August 20, 2007

Via E-Filing

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an unredacted version and a redacted version of the Initial Brief of Union Pacific Railroad Company (UP/SP 406) in the above-referenced proceeding. The unredacted version contains information produced by BNSF Railway Company (BNSF) in discovery designated by it as "Highly Confidential". That version is filed under seal and should thus not be made available to the public. The redacted version redacts the information designated by BNSF as "Highly Confidential" and therefore may be made available to the public.

Thank you for your assistance.

Sincerely,

Enclosures

William G. Barr
Assistant General Solicitor

UNION PACIFIC RAILROAD
1400 Douglas St., Stop 1580, Omaha, NE 68179-1580
ph. (402) 544-5354 fx. (402) 501-0127
wgbarr@up.com

REDACTED PUBLIC VERSION UP/SP 406

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

INITIAL BRIEF OF UNION PACIFIC RAILROAD COMPANY

J. Michael Hemmer
Lawrence E. Wzorek
William G. Barr
Jeffrey S. Asay
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
Tel: (402) 544-5000

Attorneys for Union Pacific Railroad Company

August 20, 2007

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INITIAL BRIEF OF UNION PACIFIC RAILROAD COMPANY

Pursuant to the procedural schedule adopted by the Surface Transportation Board in its Decision dated May 4, 2007 (served May 7, 2007), in this proceeding, UP submits this brief in support of its Petition for Reformation of Agreement ("Petition") filed on February 16, 2007.[1]

INTRODUCTION AND SUMMARY

The Petition seeks the Board's reformation of the Restated and Amended Settlement Agreement. Specifically, UP asks that Section 1(g) of the Restated and Amended Settlement Agreement be reformed to reflect the parties' intent to retain certain restrictions on BNSF's use of UP trackage between Stege (Richmond), California, and Sacramento, California, and between Sacramento and Stockton, California, over which BNSF operates as a trackage rights tenant. The parties designed and tailored these trackage rights to allow BNSF to compete with the combined UP/SP

[1] Any capitalized term not defined in this Brief has the meaning given it in the Petition.

only for (a) transcontinental intermodal and automotive traffic moving over the Central Corridor Route and (b) intermodal traffic moving over the "I-5" Route.

A mistake by the parties in drafting the Restated and Amended Settlement Agreement inadvertently removed those restrictions. BNSF interprets this mistake as allowing, by implication, BNSF to use the UP segments via Sacramento for Intermodal Trains that do not operate over the Central Corridor Route or over the I-5 Route. Reformation of the Restated and Amended Settlement Agreement is essential to prevent BNSF's trains from continuing to (a) contribute to cause delays to the 44 passenger trains operating daily over the Cal-P Line between Martinez and Oakland and (b) interfere with UP's ability to compete with BNSF.

FACTS

UP's Petition, including its supporting exhibits, describes the pertinent UP and BNSF lines, the subject BNSF operations, the terms of the Original Settlement Agreement by which BNSF obtained the right to operate certain trackage rights trains over the Cal-P Line, and the evolution of Section 1(g) from the Original Settlement Agreement up to and including the version that is mistakenly included in the Restated and Amended Settlement Agreement. In essence, UP inadvertently omitted the crucial Central Corridor and I-5 Restrictions from one of two alternative versions of Section 1(g) which it proposed to BNSF in an effort to simplify, rather than change, its provisions. The deficient alternative was included in the Restated and Amended Settlement Agreement jointly submitted to the Board on March 1, 2002. BNSF thereafter (since mid-[dated redacted] by BNSF's own admission) has taken advantage of this mistake by

operating Oakland - Stockton Intermodal Trains to and from its Southern Transcon Route over the Cal-P Line via Sacramento (Elvas).

Verified Statements appearing as exhibits to the Petition provide evidence supporting UP's position. The joint Verified Statement of Messrs. John H. Rebensdorf and Lawrence E. Wzorek describes the parties' mistake in drafting and agreeing upon the version of Section 1(g) included in the Restated and Amended Settlement Agreement. The Verified Statements of Mr. Thomas F. Jacobi, UP's Vice President of Operations for its Western Region, and Mr. Eugene Skoropowski, Capitol Corridor Managing Director, describe, respectively, the adverse impact that perpetuation of the mistake will have on UP and its customers and on the 32 Capitol Corridor trains, 8 Amtrak San Joaquin intercity trains, and four Amtrak national network trains that operate each weekday between Martinez and Oakland.

LEGAL STANDARD

The Petition also presents a synopsis of the "black letter" law applicable to the reformation of contracts. In summary, the equitable remedy of reformation is available to reform a contract that fails through mutual mistake or fraud to express the true agreement or intention of the parties. UP does not believe that BNSF intended or sought during the negotiations to eliminate the Central Corridor and/or I-5 Restrictions from the Restated and Amended Settlement Agreement in a deliberate effort to gain an operating advantage that BNSF did not receive in the Original Settlement Agreement. Rather, the deletion was a mistake that resulted from a number of factors. Those factors included the extended and sporadic nature of the Restated and Amended Settlement Agreement negotiations and the numerous issues under consideration by

the parties during those negotiations. The result was a laudable but poorly implemented effort by the parties to simplify the Central Corridor and I-5 Restrictions without substantively changing -- and certainly not eliminating -- them.

It is irrelevant whether the elimination of the restrictions resulted from a mutual mistake or from the unilateral mistake of UP. It is irrelevant whether BNSF at the time knew or suspected that the eliminated wording was a mistake upon which it now seeks to capitalize. The fact is that Section 1(g) of the Restated and Amended Settlement Agreement does not correctly express either the parties' intent with respect to BNSF's operating rights over the Cal-P and the Elvas - Stockton Lines or the Board's mandate to maintain the competitive status quo between the two carriers.

The Board should correct this mistake for two reasons. First, by correcting this mistake the Board would preserve the competitive relationship between UP and BNSF which the Board intended when it adopted the Original Settlement Agreement and imposed the Central Corridor and I-5 Restrictions on BNSF's use of the Cal-P Line. Second, by correcting this mistake, the Board would reduce delays to the passenger and UP freight trains that operate over the Cal-P Line.

ARGUMENT

The issue under consideration in this proceeding is not complex. A mistake was made in the drafting of Section 1(g) of the Restated and Amended Settlement Agreement which must be corrected by reformation of that section to return the parties to their relative competitive positions as they existed before the mistake was made. If this correction is not made, UP and the 44 passenger trains that operate over its Cal-P Line will continue to suffer material adverse impacts on their operations.

I. Purpose of the Original Settlement Agreement and the Restated and Amended Settlement Agreement.

BNSF obtained the right to operate limited trackage rights trains over the Cal-P Line in the Original Settlement Agreement, which the Board adopted at the request of UP and SP in its decision approving the UP/SP merger. These rights addressed alleged competitive issues raised by the proposed UP/SP merger in the Central Corridor via Utah and also created a new competitive route between the Pacific Northwest and California. In doing so, the rights were intended to be used for the movement of Central Corridor Intermodal Trains and I-5 Intermodal Trains. The parties never intended that BNSF could stitch those trackage rights together to operate BNSF Intermodal Trains either (a) between Oakland and the Los Angeles Basin or (b) for transcontinental movements over BNSF's Southern Transcon Route. BNSF had its own routes for these movements before the UP/SP merger; the merger did not affect those routes. The parties did not intend to expand BNSF's route alternatives for its operations.

BNSF and UP decided to amend and restate the Original Settlement Agreement (a) to clarify a number of issues that had arisen in the course of implementing other trackage rights operations granted to BNSF therein, (b) to incorporate the conditions imposed by the Board on the UP/SP merger, and (c) to adopt certain agreements that they had reached relating to those conditions and other related matters. The I-5 and Central Corridor Restrictions, as they related to operations over the Cal-P and Elvas - Stockton Lines, were not among the matters requiring revision.

II. BNSF's Delay in Taking Advantage of the Restated and Amended Settlement Agreement Language.

BNSF and UP jointly submitted the Restated and Amended Settlement Agreement to the Board on March 1, 2002. Yet, by its own admission in response to a UP discovery request, it was not until at least [date redacted] -- or more than [number redacted] years after that submission -- that BNSF began to operate non-I-5 and non-Central Corridor Intermodal Trains over the Cal-P Line (see Exhibit A). BNSF has produced no internal documentation evidencing, or even tending to suggest, that prior to 2004 it believed it had these rights.

III. The Impact on Train Operations.

Mr. Jacobi's and Mr. Skoropowski's Verified Statements explain that the Cal-P Line is a critical freight and passenger corridor for UP and the State of California. The Cal-P Line is one of the most heavily used passenger train lines in the United States. BNSF's operation of Intermodal Trains on the Cal-P Line which are neither Central Corridor nor I-5 Intermodal Trains has congested that line. As a result, these Intermodal Trains adversely affect rail commuter passengers as well as UP and its customers. These operating problems are neither trivial nor easily remedied absent removal of the unintended/unauthorized trains.

A. Passenger Trains.

As detailed in the Petition, a total of 44 passenger trains operate each day between Martinez and Oakland. On a typical day, between 50 and 56 freight (including BNSF trackage rights trains) and passenger trains operate on the Martinez-Oakland segment of the Cal-P Line. UP's goal is to operate at least 96% of the Capitol Corridor

trains on time. Since August 2006, however, the monthly on-time percentage of Capitol Corridor trains has averaged just over 82%. This past December, that on-time percentage fell as low as 75% (Skoropowski VS, p. 4). In the opinion of Mr. Skoropowski (Skoropowski VS, p. 5) and of Mr. Jacobi (Jacobi VS, p. 6), the addition of Southern Transcon Route BNSF Intermodal Trains to the segment between Sacramento and Richmond has contributed to the deterioration in on-time arrivals of the Capitol Corridor and Amtrak trains that operate over the Cal-P Line.

Mr. Skoropowski's Verified Statement describes the State of California's significant investment in the Cal-P Line, the Line's limited capacity, and the delays that Capitol Corridor trains have experienced as a result of the operation of BNSF Southern Transcon Route Intermodal Trains (Skoropowski VS, pp. 4 and 5). He believes that BNSF is unjustifiably benefiting, at taxpayer expense, from the State's public investment. This unjustified benefit comes from operating the unauthorized Intermodal Trains over the Cal P-Line rather than its own shorter route between Richmond and Stockton. That shorter route handles only eight Amtrak trains daily between Port Chicago (east of Martinez) and Stockton.

B. UP's Freight Trains.

As described in Mr. Jacobi's Verified Statement, BNSF historically operated its non-I-5 and non-Central Corridor Intermodal Trains between Oakland and Stockton using its own main line between Richmond and Stockton. According to UP's records, in early 2005 BNSF began shifting non-Central Corridor and non-I-5 Intermodal Trains to UP's Cal-P Line between Stege and Sacramento (Elvas). From Elvas, these trains operated south to Stockton over UP's Fresno Subdivision, with ultimate destinations of

either Los Angeles (typically empty repositioning movements) or to points east of Barstow over BNSF's Southern Transcon Route.

This shift was made even though the trackage rights route on UP between Stockton and Oakland via Sacramento, which includes the Cal-P Line, is 50 miles longer than BNSF's own Richmond-Stockton route (135 miles compared to 85 miles) and takes much longer to traverse. Delays to both UP freight trains and Amtrak-Capitol Corridor passenger trains became substantially worse as BNSF began running Southern Transcon Route Intermodal Trains. As a direct result, just to maintain Capitol Corridor on-time rates in the mid-80% range, UP has had to divert UP freight trains to other, much longer UP routes to and from the San Francisco Bay area, including its highly circuitous Altamont line (Jacobi VS, p. 7).

IV. The Negotiations Over Section 1(g) and the Mistake.

The clear and convincing evidence, and the lack of any evidence to the contrary from BNSF, show that neither party intended to alter Section 1(g) in the Restated and Amended Settlement Agreement to eliminate the I-5 and Central Corridor Restrictions. The elimination of those Restrictions when UP and BNSF negotiated, drafted, and entered into the Restated and Amended Settlement Agreement was an inadvertent omission that should be corrected by reformation.

BNSF has produced no document or any other evidence indicating that it requested, or even suggested, that UP agree to the elimination or modification of the I-5 and Central Corridor Restrictions. Likewise, there is no evidence of any sort that BNSF sought the elimination of these Restrictions as part of any overall "give and take" resolution of multiple open issues during the negotiations for the Restated and

Amended Settlement Agreement. UP is aware of no documentation -- and certainly none was produced by BNSF in response to UP discovery in this proceeding -- that would support any claim that the alternative version of Section 1(g) included in the Restated and Amended Settlement Agreement was bartered by UP to BNSF in exchange for some concession by BNSF on another point. If UP and BNSF had so bartered, there should have been correspondence back and forth between the parties discussing the alternative versions and what they meant. There is no such correspondence. The obvious reason for the absence of any such correspondence is that no "horse trading" was taking place over Section 1(g). Both railroads wanted only to simplify the manner in which the Restrictions were expressed. They did not intend to eliminate them as a part of some overall resolution of multiple contested points or otherwise.

Unfortunately, in the attempt to simplify the Restrictions without substantively changing them, they were mistakenly eliminated from the second of the two suggested versions of redrafted Section 1(g) proposed by UP. Whether or not BNSF recognized the mistake at the time the two alternatives were offered cannot be determined because BNSF has produced no documents or other evidence bearing on that issue.

Notwithstanding the lack of any evidence on the issue from BNSF, it now maintains that elimination of the I-5 and Central Corridor Restrictions was part of a negotiated deal with UP. But that is not true. UP did not offer the elimination of the Restrictions in return for some concession from BNSF; BNSF neither requested their elimination nor offered anything to UP in return therefor.

The Joint Verified Statement of UP's J. H. Rebensdorf and Lawrence E. Wzorek summarizes the negotiations pertaining to Section 1(g) of the Restated and Amended Settlement Agreement. Neither Mr. Rebensdorf nor Mr. Wzorek can recall any discussion or statement by either party during the sporadic negotiations over a period of fourteen months that would reflect or evince any intent by either party to eliminate either the Central Corridor Restriction or the I-5 Restriction (Rebensdorf/Wzorek VS, pp. 6 and 7).

In a December 22, 2000 letter to Mr. Wzorek, BNSF proposed to UP a first draft of the Restated and Amended Settlement Agreement along with "a chart showing the principal sections which have been changed and a brief description of the modifications." (See Attachment 1 to Rebensdorf/Wzorek VS.) Section 1(g) of this redraft retained the Central Corridor and I-5 Restrictions, rephrasing them only slightly to improve their syntax while making no change in their substance. Specifically, the Central Corridor and I-5 Restrictions on Intermodal Trains in the Original Settlement Agreement permitted only

> "intermodal trains moving between (x) Weso and points east or Keddie and points north and (y) Oakland . . . ."

Those Restrictions in the draft of the Restated and Amended Settlement Agreement proposed by BNSF permitted only

> "intermodal trains moving between Oakland and Weso and points east or Keddie and points north, ..."

Significantly, the BNSF-prepared chart showing principal changes contains no reference to Section 1(g) (Rebensdorf/Wzorek VS, pp. 4 and 5, Attachment I).

In response to the BNSF-proposed revision of Section 1(g) that retained the Central Corridor and I-5 Restrictions, UP proposed two versions of Section 1(g): one inadvertently omitting the Restrictions that BNSF selected and one retaining the Central Corridor and I-5 Restrictions essentially in the same form as they were set forth in Section 1(g) of the Original Settlement Agreement, as amended by the Second Supplement. UP's representatives in the negotiations mistakenly considered the two versions offered by UP to be "equivalent and interchangeable" and to impose substantively the same Restrictions as Section 1(g) of the Original Settlement Agreement (Rebensdorf/Wzorek VS, pp. 6 and 7). As stated by Mr. Rebensdorf and Mr. Wzorek in reference to the Restated and Amended Settlement Agreement negotiations, "[n]o change in or elimination of the Central Corridor Restriction and/or the I-5 Restriction was discussed between the parties during those negotiations." (Rebensdorf/Wzorek VS, p. 7).

UP believes that BNSF also mistakenly considered the two alternative versions to have the same operational restrictions. BNSF's failure to produce any evidence on that issue supports UP's belief. Furthermore, on July 25, 2001, BNSF and UP jointly submitted to the Board a version of the Restated and Amended Settlement Agreement that contained the version of Section 1(g) also contained in the final that they jointly submitted on March 1, 2002. This filing also included a chart of "Principal Amendments to BNSF Settlement Agreement" (in addition to those made by the First and Second Supplements). That chart states that the proposed Restated and Amended Settlement Agreement "restates," rather than "changes," the Section 1(g) traffic restrictions on the Cal-P and Donner Pass lines.

As explained by Messrs. Rebensdorf and Wzorek in their verified statement, it never remotely occurred to UP that BNSF would avoid using its own direct route between Stockton and Richmond and would instead use UP's Cal-P Line which is some 50 miles longer (Rebensdorf/Wzorek VS, p. 7). If BNSF harbored such a plan at the time of the Restated and Amended Settlement Agreement negotiations, it had an obligation to disclose that plan to UP. Yet BNSF never disclosed any such intent to UP. The parties' mistaken omission of the then existing I-5 and Central Corridor Restrictions should not now be converted by BNSF into trackage rights operations clearly in conflict with the parties' intent and the intent of the merger conditions adopted by the Board.

CONCLUSION

The proposal and acceptance of the version of Section 1(g) now contained in the Restated and Amended Settlement Agreement has nullified the parties' intent that the Central Corridor and I-5 Restrictions remain in effect on the Cal-P Line and the Elvas-Stockton Line. As such, it represents either a mutual mistake by the parties or a unilateral mistake by UP which BNSF recognized at the time and has subsequently exploited causing unacceptable delays to UP's freight trains and the 44 passenger trains that operate each weekday between Martinez and Oakland. In either case, the mistake should be corrected by reformation of the Restated and Amended Settlement Agreement to re-impose the I-5 and Central Corridor Restrictions.

Respectfully submitted,

J. Michael Hemmer
Lawrence E. Wzorek
William G. Barr
Jeffrey S. Asay
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
Tel: (402) 544-5000

Attorneys for Union Pacific Railroad Company

August 20, 2007

CERTIFICATE OF SERVICE

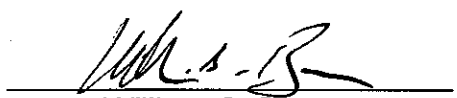
I, William G. Barr, hereby certify that on this 20th day of August, 2007, I served a copy of the foregoing Initial Brief of Union Pacific Railroad Company by email and UPS Overnight mail on the following:

Adrian L. Steel, Jr.
Evan P. Schultz
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, D.C. 2006

and by first-class mail, postage prepaid, on the following:

William A. Mullins
Robert A. Wimbush
Baker and Mullins PLLC
Suite 300
2401 Pennsylvania Ave., N.W.
Washington, D.C. 20037

Christopher A. Mills, Esq.
Slover & Loftus
Attorneys at Law
1224 Seventeenth Street, N.W.
Washington, D.C. 20036-3003



William G. Barr

EXHIBIT A

OBJECTIONS AND RESPONSES OF THE
BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
TO UNION PACIFIC RAILROAD COMPANY'S
FIRST SET OF DISCOVERY REQUESTS

14. What was the date on which BNSF first operated an Intermodal Train over either the Cal-P Line or the Elvas-Stockton Line that was neither an I-5 Intermodal Train nor a Central Corridor Intermodal Train?

Response: [Redacted.]