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November 13, 2013

235076

BY HAND-DELIVERY

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

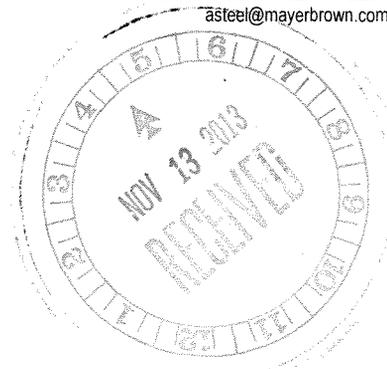
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Office of Proceedings

NOV 13 2013

Part of
Public Record

Adrian L. Steel, Jr.

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asteel@mayerbrown.com



Re: Finance Docket No. 35776, Union Pacific Railroad
Company – Operation Exemption – In Bexar and
Wilson Counties, TX

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding are the original and ten (10) copies of BNSF Railway Company's Petition to Reject Notice of Exemption and Request for Stay of Effective Date of Exemption.

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

Please contact me if you have any questions. Thank you.

Sincerely yours,

A handwritten signature in black ink that reads 'Adrian L. Steel, Jr.' with a stylized flourish at the end.

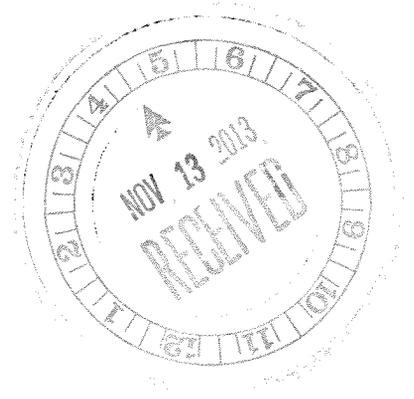
Adrian L. Steel, Jr.

Enclosures

cc: Jeremy M. Berman

BEFORE THE
SURFACE TRANSPORTATION BOARD

_____ **235076**
STB FINANCE DOCKET NO. 35776



UNION PACIFIC RAILROAD COMPANY
-- OPERATION EXEMPTION --
IN BEXAR AND WILSON COUNTIES, TX

**PETITION TO REJECT NOTICE OF EXEMPTION AND
REQUEST FOR STAY OF EFFECTIVE DATE OF EXEMPTION**

Richard E. Weicher
David T. Rankin
Courtney B. Estes
BNSF Railway Company
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COUNSEL FOR BNSF RAILWAY COMPANY

Dated: November 13, 2013

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. ~~35778~~ 235076

UNION PACIFIC RAILROAD COMPANY
-- OPERATION EXEMPTION --
IN BEXAR AND WILSON COUNTIES, TX

**PETITION TO REJECT NOTICE OF EXEMPTION AND
REQUEST FOR STAY OF EFFECTIVE DATE OF EXEMPTION**

BNSF Railway Company (“BNSF”) hereby petitions the Board to reject the Verified Notice of Exemption (“Notice”) filed by Union Pacific Railroad Company (“UP”) in this proceeding on October 21, 2013. BNSF further requests that the Board stay the effective date of the exemption, if such a stay is needed to afford the Board sufficient time to act on BNSF’s petition to reject the Notice.¹

UP filed its Notice pursuant to 49 C.F.R. § 1150.31, *et seq.* Notice at 2. The Board has held that the Section 1150.31 exemption procedure is “typically reserved for uncomplicated and noncontroversial cases.” STB Finance Docket No. 34645, *Burlington N. & Santa Fe Ry. Co. – Acquisition and Operation Exemption – South Dakota.*, slip op. at 2 (STB served Jan. 14, 2005). As BNSF explains below, this matter is by no means “‘routine’ or ‘noncontroversial’” (*id.* at 3) because it presents “‘complicated and controversial’” (*id.* at 2) issues with significant competitive implications. *See id.* at 3 (rejecting use of exemption procedure because the transaction presented competitive issues that “cannot be regarded as ‘uncomplicated.’”); *see also, e.g.*, STB Finance Docket No. 35208, *Winamac S. Ry. Co. – Trackage Rights Exemption – A. & R. Line.*

¹ As announced by the Board in the Federal Register, the effective date of the exemption is November 20, 2013 (30 days after the exemption Notice was filed). 78 Fed. Reg. 66,802, 66,802 (Nov. 6, 2013). Petitions for a stay may be filed no later than November 13, 2013. *Id.*

Inc., slip op. at 2 (STB served Jan. 9, 2009) (stating that “the notice of exemption process is an expedited means of obtaining Board authority in certain classes of transactions, defined in the Board’s regulations, that ordinarily do not require greater regulatory scrutiny. Thus, notices of exemption are intended to be used for routine and non-controversial cases.”). 235076

Accordingly, for the reasons described below, the Board should reject UP’s Notice before the exemption becomes effective on November 20, 2013. Alternatively, the Board should stay the effectiveness of the exemption until it can thoroughly consider the issues presented by the Notice.

BACKGROUND

Soon after BNSF requested access to a New Shipper Facility in the area of Elmendorf, Texas (*see* Exhibit C, attached hereto), UP filed the Notice initiating this proceeding. By this Notice, UP seeks to change the legal status of the customer-built track to which BNSF has sought access—track that extends from and connects to a “2-to-1” point identified in the Restated and Amended Settlement Agreement (“RASA”) in the UP/SP merger proceeding.² Thus, the Notice (and, specifically, its timing in relation to the unresolved access dispute between UP and BNSF) raises concerns about whether UP will take the position that the change in the jurisdictional status of the track would preclude current and future shippers adjacent to the track from availing themselves of the competitive option for BNSF service applicable at “2-to-1” points that the Board provided in the UP/SP merger proceeding and that UP and BNSF agreed to in the RASA.

² The “UP/SP merger proceeding” refers to the proceeding docketed as Finance Docket No. 32760 and captioned *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*.

In the UP/SP merger proceeding, BNSF was granted extensive trackage rights as a condition to the UP/SP merger to replicate the competition that would otherwise be lost as a result of SP's absorption into UP. *See* STB Finance Docket No. 32760, UP/SP Merger Proceeding, Decision No. 61, slip op. at 8-9 (STB served Nov. 20, 1996). The Board imposed the new facilities condition in approving the UP/SP merger. *See id.* at 2. As the Board explained, "[o]ur new facilities and transload conditions were intended to serve two analytically distinct purposes. These conditions were imposed: (1) so that the post-merger competitive options provided by BNSF vs. UP/SP competition would replicate the pre-merger competitive options provided by UP vs. SP competition; and (2) so that BNSF could achieve sufficient traffic density on its trackage rights lines." *Id.* at 10.

Consistent with the Board's new facilities condition, the RASA includes provisions affording BNSF the right to serve "any New Shipper Facility located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement." RASA, Section 4(b), at 16. Exhibit A lists "2-to-1" points and includes Elmendorf, Texas as one such point. *See id.*, Exh. A, at 50. "The boundaries for such '2-to-1' Points shall be deemed to include all areas within the switching limits of the locations" as designated by tariff as of September 25, 1995. *Id.*, Definitions, at 2-3 (cross-referencing RASA Section 9(g)). The RASA also states, "It is the intent of the parties that this Agreement result in the preservation of competition by two rail carriers for . . . all other shippers who had direct competition or competition by means of siting . . . from only UP and SP pre-merger." *Id.* Section 8(i), at 30.

According to UP's Notice, the track at issue in the Notice is currently non-jurisdictional track that connects with the southern boundary of the Elmendorf switching limits. *See* Notice, Exh.1 (map showing track connecting to UP track at Mile Post 16.1); Letter from Daniel

Hartmann, Senior Director – Interline Marketing, UP, to Chris Bigoness, Manager Merger Customer Access, BNSF, dated July 29, 2013 (attached hereto as Exhibit B) (confirming that Elmendorf switch limits extend to Mile Post 16.1).³

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That track was constructed as private track by Frac Resources, L.P. and later purchased by UP. *See* Notice at 3 & n.3. Frac Resources is a co-developer of Mission Rail Park, a new “commercial rail park” being constructed near Elmendorf in southeast Bexar and Wilson Counties, TX. *See* <http://missionrailpark.com> (last visited October 28, 2013). In June, July, and September 2013, BNSF and UP exchanged correspondence regarding BNSF’s access to the Mission Rail Park facility via the track. *See* Exhs. A-C (correspondence between BNSF and UP). In response to UP’s contention that Mission Rail Park was not in the Elmendorf switch district (*see* Exh. B), BNSF pointed out that “Section 4(a) of the RASA grants BNSF the right to provide direct service within the switch limits of ‘2-to-1’ points, in this case up to and including MP 16.1 in Elmendorf. BNSF is entitled to access any New Shipper Facility, as long as the track and/or connection is located at or between the mileposts which define the switch district.” Exh. C (Letter from Chris Bigoness to Daniel Hartman, dated Sept. 30, 2013)).

BNSF’s position was supported by the fact that, in the UP/SP proceeding, the Board had held that a “new facility will be deemed to be ‘on’ a trackage rights line, and open to BNSF service, if the facility is . . . adjacent to a spur, an industrial track, and/or a yard that is itself served by a trackage rights line.” STB Finance Docket No, 32760, UP/SP Merger Proceeding,

³ The Elmendorf switch limits discussed in the correspondence between Messrs. Hartmann and Bigoness are consistent with those in effect on September 25, 1995, the effective date for determining switch limits for purposes of establishing the parameters of “2-to-1” points set forth in the RASA. *See* Southern Pacific Transportation Company Tariff ICC SP 9500-C, Item 11920 (effective Aug. 1, 1995) (excerpt attached hereto as Exhibit D). As is evident from the SP tariff, the Elmendorf switch district runs along approximately 3.5 miles of track from Mile Post 16.1 northward.

Decision No. 86, slip op. at 4 (STB served July 12, 1999) (hereinafter “Decision No. 86”). If a facility is “on” a trackage rights line by virtue of its location adjacent to a spur or industrial track connecting to the trackage rights line, then surely a facility must be deemed to be “in” a switch district if it is adjacent to such track that connects to that district.⁴

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UP, however, has not responded to BNSF’s September 30, 2013 letter, and the issue of BNSF’s access to new and future shippers along the trackage remains unresolved as UP proceeded to purchase the track and file the instant Notice to change the track’s jurisdictional status under 49 U.S.C. § 10901.

ARGUMENT

I. THE BOARD SHOULD REJECT UP’S VERIFIED NOTICE OF EXEMPTION BECAUSE THE CLASS EXEMPTION PROCESS IS INAPPROPRIATE FOR THE TRANSACTION CONTEMPLATED BY UP

“[T]he notice of exemption process is an expedited means of obtaining Board authority in certain classes of transactions, defined in the Board’s regulations, that ordinarily do not require greater regulatory scrutiny. Thus, notices of exemption are intended to be used for routine and non-controversial cases.” STB Finance Docket No. 35208, *Winamac S. Ry. – Trackage Rights Exemption – A. & R. Line, Inc.*, slip op. at 2 (STB served Jan. 9, 2009). “[T]he class exemption process is not appropriate for controversial cases in which a more detailed record is required than what is produced through a notice invoking a class exemption.” STB Finance Docket No. 34501, *James Riffin d/b/a The N. Cent. R.R. – Acquisition & Operation Exemption – in York County, PA*, slip op. at 6 (STB served Feb. 23, 2005). The Board has not hesitated to reject exemption notices brought under 49 C.F.R. § 1150.31, like the one at issue here, when those cases are “complicated and controversial” or present disputed competitive issues. *See* STB

⁴ This is a particularly apt analogy where, as here, the switch district runs from point to point *along* specified track, rather than consists of the area *around* a given terminal.

Finance Docket No. 34645, *The Burlington N. and Santa Fe Ry. Co. – Acquisition and Operation Exemption – State of South Dakota*, slip op. at 2-3 (STB served Jan. 14, 2005); *see also* STB Finance Docket No. 35705, *James Riffin & Eric Strohmeyer—Acquisition & Operation Exemption—in Rio Grande & Mineral Cntys., Colo.*, slip op. at 2 (STB served Jan. 11, 2013) (“In general, the notice of exemption process is an expedited means of obtaining Board authorization in certain classes of transactions, as defined in the Board’s regulations, that ordinarily do not require greater regulatory scrutiny. In cases that require information beyond that provided through simplified notice procedures, or that are controversial, the Board has rejected notices of exemption.”) (internal footnote omitted).⁵

Here, as described above, UP’s Notice presents non-routine and potentially controversial issues relating to BNSF’s right to provide competitive service to a New Shipper Facility at a “2-to-1” point, as provided for by the Board’s decisions in the UP/SP merger proceeding and by UP and BNSF in the RASA. BNSF is concerned that, if shippers in the new Mission Rail Park shipper facility must use jurisdictional track owned by UP to reach the switch limits of Elmendorf, UP may argue that such shippers would thereby not be deemed to be located at a facility “in” the Elmendorf switch district, and therefore could not avail themselves of the option

⁵ The Board’s authority to “reject” notices of exemption is well-established. In the Riffin/Strohmeyer case cited in the text above, the Board cited four cases decided since 2008 in which it rejected exemption notices. Other cases could be added to the Board’s list. *See, e.g.*, STB Finance Docket No. 35558, *Utah S. R.R. Co., LLC—Change in Operators Exemption—Iron Bull R.R. Co., LLC*, slip op. at 5 (STB served Sept. 21, 2012) (rejecting exemption notice as void *ab initio* on the basis of false and misleading information); STB Finance Docket No. 35559, *Saratoga & N. Creek Ry., LLC—Operation Exemption—Tahawus Line*, slip op. at 3 (STB served Nov. 23, 2011) (“Saratoga’s notice of exemption will be rejected because the record indicates that this matter is not routine and non-controversial and because the short deadlines provided in the class exemption regulations do not provide sufficient time to enable the Board to address the issues raised here before the exemption takes effect.”). The United States Court of Appeals for the District of Columbia Circuit has recently affirmed the Board’s rejection of a notice of exemption (also filed by Messrs. Riffin and Strohmeyer). *See Riffin v. STB*, ---F.3d---, 2013 WL 5762797 (D.C. Cir. Oct. 25, 2013).

to use BNSF competitive service as new shippers at a “2-to-1” point. BNSF believes that an exemption should not be used to facilitate forestalling BNSF’s access to shippers along or adjacent to a spur or industrial track.

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Such a result would be contrary to the Board’s policy of replacing the loss of two-carrier competition—including, siting competition—through BNSF service. Before the UP/SP merger, if a shipper built a spur or industrial lead to connect to the Elmendorf switch district, the shipper could have sought through negotiation with UP and SP to obtain service from both carriers. An alteration in the jurisdictional status of the customer-built private track connecting the new Mission Rail Park to the Elmendorf switching limits should not be permitted to reduce the competitive options that the Board sought to preserve at “2-to-1” points.

The Notice thus presents non-routine, potentially controversial issues that require scrutiny that cannot be afforded within the constraints of an exemption proceeding. For these reasons, the Notice should be rejected.

Moreover, UP’s Notice fails to mention the unresolved competitive dispute between UP and BNSF concerning BNSF’s access to new and potential shippers via the track. The failure to mention that dispute conveys the erroneous impression that UP’s proposed transaction is routine and non-controversial without serious competitive implications, rendering the Notice misleading and thus, void *ab initio*.⁶

⁶ The Board has often noted that an exemption notice that is found to contain false or misleading information is “treated as void *ab initio*.” STB Finance Docket No. 33950, *Jefferson Terminal R.R. Co. – Acquisition & Operation Exemption – Crown Enters., Inc.*, slip op. at 4 (STB served Mar. 19, 2001).

II. THE BOARD SHOULD STAY THE EFFECTIVE DATE OF UP'S VERIFIED NOTICE OF EXEMPTION UNTIL IT CAN ACT ON BNSF'S PETITION TO REJECT THE NOTICE

If necessary, the Board should stay the effective date of UP's Verified Notice of Exemption at least long enough to permit the Board to act on the instant petition to reject the Notice. A stay is appropriate and justified to protect the integrity and efficiency of the Board's processes. As noted above, the Notice presents non-routine and complex competitive issues that are not appropriately addressed through the Board's exemption procedures. In such a circumstance, a stay is fully warranted.

At the very least, the Board should institute a housekeeping stay so that the exemption cannot take effect until the Board has sufficient time to deliberate fully upon the issues presented in this petition. *See* STB Finance Docket No. 34645, *The Burlington N. and Santa Fe Ry. Co. – Acquisition and Operation Exemption – State of South Dakota*, slip op. at 2 (STB served Jan. 14, 2005) (noting that the Board “issued a ‘housekeeping stay’ of the effective date of BNSF’s notice of exemption, to allow BNSF an opportunity to file a formal reply to the stay petition, and to allow time for the Board to consider, in a more orderly fashion, the issues presented in the stay petition”).

A stay also is justified under the Board's traditional stay criteria. The Board will grant a stay when the proponent of the stay petition can establish that: (1) there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of a stay. *See* NOR 41191, *W. Tex. Utils. Co. v. Burlington N. R.R. Co.*, 1996 WL 347102, at *3-4 (STB served June 25, 1996); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

A. BNSF Is Likely to Succeed on the Merits.

BNSF is likely to succeed on the merits of its petition to reject UP's Notice. As discussed above, this case is not appropriate for the exemption process because, far from being routine and non-controversial, it raises complex competitive issues. The Notice also fails to disclose the full context and possible implications of the proposed transaction. It is thus likely that the Board will reject UP's Notice.

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B. BNSF Will Suffer Irreparable Harm in the Absence of a Stay.

If the Board does not grant a stay, BNSF will be foreclosed from offering service in competition with the service that UP seeks to have authorized. Even if the Notice is eventually rejected or UP's exemption is eventually revoked, there will be no mechanism available to compensate BNSF for the losses it would suffer as a result of being foreclosed from competition during the period when UP has the exclusive right to serve the new Mission Rail Park facility. Such unrecoverable losses suffice to establish irreparable harm. *See W. Tex. Utils. Co.*, 1996 WL 347102, at *3 ("Absent some means of assuring that foregone revenues can be recovered, BN could be harmed absent a stay."); *Va. Petroleum Jobbers Ass'n*, 259 F.2d at 925 (irreparable harm results when there is no "adequate compensatory or other corrective relief [that] will be available at a later date").

C. No Other Interested Parties Will Be Substantially Harmed by a Stay.

A stay of the effective date of the exemption will not cause substantial harm to any interested party. Even if the track remains non-jurisdictional, it can be used as a spur to connect the new Mission Rail Park Facility with the UP line at MP 16.1.

A stay will not substantially harm UP, either. UP's Notice indicates that it is seeking to alter the jurisdictional status of the track not because, in the absence of the exemption, it will not be able to serve Frac Resources, but rather because "the parties determined that the best course

of action was for UP to operate the Line as a common carrier *due primarily to the potential for additional customers on the Line.*” Notice at 3 (emphasis added). Thus, UP has not indicated that Section 10901 jurisdictional status is needed for present operations on the track. Rather, the change of the line’s jurisdictional status is, according to UP, “the best course of action” for “potential” future customers on the line. UP has not provided any basis to conclude that the track cannot now be used as private or spur track to serve a single customer (Frac Resources) in the Mission Rail Park. Therefore, neither UP nor any other interested parties will be harmed by the stay.

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D. A Stay Will Be in the Public Interest.

The public interest clearly warrants instituting a stay. First, the public interest supports full regulatory scrutiny of a change in the legal status of the track that could be argued by UP to foreclose BNSF from providing a fully competitive service to new shippers at Elmendorf—a “2-to-1” point. The public interest in the continued vitality of the Board’s merger condition squarely supports the stay sought here.

CONCLUSION

For the foregoing reasons, the Board should reject UP’s Verified Notice of Exemption. If necessary, the Board should stay the effective date of the Notice until it has sufficient time to act on the instant petition to reject UP’s Notice.

If, however, UP affirms that it will not use the exemption sought in the Notice as a basis for denying BNSF’s access to shippers at the New Mission Rail Park facility or at locations adjacent to the trackage at issue in the Notice, BNSF would consider withdrawing its objections to the Notice.

Respectfully submitted,



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David T. Rankin
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BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2351

Counsel for BNSF Railway Company

Dated: November 13, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2013, I caused a copy of the foregoing Petition to Reject Notice of Exemption and Request for a Stay of Effective Date of Exemption to be served by first-class U.S. Mail on all parties as listed on the Board's website for the service list in Finance Docket No. 35776. **235076**

A copy of the foregoing has also been served on counsel Union Pacific Railway Company.



Adrian L. Steel, Jr.

235076

Exhibit A



Chris Bigoness
Manager Merger Customer
Access
Network Strategy

BNSF Railway Company
2500 Lou Menk Drive
AOB 3rd Floor
Fort Worth, TX 76131
Phone: 817-867-6697
Fax: 817-352-7154

235076 Email: chris.bigoness@bnsf.com

June 28, 2013

Mr. Daniel P. Hartmann
Senior Director Interline
Union Pacific Railroad Company
1400 Douglas Street, STOP 1350
Omaha, NE 68179

Re: Mission Rail Park in Elmendorf, TX

Dear Dan,

Pursuant to the Restated and Amended Settlement Agreement between BNSF and UP dated March 1, 2002, Section 4(d), this letter shall serve as notice of BNSF's election to initiate service to Mission Rail Park at Elmendorf, TX. This is a new shipper facility inside the switch district of a 2 to 1 point and also on a Trackage Rights Line (map attached for reference).

BNSF will serve this industry directly. Service is planned to commence the later of 45 days from the date of this letter (August 12, 2013) or immediately upon placement into service of the connection and will be in conformity with the terms of any applicable agreements between BNSF and UP. Upon UP's confirmation of service, BNSF's local Operations personnel will contact UP's local Operations personnel to discuss any concerns.

In accordance with Section 4(d) of the Restated and Amended Agreement, UP must notify BNSF in writing of your approval or disapproval of BNSF's service plan within 30 days (i.e., July 28, 2013) of receipt of this letter. Upon UP's confirmation of service, BNSF's local Operations personnel will contact UP's local Operations personnel to discuss any concerns.

Sincerely,

Christopher P. Bigoness
Manager Merger Customer Access
BNSF Railway

235076

Exhibit B

UNION PACIFIC RAILROAD
1400 Douglas Street Omaha, Nebraska 68179

235076

July 29, 2013

Mr. Chris Bigoness
Manager Merger Customer Access
BNSF Railway
2500 Lou Menk Drive, AOB 3rd Floor
Fort Worth, TX 76131

VIA: Email

Re: Mission Rail Park, Elmendorf, TX – UP Response

Dear Chris,

Union Pacific has received BNSF's June 28, 2013 letter electing to initiate service to the Mission Rail Park located near Elmendorf, TX. In your letter, you incorrectly state the facility is inside the switch district of a 2-to-1 point and on a Trackage Rights Line.

On December 1, 2011 BNSF submitted a letter to UP asking UP to provide a response confirming access to a proposed new shipper that would be located inside the Elmendorf switch district. Accompanying your letter was a map and an excerpt from the SP circular 9500-C that defines the Elmendorf, TX switch district as follows:

"The switching limits at Elmendorf, TX extend from a point one mile south of the head block of the spur track serving Elmendorf, to a point 2.5 miles north of the head block of the spur track serving Elmendorf".

The current end of UP track southeast of Elmendorf coincides with this definition making it the southern boundary of the switch district (Mile Post 16.1). As depicted on your map included with your June 28th letter, the Mission Rail Park is clearly located approximately 1.4 miles beyond Mile Post 16.1 placing it outside the Elmendorf Switch district.

Additionally, BNSF does not have trackage rights on the trackage from Mile Post 16.1 to the switch leading to the Mission Rail Park facility. Therefore, this is not a New Shipper Facility adjacent to a line over which BNSF has trackage rights.

Regards,



Daniel Hartmann
Senior Director – Interline Marketing
Network and Industrial Development
402 544 3169

235076

Exhibit C



Chris Bigoness
Manager Merger Customer
Access
Network Strategy

BNSF Railway Company
2500 Lou Merk Drive
AOB 3rd Floor
Fort Worth, TX 76131
Phone: 817-867-6697
Fax: 817-352-7154

235076 Email: chris.bigoness@bnsf.com

September 30, 2013

Mr. Daniel P. Hartmann
Senior Director Interline
Union Pacific Railroad Company
1400 Douglas Street, STOP 1350
Omaha, NE 68179

Re: Mission Rail Park in Elmendorf, TX

Dear Dan,

BNSF has received your letter of July 29, 2013, in which UP rejected BNSF's election to serve Mission Rail Park (MRP) at Elmendorf, Texas. UP's stated reasons for denying BNSF access to MRP under the Restated and Amended Settlement Agreement (RASA) are that MRP is not located within the Elmendorf switch district and that MRP is not located "on" a Trackage Rights Line. UP's position is not supported by the RASA or the facts.

UP has previously acknowledged that Elmendorf is a "2-to-1" point and that the south edge of the Elmendorf switch district is located at MP 16.1. UP has also acknowledged that the connection for MRP's customer trackage occurs at MP 16.1. UP's own documentation (attached) up to the present time shows that UP's owned and controlled railroad ends at MP 16.1, coinciding with the published switching limits of Elmendorf. Any track connecting to UP trackage within the switch district, in this case MP 16.1, is connecting to UP at the station of Elmendorf. Thus, MRP's trackage connects directly to the Elmendorf switch district at MP 16.1 as depicted on the map included with our access election of June 28.

Section 4(a) of the RASA grants BNSF the right to provide direct service within the switch limits of "2-to-1" points, in this case up to and including MP 16.1 in Elmendorf. BNSF is entitled to access any New Shipper Facility, as long as the track and/or connection is located at or between the mileposts which define the switch district.

Here, the New Shipper Facility is connected directly to the Elmendorf switch district and is entitled to BNSF access.

Again, BNSF requests that UP confirm BNSF's right to access and directly serve Mission Rail Park pursuant to the RASA.

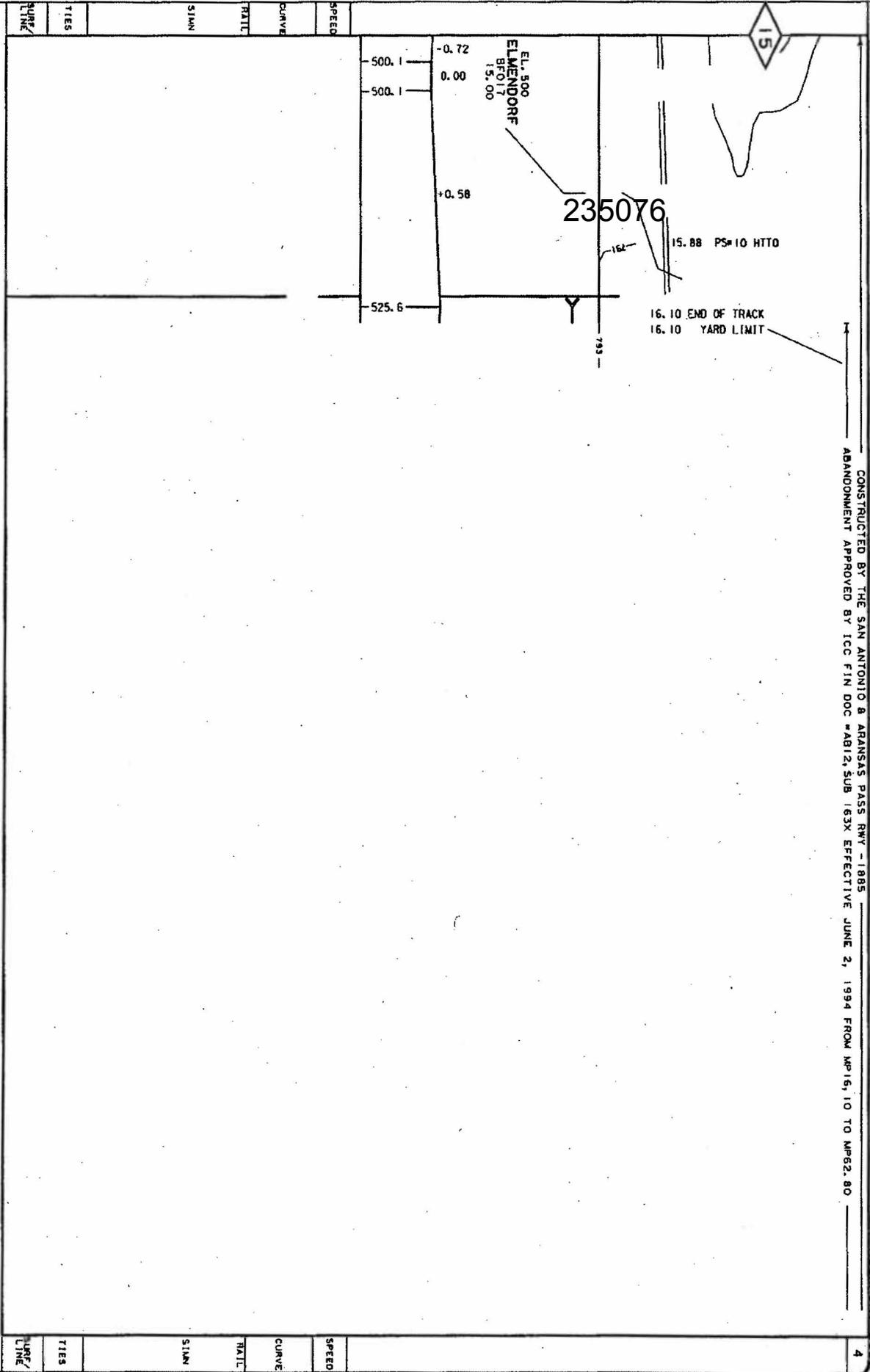
Sincerely,

Christopher P. Bigoness
Manager Merger Customer Access
BNSF Railway

CONSTRUCTED BY THE SAN ANTONIO & ARKANSAS PASS RY - 1885
ABANDONMENT APPROVED BY ICC FIN DOC #A12, SUB 163X EFFECTIVE JUNE 2, 1994 FROM MP 16.10 TO MP 62.80

ROCKPORT SD

4



Last Updated 07/22/2003

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Exhibit D

SOUTHERN PACIFIC TRANSPORTATION COMPANY		ICC SP 9500-C
RULES --- APPLICATION		ITEM
<u>ECHO, TEXAS</u> (SWITCHING LIMITS) ²³⁵⁰⁷⁶ Continued)		
EXCEPTION 1:	The switching limits of Echo, TX will also include points of interchange with Sabine River & Northern Railroad Co. on traffic originating at or destined to Mulford, TX when SP receives linehaul to, from or beyond Orange, TX, or Lake Charles, LA.	11895
EXCEPTION 2:	The switching limits of Echo, TX will also include point of interchange with Sabine River & Northern Railroad Co. on traffic for on-track storage only on privately owned or leased tracks at Echo, TX where the SP receives a line haul both to and from Echo, TX.	
<u>EDINBURG, TEXAS</u> (SWITCHING LIMITS)		
	The switching limits at Edinburg, TX extend from a point 750 feet north of north boundary line of Chavez Street (Alice line) on the north, to a point 2,150 feet west of west boundary line of Sugar Road (McAllen line) on the south, to west boundary line of Jasman Road on the east.	11900
<u>ELAM, TEXAS</u> (SWITCHING LIMITS)		
	The switching limits at Elam, TX extend from a point 4,410 feet east of center of Highway Loop 12, to a point 810 feet west of center of Jim Miller Road.	11905
<u>EL CAMPO, TEXAS</u> (SWITCHING LIMITS)		
	The switching limits at El Campo, TX extend from a point 1,300 feet west of center of Palacios Street to a point 400 feet east of Elwood Street.	11910
<u>ELDON, TEXAS</u> (SWITCHING LIMITS)		
	The switching limits at Eldon, TX extend from Cedar Bayou Bridge on the north, to center of First Railroad Bridge on Baytown Branch on the south, and a point 4 feet south of switch of Houston Lighting and Power Co. tracks on the south.	11915
<u>ELMENDORF, TEXAS</u> (SWITCHING LIMITS)		
	The switching limits at Elmendorf, TX extend from a point one mile south of the head block of the spur track serving Elmendorf, to a point 2.5 miles north of the head block of the spur track serving Elmendorf.	11920
For explanation of (other) reference marks, see Item 50000.		
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