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August 3, 2007

By e-file

Vernon A. Williams, Secretary
Surface Transportation Board
395 I Street, S.W., Suite 1149
Washington, DC 20024

Re Finance Docket No. 33753, *South Plains Switching, Ltd. Co. -- Acquisition
Exemption -- The Burlington Northern and Santa Fe Railway Company*

Dear Mr. Williams:

Hereby transmitted is a Reply In Opposition To Petition For Clarification, for filing with
the Board in the above referenced matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
*Attorney for South Plains
Switching, Ltd. Co.*

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BEFORE THE
SURFACE TRANSPORTATION BOARD

SOUTH PLAINS SWITCHING, LTD CO)
-- ACQUISITION EXEMPTION -- THE) FINANCE DOCKET
BURLINGTON NORTHERN AND) NO. 33753
SANTA FE RAILWAY COMPANY)

REPLY IN OPPOSITION TO
PETITION FOR CLARIFICATION

SOUTH PLAINS SWITCHING, LTD CO
P.O. Box 64299
Lubbock, TX 79464-4299

Replicant

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Attorney for Replicant

DLL DATE August 6, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD

SOUTH PLAINS SWITCHING, LTD. CO.)
-- ACQUISITION EXEMPTION -- THE) FINANCE DOCKET
BURLINGTON NORTHERN AND) NO 33753
SANTA FE RAILWAY COMPANY)

**REPLY IN OPPOSITION TO
PETITION FOR CLARIFICATION**

Pursuant to 49 C.F.R. § 1104.13(a), SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby replies in opposition to a Petition for Clarification (Petition) filed by BNSF Railway Company (BNSF) on July 16, 2007.

REPLY

**I. THE PETITION SHOULD BE DENIED BECAUSE IT SEEKS
INTERPRETATION OF A CONTRACT, OVER WHICH THE BOARD
DOES NOT HAVE JURISDICTION**

In substance and in legal effect, the Petition is a request that the Board interpret the nature and extent of trackage rights conveyed by BNSF to SAW in the 1999 Asset Sale Agreement (Agreement).¹ Thus, BNSF acknowledges that it seeks clarification of the extent of SAW's trackage rights "as stated in the relevant contractual agreement between the parties" (Petition at 1). Indeed, the principal argument advanced by BNSF is predicated on BNSF's interpretation of Section 1(d) of the Agreement (*id.* at 3-4).

¹ A copy of the Agreement is Attachment B of the Petition.

The Petition is required to be denied because the Board does not have jurisdiction to interpret contract provisions, nor to resolve contract law disputes between the parties. See *Cleveland Cliffs Iron Co. v. ICC*, 664 F.2d 568, 591-592 (6th Cir. 1981), *Burlington Northern R. Co. v. ICC*, 679 F.2d 934, 941-942 (D.C. Cir. 1981); *Coal Trading Corp., et al. v. B&O Railroad, et al.*, 61 C.C.2d 361, 365 (1990) ("The Commission has no jurisdiction to provide such interpretation or to determine the rights of the parties under these contracts"). *Railroad Transportation Contracts*, 31 C.C.2d 219, 230, n. 6 (1986) ("... the ICC has no jurisdiction to resolve or intrude upon contract law disputes between the contracting parties"), *Burlington Northern Inc. -- Trackage Rights*, 347 I.C.C. 210, 213 (1974). Interpretation of contract provisions is the province of Courts. The Petition is a poorly disguised attempt to avoid interpretation of provisions of the Agreement by a Texas State Court in the case referred to at page 2 of the Petition. It is beyond dispute that that State Court, not this Board, has jurisdiction to interpret and apply the provisions of the Agreement.

BNSF cannot avoid the effect of that principle by seeking clarification of the Board's Notice of Exemption, served July 15, 1999 (Petition at 4-5).² Such a Notice confers only a federal operating right based on a finding that such rail operation would not be inconsistent with public convenience and necessity under 49 U.S.C. § 10902(c). As to the Board's Notice served July 15, 1999, that operating right was conferred pursuant to a class exemption from § 10902(c), adopted at 49 C.F.R. § 1150.41. Such a Notice does not purport to determine the existence of an underlying contractual or property right necessary to conduct such operation under State law. The Board and its predecessor, the Interstate Commerce Commission (ICC), have so ruled on

² A copy of the Board's Notice of Exemption is Attachment C of the Petition.

numerous occasions. See, e.g., *Buckingham Branch R Co -- Lease -- CSX Transp Inc*, 2004 S1B LEXIS 713 (S1B Finance Docket No. 34495, served November 5, 2004), where the Board said

NSR contends that the proposed transaction cannot be carried out until NSR consents to the exercise, by BBRR, of certain rights now exercised by CSXT pursuant to contracts with NSR. Most of these rights involve the Orange Line, although some involve NSR facilities at Charlottesville, a point on the C&O Line. We will leave it to the parties to interpret the various contracts at issue, and, if they do not agree, to resort to arbitration or the courts to resolve those contractual disputes. Our approval of this application conveys only permissive authority for BBRR and CSXT to enter into the proposed lease and sublease agreements, and does not mandate those arrangements or interpret CSXT's contractual rights and obligations as to NSR. (emphasis added)

The Board's Office of Proceedings often so rules in conferring a federal operating right, while disclaiming a ruling on an underlying contractual or property right under State law. Thus, the nature and extent of SAW's trackage rights over BNSF is a matter of Texas contract law determinable in a Texas Court, not a matter for Board determination under federal law. BNSF's Petition should be denied on that basis.

II. IF THE BOARD CLARIFIES THE NOTICE OF EXEMPTION, IT SHOULD FIND THAT SAW HAS TRACKAGE RIGHTS OVER BNSF'S MAINLINE TO PROVIDE REASONABLE ACCESS TO TRACKS SOLD BY BNSF TO SAW

The Board should not clarify its Notice of Exemption for the reasons explained in Section I of this Reply. However, if the Board decides to clarify that Notice it should find that SAW has trackage rights over BNSF's mainline to provide reasonable access to tracks sold by BNSF to SAW.

The argument in this Section of Reply is supported by the verified statement of Mr. Shad Wisener ("VS Wisener"), who has eight years of on-the-ground train operating experience on the SAW property at Lubbock.²

It should be noted at the outset that the interpretation put forth by BNSF -- that SAW's trackage rights are limited to BNSF's mainline between Track 9298 and the Lower Yard for the sole purpose of interchange -- is not reconcilable with actual operations nor consistent with the Agreement and Notice of Exemption as a whole. Operationally, SAW has no way of entering the mainline between Track 9298 and the Lower Yard, when SAW enters the mainline, it does so in an easterly direction, occupying track beyond the Track 9298-Lower Yard segment. (VS Wisener at 2)

In addition, both the Agreement and the Notice of Exemption refer to approximately three miles of SAW trackage rights. It is only 50 to 100 feet between Track 9298 and the Lower Yard. Thus, BNSF's argument that SAW's trackage rights are limited to the Track 9298-Lower Yard segment does not account for three miles of trackage rights referred to in the Agreement and Notice of Exemption. BNSF's argument that the three miles consists of trackage within Lower Yard is not plausible. (Petition at 5). There are far more than three miles of tracks in Lower Yard, moreover, SAW is directed by BNSF as to which track in the Yard to use for interchange, and is forbidden to use any other track, so that three miles of trackage rights would be wholly unnecessary. (VS Wisener, at 2-3)

Contrary to BNSF's position, the approximate three miles of trackage rights apply over BNSF's mainline between SAW's Track 9298 on the one hand, and SAW Tracks 310, 320, 330

² Mr. Wisener's verified statement is attached to this Reply as Appendix I

and 340 on the other, in order to provide SAW with reasonable access to those tracks that were sold by BNSF to SAW in 1999. Two exhibits are attached to Mr. Wisener's verified statement in order to facilitate an understanding of SAW's position in that respect. The first exhibit is a drawing marked as Attachment SW-1, which depicts the BNSF Lower Yard and the BNSF mainline in yellow and SAW Tracks 9298, 310, 320, 330 and 340 in pink. The second exhibit consists of two pages from a "CLIC" book that was provided to SAW when it acquired trackage in Lubbock. That exhibit is marked as Attachment SW-2. On page 1 of Attachment SW-2, the BNSF mainline (shown as "Santa Fe Main Track" on the exhibit) is colored in yellow. SAW Tracks 310, 320 and 330 are shown in pink. On page 2 of Attachment SW-2, the BNSF mainline is shaded in yellow. SAW Track 340 is shaded in pink.

It is approximately 530 feet between SAW Track 9298 and SAW Track 310 via the BNSF mainline (VS Wisener, Attach SW-1). Track 310 is used to provide rail service to Attebury Grain Company and Farmers Compress Plant 1 (*id.*, Attach SW-2 [Producers Grain shown on that exhibit is a predecessor of Attebury Grain]). After its acquisition of trackage at Lubbock in 1999 until the beginning of alternative rail service in 2006, SAW regularly operated over the BNSF mainline between SAW Track 9298 and SAW Track 310 in order to provide rail service to Attebury Grain and Farmers Compress Plant 1. That operation was provided over more than seven years with BNSF's knowledge and approval. Indeed, BNSF regularly gave dispatching authority for SAW's trains to so operate. That constituted acknowledgment by BNSF that SAW's operation over the BNSF mainline between SAW Track 9298 and SAW Track 310 is necessary in order to provide SAW with reasonable access to SAW Track 310.⁴

⁴ BNSF has submitted an unsigned draft of a proposed agreement between BNSF
(continued .)

It is approximately 1.4 miles between SAW Track 9298 and former SAW Track 320 via the BNSF mainline (VS Wisener, Attach SW-1). Track 320 was used to provide direct rail service to PYCO Plant 2 (*id.*, Attach SW-2 [PYCO Plant 2 is there shown as Plains Cotton Oil Mill]). It is physically possible to serve PYCO Plant 2 via Track 310, but as a practical matter it is often impossible to provide service via that track because it is blocked by traffic for Farmers Compress Plant 1, and/or Attebury Grain (*id.*). Track 310 actually goes through the Farmers Compress Plant 1 warehouse, on which railcars for that Plant are often being held. That prevents or substantially delays rail service to PYCO Plant 2. It is also physically possible to serve PYCO Plant 2 via Track 231 in the BNSF Lower Yard and Track 9298 (colored in green on Attach SW-2), but as a practical matter such service is problematical because BNSF has refused permission to provide such service through its Yard. That routing is highly circuitous, as well. Prior to sale of Lubbock trackage to SAW, BNSF itself provided rail service to PYCO

*(, continued)

and SAW as if that agreement constituted Amendment 2 of the Agreement. (Petition, Attach B, "Amendment 2"). That agreement would have provided for SAW's use of what was referred to as BNSF's switch at the west end of SAW Track No. 0310 in order to provide service to SAW Track Nos. 0310, 0311, 0312 and 0313. That agreement was not signed because that switch is owned by SAW, not BNSF. The Bill of Sale issued by BNSF to SAW provided for conveyance to SAW of all turnouts to tracks that were conveyed to SAW. Track 310 was conveyed to SAW in the Agreement. Consequently, the Bill of Sale executed as part of the Agreement conveyed the turnout (switch) to Track 310 to SAW.

Plant 2 via Track 320 and the mainline That is evidence that use of BNSF's mainline is necessary to provide reasonable access to SAW Track 320 ²⁷

It is approximately 1.75 miles between SAW Track 9298 and former SAW Track 330 via the BNSF mainline (VS Wisener, Attach SW-1). Track 330 was used to provide rail service to Farmers Compress Plants 4 and 5 (*id.* Attach SW-2). It is physically possible to serve those Plants via Track 310 and via Tracks 231 and 9298, but those routes suffer from the same practical limitations in relation to service as the limitations in relation to service to PYCO Plant 2. Prior to sale of Lubbock trackage to SAW, BNSF provided service to those Farmers Compress Plants via Track 330 and the mainline That is evidence that use of BNSF's mainline is necessary to provide reasonable access to SAW Track 330 ²⁸

It is approximately 1.8 miles between SAW Track 9298 and SAW Track 340 via the BNSF mainline (VS Wisener, Attach SW-1). Track 340 is used to provide rail service to Southern Cotton Oil Company (ADM) (*id.*, Attach SW-2 [shown as Anderson Clayton on the exhibit]) It is physically possible to provide service to ADM via Tracks 371, 370, the Johnson (Orchard) Lead and Tracks 380, 340 and 341, but that route is circuitous (that route is shown in green on Attachment SW-2, page 2) Prior to sale of Lubbock trackage to SAW, BNSF provided

²⁷ In December, 1999, before PYCO Plant 2 tendered any shipments to SAW, BNSF removed the switches to Track 320 SAW and PYCO complained about that removal informally to the Board's Staff, but those switches were not restored. SAW intends to institute a Court action to require restoration of those switches As noted above (note 4 *supra*) the Bill of Sale (attached to the Agreement) conveyed those switches to SAW BNSF thus unlawfully converted SAW's property when it removed those switches

²⁸ BNSF removed the switch to Track 330 at the same time that it removed the switches to Track 320 That, too, was an unlawful conversion of SAW's property.

rail service to ADM via Track 340 and the mainline. That is evidence that use of the BNSF mainline is necessary to provide reasonable access to SAW Track 340.

SAW regularly receives authority from BNSF's Dispatcher to enter onto the BNSF mainline between East Lubbock and West Burris for the purpose, among others, of switching (VS Wisener at 1). As reflected on Attachment SW-1, BNSF mainline trackage between East Lubbock and West Burris encompasses BNSF mainline trackage between SAW Track 9298 on the one hand and SAW Tracks 310, 320, 330 and 340 on the other. The regular dispatching authority from BNSF is yet another acknowledgment by BNSF that operation over the BNSF mainline is necessary to provide reasonable access from SAW Track 9298 to SAW Tracks 310, 320, 330 and 340.

Where, as here, use of a seller's property is necessary to provide reasonable access to other property sold to a buyer, the common law creates an easement by necessity for the buyer over the seller's property. In *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), the U.S. Supreme Court described an easement by necessity as follows (at 679).

Where a private landowner conveys to another individual a portion of his lands in a certain area and retains the rest, it is presumed at common law that the grantor has reserved an easement to pass over the granted property if such passage is necessary to reach the retained property. These rights-of-way are referred to as 'easements by necessity' . . .

That common law principle applies with equal force if it is the grantee who must pass over the grantor's retained property in order to reasonably access the property granted.

The approximate three miles of trackage rights in the present case thus corresponds to SAW's easement by necessity over BNSF's mainline to provide access from SAW's Track 9298 to SAW Tracks 310, 320, 330 and 340. An easement by necessity is a creature of the common law. It is not a matter of record, so it will not be identified in a title search. It exists

independently of a contract of sale, so it is of no significance that it does not appear in the BNSF-SAW Sale Agreement.

For all of the foregoing reasons, if the Board decides to clarify the Notice of Exemption it should find that SAW has an easement by necessity and corresponding trackage rights over BNSF's mainline to provide reasonable access from SAW Track 9298 to Tracks 310, 320, 330 and 340

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Board should deny the Petition for lack of jurisdiction over contract disputes. If the Board clarifies its Notice of Exemption, it should find that SAW has trackage rights over the BNSF mainline between SAW Track 9298 on the one hand and SAW Tracks 310, 320, 330 and 340 on the other.

Respectfully submitted,

SOUTH PLAINS SWITCHING, LTD. CO
P.O. Box 64299
Lubbock, TX 79464-4299

Replicant

Thomas F. McFarland

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Attorney for Replicant

DUE DATE August 6, 2007

VERIFIED STATEMENT OF SHAD WISENER

My name is Shad Wisener. I have been employed by South Plains Switching, Ltd. Co (SAW) in train operations continuously since inception of SAW's rail service at Lubbock in July, 1999. I am familiar with SAW's trackage in the Lubbock area.

Attached to my statement as Attachment SW-1 is a drawing that I have made of the BNSF mainline at Lubbock and tracks extending therefrom between BNSF's Lower Yard on the west, and West Burris TX on the east.

Attached to my statement as Attachment SW-2 are two pages from the Lubbock "CLIC book" showing a diagram of SAW Tracks 310, 320 and 330 (page 1) and Track 340 (page 2).

SAW always requests authority from the BNSF Dispatcher to occupy specific limits on the BNSF main track. No entry is made by SAW to BNSF Main Line without permission. SAW often obtains authority to hold, for SAW use, the limits between East Lubbock and West Burris for a designated period of time, (i.e., 20 minutes, 30 minutes, 45 minutes, etc.). The amount of time we are afforded often depends on the main track traffic conditions. If traffic is too heavy, SAW may be denied access to the main track altogether. SAW receives authority to occupy these limits for the purposes of "crossing over" the main, for "switching" on the main, or for moving West to the Lower Yard at Lubbock for interchange. SAW has been utilizing the main track for these purposes for eight years.

SAW has access to Track 380 by means of its Orchard Lead track. This is the customary route by which SAW serves the customers located on Tracks 340 and 380. However, in the event that the Orchard Lead is unusable for some reason, the BNSF main track has been used for the purpose of accessing Track 340 and providing service to those customers.

SAW also receives unit Rock Trains on Track 380. Any Rock Train over 3,000 feet blocks SAW's access to Track 380 via the Orchard Lead. BNSF's cancellation of the Power Agreement that allowed SAW crews to deliver the Rock Trains has necessitated SAW's use of the BNSF main track for the purposes of delivering those trains. SAW cannot reasonably stage power in anticipation of the arrival of an aggregate train as they are a low priority and their scheduling is often unreliable. For example, a recent aggregate train arrived four days after its initial ETA. BNSF does not notify SAW of a Rock train's impending arrival. They spot the train on Track 380, cut off the power and leave the loaded cars. This doesn't cause a problem as long as I am afforded access to SAW Track 340 via the BNSF main track so that I can get to the train on 380.

To be given the authority to work within specific limits by the BNSF Dispatcher and then not be allowed to use those limits in order to provide service to our customers is illogical, especially when the BNSF's actions necessitate the use of those limits.

BNSF relies heavily on the language of the sale contract as it reads "between 9298 and the Lower Yard at Lubbock". Operationally SAW has no way of entering the Main Track "between 9298 and the Lower Yard". When SAW enters the Main Track at milepost 676.6 (SAW track 9298) it enters eastward, occupying trackage beyond the Track 9298-Lower Yard segment. This trackage is not covered however, by the authority given to SAW by the dispatcher. "To enter the Main Track at milepost 676.6 between East Lubbock and West Burns".

BNSF suggests that the three miles of trackage rights are the tracks in the lower yard. There are certainly more than three miles of tracks in the Lower Yard at Lubbock. Additionally,

SAW is told by local BNSF personnel which track(s) to use for interchange purposes and cannot occupy track(s) other than those directed. Therefore, three miles of trackage rights in the Lower Yard at Lubbock would not be necessary.

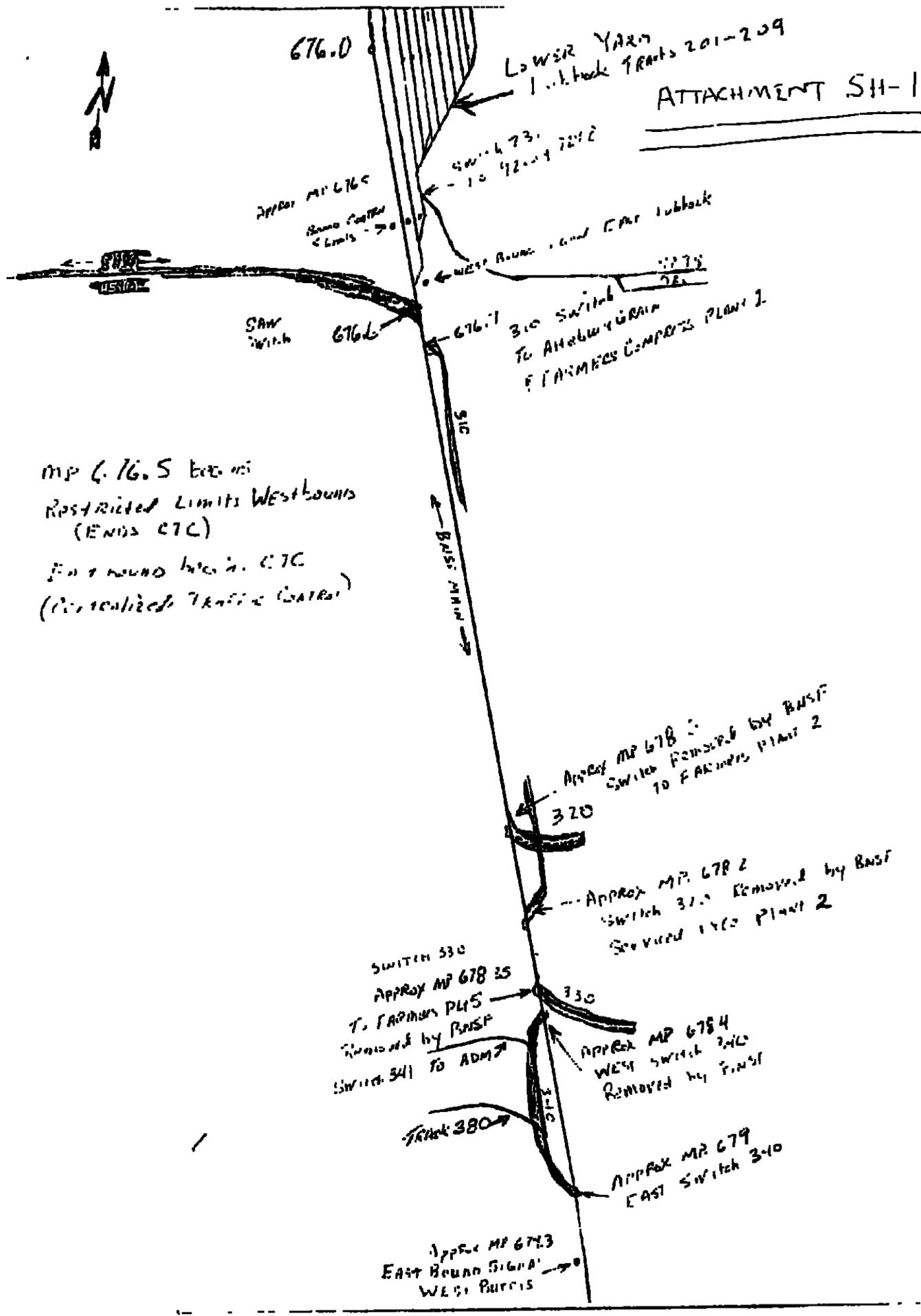
BNSF asserts that SAW wants to use the mainline to serve shippers along the mainline. SAW does not serve shippers on the BNSF mainline. SAW uses the BNSF mainline to access tracks owned by SAW. It is from these tracks that SAW serves our customers.

All SAW traffic, except Rock Trains, is typically interchanged in the Lubbock Lower Yard. However, many of SAW's tracks are designated by the BNSF as interchange tracks, including Track 380. To use the BNSF mainline from SAW 9298 to SAW 340 in order to access SAW 380 for the purposes of delivering a Rock Train is indeed "picking up" an inbound interchange. Likewise, dragging an empty train back to the East end of SAW 380 and returning the power to SAW 9298 via the main is indeed delivering an outbound interchange to the BNSF.

The SAW must have use of the Main Track in order to provide reliable service to our customers. SAW has been utilizing the main for a very long time and only recently and suddenly has this become an issue for BNSF.

SAW's customers are BNSF's customers. Surely BNSF would wish to make a reasonable effort to ensure timely and reliable service to our mutual customers.

ATTACHMENT SH-1

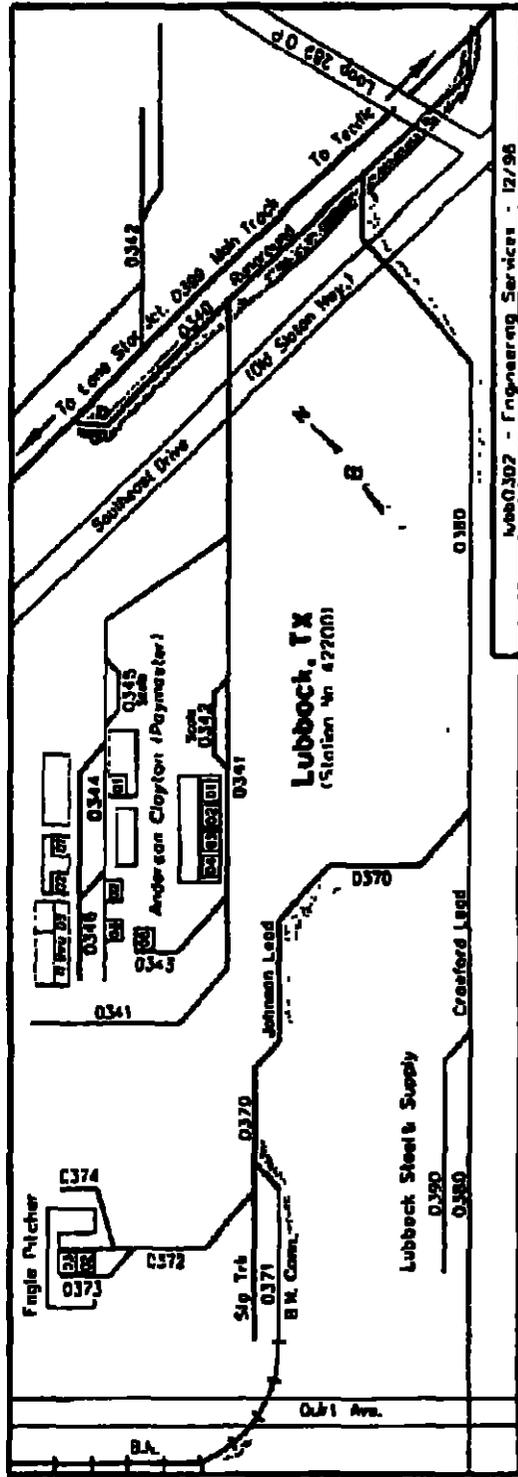


MP 676.5 ETC. etc
 RESTRICTED LIMITS WESTBOUND
 (ENDS CTC)
 EAST BOUND HIGH. CTC
 (CENTRALIZED TRAFFIC CONTROL)

APPROX MP 676 3
 EAST BOUND SIGNAL
 WEST BOUND

3

CG NUMBER	AREA	TOTAL	SPR	LYFTYH I	AVAILBL	OPPORTY	CONTRACT	CUSTOMER	UNIT	TRUCK	MANUFACTURER
0340	150	3148	3148	PERMITS	AREA		NUMBER		NO	TYPE	UNIT
0341	151	6165	432	5713	3148		033680	WESTERN COTTON OIL CO	NO	INDY	INDY
0342	152	210		10	432		033680	WESTERN COTTON OIL CO	NO	INDY	INDY
0343	154	942		942			033680	WESTERN COTTON OIL CO	NO	INDY	INDY
0344	152	3548		3548			033680	WESTERN COTTON OIL CO	NO	INDY	INDY
0345	155	211		211			033680	WESTERN COTTON OIL CO	NO	INDY	INDY
0346	153	1700		1700			033680	WESTERN COTTON OIL CO	NO	INDY	INDY
0347	488	5538	4235		4535				NO	YARD	YARD
0371	280	987	777	380	777		110400	JOHNSON MARLE ACTURING CO	NO	INDY	INDY
0372	274	656	110	546	110		102MB	WILKINSON COLO STORAGE CO	NO	INDY	INDY
0373	294	933		933			110400	JOHNSON MARLE ACTURING CO	NO	INDY	INDY
0380	245	1275	1275		1275		152315	CHRYSLER EQUIPMENT	NO	INDY	INDY
0390	296	2848	172	2648	172		198932	LUBBOCK AMERICAN IRON & METAL INC	NO	INDY	INDY
0399	81								NO	MTY	MTY



Lubbock, TX
(Station No. 42200)

Zone 03

256

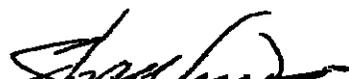
- ▬ Trackage Right
- ▬ Full Control & Maint
- ▬ Control & Maint
- ▬ Neatly Control & Maint

Lubbock, TX - Engineering Services - 12/96

VERIFICATION

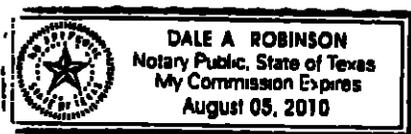
STATE OF TEXAS)
)
COUNTY OF LUBBOCK)

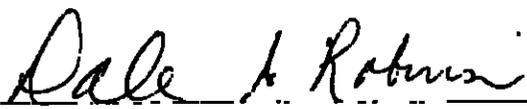
SHAD WISENER, being duly sworn on oath, deposes and states that he has read the foregoing statement, that he knows the contents thereof, and that the facts therein stated are true and correct.



SHAD WISENER

SUBSCRIBED AND SWORN TO before me on this the 3 day of August, 2007.



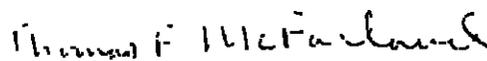


NOTARY PUBLIC

My Commission Expires: Aug. 5, 2010

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2007, I served the foregoing document. Reply In Opposition To Petition For Clarification, on Richard E. Weicher, Esq and Jake P. DeBoever, BNSF Railway Company, 2500 Lou Menk Drive, Fort Worth, TX 76131, and Adrian L. Steel, Jr., Esq., Mayer, Brown, Rowe & Maw LLP, 1909 K Street, N.W., Washington, DC 20006, by UPS overnight mail



Thomas F. McFarland