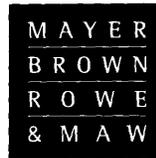


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December 2, 2002

BY HAND

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

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

**ENTERED**  
**Office of Proceedings**

**DEC 3 2002**

**Part of**  
**Public Record**

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of The Burlington Northern and Santa Fe Railway Company's Petition for Reconsideration (BNSF-105). Also enclosed is the disk with the text of the Petition in WordPerfect 9 format.

As BNSF and UP have previously advised the Board, they are currently discussing the possible mutually-agreeable resolution of all of the open issues relating to the trackage rights charges under the BNSF Settlement Agreement. BNSF remains hopeful that the parties will be able to reach agreement before the December 11, 2002 deadline for the report required to be filed by BNSF and UP in Decision No. 98. Accordingly, while BNSF is filing the enclosed Petition in order to comply with the December 2, 2002 deadline set by the Board in Decision No. 99 for the filing of such petitions, BNSF requests that its Petition be held in abeyance (and that the time for the filing of responses by UP or other interested parties to BNSF's Petition be extended correspondingly) until BNSF and UP have determined whether they are able to reach an overall resolution of the open issues. BNSF anticipates that it will be able to advise the Board in this regard before or at the time of the filing of the parties' December 11 report.

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

**FEE RECEIVED**

**DEC 0 2 2002**

**SURFACE**  
**TRANSPORTATION BOARD**

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Brussels Charlotte Chicago Cologne Frankfurt Houston London Los Angeles Manchester New York Palo Alto Paris Washington, D.C.  
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The Honorable Vernon Williams  
December 2, 2002  
Page 2

If you have any questions, please contact the undersigned at (202) 263-3237. Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Adrian L. Steel, Jr.", written in a cursive style.

Adrian L. Steel, Jr.

Enclosures

cc: All Parties of Record

BNSF-105

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

BNSF'S PETITION FOR RECONSIDERATION



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December 2, 2002

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

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BNSF'S PETITION FOR RECONSIDERATION

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The Burlington Northern and Santa Fe Railway Company ("BNSF") submits this Petition for Reconsideration of the Board's decision served October 22, 2002 (Decision No. 98) in this proceeding. In Decision No. 98, the Board denied BNSF's Petition for Clarification (BNSF-98) concerning the mechanism for adjusting the fees to be paid by BNSF for the trackage rights that BNSF acquired over the lines of Union Pacific Railroad Company ("UP") in connection with the 1996 UP/SP merger. In particular, the Board held that BNSF and the American Chemistry Council ("ACC")<sup>1</sup> had not shown that two disputed items (the SP "acquisition premium" and Section 9(c)(i) and 9(c)(iii) merger-related capital expenditures) should be omitted from the calculations used to

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<sup>1</sup> The American Chemistry Council was formerly known as the Chemical Manufacturers Association or "CMA".

determine annual adjustments to the trackage rights fees.<sup>2</sup> In so deciding, the Board rejected BNSF and ACC's argument that the language of Section 7 of the CMA Agreement requires that only post-merger years be considered in the adjustment process. Id. at 4-6. As set forth below, BNSF seeks reconsideration because the Board has failed to give proper weight and effect to this critical section of the CMA Agreement, which is a separate contractual agreement between UP, BNSF and CMA as well as an independent condition imposed by the Board on the UP/SP merger.

### **BACKGROUND**

Section 7 of the CMA Agreement provides:

Section 12 of the BN/Santa Fe Settlement Agreement shall be amended to provide that BN/Santa Fe's trackage rights fees shall be adjusted upward or downward each year by the difference between the year in question and the preceding year in UP/SP's system average URCS costs for the categories of maintenance and operating costs covered by the fee. CMA or its designee shall have the right to audit the escalation calculations. (Emphasis added.)

In their prior submissions to the Board, BNSF and ACC asserted that the plain language of Section 7 requires that post-merger URCS costs should be used in making the annual adjustment calculations. There would be no reason to adjust the GTM rates

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<sup>2</sup> The Board concluded that BNSF and ACC had not pointed to any evidence from the period when the adjustment mechanism was negotiated to support their position. Decision No. 98 at 4. The Board reached this conclusion notwithstanding verified statements from the principal BNSF and ACC negotiators expressly setting forth their intent that the disputed items would have no effect in the annual adjustment process. BNSF therefore continues to adhere to its position that the initial trackage rights fees set by the BNSF Settlement Agreement were meant to incorporate and fully account for both the SP acquisition premium and the anticipated costs of the Section 9(c)(i) and 9(c)(iii) merger-related capital improvements that UP was to fund, and that the consideration of those factors in the fee adjustment process results in double counting. Nonetheless, BNSF does not seek the reconsideration of the Board's conclusion with respect to the specific issue of the parties' intent in this Petition.

in the first year of the merger, and the first adjustment to the rates would be in the second year that they applied. Therefore, the first "year in question" was by definition the second year of the merger, and, by comparing "the year in question" with "the preceding year", the language provides for a comparison of post-merger URCS costs.

UP, on the other hand, contended that the language of Section 7 of the CMA Agreement is "subject to multiple interpretations".<sup>3</sup> UP further argued that John Rebensdorf's April 29, 1996 rebuttal verified statement set forth how UP interpreted the language and intended to apply it and that UP and BNSF executed the Second Supplemental Agreement which incorporated language substantially identical to Mr. Rebensdorf's proposed language. UP/SP-397 at 12-13.

In Decision No. 98, the Board set forth several reasons for its conclusion that the language of Section 7 should not be interpreted and applied as BNSF and ACC had argued. First, the Board held that ACC's current position could not be squared with CMA's original rationale for proposing to alter the original adjustment mechanism (RCAF-U). Decision No. 98 at 6. Second, ACC's position would cause practical problems in implementing the annual adjustments since the URCS costs for "the year in question" would not be available until several months after the end of the year. Ibid. Third, the Board noted that BNSF had agreed to and executed the Second Supplemental Agreement which contained the current Section 12 adjustment process, that CMA had expressed no opposition to that Agreement or the amended Section 12 process, and that CMA's witness, Thomas D. Crowley, had proposed an adjustment

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<sup>3</sup> As ACC pointed out, UP's proposed alternative interpretation that the words "the year in question" in Section 7 must mean the previous year is without foundation. See CMA-18 at 4 n.3 ("If the intention had been to base the adjustment on a comparison of the two prior years' costs, that is what the CMA Agreement would have said.").

mechanism that closely resembled the current Section 12 process. Finally, the Board found no basis for concluding that the current Section 12 adjustment process results in "far less favorable trackage rights fees" than the procedure provided in Section 7 of the CMA Agreement, and that using ACC's proposed interpretation of Section 7 would "have led to slightly *higher*, not lower, trackage rights fees in 1997 and beyond." Ibid. (emphasis original).

However, each of these reasons rests on an apparent misunderstanding of BNSF and ACC's position and their prior submissions, and the Board should reconsider its decision on the weight and effect which should be accorded to Section 7 of the CMA Agreement.

#### **ARGUMENT**

##### **A. CMA's Original Rationale for Revising the Annual Adjustment Mechanism**

The Board's first reason for concluding that Section 7 of the CMA Agreement should not be read to mandate the use of only post-merger years is that, in order to incorporate UP's projected post-merger efficiencies in the trackage rights fees, UP's pre-merger costs would have to be used as a base. Thus, the Board found that ACC's argument for use of only post-merger years in the adjustment calculations would be contrary to CMA's original concern that the "mechanism would not fully incorporate UP's projected post-merger efficiencies". Decision No. 98 at 4. This reasoning, however, misconstrues CMA's intent in seeking the revision of the annual adjustment mechanism.

CMA had two concerns about the trackage rights compensation set forth in the original BNSF Settlement Agreement. The first concern was that the GTM rates set by the Agreement were at a level which provided UP with compensation in excess of its

operating costs and thus would provide UP with a competitive advantage. See CMA-7, Verified Statement of Thomas D. Crowley ("V.S. Crowley"), at 51-54. The second concern – and the concern that is relevant here – was that the use of RCAF-U to adjust the GTM rates once they were initially set would ignore "the substantial productivity gains that have been achieved by railroads in the recent past and are likely to continue to be achieved in the future". CMA-7 at 14. See also V.S. Crowley at 55-58. Specifically, CMA was concerned that, on a year-to-year going forward basis, the adjustment mechanism would ignore not only productivity improvements brought about by the projected post-merger efficiencies but also productivity improvements resulting from other efficiency enhancements that the industry was expected to achieve. This concern did not focus on an apprehension that the initial cost savings from the merger itself would not be captured. CMA addressed that concern in its argument that the initial GTM rate levels were too high.

Thus, the specific purpose of Section 7 was to fully incorporate UP's post-merger productivity improvements in the Section 12 adjustment mechanism. This is entirely consistent with measuring UP's costs from the commencement of the merger in 1996, as opposed to including one-time charges that would be reflected only through comparison with a pre-merger year.

Moreover, CMA's intent to incorporate UP's future productivity gains can be just as effectively achieved under the procedure set forth in Section 7 as it can through the revised language drafted by UP for Section 12 of the Settlement Agreement. In fact, given CMA's purpose, Section 7 achieves that goal better since it precludes the

comparison of pre-merger and post-merger years and thereby avoids the offset against productivity gains caused by UP's methodology.

**B. Implementation Problems**

The Board's second reason for rejecting BNSF and ACC's post-merger-years-only interpretation of Section 7 is that such an interpretation would be unworkable because the UP URCS costs for "the year in question" would not be available until several months after the close of the year. While the Board is correct about the availability of the cost figures, the delayed availability does not present an insurmountable – or even unique – problem. The delay could quite easily be accommodated by UP and BNSF through adjustments to the fees once the cost data becomes available. Such adjustments are routine in the railroad industry, and the fact that they would be utilized under Section 7 does not justify deviating from that section's clear intent that only post-merger years would be used in comparing UP URCS costs changes.

**C. Second Supplemental Agreement**

The Board's third reason for refusing to adopt BNSF and ACC's position was that both BNSF (through its execution of the Second Supplemental Agreement) and CMA (through its failure to object to the revised Section 12 language in the Second Supplemental Agreement) had implicitly acknowledged that UP's formulation of the revised adjustment was appropriate. The Board further noted that UP's revised language was based in large part on testimony given by CMA's witness Mr. Crowley. Decision No. 98 at 5. However, the Board's reliance on these factors is misplaced.

First, as both BNSF and ACC explained in their prior submissions, it was their expectation and understanding that the language in the Second Supplemental

Agreement proposed by UP would be interpreted and applied in such a manner that all comparisons of URCS costs would be between post-merger years.<sup>4</sup> This understanding was based on the express language of Section 7 and on the fact that BNSF and CMA reasonably understood that UP would book the purchase premium in 1996. It was not until BNSF audited UP's annual rate calculations in late 2000 that BNSF or ACC had any indication that UP was interpreting the language in a manner inconsistent with Section 7, and BNSF and ACC have consistently thereafter expressed their understanding that only URCS costs from post-merger years should be used to make the annual adjustment calculations.<sup>5</sup>

Further, the Board's reliance on Mr. Crowley's testimony, which was submitted before the CMA Agreement was executed, is misplaced. Mr. Crowley's testimony

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<sup>4</sup> As stated by CMA's witness Thomas E. Schick in his Verified Statement, CMA was not involved in the negotiation of the Second Supplemental Agreement and, when he became aware of the change in the language from what was agreed to in Section 7, UP portrayed the change as "simply a technical amendment" due to the difficulty of adjusting fees in the current year based on costs from that year. CMA-17, Verified Statement of Thomas E. Schick at 5-6. UP did not indicate in any manner that the change was substantive in nature or that there would be an impact on the level of fees to be charged to BNSF for its use of the trackage rights lines. Neither Mr. Rebensdorf nor any other UP witness has contradicted Mr. Schick's testimony in this regard. Further, Mr. Rebensdorf's April 29, 1996 testimony stating UP's unilateral interpretation regarding the adjustment mechanism could have no legal effect in modifying the mutual contractual agreement of UP, BNSF and CMA in Section 7 the CMA Agreement.

<sup>5</sup> In Decision No. 98, the Board addressed UP's determination to book the SP purchase premium in the year after SP's acquisition by UP rather than in 1996 and accepted UP's explanation for why it booked the premium in 1997. BNSF and CMA had, however, made the point that, when the rate adjustment mechanism was being negotiated, they had no reason to expect that the purchase premium would be booked in any year except when UP acquired SP, which was 1996. Regardless of when the purchase premium was ultimately booked, it was the intent of the parties to Section 7 of the CMA Agreement that only post-merger years were to be considered in the adjustment, and thus it was implicit that, if UP were to book the premium in a manner which would not lead to that result, necessary adjustments would need to be made so that the underlying intent of the parties would be fulfilled.

concerning the adjustment process was submitted not solely on behalf of CMA, but also on behalf of a number of other parties, including NITL, WCTL, SPI, WPL and WPS, ESI, KENN and SPP. In addition, a careful reading of Mr. Crowley's testimony reflects that, in fact, it says nothing with respect to whether pre-merger and post-merger years should be considered in the annual adjustment process. His testimony merely suggested that a one-year lag should be utilized in the adjustment process. While he used the 1997 adjustment as an example, he did not address the question of whether or not any adjustments would be required in comparing 1995 and 1996 costs to reflect the SP acquisition premium and Section 9(c)(i) and 9(c)(iii) merger-related capital expenditures. Indeed, since the language of Section 7 of the CMA Agreement had not even been fully negotiated or executed at the time he prepared his testimony, the fact that Mr. Crowley did not address the issue is fully understandable. Finally, CMA rejected Mr. Crowley's proposed methodology when, in return for agreeing to support the UP/SP merger, it agreed to Section 7 of the CMA Agreement. Thus, the execution of the CMA Agreement negated any relevance that Mr. Crowley's testimony might have had.

**D. Impact of Trackage Rights Fees**

The final reason given by the Board for declining to read the language of Section 7 as BNSF and ACC have argued is that there is little difference on a mills per ton mile basis (0.1 mills) in the total trackage rights fee adjustment between the alternative adjustment methodologies, and the interpretation advanced by BNSF and ACC would have led to slightly higher trackage rights fees. While the Board is correct that the difference in the parties' methodologies on this issue approximates 0.1 mills per ton-mile, the Board's adoption of UP's argument that a post-merger-years-only interpretation of Section 7 would have led to higher trackage rights fees is misplaced.

The reductions in UP's relevant URCS costs from 1995 to 1996 amounted, by both parties' calculations, to approximately 0.05 mills, and thus the use of a post-merger-years-only interpretation under which the impact of the acquisition premium and Section 9 (c)(i) and 9(c)(iii) are treated consistent with the parties' intent in Section 7 would lead to reduced trackage rights fees.<sup>6</sup>

### CONCLUSION

As the Board itself has recognized, the language of Section 7 of the CMA Agreement if given effect would require that the adjustment for 1997 should be based on the differences between UP's 1997 and 1996 URCS data. Decision No. 98 at 5. Both 1996 and 1997 were post-merger years, and thus only URCS costs from such years should be considered in the annual adjustment process.<sup>7</sup> Further, Section 7 is part of an independent contractual agreement executed between UP, BNSF and CMA, and it was imposed by the Board as a separate independent condition on the merger. See Decision No. 44, 1 S.T.B. 233, 419.

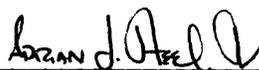
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<sup>6</sup> The Board also concluded that there is no competitive justification for adjusting the fees that have been in place because BNSF has continued to effectively replace the competition that otherwise would have been lost when SP was absorbed by UP. Decision No. 98 at 7. The Board had previously expressed this view in Decision No. 96 (served March 21, 2002), and BNSF submitted the Verified Statement of Denis J. Smith, its Vice President of Industrial Products Marketing, to demonstrate how an unfavorable cost structure likely will erode BNSF's ability to compete over the long term and that the amount in dispute here results in a differential in the rates which can affect BNSF's ability to compete successfully. BNSF does not, however, seek reconsideration of this aspect of the Board's decision.

<sup>7</sup> As explained by BNSF's witness Richard E. Weicher, this conclusion is further supported by the fact that the use of pre-merger years in the adjustment process contradicts the intent of the parties to the BNSF Settlement Agreement as set forth in Section 12 that the GTM rates were to preserve the "same basic relationship" between rates and costs over the life of the Agreement. See BNSF-102, Verified Statement of Richard E. Weicher at 10-11. Such use of pre-merger years causes an immediate and permanent deviation from that relationship.

Fundamental fairness requires that the bargained-for language of Section 7 of the CMA Agreement not be disregarded and that UP's revision of that language not be applied in a manner that results in an increase in the trackage rights fees that would not otherwise occur. There is no doubt that UP's application of the revised language has just such an effect. Accordingly, BNSF respectfully requests that the Board reconsider the weight and effect to be accorded to Section 7 and that UP, BNSF and ACC be directed to devise an annual adjustment mechanism consistent with the express intent of Section 7.

Respectfully submitted,



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Attorneys for The Burlington Northern and Santa Fe Railway Company

December 2, 2002

CERTIFICATE OF SERVICE

I do hereby certify that copies of The Burlington Northern and Santa Fe Railway Company's Petition for Reconsideration (BNSF-105) are being served on all parties of record.

Leon J. G. G.