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204406

January 11, 2001

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW Suite 700
Washington, DC 20423-0001

Re: Fin. Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company

Dear Secretary Williams:

Enclosed are an original and 25 copies of:

1. CMA-14, the Reply of the American Chemistry Council to BNSF-97, Petition for Clarification Regarding Costs of Accommodating BNSF Build-In/Build-Out Traffic.
2. CMA-15, the Reply of the American Chemistry Council to BNSF-98, Petition for Clarification Regarding Trackage Fee Adjustment

Also enclosed is a 3 1/2" diskette containing these filings in WordPerfect 5.x for Windows.

Please stamp the additional copy with the date of receipt and return with our messenger.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott N. Stone".

Scott N. Stone

204406



CMA-14

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of the Secretary
JAN 15 2002
Part of
Public Record

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY

- CONTROL AND MERGER -

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

REPLY OF THE
AMERICAN CHEMISTRY COUNCIL
TO BNSF-97, PETITION FOR CLARIFICATION
REGARDING COSTS OF ACCOMMODATING
BNSF BUILD-IN/BUILD-OUT TRAFFIC

The American Chemistry Council ("the Council")¹ respectfully submits this reply to
BNSF-97, which seeks clarification of who should bear the expense of accommodating BNSF
build-in/build-out traffic in the event such traffic interferes with UP system traffic.

¹ The American Chemistry Council (formerly the Chemical Manufacturers Association, or
CMA) represents the leading companies engaged in the business of chemistry. Council members
apply the science of chemistry to make innovative products and services that make people's lives
better, healthier and safer. The Council is committed to improved environmental, health and
safety performance through Responsible Care®, common sense advocacy designed to address
major public policy issues, and health and environmental research and product testing. The
business of chemistry is a \$460 billion a year enterprise and a key element of the nation's
economy. It is the nation's largest exporter, accounting for 10 cents out of every dollar in U.S.
exports. Chemistry companies invest more in research and development than any other business
sector.

UP takes the position that BNSF must fund new connections or other improvements to UP's system whenever BNSF's trackage rights operations "creat[e] any level of interference with the owner's operations and service to its customers." See BNSF-97 at 7. The Council emphatically agrees with BNSF that UP's position is incorrect and untenable. The operation of BNSF's trackage rights trains, by definition, creates some level of interference with UP's operations, because accommodating such trains means that UP cannot schedule its own trains based solely on its own operational convenience.

It was wholly foreseeable that conflicts between UP's traffic and BNSF's trackage rights trains would grow steadily following the merger of SP and UP. UP in its merger presentations espoused the view, strongly concurred in by Board, that the merger would result in substantial growth in traffic on the merged lines, both because UP routes would become more efficient and attract more traffic, and because the BNSF would step into the shoes of the weaker SP as the principal competitor to UP in key parts of the west, including the Gulf Coast. Part of the traffic BNSF was entitled to pursue was build-in/build-out traffic, and there had already been a strong trend towards more of this type of traffic nationwide in the previous 15 years. It was an express goal of the Council and the Board to assist BNSF to acquire a "critical density" of trackage rights traffic (by, among other means, opening up certain existing long-term contracts for bidding, and opening new facilities to BNSF), so that BNSF could provide cost-effective, competitive service more quickly. BNSF has succeeded, as the Board recently observed, in developing the trackage rights traffic "to the size and scale of a Class I railroad in its own right."²

² Fin. 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], Dec. No. 21 (Decided: December 19, 2001) at 4.

In sum, it was within the contemplation of UP, the Board and the parties to this proceeding that there would be more trains, including BNSF trains, operating over the trackage rights lines. At the same time, as the Board has observed, rail infrastructure has been pared and rationalized by abandonments and mergers to the point that there is little excess capacity in the major rail systems.³ It was therefore clear, or should have been clear, that the growing BNSF trackage rights operations, when combined with UP's own growing operations, would lead to some level of interference between the desired operations of UP and BNSF. Indeed, the UP, the BNSF and the Board have spent considerable time and effort finding ways of dealing with such interference or potential interference, such as the establishment of the Spring, TX dispatching center to ensure that UP and BNSF trains are afforded equal treatment by dispatchers.

As BNSF shows (BNSF-97 at 7-8), UP's "no interference" position is also inconsistent with the settlement agreements under which the BNSF trackage rights have been conducted. Those agreements call for consultation between UP and BSNF on BNSF trackage rights operations to balance two objectives: (1) minimizing the operational inconvenience to UP/SP while (2) ensuring that BNSF can provide competitive service. A fair reading of these two objectives is that BNSF's ability to compete is the higher priority, because that objective is to be ensured, while operational inconvenience to UP is only to be minimized, not avoided altogether.

Therefore, the Council agrees with BNSF that UP has no right to demand that BNSF undertake expensive capital improvement projects whenever its trackage rights trains create any interference with UP operations.

The Council also agrees with the general principles advocated by BNSF to deal with conflicts between UP and BNSF operations. In a nutshell, the goals of such principles should be

³ See, e.g., Ex Parte No. 582, Public Views on Major Rail Consolidations (slip op. at 6)(served March 17, 2000).

to ensure that (1) the UP and BNSF consult in a timely and cooperative manner concerning BNSF build-in/build-out traffic, (2) every effort be made to accommodate BNSF traffic through dispatching, scheduling, or other operational means, (3) where BNSF operations cannot be accommodated through dispatching, scheduling, or other operational means, that the most efficient construction solution be agreed upon or ordered by a mediator and (4) that the construction be paid for in accordance with the economic benefit it will afford to BNSF and UP, respectively. A model for the funding of any new construction would be the joint facility agreements that exist between BNSF and UP in respect of various shared railroad facilities.

The Council believes that it will not be particularly productive for BNSF and UP to attempt to define or debate the meaning of what constitutes "unreasonable and material interference," as suggested by BNSF. Rather, the more important issue is whether interference, of whatever magnitude, can be accommodated by dispatching, scheduling or other operational coordination. BNSF and UP have already shown that they are able to deal cooperatively with dispatching and other operational issues without continuous Board involvement. Even though dispatching and other operational decisions may have economic ramifications for both carriers, they should not be permitted to grow into issues requiring arbitration and Board attention. Hence, the Council would recommend telescoping the procedure suggested by BNSF to get more immediately to the issue of whether interference can be dealt with by dispatching, scheduling or other operational accommodations. If they can, then UP and BNSF should be required to work out the problems themselves. If they cannot, and capital improvements are required, then the clarification given by the Board in this matter should provide guidance on principles for the funding of any needed capital improvements.

To make the Council's position clear, we present it below in a format roughly comparable to the procedure proposed by BNSF in the four bullet points in BNSF-97 at 9-10.

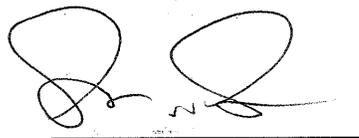
- When BNSF presents an operating plan to UP to serve a build-in/build-out line, UP is required to approve that operating plan unless UP within 60 days presents a detailed written report showing that BNSF's proposed operations would interfere with UP's operations and that the interference cannot be alleviated through the use of dispatching, scheduling, or other operational coordination. The report shall review all reasonable alternative dispatching, scheduling and operational options before concluding that none is feasible in the absence of new construction.
- The aforementioned UP report shall detail any construction of new facilities said by UP to be required, and shall outline BNSF and UP operating plans that would, at the least cost, permit BNSF to conduct its proposed operations competitively using these facilities.
- Any new facility required to be constructed shall be funded on the basis of the degree of use of the facility by UP and BNSF and/or the incremental economic benefit provided to UP and BNSF, respectively, by the facility. Models for such funding would include joint facilities agreements to which UP and/or BNSF are parties.
- If UP and BNSF, after good faith negotiations aimed at reaching the lowest cost solution, cannot agree on the need for a new facility, or the funding for such facility, they may submit the dispute to arbitration, or to the Board, in accordance with the above principles and the principles of ensuring BNSF's ability to provide competitive service while minimizing interference with UP operations.

The above principles, including the principle that funding of new facilities should be in accordance with use and/or economic benefits, attempt to replicate the competitive situation that existed pre-merger, while recognizing the unique nature of BNSF's operating over trackage rights on the UP system. Pre-merger, neither UP nor SP would construct a build in, or serve new traffic, if doing so did not justify the costs involved. Matching costs of new facilities against expected use of and economic benefit from new facilities is the basic free market test of whether an investment makes sense. Those costs would consist principally of the cost of constructing the build-in or build-out line, but might include costs of sidings or other facilities to allow the new build-in or build-out traffic to be accommodated on top of pre-existing traffic. The railroad

constructing the build -in or build-out would find the cheapest, most efficient way to accommodate the new traffic on its pre-existing system, examining first any dispatching or scheduling options before looking at new construction. If that meant changing its operations to find a place for a train that had previously been parked on a main line track, to permit the new traffic to be handled, that is what would have been done.

The wrinkle, post merger, is that BNSF, after obtaining new traffic by means of a build-in or build-out, must carry that traffic not over its own lines, but over trackage rights on UP's system. Hence, the BNSF and UP have partly shared and partly conflicting interests in accommodating the new traffic. Those interests are guided and tempered by the BNSF settlement agreement which contains the balancing objective mentioned above – ensuring that BSNF can provide competitive service while minimizing interference to UP's operations. The UP and BNSF interests, and the interests of shippers and the public, will best be accommodated if UP and BNSF both have incentives to avoid the construction of new facilities if they are not needed, to minimize the costs of any new facilities that are needed, to construct new facilities that will make both UP and BNSF operations more efficient, and to share the cost of the new facilities in accordance with their respective use by and economic benefit to UP and BNSF.

Respectfully submitted,



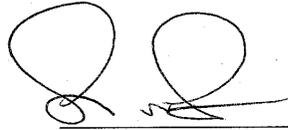
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Counsel for the American
Chemistry Council

CERTIFICATE OF SERVICE

This is to certify that I have, this 14th day of January, 2002, served copies of the foregoing filing by hand upon Washington counsel for the Burlington Northern Santa Fe and Union Pacific and by mail upon other parties of record.

A handwritten signature in black ink, consisting of two large, stylized loops followed by a horizontal line and a small flourish.

Scott N. Stone