this proceeding.<sup>83</sup>

**UP/SP-361 Reply.** UP contends that the merger has generated a particularly wide array of benefits for forest products and paper shippers, which (UP claims): have benefitted from access to the merged system’s greatly expanded fleets of centerbeam flatcars,<sup>84</sup> bulkhead flatcars,<sup>85</sup> and boxcars;<sup>86</sup> have benefitted from the merged system’s ability to use the combined UP/SP fleet more efficiently; have benefitted from the merged system’s complete redesign and simplification of SP’s lumber tariffs; have benefitted from reductions in the rates applicable to forest products; and have benefitted from the shorter routes and single-line routing options made possible by the merger. UP further contends, with respect to the shortline issues raised by AF&PA: that these issues have no connection to the UP/SP merger, which neither rendered any shortline “captive” nor created any “paper barrier”; that, in any event, these issues have been addressed in a recent AAR/ASLRRRA agreement;<sup>87</sup> and that, furthermore, UP is in the process of instituting new, competitive through rates that will allow exclusively served shortlines to ship products to BNSF local points.<sup>88</sup>

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<sup>83</sup> See Review of Rail Access and Competition Issues, STB Ex Parte No. 575 (STB served Apr. 17, 1998).

<sup>84</sup> UP indicates that its centerbeam fleet will grow from 3,221 cars pre-merger to 4,396 cars in the first quarter of 1999.

<sup>85</sup> UP indicates that, since the merger, it has acquired 800 additional bulkhead flatcars for lumber traffic, and has plans to acquire another 125 such cars, which will bring its fleet of bulkheads to almost 4,000.

<sup>86</sup> UP indicates that, since the merger, it has purchased or repaired 763 50-foot boxcars and 308 60-foot boxcars, which has brought UP’s fleet of boxcars used in the lumber and paper business to almost 19,000 cars.

<sup>87</sup> See Association of American Railroads and American Short Line and Regional Railroad Association--Agreement--Application Under 49 U.S.C. 10706, STB Docket No. S5R 100 (STB served Sept. 22, 1998 and published in the Federal Register on Sept. 25, 1998, at 63 FR 51398; STB served Dec. 18, 1998) (decisions approving the rate-related provisions of the AAR/ASLRRRA agreement).

<sup>88</sup> UP indicates that it has already put such rates in place for one Pacific Northwest shortline and is in the process of negotiating similar through rates with respect to three other Pacific Northwest

(continued...)

**THE PSC-9 COMMENTS.** PSCo<sup>89</sup> contends that UP's service in transporting PSCo and SPS coal trains over the Moffat Tunnel line has deteriorated markedly during the period of approximately 1 year since UP discontinued operations on the Tennessee Pass line and shifted to the Moffat Tunnel line the traffic (especially the eastbound coal traffic) that formerly used the Tennessee Pass line. PSCo contends that, following the discontinuance of operations on the Tennessee Pass line, the Moffat Tunnel line has experienced increased traffic,<sup>90</sup> congestion, and delays, and associated service problems as well (round-trip cycle times, PSCo claims, have increased substantially over the past year and a half). And, PSCo fears, UP, although it has not been authorized to abandon the Tennessee Pass line, may be taking actions that will effectively disrupt the continuity both of the Tennessee Pass line<sup>91</sup> and of the former UP line extending east from Pueblo, CO, that was used by SP to transport Colorado coal to Midwestern destinations.<sup>92</sup>

PSCo, which is concerned that the congestion problems UP is already experiencing on the Moffat Tunnel line may become worse in the future,<sup>93</sup> asks that we: (1) preserve the Tennessee Pass line

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<sup>88</sup>(...continued)  
shortlines.

<sup>89</sup> PSCo's comments were filed on its own behalf, and also on behalf of a PSCo affiliate, Southwestern Public Service Company (SPS).

<sup>90</sup> The increased traffic consists of UP trains routed off of the Tennessee Pass line (this portion of the increase is attributable to the Tennessee Pass discontinuance) and BNSF trains operating over the Moffat Tunnel line pursuant to BNSF's Central Corridor trackage rights (this portion of the increase is not attributable to the Tennessee Pass discontinuance).

<sup>91</sup> PSCo has in mind the acquisition by Royal Gorge Express, LLC, of an 11.75-mile segment of the Tennessee Pass line (between Parkdale and Cañon City), which will be leased to and operated by Rock & Rail, Inc., subject to a permanent, irrevocable overhead trackage rights easement retained by UP. See Royal Gorge Express, LLC--Acquisition and Operation Exemption--Union Pacific Railroad Company, STB Finance Docket No. 33622 (STB served July 15, 1998); Rock & Rail, Inc.--Lease and Operation Exemption--Royal Gorge Express, LLC, STB Finance Docket No. 33608 (STB served July 15, 1998).

<sup>92</sup> PSCo claims that efforts by a shortline operator (the reference is apparently to CK&PR) to purchase the abandoned segment of this line between NA Junction, CO, and Towner, CO, have been unsuccessful, although (PSCo adds) the State of Colorado remains interested in acquiring this segment so that rail operations thereon can be resumed.

<sup>93</sup> PSCo contends, in essence, that the very existence of the Moffat Tunnel imposes a capacity limitation on the Moffat Tunnel line. PSCo indicates, in this regard, that it has been advised that, due to  
(continued...)

as a potential alternative through route for traffic moving between points west of Dotsero, CO, on the one hand, and, on the other hand, Pueblo, CO, by continuing in effect the condition permitting UP to discontinue service on, but not to abandon, the Tennessee Pass line;<sup>94</sup> (2) order UP to continue to preserve the integrity and continuity of the Tennessee Pass line as a potential through route;<sup>95</sup> and (3) revisit, in the next annual round of the general oversight proceeding, the level of service UP is providing on the Moffat Tunnel line.

**UP/SP-361 Reply.** UP indicates that, because traffic growth is indeed pressing capacity on the Moffat Tunnel route,<sup>96</sup> it has reconsidered its plans to abandon the Tennessee Pass route, and has determined that service on the Tennessee Pass route will be resumed if necessary to alleviate congestion on the Moffat Tunnel route.<sup>97</sup> UP adds that the conditions requested by PSCo are not needed, given UP's own decision to preserve the Tennessee Pass route and its continuity as a through route.

**THE CK&PR COMMENTS.** CK&PR was established for the purpose of acquiring and operating the Tennessee Pass line and the NA Junction-Towner line,<sup>98</sup> but, to date, it has neither acquired nor operated either line. CK&PR contends: that it made a good faith effort to acquire the NA Junction-Towner line; that UP, however, did not make any particular effort to help CK&PR acquire that line; that, in fact, UP, after giving CK&PR little time to assemble certain complicated financing arrangements, kept CK&PR's good faith nonrefundable \$100,000 deposit; but that CK&PR has not yet

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<sup>93</sup>(...continued)

the need to vent locomotive exhaust fumes, at least 20 minutes must elapse after one train exits the tunnel before another train is allowed to enter the tunnel.

<sup>94</sup> See Merger Dec. No. 44, slip op. at 155-56.

<sup>95</sup> PSCo insists that UP should not be permitted to sell portions of the Tennessee Pass line in a manner that would impair UP's ability to resume through train operations between Dotsero and Pueblo via the Tennessee Pass.

<sup>96</sup> UP indicates that traffic has grown on the Moffat Tunnel route: because UP has successfully promoted expansion of Utah and Colorado coal traffic; and because BNSF has greatly expanded its own Central Corridor trackage rights operations. UP adds that, to reduce traffic on the Moffat Tunnel route, it has rerouted some coal trains to its Wyoming mainline.

<sup>97</sup> UP notes that, on August 21, 1998, it advised the Board that it was removing the Tennessee Pass line from Category 1 on UP's system diagram map.

<sup>98</sup> CK&PR apparently would like to acquire the UP lines between Dotsero, CO, and Towner, CO (i.e., the Tennessee Pass line and the NA Junction-Towner line, plus the Dotsero-Sage segment that lies west of the Tennessee Pass line and the Cañon City-NA Junction segment that lies between the Tennessee Pass line and the NA Junction-Towner line).

given up on its efforts to acquire the NA Junction-Towner line. CK&PR adds: that, in July 1998, the State of Colorado exercised its state-law right of first refusal to purchase the NA Junction-Towner line;<sup>99</sup> that the State has indicated that it will request shortline operator bids once it takes possession of the line; and that, despite opposition from UP, CK&PR intends to submit a bid in response to that request.<sup>100</sup> CK&PR further contends that, with respect to the Tennessee Pass line, UP has exercised a “divide and conquer” strategy by selling an 11.75-mile segment of the line to a newly established passenger excursion operator (Royal Gorge Express) and its shortline freight affiliate (Rock & Rail, Inc).

CK&PR argues, in essence, that our focus on the narrow issue of the amount of local traffic moving over the NA Junction-Towner line led us to overlook the vital role this line has played as respects Central Corridor competitive options. CK&PR claims, in fact, that eradication of the former DRGW/MPRR Central Corridor routes and the competitive options they once offered is a top UP corporate priority that UP is determined to pursue even if it results in continued degradation of service over UP’s other Central Corridor routes.

CK&PR therefore asks that we scrutinize carefully UP’s assertions regarding the Tennessee Pass line and competition in the Central Corridor. CK&PR asks, in particular: that we continue the condition barring UP from abandoning the Tennessee Pass line; and that we order UP to preserve the integrity and continuity of the Tennessee Pass line as a through route between Dotsero and Pueblo, until such time as it might sell the line in one piece to another rail carrier for continued service. CK&PR also urges that we ask UP whether it required Royal Gorge Express to pay fair value for the Parkdale-Cañon City segment or whether it sold that segment for a nominal consideration.<sup>101</sup>

**UP/SP-361 Reply.** UP claims: that CK&PR is a gathering of rail aficionados with dreams of operating excursion passenger trains throughout Colorado; that the State of Colorado, not UP, rejected as

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<sup>99</sup> CK&PR’s comments suggest that, under Colorado law, before a railroad may physically dismantle an abandoned line, the railroad must give the State a right of first refusal to purchase the line. See also UP/SP-316, V.S. Opal at 11 (UP indicates that a new Colorado law requires a railroad to delay salvage of an abandoned line to give an opportunity for government entities to acquire the line in whole or in part; UP further indicates that it has “voluntarily” complied with this law, although UP believes that this law is preempted by federal law).

<sup>100</sup> CK&PR claims that UP has told the State: that it does not want the State to select CK&PR or any CK&PR affiliate as an operator; and that it wants to forbid the State from reselling the line to CK&PR or any CK&PR affiliate. CK&PR further claims that UP has also attempted to persuade one of CK&PR’s shipper backers to refrain from supporting CK&PR in any future purchase or operating bids for the line.

<sup>101</sup> CK&PR claims that UP insisted that CK&PR pay fair value for the NA Junction-Towner line.

not viable CK&PR's bid to purchase the Tennessee Pass and NA Junction-Towner lines; that, following that rejection, UP, acting at the request of Colorado officials, attempted to work separately with CK&PR on a purchase of the NA Junction-Towner line; that this attempt failed, however, when it became clear that CK&PR had no financing to buy this line, and had misrepresented its financial resources both to UP and to Governor Romer;<sup>102</sup> that, in July 1998, UP sold the NA Junction-Towner line to the State of Colorado; and that, in any event, the conditions requested by CK&PR are not needed, given UP's own decision to preserve the Tennessee Pass route and its continuity as a through route. UP adds that the price of the Parkdale-Cañon City segment paid by Royal Gorge Express was based on net liquidation value, the same method of valuation used in connection with the NA Junction-Towner line.<sup>103</sup>

**THE CEMEX COMMENTS AND PETITION.** Cemex, a cement and aggregates shipper with facilities in Dittlinger, TX (near New Braunfels, TX) is served by UP's Austin Subdivision, a heavily used mainline that carries most of UP's traffic to and from Mexico. Cemex insists, and UP has conceded, that Cemex has been adversely impacted by UP's service problems.

**Prior Decision.** In our decision served July 31, 1998,<sup>104</sup> we acknowledged Cemex's problems but nevertheless denied Cemex's request that we use our emergency authority to grant BNSF, which had overhead trackage rights over the Austin Subdivision that it was not then using, the right to provide local services in order to interchange with the Cemex-owned Western Rail Road (WRR, which operates inside Cemex's Dittlinger facility). We noted: that we were not inclined to impose, under 49 U.S.C. 11123, remedies that might significantly impede UP's own service recovery plan, or create service problems for shippers elsewhere, or favor one shipper over another; that we were not convinced that BNSF could provide additional service to make up any current UP service shortfall without jeopardizing other operations over the line;<sup>105</sup> that, furthermore, although it was possible that BNSF had sufficient excess

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<sup>102</sup> UP disputes most of CK&PR's factual allegations regarding the CK&PR-UP relationship. See UP/SP-361, V.S. Opal.

<sup>103</sup> See UP/SP-361, V.S. Opal at 4 n.2 (UP indicates that the actual price paid by Royal Gorge Express for the Parkdale-Cañon City segment is confidential).

<sup>104</sup> Rail Service In The Western United States, STB Ex Parte No. 573 (STB served July 31, 1998).

<sup>105</sup> We noted that, beyond originating cement and aggregates shipments and transporting local traffic, the Austin Subdivision is also used to carry most of UP's through traffic to and from Mexico, and must be cleared several times each week to accommodate Amtrak passenger trains. We also noted: that, at the relevant points, the Austin Subdivision's single mainline track is used for a large portion of each day to switch traffic for adjacent shippers; that Cemex itself must be reached by a time-consuming and operation-delaying manual switch; and that Cemex apparently lacked enough track space to store the number of empty cars needed to sustain even its then present level of service.

capacity to serve Cemex, there was no indication that BNSF had sufficient capacity to serve the other nearby UP-served facilities that compete with Cemex; and that, in any event, although Cemex was still not receiving fully adequate service, UP's service for Cemex had already improved markedly and was likely to improve even further in the future.<sup>106</sup>

**Cemex's Comments.** In its comments filed in STB Finance Docket No. 32760 (Sub-No. 21), Cemex, which claims that the UP service improvements that have occurred have proven to be inadequate and unsustainable, asks that we impose a condition granting BNSF local service rights to all cement, stone, and sand bulk facilities in Texas<sup>107</sup> located along the UP lines over which BNSF received, in connection with the UP/SP merger, overhead trackage rights. Cemex contends that the requested condition: is necessary to address UP's continuing systemic inadequacies in providing reliable service to cement, stone, and sand producers in Texas;<sup>108</sup> is essential for the continuation of competition in bulk shipments in Texas; will ensure that BNSF can achieve sufficient traffic density to sustain the use of its trackage rights; and will result in minimal, if any, harm to UP, because UP is currently unable to provide adequate service to these shippers. Cemex further contends that the requested condition: is intended to mitigate the adverse impacts of the UP/SP merger;<sup>109</sup> is designed to enable shippers to receive adequate

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<sup>106</sup> We noted, in this respect: that UP was rehabilitating a parallel 16.7-mile line segment near New Braunfels that had previously been abandoned; and that the reactivation of this segment, which UP anticipated would occur in October, would eliminate the Austin Subdivision's only single-track segment between San Antonio and San Marcos. See also Union Pacific Railroad Company--Petition For Declaratory Order--Former Missouri-Kansas-Texas Railroad Line Between Jude and Ogden Junction, TX, STB Finance Docket No. 33611 (STB served June 5, 1998; published that day in the Federal Register at 63 FR 30810) (requesting comments on UP's petition for an order declaring that the Board lacks authority under 49 U.S.C. 10901 over the rehabilitation and reactivation, by UP, of the 16.7-mile segment).

<sup>107</sup> Cemex states that the problems it is experiencing are also being experienced by other similarly situated shippers.

<sup>108</sup> Cemex claims that UP cycle times remain excessively high and highly variable, resulting in extreme "bunching" of empties, insufficient train starts, and substantial departure delays, all of which cause congestion and severely tax Cemex's resources and facilities. Cemex concedes that, as respects Cemex's traffic, UP cycle times have improved as compared to early 1998, but Cemex insists that much of this improvement has come from actions taken by Cemex to restrict its shipments to unit trains to destinations capable of receiving from 40 to 90 rail cars at a time. And these actions, Cemex adds, have forced Cemex to stop serving many of its customers.

<sup>109</sup> Cemex insists that the service problems it is experiencing are predominantly the result of the UP/SP merger. The satisfactory service that UP provided pre-merger, Cemex claims, began deteriorating almost immediately after the merger was approved by the Board.

service;<sup>110</sup> would not create unreasonable operating or other problems for UP;<sup>111</sup> and would not frustrate UP's ability to obtain the anticipated public benefits of the UP/SP merger.<sup>112</sup>

**Cemex's Petition.** In its petition filed in STB Ex Parte No. 573 and STB Service Order No. 1518, Cemex contends that we erred in denying, in our decision served July 31, 1998, Cemex's request for an emergency service order. Cemex contends, in particular: that we erred in stating that Cemex had acknowledged that UP was adequately transporting all of the cement loads that Cemex was offering;<sup>113</sup> that we erred in stating that, in May 1998, UP transported more than 80% of its originally stated goal of 1,656 carloads per month;<sup>114</sup> that we were not entirely accurate in our assessment that the cycle time for returning empty cars for reloading has substantially improved;<sup>115</sup> that we erred in relying on UP's attempt to provide additional rail capacity by rehabilitating the previously abandoned 16.7-mile line segment near New Braunfels;<sup>116</sup> that we erred in emphasizing that Cemex must be reached by a

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<sup>110</sup> Cemex insists that granting BNSF local service rights to all cement, stone, and sand bulk facilities in Texas located along the trackage rights lines will create a level playing field for all shippers by allowing all shippers to meet current market demands. The sought relief is especially appropriate, Cemex claims: because UP gives, and will continue to give, a low priority to stone and cement trains; because UP does not now have, and will not in the future have, the ability to service the needs of cement and stone shippers; and because certain competitors that are now served either by BNSF alone or by both BNSF and UP have experienced a significantly less adverse impact than shippers like Cemex that are served exclusively by UP.

<sup>111</sup> Cemex notes that BNSF already has overhead trackage rights over the relevant lines.

<sup>112</sup> Cemex argues that the sought relief would enable BNSF to take rail volume off of UP's lines, which would effectively reduce UP's congestion problems.

<sup>113</sup> Cemex claims that UP's performance in transporting Cemex's cement has been unpredictable and unsustainable.

<sup>114</sup> Cemex claims that, in May 1998, UP achieved only 74% of its commitment.

<sup>115</sup> Cemex claims that, although cycle times have improved, there has not been a commensurate increase in train starts per month. Cemex further claims: that cycle times remain excessively high and highly variable; and that, in any event, much of the improvement in cycle times has come from actions taken by Cemex to restrict its shipments to unit trains to destinations capable of receiving from 40 to 90 rail cars at a time.

<sup>116</sup> Cemex claims that UP has advised shippers that reactivation of that segment will be delayed to some unknown future date, possibly in mid-October. The line, in fact, has been opened.

“time-consuming and operation-delaying” manual switch;<sup>117</sup> that we erred in stating that Cemex appears to lack enough track space to store the number of empty cars needed to sustain its present level of service, let alone that necessary for the additional carloadings it seeks;<sup>118</sup> that we erred in concluding that “there is too small a margin for error -- and too great a risk of harm -- to require” the emergency service relief sought by Cemex;<sup>119</sup> and that we erred in stating that BNSF access for Cemex would likely produce for Cemex an immediate competitive advantage over similarly situated shippers nearby.<sup>120</sup> Cemex asks that we grant its petition for reconsideration, that we grant emergency service relief, and that we authorize BNSF to provide local service rights to Cemex’s Dittlinger facility.

**UP’s Reply To Cemex’s Petition.** In its reply to Cemex’s petition, UP contends: that there is no longer an emergency situation in the Houston/Gulf Coast area;<sup>121</sup> that, therefore, there is no basis for the emergency service relief sought by Cemex; that UP is working at addressing Cemex’s operational concerns; that UP’s service to Cemex continues to improve; and that, in any event, the particular relief sought by Cemex could not possibly accomplish Cemex’s goal of increasing the total volume of rock transported over the Austin Subdivision.<sup>122</sup> UP further contends: that the information submitted by UP, upon which we relied in our decision denying Cemex’s request for an emergency service order, was accurate; and that our decision adequately explained our reasons for denying Cemex’s request.

**UP/SP-361 Reply.** In its reply to Cemex’s comments, UP insists that Cemex has presented neither a plausible allegation of any defect in competition on the Austin Subdivision nor any other basis for what would amount to a permanent “open access” condition on that Subdivision. UP contends: that Cemex was exclusively-served both before and after the UP/SP merger; that Cemex’s complaints derive from UP’s inability to carry all the rock that Cemex wanted to ship in a “sizzling” construction market;

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<sup>117</sup> Cemex claims that the manual switch at its interchange tracks is precisely the same type of manual switch that is used at all other cement and aggregate shippers on the Austin Subdivision.

<sup>118</sup> Cemex claims that this statement is simply untrue.

<sup>119</sup> Cemex insists that BNSF local service operations at Dittlinger would not pose unreasonable operating or other problems.

<sup>120</sup> Cemex insists that it seeks only a level playing field, and contends that it has been unable to compete with other aggregate producers that are not limited by UP’s lack of reliable service. And, Cemex adds, it is not requesting that UP favor Cemex by taking cars away from other shippers; rather, it is requesting only that BNSF be granted local service rights in order to augment UP service.

<sup>121</sup> See Joint Petition For A Further Service Order, STB Service Order No. 1518 (Sub-No. 1) (STB served July 31, 1998).

<sup>122</sup> UP insists that it is utilizing the Austin Subdivision as effectively as possible, and is operating as many trains over that line as its capacity allows.

that this was a problem of rail capacity, not a problem of inadequate competition; that UP is attempting to expand capacity by rehabilitating the previously abandoned segment near New Braunfels;<sup>123</sup> that, over the past several months, the service UP has provided to Cemex has gotten progressively better, thanks (at least in part) to UP-initiated productivity enhancements, such as using longer trains to transport Cemex's products and working with receivers to unload cars more quickly;<sup>124</sup> and that UP could transport even more shipments for Cemex if Cemex would build additional trackage at its facility, which would allow Cemex's WRR subsidiary to tender 90-car trains to UP without forcing UP to build trains on the Austin Subdivision mainline from Cemex's short tracks. UP further contends: that, even if BNSF were authorized to serve Cemex, track capacity in the relevant area is such that BNSF and UP combined could not move more trains than UP can move alone; and that, as a practical matter, the addition of BNSF would result in UP-BNSF coordination problems that would actually reduce the effective transportation capacity of the local track network.

**THE LACSD COMMENTS.** The County Sanitation Districts of Los Angeles County claim that UP has been unable to consistently supply their wastewater treatment facilities with chlorine, a key component in disinfecting wastewater. The County Sanitation Districts, noting that the lack of a dependable chlorine supply could threaten their ability to provide adequate wastewater treatment for their customers, urge us to take all appropriate actions to restore normal rail service in order to protect the public health of citizens in the Los Angeles area.

**UP/SP-361 Reply.** UP concedes that chlorine shipments in July and August suffered delays, and that one car in particular was badly mishandled, on account of congestion-spawned shortages of locomotives and crews throughout Southern California.<sup>125</sup> UP contends, however, that its congestion problems in the Southern California area have been resolved, and that UP service in this area is now much more reliable.

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<sup>123</sup> See Union Pacific Railroad Company -- Petition For Declaratory Order -- Rehabilitation Of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, STB Finance Docket No. 33611 (STB served Aug. 21, 1998) (holding that the Board does not have 49 U.S.C. 10901 jurisdiction over the rehabilitation and reactivation, by UP, of the previously abandoned segment).

<sup>124</sup> UP contends, in particular: that, in August 1998, UP transported 1,773 cars of rock for Cemex (this, UP notes, is the largest number of rock cars it has moved for Cemex during the 3½ years for which UP has records); that UP's cycle times for rock cars have been plummeting; that, due to a recent weather-related slowdown in Houston construction, Cemex is no longer able to fill the rock trains UP is prepared to operate; and that UP is also carrying all the cement Cemex can tender.

<sup>125</sup> UP indicates that the LACSD chlorine shipments, which move from a supplier in Henderson, NV (southeast of Las Vegas), to points in Southern California, are routed via UP to Barstow, CA, and via BNSF beyond Barstow to destination.

**THE DOT-3 REPLY.** DOT has addressed both safety issues and competitive issues.

Safety Issues. DOT advises that UP safety issues have been studied intensively by the Federal Railroad Administration (FRA). DOT indicates: that FRA completed a comprehensive safety review of UP's operations, through a Safety Assurance and Compliance Program (SACP); that FRA's Final Safety Assurance and Compliance Report on UP, which was issued in February 1998, concluded that UP was making progress in remedying its safety deficiencies, but that continued effort and commitment would be needed to remedy UP's underlying problems; that, to address these problems, FRA conducted, in February 1998, a Senior Management Meeting, with representatives from UP management, UP labor, and FRA; that UP management has developed, in coordination with UP labor and FRA, a Safety Action Plan that details both long-term and interim measures to address UP's safety problems; that FRA has been working closely with UP to implement the Safety Action Plan; that, to assure continued progress, FRA has developed a detailed monitoring program; and that, as a result of all these efforts, significant results have already been achieved.<sup>126</sup> DOT adds: that continued effort is needed to ensure that safety continues to receive the highest priority; and that, in pursuit of this goal, FRA will continue regular inspection activities, and will work with UP management and UP labor to develop additional initiatives to address any new safety concerns.

Competitive Issues. DOT indicates that it continues to have reservations about BNSF's ability to provide competition via trackage rights for 2-to-1 shippers. See Merger Dec. No. 44, slip op. at 90 (DOT argued that the trackage rights provided for in the BNSF agreement would not allow BNSF to conduct independent operations on an equal footing). DOT insists, in this regard: that BNSF's trackage rights service has been adversely affected by UP's service problems; that the effect on BNSF of any UP service problems would have been much less significant if BNSF had operated on its own tracks rather than as a "tenant" on UP's tracks; and that shippers likely would not have suffered to the same degree if they had had access to alternative "landlord" carriers.<sup>127</sup> DOT adds, however, that UP's service problems have made a fair assessment of the competitive impacts of the merger impossible; a period of "normal" operations is necessary, DOT suggests, to determine the true impact of the merger. DOT therefore contends: that continued oversight will be necessary until such time as a more accurate assessment of the effectiveness of UP vs. BNSF competition is possible; and that, until that time, the reporting requirements currently in effect will have to be continued. We note that reporting requirements are, in fact, being continued.

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<sup>126</sup> DOT indicates that, since August 1997, there has been: a 19% reduction in reportable employee injuries; a 21% reduction in lost work days by employees; a 20% reduction in grade crossing accidents; and a 9% reduction in grade crossing injuries.

<sup>127</sup> DOT indicates, however, that it has not concluded that UP has consistently discriminated against BNSF trains.

**UP/SP-361 Reply.** UP insists that its service problems have not made a fair assessment of the competitive impacts of the merger impossible. The fact of the matter, UP claims, is that the evidence demonstrates: that the conditions imposed in Merger Dec. No. 44 have been highly effective;<sup>128</sup> that the UP/SP merger has not caused any reduction in competition; and that, all things considered, the UP/SP merger has been entirely procompetitive.<sup>129</sup>

**THE CIC-2 AND A&NR-2 COMMENTS.** CIC, which produces paper, plywood, lumber, and forest products, has or formerly had four East Texas plants (at Corrigan, Sheldon, Camden, and Lufkin) that rely, either directly or via a shortline connection, on UP's (formerly SP's) Lufkin Subdivision (between Houston, TX, and Shreveport, LA). See Merger Dec. No. 44, slip op. at 76 and 193.<sup>130</sup> CIC claims that the UP/SP merger and the conditions we imposed in connection therewith have had a negative impact on CIC, its MC&SA subsidiary, and its A&NR affiliate. CIC contends: that both UP and BNSF are funneling southbound trains to Houston over the Houston-Fair Oaks line; that this directional running has impacted the local operation which serves CIC, MC&SA, and A&NR; that, on account of this directional running, there has been a severe reduction in the frequency of car pickups and set outs by UP and there have been increased transit times for movements via UP; and that CIC has incurred substantially increased costs related to shipping products by truck or other modes in order to meet the delivery schedules of its customers.

A&NR, a shortline which interchanges with UP at Lufkin, handles an average of 5,000 rail cars a year for the several customers located on its lines. A&NR indicates that it has been negatively impacted by UP's service problems: it has experienced severe reductions in the frequency and reliability

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<sup>128</sup> UP insists that BNSF's trackage rights traffic volumes (and Tex Mex's trackage rights traffic volumes as well) have reached a level that supports fully competitive train services.

<sup>129</sup> UP cites the following procompetitive impacts: sharply lower reciprocal switch fees throughout the West; the creation of two entirely new single-line routes in the I-5 Corridor; the creation of a cornucopia of equipment utilization benefits; and the injection of new competition for "1-to-2" shippers in Louisiana (see UP/SP-344 at 94).

<sup>130</sup> The Corrigan plant is served directly by UP. The Sheldon plant, which is no longer owned by CIC, is served directly by UP, and (CIC indicates) may also be served in the future by BNSF, as a result of a UP-BNSF agreement, announced in February 1998, respecting ownership of certain Houston-New Orleans lines. See UP/SP-344 at 60-61; see also The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company--Acquisition Exemption--Lines Between Dawes, TX, and Avondale, LA, STB Finance Docket No. 33630 (STB served Sept. 29, 1998). The Camden plant is served by CIC's MC&SA subsidiary, which has only one customer (the Camden plant) and which interchanges with UP at Moscow. The Lufkin (Herty) plant, which is no longer owned by CIC, is served by A&NR, a 50%-owned CIC affiliate which has several customers and which interchanges with UP at Lufkin.

of local service; it has experienced a complete breakdown in communication with UP operating managers; it has experienced increased transit times for movements via UP; and it has experienced a 40% decline in rail traffic through the third quarter of 1998 as compared to the same period in 1997. A&NR claims: that directional running has added traffic and congestion over the mainline at the expense of local service to shortlines and their customers; and that the BNSF trackage rights have contributed to the additional congestion.

CIC and A&NR have offered several suggestions with respect to the problems they have identified. (1) CIC and A&NR support what they call "open interchange," i.e., the removal of service restrictions to shortlines by carriers granted overhead trackage rights. CIC and A&NR, which indicate that they support AF&PA's proposals respecting shortline routing options and paper barriers, suggest that the issue of "open interchange" should be addressed in a proceeding applicable to all railroads. (2) CIC and A&NR suggest that we should provide for specific daily local service to shortlines that interchange traffic with UP and/or BNSF on mainlines running into and out of Houston. Local crews, CIC contends, should get priority to travel over or across mainlines to switch local industries and to collect or deliver shipments and/or equipment to shortlines. (3) CIC and A&NR urge us to maintain continued and vigilant oversight of the UP/SP merger.

A&NR has also suggested that the new facilities condition we imposed in Merger Dec. No. 44<sup>131</sup> has created an unintentional disadvantage for shortlines. Shortlines have little prospect of developing a larger shipper base on their existing lines, A&NR contends, when a shipper will enjoy access both to UP and to BNSF by locating a new facility on the UP mainline. A&NR, which suggests that shortlines should receive the same treatment as shippers in that BNSF (or any other railroad given trackage rights) should have access to shortlines that interchange with UP, urges us to seek comments from other shortlines concerning their ability to attract new customers since the imposition of the new facilities condition.

**UP/SP-361 Reply.** UP concedes that local service on the Lufkin Subdivision has not been entirely satisfactory.<sup>132</sup> UP contends, however, that it has taken a number of steps to improve local service on this line: it has doubled the frequency of local service between Shreveport and Lufkin provided by trains LEF60 and LEF61; it has relocated dispatching of the Lufkin Subdivision from Omaha, NE, to the Spring Dispatching Center in Spring, TX; it plans to assign locomotives to locals LEF52 and LEF53 between Houston and Lufkin so that they will not have to compete for power with other operations; and it has taken action to ensure that the trains are ready to go at Englewood Yard

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<sup>131</sup> See Merger Dec. No. 44, slip op. at 145-46.

<sup>132</sup> UP adds that, because much of the outbound traffic generated by CIC, MC&SA, and A&NR is destined to California, CIC, MC&SA, and A&NR were also impacted by the congestion, in July and August, in UP's California operations.

when the local crew comes on duty, thus eliminating situations where the crew consumes part of its service time waiting for its train to be prepared.

With respect to the second suggestion advanced by CIC and A&NR (the suggestion that we should provide for specific daily local service to shortlines that interchange with UP and/or BNSF on mainlines running into and out of Houston, and that local crews should get priority to travel over or across mainlines to switch local industries and to collect or deliver shipments and/or equipment to shortlines), UP contends that CIC and A&NR have submitted no evidence: that such daily local service was guaranteed before the merger; that local crews had any such priority before the merger; or that any competitive impact of the merger, as opposed to specific local-train service issues on one line, has caused any reduction in UP's service to shortlines. And, UP further contends: a condition requiring daily local train service to every shortline in east Texas, or anywhere else, might require UP to provide uneconomic service; and a condition requiring priority for local crews would involve a government override of sensible day-to-day operating decisions in order to favor a particular group over others.

With respect to A&NR's suggestion concerning the new facilities condition, UP contends: that, even if A&NR's contention as to relative disadvantage were true, this would be a circumstance that existed prior to the merger (because, at that time, shippers could elect to locate new facilities at points served by both UP and SP, while an exclusively-served shortline could not offer a site open to rail competition); but that, as a practical matter, there is every reason to conclude that A&NR's contention as to relative disadvantage is not true (because recent history has demonstrated that solely-served shortlines clearly can compete for new industries). And, UP adds, BNSF is already handling ample traffic volumes, and does not need more industry access to ensure its competitiveness.

**THE ESI-28 PETITION.** Entergy's interests are focused on its White Bluff Steam Electric Station (White Bluff), which is located near Redfield, AR, and which uses coal originated at Powder River Basin (PRB) mines served by both UP and BNSF. Prior to the UP/SP merger, White Bluff, which lies on UP's line between North Little Rock and Pine Bluff, was rail-served exclusively by UP, which transported coal to White Bluff via a single-line routing from the PRB. Entergy insisted, however, that, in the context of the UP/SP merger, White Bluff had to be regarded as a 2-to-1 point, because a build-out to an SP line, located about 21 miles away at Pine Bluff, would enable White Bluff to enjoy a BNSF-SP joint-line routing from the PRB. Entergy therefore argued that the pre-merger status quo at White Bluff could be preserved only by granting trackage rights to BNSF (or another independent carrier) over SP's line between Pine Bluff (the point of connection with a White Bluff build-out) and West Memphis, AR (the point of connection with BNSF's own line), limited to the transportation of coal trains to/from White Bluff via the White Bluff-Pine Bluff build-out line. See Merger Dec. No. 44, slip op. at 54-55.

We granted the build-out preservation condition sought by Entergy vis-à-vis White Bluff, and thereby preserved the White Bluff build-out status quo, by requiring that the BNSF agreement be amended to allow BNSF to transport coal trains to and from White Bluff via the White Bluff-Pine Bluff build-out line, if and when that line is ever constructed by any entity other than UP/SP. We noted that,

with this build-out relief, Entergy would continue to have the option of building out to an independent carrier and would continue to be able to use this option in its negotiations with the post-merger UP. See Merger Dec. No. 44, slip op. at 154 and 185.

Now, in its ESI-28 petition (filed October 23, 1997), Entergy contends that, on account of UP's service problems, UP has been unable to deliver all the coal White Bluff needs to meet its generation requirements, and, in consequence, the generation of electricity at White Bluff has had to be curtailed and Entergy has had to rely on more expensive power (by purchasing power from the grid and by generating power at its gas-fired plants). The situation, Entergy warns, is approaching near-critical proportions; UP, Entergy claims, is simply unable to provide Entergy with adequate rail transportation service for coal consumed at White Bluff. Entergy adds that the build-out preservation condition imposed for its benefit in Merger Dec. No. 44 is inadequate to protect it from competitive harm during the UP service crisis.

Entergy, which expresses concern that UP will not be able to return to anything approaching normal service levels in the foreseeable future, asks that BNSF be allowed immediate interim access to White Bluff for the duration of the UP service crisis, and be permitted to serve White Bluff directly for a period of 3 years (the estimated time required to design, construct, and place in service a build-out line to Pine Bluff).<sup>133</sup> Entergy suggests that we can award it the relief it seeks either by modifying the build-out preservation condition pursuant to the oversight jurisdiction we retained in the UP/SP merger proceeding<sup>134</sup> or by issuing a directed service order pursuant to the "directed service" provisions of 49 U.S.C. 11123. Entergy adds: that it has filed a breach of contract action in federal district court in Louisiana; that it seeks, in that action, the right to terminate its UP contracts; but that, unless we allow BNSF immediate interim access to White Bluff, Entergy may be unable to obtain, in the district court action, an effective remedy.

**UP/SP-328 Reply.** UP, by reply filed November 12, 1997, urges denial of the ESI-28 petition. (1) UP argues that, in essence, the Entergy vs. UP dispute is a private contractual dispute; Entergy, UP claims, is seeking what amounts to a remedy for UP's supposed breach of the service commitments set forth in Entergy's UP contracts. The Board, UP insists, should not intervene in the resolution of private contractual disputes. And, UP adds, this point applies with particular force where, as here, Entergy is already pursuing, in a federal district court, its contract claim against UP. (2) UP argues that we impose conditions upon a merger only to rectify harms that the merger causes to competition or to another railroad's ability to provide essential services. Entergy, UP claims, has not seriously suggested that the condition it now seeks satisfies those standards. UP contends, in particular: that the service problems

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<sup>133</sup> The condition sought by Entergy would provide that direct BNSF service to White Bluff will terminate after 3 years if Entergy has not completed the White Bluff build-out by then.

<sup>134</sup> Entergy insists that its present predicament at White Bluff is largely a consequence of UP's failure to implement the UP/SP merger in an orderly manner.

claimed by Entergy are not as severe as Entergy has suggested,<sup>135</sup> and, in any event, were not caused by the UP/SP merger;<sup>136</sup> and that the requested condition would expand rather than preserve Entergy's competitive options. (3) UP argues that, if Entergy's coal supplies are indeed threatened by UP's performance, Entergy has an efficacious remedy: it can readily move coal by rail to the Mississippi River, and then by barge to White Bluff.<sup>137</sup>

**Decision Served July 31, 1998.** By decision served July 31, 1998, we ruled that, although service at White Bluff might not be at the levels that Entergy would prefer, Entergy had not demonstrated an entitlement to emergency relief vis-à-vis White Bluff (i.e., access by BNSF to White Bluff for a period of 6 months). We noted: "UP states that it has delivered more trains to Entergy's power plants during the first five months of 1998 than it did during the comparable months of 1997 when there were no service problems on the UP system. Moreover, unlike other utilities, Entergy has apparently refused to support operational changes to minimize congestion or pursue other UP-suggested transport alternatives that would have increased its coal deliveries. Finally, as UP notes, the imminent completion of its \$400 million track improvements and capacity expansion in the Central Corridor over routes used for Entergy shipments will reduce cycle times and provide the increased capacity that Entergy seeks."<sup>138</sup>

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<sup>135</sup> UP insists that the service problems cited by Entergy represent only a short-term service issue involving only 3 of the past 4 months of deliveries to White Bluff. And, UP adds, even the recent few months of higher cycle times are not significantly different from limited periods in the past when cycle times for White Bluff deliveries have risen.

<sup>136</sup> UP claims: that its service problems arose in an area where the merger had not yet been implemented, and were caused by the fragility of, and certain extraordinary stresses that had been imposed upon, SP; that, with or without the merger, SP would have experienced a congestion crisis; that shippers responded to service problems on SP lines by rerouting traffic via UP lines, which spread congestion beyond the limits of the SP lines; and that, because the congestion around White Bluff flowing from SP's problems in Texas would have occurred even without the merger, that congestion cannot be causally attributed to the merger.

<sup>137</sup> See UP/SP-328 at 6 n.4. UP, however, has not addressed Entergy's claim that, under the terms of Entergy's UP contracts, "Entergy is not free to seek alternative transportation of coal" for White Bluff. See ESI-28, Exhibit CWJ-3, page 8, ¶21.

<sup>138</sup> Joint Petition For A Further Service Order, STB Service Order No. 1518 (Sub-No. 1) (STB served July 31, 1998), slip op. at 2 (describing Entergy's most recent request for emergency relief) and 7-8 (denying Entergy's requests for emergency relief). See also Rail Service In The Western United States, STB Ex Parte No. 573 (STB served July 1, 1998), slip op. at 2 (describing Entergy's earlier requests for emergency relief).

**THE AL&M PETITION.** AL&M, a class III shortline that is wholly owned by Georgia-Pacific Corporation (G-P), operates over 109 miles of track extending in a generally north-south direction between its northern terminus at Fordyce, AR, and its southern terminus at Monroe, LA.<sup>139</sup> AL&M's principal customers are: G-P, which produces pulp, paper, paperboard, lumber, plywood, other wood products, and chemical resins at plants at Fordyce and Crossett; International Paper Company (IP), which produces paper at its plant at Bastrop, LA;<sup>140</sup> Geo Chemical Company; the Ouachita Fertilizer Company; the Shops Warehouse; Century Redi-Mix;<sup>141</sup> and the Coating & Laminating Company. AL&M indicates that, by means of its Class I connections, the products of these shippers move outbound in various types of cars to destinations throughout the United States. Prior to the UP/SP merger, AL&M had three Class I connections: UP (at Monroe and Bastrop); SP (at Fordyce); and KCS (at Monroe). At present, however, AL&M has only two Class I connections: the post-merger UP (at Monroe, Bastrop, and Fordyce); and KCS (at Monroe).

AL&M claims, in essence, that, although it appears to be a 3-to-2 shortline, its situation is more akin to that of a 2-to-1 shortline. AL&M contends: that the pre-merger UP and the pre-merger SP were able to provide, and the post-merger UP is able to provide, direct access to/from a wide range of destinations/origins; but that KCS was able to provide, and remains able to provide, direct access to/from a few points only. AL&M insists: that KCS directly reaches only a handful of the hundreds of destinations to which AL&M traffic was shipped in 1997;<sup>142</sup> and that, although KCS is able to interline traffic to reach other destinations, these routings add circuitry and cost, so that rates for KCS movements are typically higher than comparable UP rates.<sup>143</sup> And, AL&M states: KCS routings tend to be circuitous, given that, at Monroe, traffic must move either west to Shreveport or east to Jackson before reaching a north-south line; and, because the AL&M-KCS connection is at the southern end of the

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<sup>139</sup> The Fordyce, AR-Crossett, AR segment of the Fordyce, AR-Monroe, LA line is owned by the Fordyce & Princeton Railroad (F&P), an AL&M affiliate that, like AL&M, is wholly owned by G-P.

<sup>140</sup> Bastrop is located near the southern end of the Fordyce-Monroe line.

<sup>141</sup> Century Redi-Mix produces cement.

<sup>142</sup> AL&M indicates that the KCS-served destinations to which AL&M-originated traffic was shipped in 1997 were: New Orleans, Lake Charles, DeRidder, Springhill, and West Monroe, LA; Hatfield, AR; Brandon and Louisville, MS; Korf and Garland, TX; and some points in the Kansas City, MO, area.

<sup>143</sup> AL&M notes, in particular, that KCS must interline traffic to provide efficient routings to Houston and the St. Louis area gateways. And, as respects the St. Louis area gateways, AL&M adds that, although the connections provided to KCS by the Gateway Western and Gateway Eastern railroads (which KCS recently acquired) might in theory allow KCS to reach East St. Louis, the routing would be highly circuitous.

Fordyce-Monroe line, traffic from/to the northern end of the line (e.g., traffic from/to G-P's Fordyce plant) requires a 109-mile haul on AL&M in addition to the already circuitous haul on KCS.

AL&M asserts that it and its shippers have been seriously and adversely affected by the UP/SP merger, which (AL&M argues) eliminated the vigorous competition that had previously existed between UP and SP. Post-merger UP service, AL&M insists, has been poor, and, although there have been, from time to time, improvements, these improvements have been sporadic and episodic. UP rate increases, AL&M adds, have already occurred, and further UP rate increases are anticipated.<sup>144</sup> And, AL&M alleges, UP has also imposed "hidden" rate increases by transferring operating costs from itself to AL&M and AL&M's customers. These impacts, AL&M states, are not simply by-products of UP's well-known service problems, but reflect, instead, the fact that UP lacks competitively-driven incentives to offer good service and reasonable rates. AL&M argues, in particular, that the KCS competitive option has not constrained UP from providing poor service and implementing substantial rate increases.<sup>145</sup>

AL&M therefore asks that we impose a condition allowing for the creation, at Fordyce, of a BNSF-AL&M interchange<sup>146</sup> with respect to all traffic except traffic that can be handled by KCS direct to destination or direct from origin.<sup>147</sup> This condition, AL&M contends, would remedy the competitive harm caused by the UP/SP merger and would restore to AL&M and its shippers the vigorous and effective competition that existed prior to the merger by ensuring that AL&M and its customers have access to two Class I connections (UP and BNSF) able to compete for AL&M traffic which KCS cannot directly serve.<sup>148</sup>

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<sup>144</sup> AL&M claims that UP has indicated that the rates charged by SP were "too low."

<sup>145</sup> AL&M also notes that other competitive options (i.e., truck or intermodal) are prohibitively expensive except in emergency situations.

<sup>146</sup> BNSF already has overhead trackage rights on the UP (formerly SP) line that runs through Fordyce.

<sup>147</sup> AL&M indicates that, under its requested condition, BNSF would not be given access at Fordyce "to AL&M traffic moving to or from points directly served by the KCS, including KCS-served points in New Orleans, Shreveport, Lake Charles, and Kansas City." AL&M Petition at 10-11. AL&M further indicates that it "is willing to exclude from BNSF access traffic that travels from the AL&M direct to a destination on the KCS (or vice versa). This exclusion should not encompass traffic that can reach its destination only after being interchanged by the KCS to another carrier, nor, conversely, traffic originating off the KCS and routed over the KCS to AL&M destinations." AL&M Supplement at 12 n.26.

<sup>148</sup> AL&M claims that the requested condition is operationally feasible, and it insists that it has  
(continued...)

AL&M concedes that it did not request, in the UP/SP merger proceeding, the condition it has requested now; there then appeared to be, AL&M indicates, no precedent for remedial access by a third carrier where a merger would result in a 3-to-2 reduction in the number of available carriers. AL&M notes, however, that such a precedent exists now, because we created it in our decision approving the UP/SP merger. See Merger Dec. No. 44, slip op. at 152-54 (certain shippers in the Lake Charles area had, prior to the merger, access to UP, SP, and KCS; we noted, however, that KCS had to interline with UP or SP to provide “efficient routings” to the key gateways at Houston, New Orleans, St. Louis, and Chicago; and we therefore required that BNSF be given greater access to these shippers than the access that the UP/SP applicants had proposed).<sup>149</sup> See also Merger Dec. No. 63, slip op. at 7-8 (rejecting KCS’s argument that we erred in granting BNSF access to shippers in the Lake Charles area).<sup>150</sup>

**BNSF-6 Reply.** BNSF, which supports the relief sought by AL&M, contends that, even if two carriers have access to a shipper’s facilities, that shipper should be deemed a “2-to-1” shipper if route circuitry or other service impediments effectively limit its commercially realistic, efficient, and competitively priced rail carrier options to one carrier.<sup>151</sup> BNSF further contends that the same principle should be equally applicable to similarly situated shortlines such as AL&M. And, BNSF adds, it would be able to provide service to AL&M through a Fordyce interchange with minimal or no impact on UP operations.

**KCS Reply.** KCS, which opposes the relief sought by AL&M, contends: that KCS, which handled over 8,600 cars in 1997 and over 2,600 cars during the first quarter of 1998 that were

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<sup>148</sup>(...continued)

adequate tracks, sidings, and crews to position cars for two pick-ups and set-offs per day at Fordyce, one by UP and one by BNSF.

<sup>149</sup> AL&M claims that the limitations on KCS routings from Lake Charles are present in almost identical form in the case of KCS routings from Monroe. The principal difference, AL&M adds, is that, whereas the Lake Charles-New Orleans KCS routing is 109.9% longer than the comparable UP routing, the Monroe-New Orleans KCS routing is only 40.3% longer than the comparable UP routing.

<sup>150</sup> Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 63 (STB served Dec. 4, 1996) (Merger Dec. No. 63).

<sup>151</sup> BNSF cites Merger Dec. No. 44, slip op. at 152-53 (respecting the Lake Charles area) and 186 (respecting Texas Utilities Electric Company).

interchanged with AL&M, provides a significant competitive restraint vis-à-vis UP;<sup>152</sup> that, during 1997, KCS handled traffic originated by AL&M and destined to dozens, if not hundreds, of destinations beyond the KCS system (from Vermont to Florida, and from California to Washington); and that KCS routings are preferable to many UP routings and to many prospective BNSF routings as well.<sup>153</sup> KCS also contends that the lack of shipper support for the AL&M petition<sup>154</sup> may indicate that the “rate” increases alleged by AL&M are not increases in the rates charged to shippers but, rather, increases in UP’s division of such rates; the AL&M-UP dispute, KCS suggests, may really be a “divisions” dispute; but variations in the division of the revenues generated by the rates charged to shippers, KCS argues, should not, in and of itself, have an effect upon the rates that shippers are charged.<sup>155</sup>

KCS further contends: that the insufficiency of UP service complained of by AL&M is no different than that suffered by many, including KCS, as a result of UP’s service problems; that, as respects AL&M, the effect of UP’s service problems was exacerbated by UP’s inability to maintain manageable levels of traffic in its Pine Bluff Yard; but that, because the problem at Pine Bluff Yard appears to have been cured, UP’s service levels for AL&M traffic can be expected to improve. And, KCS adds, AL&M’s analogy to the Lake Charles situation fails because that situation was entirely different: KCS’s pre-merger routings at Lake Charles were largely KCS-UP joint line routings that competed against SP single-line routings; and an unconditioned merger would therefore have made the post-merger UP a participant in almost all post-merger KCS routings. KCS also claims that, even if BNSF were given access to AL&M at Fordyce, BNSF could not offer more effective competition to UP than KCS currently does: BNSF (KCS notes) would have to use UP lines to interchange with AL&M (and would therefore be subject to UP interference and UP’s service problems), whereas KCS has its own independent lines; and, in any event, BNSF, just like KCS, would have to interline AL&M’s traffic.

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<sup>152</sup> KCS claims that, during the first quarter of 1998, the AL&M-KCS routing handled almost as many outbound cars as the AL&M-UP routing (1,294 for AL&M-KCS; 1,382 for AL&M-UP).

<sup>153</sup> KCS claims that all prospective BNSF routings would involve movement of freight via Longview, TX, and would therefore often be more circuitous than the comparable KCS routings. See also BNSF-6 at 3-4 (BNSF indicates that, initially, its service at the Fordyce interchange would involve the movement of all outbound freight via Longview; BNSF adds that, if volumes increased, it might operate a local “turn” operation between Camden, AR, and Pine Bluff, AR).

<sup>154</sup> KCS claims that AL&M has submitted no evidence that shippers located on its line have suffered a reduction in competition for their traffic.

<sup>155</sup> KCS argues that, in the merger context, conditions are imposed to protect shippers, not to protect railroads. And, KCS adds, AL&M has not demonstrated that a realignment of the AL&M-UP divisions will impair AL&M’s ability to provide essential services to shippers located on the AL&M line.

**G-P Replies.** Georgia-Pacific indicates that the products it produces at its Fordyce and Crossett plants<sup>156</sup> generally must move outbound by rail; truck and intermodal, G-P claims, are prohibitively expensive except in emergency situations. G-P contends: that, prior to the UP/SP merger, it had, through AL&M, a choice of service and rates from two major systems (UP and SP) and one regional system (KCS); that, since the merger, its choices have been limited to one major system (the post-merger UP) and one regional system (KCS); but that KCS, given its geographic limitations, cannot be fully competitive with the post-merger UP.<sup>157</sup> G-P further contends that, because the KCS competitive option has not had a constraining effect on UP, G-P has experienced: excessive delays in obtaining, from UP, empty equipment for loading; substantially increased UP line-haul transit times for almost all movements;<sup>158</sup> and increases in the rates charged by UP.<sup>159</sup> And, G-P adds: it has had to ship products by truck or intermodal, at substantially increased cost, in order to meet delivery schedules; and it has experienced, as a result of this shift to non-rail modes, a reduction of business due to non-competitive costs.

The inability of KCS to provide a fully effective competitive option vis-à-vis UP, G-P claims, is demonstrated by the fact that the KCS competitive option has not induced UP to offer better service, to provide adequate equipment, and to refrain from rate increases. Only BNSF, G-P contends, has the system reach to compete effectively with, and to provide an effective competitive constraint on the rates and service provided by, the post-merger UP. BNSF, G-P argues, can provide a fully competitive alternative to UP; KCS, G-P insists, cannot.<sup>160</sup> G-P therefore supports the relief requested by AL&M.

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<sup>156</sup> G-P operates a plywood plant at Fordyce and plywood, lumber, and chemical plants at Crossett. G-P indicates that, in 1997, the rail volume from these four plants was approximately 5,000 carloads. The distribution of traffic, on a regional basis, was as follows: 49% to the Midwest, 34% to the West, 12% to the Northeast, and 5% to the South.

<sup>157</sup> G-P claims: that KCS does not directly serve more than a handful of G-P destinations (i.e., only a few G-P destinations are located on KCS lines); that, in all other cases (e.g., traffic moving to the Houston and St. Louis area gateways), KCS must interline traffic to reach G-P destinations; and that, although KCS can offer service over joint routes, the rates for these joint routes have typically been higher than the UP rates to the same points (presumably on account of the inherent additional costs involved in interlining traffic).

<sup>158</sup> G-P indicates that it has not realized a significant, sustained improvement in UP service levels over the last 6 months (i.e., the 6 months preceding June 1, 1998).

<sup>159</sup> G-P indicates that, given the recent rate increases received on a negotiated G-P plywood contract, it expects UP to increase its rates by amounts in the 15% to 20% range, over the course of the next year, if AL&M's efforts to create an AL&M-BNSF routing are thwarted.

<sup>160</sup> G-P claims that UP representatives have stated that UP intends to increase rates on the basis  
(continued...)

**IP-21 Reply.** In Merger Dec. No. 44, we considered International Paper’s concerns that the UP/SP merger would adversely affect UP vs. SP (i.e., UP vs. AL&M-SP) competition at its Bastrop plant. IP argued: that the pre-merger SP, which had no incentive to discriminate against AL&M and in favor of the pre-merger UP, provided a friendly connection at Fordyce for traffic originated by AL&M; that the post-merger UP/SP, however, would have an incentive to treat AL&M less favorably than itself, and therefore would not provide a friendly connection at Fordyce for traffic originated by AL&M; and that, therefore, the UP vs. SP-AL&M competition that existed pre-merger would not exist post-merger. IP suggested that, in order to preserve UP vs. SP competition at its Bastrop plant and at certain other IP plants (with respect to traffic moving from those plants to SP-served points), we should require that UP/SP keep open all routes, at competitive rates with service no less favorable than would be accorded UP/SP traffic, via pre-merger KCS-SP junctions at Beaumont, Houston, Dallas, and Shreveport, on traffic to/from competitively served points (including AL&M originations and terminations at Bastrop). See Merger Dec. No. 44, slip op. at 71-73. We denied IP’s suggestion (this was IP’s condition #2), stating: “Conditions intended to keep open existing junctions are overly intrusive and could delay, in certain respects, implementation of the increased efficiencies expected from the merger, and would deny UP/SP the freedom to adapt to new developments.” See Merger Dec. No. 44, slip op. at 191.

IP now contends: that, prior to the UP/SP merger, IP had three competitive options at Bastrop (an AL&M-SP routing via Fordyce, an AL&M-KCS routing via Monroe, and a UP routing), and, as a result, rail service was reliable and efficient, and rates were maintained at competitive levels;<sup>161</sup> that, post-merger, IP has only two competitive options at Bastrop (an AL&M-KCS routing via Monroe, and a UP routing);<sup>162</sup> but that, since July 1997, UP service at Bastrop has been grossly inferior, and IP has been forced to divert traffic to truck to meet its commitments and keep the plant open. IP further contends: that IP’s efforts to shift traffic to the AL&M-KCS routing (for traffic headed to destinations in the

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<sup>160</sup>(...continued)

that rates charged by SP were “too low.” These statements, G-P argues, prove that the loss of SP has had, and will continue to have, a direct adverse effect on the competitive choices available to G-P and its customers. And, G-P adds, UP’s ability to unilaterally increase rates that are “too low” shows conclusively that the limited rail competition offered by KCS is inadequate to constrain UP pricing.

<sup>161</sup> IP claims that, prior to the merger, SP was a far more responsive, competitive carrier than UP, and provided a substantially superior level of service and more favorable rates.

<sup>162</sup> IP claims that, once certain existing SP contracts expire, the AL&M-UP routing via Fordyce will disappear.

Southwest, Midwest, and Far West) have been thwarted by a lack of cars on AL&M<sup>163</sup> and KCS;<sup>164</sup> that UP, facing no competitive constraint capable of tempering its conduct, has simultaneously reduced service and increased rates; and that UP, unless some such competitive constraint is brought to bear against it, is likely to allow service to deteriorate further and to raise rates even higher. IP, which supports the relief requested by AL&M, maintains that BNSF could replace the AL&M-SP Fordyce routing that was lost with the merger and could restore a competitive option that was available to IP prior to the merger; BNSF, IP claims, is willing to handle traffic routed AL&M-BNSF via Fordyce and to provide IP with the badly needed boxcars that would permit AL&M to receive its proper share of IP's business.<sup>165</sup>

**UP/SP-343 Reply.** UP, which opposes the relief sought by AL&M, concedes that, as respects traffic moving via an AL&M-UP routing, UP had serious service problems in the fall of 1997, and again in February and March of 1998 (as UP implemented, and then adjusted to, directional running on the line through Fordyce). UP claims, however, that its service has improved considerably in recent months, and that, to solidify those improvements, it has restructured its local operation in various respects. UP has also made three additional arguments in opposition to the "open access" relief sought by AL&M.

(1) UP insists that it has not imposed substantial rate increases on G-P (AL&M's largest shipper). UP claims: that, since the merger, UP and G-P, to simplify G-P's rate spectrum, to bring G-P's rates into line with market conditions, and to expand G-P's marketing opportunities, have negotiated dozens of rate changes applicable throughout the West; that G-P's overall freight costs (i.e., its freight costs for all traffic handled by UP from all G-P origins) have remained flat, and, in fact, G-P has received, in many instances, substantial rate reductions; that UP has indeed made some upward rate adjustments (these apparently include the rate increases complained of by AL&M), but these adjustments have merely reflected market conditions; and that the assertion that UP has embarked on a campaign to raise SP rates that are "too low" is flatly untrue.<sup>166</sup>

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<sup>163</sup> AL&M maintains a fleet of 3,342 cars. AL&M Supplement at 6 n.10. IP indicates that AL&M's car shortages are attributable to UP, which has failed to return AL&M's cars to AL&M.

<sup>164</sup> IP indicates that KCS "has stepped up to the plate at many other locations in excess of their commitments, and has been of great assistance to IP at other locations; but there is a limit to that company's resources." IP-21, V.S. McHugh at 6.

<sup>165</sup> IP suggests that the apparent 3-to-2 impact of the merger at Bastrop is more akin to a 3-to-1½ impact, in that AL&M is not able, by itself, to substitute for the service that had been provided by SP.

<sup>166</sup> UP notes that the rates it applies to G-P's freight are constrained by intense competition in the lumber and panel products marketplace.

(2) UP insists that the AL&M-KCS routing provides effective competition to the AL&M-UP routing. UP contends: that, if KCS did not provide effective competition, UP might have been expected to raise rates on traffic moving to, or via, the destinations and gateways KCS serves; that, however, AL&M has not complained of any UP rate increases to KCS gateways such as New Orleans, Dallas, Kansas City, Shreveport, Jackson, Meridian, or Beaumont; that, in fact, KCS is indeed effective to these gateways, and it provides effective competition to points beyond by using its connections (BNSF, Tex Mex, IC, CSX, and NS) at those gateways;<sup>167</sup> and that the AL&M-KCS-BNSF routing, in particular, has been highly effective in taking business from UP. The Lake Charles precedent, UP adds, is not relevant here, because KCS single-line routes from/to Monroe are highly competitive, and because KCS joint-line routes from/to Monroe are also highly competitive (KCS, UP claims, has efficient direct routes to connections at key Eastern gateways, and has direct joint-line routes to important Western markets that are of comparable length to, or even slightly shorter than, UP routes).

(3) UP insists that “duplicate” BNSF operations at Fordyce would reduce service quality for other shippers on the UP line that runs through Fordyce. UP contends: that, with the implementation of directional operations, the former SP line through Fordyce has become the southbound route for both UP and BNSF trains; that an AL&M-BNSF interchange at Fordyce would likely entail either stopping a BNSF southbound train at Fordyce or running a BNSF local on the UP line between Pine Bluff and Fordyce; that, with either scenario, delays would occur on account of the doubling of the amount of time the UP mainline at Fordyce is blocked (because, UP claims, there is no room to get off the mainline while switching); and that, with the BNSF local scenario (which would involve running a BNSF local train northbound against the flow of southbound traffic), even more delays would be likely.<sup>168</sup>

**AL&M Supplement.** The AL&M Supplement addresses arguments raised by KCS and UP in their replies to the AL&M Petition.

(1) AL&M concedes that UP’s G-P rate changes were negotiated by UP and G-P, but insists that the fact that such changes were negotiated does not mean that UP has not exercised the increased market power resulting from the UP/SP merger. The substantial rate increases applicable to AL&M traffic, AL&M contends, reflect the additional market power gained by UP as a result of the merger. AL&M also concedes that UP decreased its rates for other products moving from other G-P origins, but insists that these decreases are irrelevant to the matter at hand. The market at issue here, AL&M contends, is

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<sup>167</sup> KCS can interchange: with BNSF at Beaumont, TX, and Dallas, TX (for traffic moving from/to the Far West); with Tex Mex at Beaumont, TX (for traffic moving from/to Mexico); with IC at Jackson, MS (for traffic moving from/to/via Memphis, East St. Louis, and Chicago); with NS at Meridian, MS, and Birmingham, AL; and with CSX at Birmingham, AL.

<sup>168</sup> UP, which claims that AL&M has been unwilling to interchange more traffic with UP at Fordyce due to lack of track space, also questions how AL&M would be able to interchange cars with two carriers at that location.

comprised of traffic moving to/from points on the AL&M line; movements of forest products to/from all points in the West, AL&M adds, constitute a different market.

(2) AL&M concedes that the substantial rate increases UP imposed on G-P (as respects traffic originating at AL&M points) were partly offset by corresponding decreases in AL&M's revenues. AL&M maintains that it and G-P accepted the new contract despite the substantial UP revenue increases because they believed this was the best they could do. The fact that AL&M was forced to offset much of UP's revenue increase by decreasing its own revenue, AL&M adds, is further evidence of UP's increased post-merger market power.

(3) AL&M insists that UP can be expected to continue to raise rates as other contracts expire.

(4) AL&M insists that the injury of which it complains was not caused by the creation of a more efficient routing that bypassed its system or that made its service less valuable. The injury of which it complains, AL&M argues, was caused by the reduction in the head-to-head competition that formerly existed between UP and SP, which created increased UP market power by which UP can extract more monopoly rents at the expense of AL&M and its shippers.

(5) AL&M, though it concedes that KCS has rendered valuable service to shippers seeking an alternative to UP during its service crisis, contends that, notwithstanding the competition supposedly offered by KCS, UP has been able to increase its rates above those that UP and SP charged G-P prior to the merger. The limitations of KCS's system and KCS's resources, AL&M maintains, are evident: KCS's routes most often are longer than UP's, and generally require KCS to interchange traffic; the points served by KCS are simply too few; KCS can reach most points only indirectly and through interchange with other carriers;<sup>169</sup> and KCS cannot furnish a sufficient number of cars.

(6) AL&M, which doubts that the restructuring announced by UP will fix UP's ever-changing service difficulties, insists that, contrary to UP's assertions, UP's service problems continued during June 1998. And, AL&M suggests, it is concerned that, unless we allow the creation of an AL&M-BNSF interchange at Fordyce, UP will have no incentive to continue to provide adequate service.

(7) AL&M claims: that track capacity at Fordyce is adequate to support interchanges with both UP and BNSF; that AL&M is willing to perform the switching that would be required for an AL&M-BNSF interchange; and that the objection that an AL&M-BNSF interchange would delay through traffic on the mainline is vague and speculative, and echoes the objections UP has typically made whenever another railroad has sought to provide service over UP's lines.

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<sup>169</sup> "It is the limited single system reach of the KCS that is the principal reason the Board should extend the Lake Charles condition to permit BNSF access to the AL&M at Fordyce." AL&M Supplement at 12.

**UP/SP-347 Reply.** (1) UP claims that the results of recent UP/G-P contract negotiations demonstrate that UP did not gain market power as a result of the UP/SP merger. UP further claims: that G-P has in fact benefitted from UP efforts, aided by merger synergies, to make G-P lumber and G-P panel products more competitive throughout the Western marketplace; that, despite isolated instances involving high percentage rates of increase on small-volume flows, the overall impact of UP's rate changes has been only a minimal increase; and that, in the few instances in which G-P's rates were increased, the increases reflected the fact that existing rates had been in place for several years and were below market levels. (2) UP contends: that the relevant issue in determining whether KCS is an effective competitor is not UP's rate level but KCS's rates and how much traffic KCS has moved; that, despite AL&M's claim that KCS is not competitive because it must interchange its traffic with other railroads, almost all of the AL&M traffic that KCS moved in the first quarter of 1998 was destined to points that KCS does not serve directly; and that the evidence supports UP's assertion that KCS provides effective competition from AL&M points with efficient routes to both Eastern gateways and Western destinations. (3) UP insists that its service with respect to AL&M has improved substantially. And, UP adds, AL&M has offered no real response to UP's evidence that adding an AL&M-BNSF interchange at Fordyce would cause added congestion and train delays on UP's line. The reality, UP claims, is that, even if AL&M might benefit from an AL&M-BNSF interchange at Fordyce, other shippers using the UP line that runs through Fordyce would suffer.

**KCS Motion To Strike.** KCS argues that the AL&M Supplement is a reply to a reply, and, as such, is prohibited by 49 CFR 1104.13(c) and is not permitted by any other directive of the Board. KCS therefore contends that we should strike the AL&M Supplement. KCS further contends that, if we deny its motion, we should allow KCS 20 days to respond to the AL&M Supplement.

**AL&M Reply To KCS Motion.** AL&M concedes that the AL&M Supplement addresses points raised by UP and KCS in their replies to the AL&M Petition. AL&M argues, however, that the AL&M Supplement has not burdened the record but rather has served to better frame the issues before the Board. AL&M therefore opposes the KCS motion, and, in order to allow KCS to have the "last word" (much as UP has had the "last word" with its UP/SP-347 reply), AL&M invites KCS to submit evidence and argument in opposition to the points made in the AL&M Supplement.

**UP/SP-361 Reply.** UP claims that, in the several months ending September 30, 1998, its service has improved markedly and cycle times are returning to normal. "The average cycle time for moves that UP interchanges with AL&M and that terminate at UP-served destinations has dropped from a February 1998 high of 26 days to 17 days in August, a level that is approaching normal. For movements to non-UP-served destinations, cycle times dropped from a February peak of 14 days to 7 days in August, at or close to normal." See UP/SP-361 at 2 n.2.