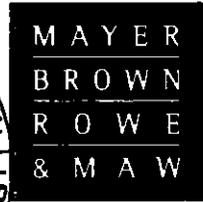
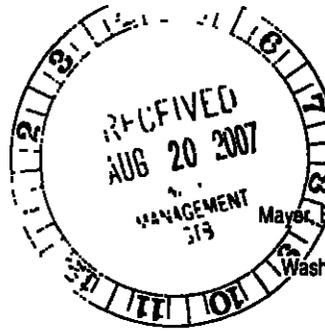


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August 20, 2007

BY HAND-DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 F. Street, SW
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

AUG 20 2007

Part of
Public Record

Dear Secretary Williams

Enclosed for filing in the above-captioned proceeding are the original and ten (10) copies of BNSF Railway Company's Opening Brief Opposing Union Pacific Railroad Company's Petition for Reformation of Agreement (BNSF-114)

Please note that we are filing a public version of the Brief as well as a highly confidential version which is being filed under seal

I would appreciate it if you would date-stamp the enclosed extra copies and return them to the messenger for our files. Please let me know if you have any questions. Thank you for your assistance.

Sincerely yours,

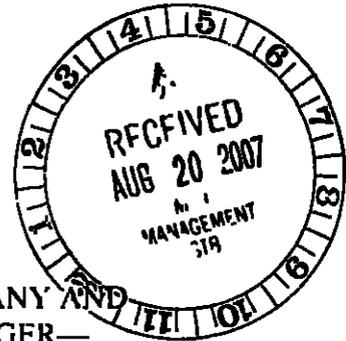
Adrian L. Steel, Jr

Enclosures

cc All Parties of Record

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, SPCSI CORP., AND
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

**OPENING BRIEF OF
BNSF RAILWAY COMPANY OPPOSING
PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR REFORMATION OF AGREEMENT**

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Office of Proceedings

AUG 20 2007

Part of
Public Record

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Dated August 20, 2007

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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

**OPENING BRIEF OF
BNSF RAILWAY COMPANY OPPOSING
PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR REFORMATION OF AGREEMENT**

Pursuant to this Board's Decision served May 7, 2007, BNSF Railway Company ("BNSF") hereby submits its Opening Brief responding to the Petition of Union Pacific Railroad Company ("UP") for Reformation of Agreement ("Petition")¹ BNSF's Brief is supported by the Verified Statement of Peter J Rickershauser, Vice President, Network Development for BNSF ("V S Rickershauser"), and the Joint Verified Statement of Chris A Roberts, Region Vice President – South Operations for BNSF, and Bruce D Barrett, Manager, Contracts and Joint Facilities, for BNSF ("V S Roberts/Barrett") Mr Rickershauser participated in and was BNSF's principal business negotiator in the negotiations of the Restated and Amended BNSF Settlement Agreement Mr Roberts is responsible for and oversees the implementation and execution of BNSF's trackage rights on the UP rail lines at issue in this proceeding Mr Barrett

¹ Acronyms used herein are the same as those in Appendix B of Decision No 44 in this docket The Burlington Northern Santa Fe Railway Company changed its name to BNSF Railway Company effective as of January 20, 2005

was BNSF's Manager of Trackage Rights Operations from 1998 through 2005. He was located at UP's Harriman Dispatching Center in Omaha, Nebraska, and was involved in the day-to-day operation of BNSF trains over UP trackage rights lines. Messrs. Roberts and Barrett jointly address BNSF operations on the two UP rail lines at issue in this proceeding.

INTRODUCTION AND SUMMARY OF ARGUMENT

UP's Petition asks the Board to declare that the parties made a mutual mistake in a contractual agreement between them. The law and the facts, however, make it impossible for UP to carry its heavy burden of demonstrating the existence of such a mutual mistake by clear and convincing evidence. Rather, the facts show that UP is trying to close its lines to BNSF in order to accommodate a high volume of passenger trains. Whatever its obligations to run the passenger trains, UP's obligation to BNSF is clear and valid and did not result from any mutual mistake by the parties.

The provision at issue here is Section 1(g) of the Restated and Amended BNSF Settlement Agreement, which the parties filed with the Board in March 2002.² The section governs BNSF's use of UP lines in California that run from Oakland to Sacramento (the "Cal-P line") and from Elvas (which is located at Sacramento) to Stockton.³ UP does not deny that the provision at issue is clear, nor does it deny that the provision allows BNSF to operate intermodal trains without restriction as to routing over the lines. So rather than challenge the language itself, UP asserts in its Petition that the parties never meant to agree to the provision. That is, as UP

² For the convenience of the Board, BNSF has attached hereto as Attachment A excerpts from the original 1995 BNSF Settlement Agreement, as supplemented, and the Restated and Amended BNSF Settlement Agreement relevant to the traffic restrictions on the two UP lines at issue in this proceeding.

³ The Cal-P line is part of UP's Martinez Subdivision, and the Elvas-Stockton line is a part of the former SP Fresno Subdivision. The lines are depicted on the two maps which UP attached to its Petition, both of which BNSF has also attached hereto for the convenience of the Board as Attachment B.

views the situation, the parties entered into an “antecedent agreement” to maintain the terms of the original version of the section

The parties, however, never entered into an antecedent agreement. Rather, UP simply *assumed* such an agreement and never actually discussed it with BNSF. Further, the documents that UP claims evidence such an agreement show no such thing and cannot absolve UP of its responsibility to read and understand the contract itself. This is especially true for a sophisticated railroad company such as UP, where UP itself wrote the provision that it now protests, where UP had at least six senior officials and lawyers review the provision it wrote, where UP did not mention the existence of an alleged mistake to BNSF during multiple rounds of negotiations involving the provision, and where UP did not mention the alleged mistake to the STB when the parties filed the Restated and Amended BNSF Settlement Agreement.

Further, UP’s own conduct after the parties agreed to Revised Section 1(g) demonstrates that no antecedent agreement existed, and therefore confirms that the parties made no mutual mistake. UP on multiple occasions conceded that the provision means what it says, UP accepted well over 1,000 of BNSF’s trains that UP now claims the parties meant to prohibit from using the two UP lines, UP accepted these trains with notice of BNSF’s plans for using the two lines and with notice of each train in particular, and UP billed BNSF for using the specific routing it now contests. In addition to demonstrating that the parties never made a mutual mistake, these facts also show that, even if a mistake did exist, UP engaged in gross negligence that should now bar its recovery.

Even if the Board were to grant UP the relief it seeks (which is actually more restrictive than the original provision UP claims the parties meant to maintain), UP would still not solve its capacity problems. The number of trains that BNSF runs on the lines is so few that granting UP

its requested relief would not materially increase UP's capacity. Indeed, the volume of trains that BNSF is running on the Cal-P line is less than what UP and BNSF anticipated when they executed the 1995 BNSF Settlement Agreement. Moreover, granting UP's request for relief to close off BNSF from UP's lines would harm the shippers who depend on BNSF to serve them.

Finally, the Board should not grant the extraordinary remedy of reformation to UP to enable it to divest BNSF of its mutually-agreed to right to use the two UP lines pursuant to Revised Section 1(g) in order to deal with the increase in commuter trains that has occurred or to avoid making necessary capacity improvements.

For the reasons discussed below, the STB should therefore reject UP's Petition.

FACTUAL BACKGROUND

A. Negotiation Of Revised Section 1(g) Of The Restated And Amended BNSF Settlement Agreement

In December 2000, BNSF prepared and sent to UP a draft restated and amended version of the original 1995 BNSF Settlement Agreement, as supplemented ("1995 BNSF Settlement Agreement"). The purpose of revising the 1995 BNSF Settlement Agreement was to incorporate the various conditions that the Board had imposed on the UP/SP merger and to reflect subsequent Board decisions interpreting and clarifying those conditions. The revision was also intended to clarify a number of issues that had arisen in the course of implementing the Settlement Agreement. Altogether, the parties negotiated over three dozen substantive changes to the Settlement Agreement, many of which involved one party or the other (and often both parties) revising its original position and agreeing to a bargained-for resolution in which the parties frequently traded rights and positions. *V.S. Rickershauser at 4*

Among the issues identified by BNSF as being in need of clarification was the meaning and scope of the traffic restrictions imposed by Section 1(g) of the 1995 BNSF Settlement

Agreement ("Original Section 1(g)") In particular, as Mr Rickershauser describes, in BNSF's view Original Section 1(g) contained ambiguous language concerning the extent to which trains using the Cal-P line and the former SP Elvas-Stockton line had to have a prior or subsequent movement over the Central Corridor or the I-5 Corridor V S Rickershauser at 2-3

Accordingly, BNSF edited Original Section 1(g) in the draft of the Restated and Amended Settlement Agreement that it sent to UP on December 22, 2000, in an initial attempt to clarify the provision The basic ambiguity, however, remained, and it was BNSF's intent to have that ambiguity resolved during the process of revising the 1995 BNSF Settlement Agreement to ensure that its meaning was clear to all readers without the need for interpretation outside the Agreement *Id* at 4 (As is described below, UP ultimately remedied the ambiguity in its own proposal to BNSF)

The text of Original Section 1(g) contains ambiguity because it establishes apparently conflicting restrictions on BNSF's manifest trains The first sentence of Original Section 1(g) entitled BNSF to move intermodal trains both ways between Oakland and Weso (and points east), and also entitled BNSF to move intermodal trains both ways between Oakland and Keddie (and points north) In addition, Original Section 1(g) entitled BNSF to move one manifest train per day in each direction over the Cal-P line regardless of the trains' routing Later in the fifth sentence, however, the original 1995 language states that BNSF "may also utilize the 'Cal-P' for one manifest train per day moving to or from Oakland via Keddie and Bieher (provided, however, that BNSF may only operate one manifest train/day in each direction via the 'Cal-P' regardless of where the train originates or terminates)" The original provision therefore left unclear whether BNSF had an unrestricted right to operate manifest trains over the Cal-P line subject to the one-train-per-day in each direction limitation, as the provision's first mention of

manifest trains indicates, or whether BNSF could operate only one I-5 line manifest train per day, as the later mention of manifest trains suggests

After BNSF sent the draft Restated and Amended Settlement Agreement to UP in December 2000, the parties negotiated over a period of several months through a series of meetings, conference calls, e-mails, and other communications,⁴ trying to reach consensus on a revised Agreement V S Rickershauser at 4-5. [REDACTED]

[REDACTED]⁵ UP rejected without explanation BNSF's proposed revision to Section 1(g), and instead sent its own revised draft of the Settlement Agreement to BNSF (the March 20, 2001 version)

At a May 1, 2001 meeting, in Washington, D C , BNSF raised the issue of the ambiguity in Section 1(g) [REDACTED]

[REDACTED]⁶
On May 5, 2001, in an e-mail from Larry Wzorek, UP proposed two different inserts for revising Section 1(g) / BNSF-00338 to BNSF-00340 The first proposed insert retained the

⁴ Contrary to UP's assertion in its Petition, the parties' negotiations, once they began in late March 2001, were not "extended and sporadic " There were frequent communications between UP and BNSF and their representatives between April and July of 2001, when the revised Settlement Agreement was submitted to the STB for the resolution of disputed issues V S Rickershauser at 5

⁵ UP discovery responses cited herein are included in Attachment C hereto

⁶ [REDACTED]
(Documents cited by Bates-stamp number are included in Attachment D hereto in numerical order by carrier)

⁷ [REDACTED]

[REDACTED] From the various e-mails exchanged between BNSF and UP, BNSF was aware of the fact that UP's proposed revisions to the Settlement Agreement (including the revisions to Section 1(g)) were receiving such high-level extensive review, and thus BNSF reasonably understood that Mr Wzorek's proposed inserts accurately reflected UP's

basic original traffic restrictions for UP's line from Weso to Oakland. It, however, failed to clarify whether any routing restrictions applied to BNSF manifest trains using the Cal-P line. UP's second proposed insert revised the traffic restrictions in the first sentence to apply them only to UP's line between Sacramento and Oakland (and not all the way to Weso). It placed the restrictions themselves in a separate sentence that read "BNSF manifest trains may be either I-5 corridor or central corridor trains." *Id.* at BNSF-00339. UP's second proposal thus removed the I-5 Corridor and Central Corridor restrictions from intermodal trains and applied them instead to manifest trains.

BNSF received and reviewed UP's two proposed inserts to Section 1(g) and determined that, because the second proposed insert more clearly stated UP's intent with respect to the traffic restrictions, it would accept that insert. Accordingly, during a May 18, 2001 conference call, UP and BNSF agreed to include UP's second proposed insert in the draft Restated and Amended BNSF Settlement Agreement. *V.S. Rickershauser* at 6-7. [REDACTED]

[REDACTED] ⁸

Subsequent to the parties' May 18th agreement to incorporate UP's second proposed insert ("Revised Section 1(g)"), UP and BNSF returned to Section 1(g) again during their negotiations to address the issues of whether BNSF could set out and pick up traffic on the two UP lines and whether to count local service against the traffic restrictions. *V.S. Rickershauser* at 7. During these further negotiations, the parties exchanged numerous drafts of Section 1(g). all

considered intent to offer two separate and distinct inserts, both of which were acceptable to UP, and that BNSF could accept either insert. *V.S. Rickershauser* at 5-6.

⁸ [REDACTED]

of which incorporated UP's second proposed insert, substantively revising the traffic restrictions UP *never* asserted that the parties had made a mistake or that the revised language failed to reflect its intent with respect to the traffic restrictions V S Rickershauser at 7, [REDACTED]

In addition, UP reviewed at least six further revised draft versions of the Settlement Agreement and at no time did it advise BNSF that a mistake had been made in Revised Section 1(g) traffic restrictions V S Rickershauser at 7, [REDACTED]

[REDACTED] Moreover, UP made submissions to the SIB pertaining to the Restated and Amended BNSF Settlement Agreement on July 2, 2001 [UP/SP-385], July 25, 2001 [UP/SP-386 and BNSF-92], July 25, 2001 [UP/SP-387], September 19, 2001 [UP/SP-389], and March 1, 2002 [UP/SP-393 and BNSF-100] In none of those submissions did UP claim or assert that a mistake had been made as to the traffic restrictions V S Rickershauser at 7, [REDACTED]

[REDACTED] The parties submitted the final Restated and Amended BNSF Settlement Agreement to the Board on March 1, 2002 UP/SP-393 and BNSF-100

B. BNSF Use Of Cal-P And Former SP Elvas-Stockton Lines For Intermodal Trains

As Mr Roberts describes, prior to the commencement of operations at the Oakland International Gateway ("OIG") in 2002, BNSF offered only limited intermodal service to and from the Port of Oakland V S Roberts/Barrett at 3 From there, BNSF used its track between Richmond and Stockton Once OIG began operations, there was not enough density initially to operate full trains in and out of the facility, so BNSF continued to use its own routing BNSF also used its Richmond-Stockton line for limited manifest service *Id*

However, the City of Richmond raised concerns about BNSF trains blocking streets, delaying traffic, and creating horn noise, which caused BNSF to explore options for minimizing

traffic on the line. Also, the trains moved slowly through Richmond, because the line accommodated traffic only at 10 miles per hour and contained multiple grade crossings, which hindered intermodal traffic. V S Roberts/Barrett at 3

On June 13, 2003, BNSF asked UP to grant it trackage rights between Port Chicago and Martinez, California, in order to bypass Richmond. BNSF-01543. UP refused on July 24, 2003, due to existing passenger and freight traffic loads (as well as a commitment to allow an additional 16 commuter trains to operate over the line). BNSF-01544. Given UP's denial of BNSF's request, BNSF then considered the Cal-P line as an alternative, and BNSF's Service Design department developed a service plan. V S Roberts/Barrett at 3

BNSF first used the Cal-P line for non-Central Corridor/non-I-5 intermodal traffic in June 2004 as traffic to and from OIG grew.⁹ V S Roberts/Barrett at 4. As reflected in the chart of monthly BNSF train counts, attached as Exhibit 2 to the Roberts/Barrett Verified Statement, BNSF began using the lines on a regular basis for such traffic in March 2005, and that usage has continued to the present (although BNSF no longer operates "bare table" cars, *i.e.* empty intermodal cars).¹⁰ Before deciding to run these trains, BNSF checked and confirmed that the Restated and Amended BNSF Settlement Agreement authorized it to do so. *Id.*

In addition, BNSF negotiated a March 3, 2004 Memorandum of Understanding ("MOU") with UP (and a subsequent trackage rights agreement implementing the MOU) which provided for, *inter alia*, trackage rights between Bakersfield and Stockton with the understanding that BNSF had the right to use the Cal-P line into Oakland for intermodal trains. V S Rickershauser

⁹ While BNSF's usage of the two UP lines was, at least for some time periods, related to BNSF's maintenance work between Bakersfield and Stockton, the maintenance work was not a principal reason for BNSF's use of the lines. V S Roberts/Barrett at 4

¹⁰ Until February 2007, BNSF operated certain "bare table" trains that repositioned empty intermodal equipment from Oakland to the Los Angeles Basin on the two UP lines

at 8-9 The MOU resulted from a decision by UP and BNSF to explore opportunities to share lines and other facilities as a way to reduce investment and costs to both carriers while improving service to shippers *Id* BNSF granted UP significant rights in the MOU, and the trackage rights between Bakersfield and Stockton were a principal part of the consideration BNSF received in return ¹¹ Those rights were of value to BNSF, however, only if trains moving over the UP line could use the Cal-P line to and from OIG *Id*

As mentioned, BNSF's increased use of the Cal-P and Elvas-Stockton lines stemmed from BNSF's increased use of OIG When OIG opened, BNSF did not initially run intermodal trains on the Cal-P line due to the lack of demand and density BNSF has not regularly run manifest trains on the Cal-P line, but it has scheduled manifest trains between Stockton and Elvas

In late August 2006, UP advised BNSF that, due to the increase in passenger trains, UP would limit freight traffic on the Cal-P line to night operations with a maximum of 6 freight trains per direction (3 UP trains and 3 BNSF trains) UP never mentioned any restrictions in any version of Section 1(g) and never pointed to those restrictions as the basis for limiting traffic *V S Roberts/Barrett at 7*

C. BNSF Notice To UP Of Its Use Of The Lines For Non-Central Corridor/Non-I-5 Intermodal Traffic

Before BNSF began use of its trackage rights on the Cal-P and Elvas-Stockton lines for non-Central Corridor/non-I-5 intermodal trains, BNSF provided UP with an operating plan, as required by the parties' agreed protocol for BNSF's use of lines over which it had trackage rights *V S Roberts/Barrett at 4* Similarly, BNSF's trackage rights officials in Omaha at UP's

¹¹ BNSF's trackage rights were the subject of a notice of exemption in Finance Docket No 34607 filed with the Board on October 28, 2004

Harriman Dispatching Center regularly spoke with their counterparts at UP, and BNSF's officials gave UP's trackage rights supervisor notice of any volume increase that was more than minimal *Id* at 5 Here, Bruce Barrett of BNSF's trackage rights office gave a notice to UP's corridor managers, directors and dispatchers advising them of BNSF's intent to operate the OIG trains to and from Stockton over the two UP lines *Id* at 4-5 BNSF also electronically entered all of its scheduled trains into UP's computer system, using a format that UP's computer system understood, which identified the type, origin, and destination of each train that BNSF would be operating *Id* at 5-6

Further, apart from these formal notifications, there is ample documentary evidence establishing that UP was aware of BNSF's use of the two lines for non-Central Corridor/non-I-5 intermodal trains Indeed, on several occasions, UP even acknowledged BNSF's right to operate such trains over the lines

[REDACTED]

[REDACTED]

[REDACTED] 13

D. UP's Discovery Of The Alleged "Mistake"

[REDACTED]

13

[REDACTED]

Corridor commuter trains and Amtrak passenger trains) on time ¹⁵ [REDACTED]

[REDACTED]

[REDACTED] On a number of occasions, these capacity issues and the failure of UP to meet contractual on-time performance benchmarks have led UP to reject BNSF trains. And, UP now asserts in its Petition that "BNSF's operation of Intermodal Trains on the Cal-P Line that are neither Central Corridor Intermodal Trains nor I-5 Intermodal Trains has congested that line, with resulting adverse effects for the traveling public as well as for UP and its customers." Petition at 9. The record establishes, however, that UP's claim is meritless.

To begin with, in light of the capacity demands imposed by the agreed to increase in Capitol Corridor trains operated over the Cal-P line in August 2006, UP sought to find any way that it could to reduce freight traffic on the Cal-P line to fulfill its passenger volume and on-time performance obligations to Capitol Corridor. For example, UP on August 28 began operating freight trains on the Cal-P line only at night, to clear capacity for passenger trains during the day.

BNSF-01580-81 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 16

UP decided on this course of action even though UP's own evidence and traffic records reveal that BNSF's trains are not the principal or even a substantial cause of the capacity, delay and congestion problems on the Cal-P line. UP's records show that from March 2005 through December 2006, BNSF averaged fewer than three trains per day on the Cal-P line (and fewer still when bare table trains are excluded) ¹⁷. See Exhibit E to Petition. But even if UP were to be successful in blocking all three BNSF trains per day, UP would still not be able to accommodate all of the traffic. That is, UP estimates that between 50 to 56 freight trains (including BNSF trackage rights trains) and passenger trains operate on weekdays on the Cal-P line between Martinez and Oakland while the maximum fluid capacity of the line is 50 to 60 trains daily ¹⁸. Without BNSF's trains, UP would still have commitments to run at least 53 trains per day, a volume that is at or beyond its daily capacity of 50-plus trains.

Further weakening UP's claims that BNSF is taking advantage of UP's lines, in fact, the average number of BNSF trains daily is *below* the level of trackage rights on the Cal-P line that

¹⁶ [REDACTED]

¹⁷ [REDACTED]

¹⁸ See Verified Statement of Thomas F. Jacobi ("V.S. Jacobi") at 5

trains the parties anticipated in 1995 when they executed the 1995 BNSF Settlement Agreement. That is, in 1995, UP and BNSF expected that at least *four* BNSF trains would operate daily over the Cal-P line. See Verified Statement of Neil D. Owen (“V.S. Owen”) submitted as part of BNSF’s Comments on the Primary Application, BN/SF-1 at 7-12, filed on December 29, 1995.¹⁹

Despite these facts, UP filed its Petition on February 16, 2007.

LEGAL ARGUMENT

A. UP Cannot Meet The High Standard Of Proof Governing Claims For Reformation

UP fundamentally misunderstands the burden it must carry in this reformation proceeding. In fact, at page 2 of its March 28, 2007 Reply to BNSF’s Initial Response, UP effectively seeks to shift the burden to BNSF. Specifically, UP claims that BNSF’s Initial Response is flawed because “BNSF does not claim that it consciously intended to expand its rights to operate on UP’s lines between Oakland and Stockton via Sacramento, or that it ever discussed that topic with UP.” In fact, UP rather than BNSF carries the burden, and it is a heavy one.

Courts have established, apparently unanimously, that the party seeking reformation carries the burden. This is true in California. See *Martinelli v. Gabriel*, 230 P.2d 444, 447 (Cal. Ct. App. 1951) (stating “the burden is on the person alleging mutual mistake to establish it”).

And it is also true in virtually every other jurisdiction. See, e.g., *Schaffner v. 514 West Grant*

¹⁹ The four trains consisted of one intermodal train-pair and one manifest train-pair (which is reflected in the language of Original Section 1(g) authorizing one manifest train daily in each direction). Mr. Owen noted that BNSF would also operate automotive trains over the Cal-P line as demand required. A copy of the relevant excerpts from Mr. Owen’s Verified Statement is attached hereto as Attachment E. UP’s subsequent filings indicate that it fully understood that BNSF would operate the four trains identified by Mr. Owen (if not more) over the Cal-P line. See Verified Statement of Richard B. Peterson submitted as part of UP’s Rebuttal, UP/SP-231 at 145-49, filed on April 29, 1996.

Place Condo Ass'n, Inc., 756 N E 2d 854, 865 (Ill App 2001), *Groff v Kohler*, 922 P 2d 870, 873 (Alaska 1996), *Feaster v First Fed Sav Bank of Kan*, 723 F Supp 1413, 1416 (D Kan 1989) (citing *Schnug v Schnug*, 454 P 2d 474 (Kan 1969)), *Covich v Chambers*, 397 N E 2d 1115, 1121 (Mass App Ct 1979), *Am Employers Ins Co v St Paul Fire & Marine Ins Co*, 594 F 2d 973, 975, 978 (4th Cir 1979), *Williams v Phillips Petroleum Co*, 453 F Supp 967, 973 (S D Ala 1978), *Paurlev v Harris*, 292 P 2d 765, 767 (Idaho 1956), *Lawson v Twin City Fire Ins Co*, 2 F Supp 171, 173 (E D Ky 1932)

The authorities also agree that the standard UP must meet is a high one. The Restatement (Second) of Contracts “requires the trier of the facts to be satisfied by ‘clear and convincing evidence’ before reformation is granted.” *Id.* at § 155, cmt c. California follows this rule, *see Martinelli*, 230 P 2d at 447, as do other jurisdictions. *See* 7 Joseph M Perillo, *Corbin on Contracts* (revised ed 2002) 326 n 13 (listing multiple state and federal jurisdictions using this standard)

In order to establish facts by clear and convincing evidence, a plaintiff must exceed the normal standard in civil trials. That is, “[a] mere preponderance of the evidence is not enough.” 7 *Corbin on Contracts*, at 326, *see also id.* at 283 (“The standard of proof for reformation, clear and convincing evidence, is a higher standard of proof than is normal in civil cases.”) As Justice Brandeis has explained, “[i]t is settled that relief by way of reformation will not be granted, unless the proof of mutual mistake be of the *clearest and most satisfactory character*.” *Philippine Sugar Estates Dev Co v Philippine Islands*, 247 U S 385, 391 (1918) (internal punctuation and citations omitted) (emphasis added). The Rhode Island Supreme Court has fleshed out the standard, stating “it is well settled that the complainant must prove a mutual mistake by clear and convincing evidence, meaning thereby that the evidence should be such that

the mind has no difficulty in reaching a point of decision " *Vanderford v Kettelle*, 64 A 2d 483, 489 (R 1 1949) (emphasis added) For the reasons that BNSF details below, UP does not meet this exacting standard

B. UP Cannot Prove All Of The Elements Necessary To Establish A Mutual Mistake

UP cannot satisfy the elements necessary to prove a mutual mistake Under traditional common law principles, the party seeking reformation on the basis of a mutual mistake must establish four elements (1) the parties entered into an agreement before they wrote up the contract (that is, that they entered into an "antecedent agreement"). (2) the parties agreed to put their agreement in writing. (3) the writing failed to express accurately the antecedent agreement, and (4) the mistake was mutual See Restatement (Second) Contracts § 155 cmt c, 7 *Corbin on Contracts*, at 283, Cal Civ Code § 3399²⁰ Additionally, before a California court will reform a contract, the party seeking reformation must prove that the mutual mistake is material See, e.g., *Cottle v Gibbon*, 200 Cal App 2d 1 (1962) Here, the facts do not permit UP to carry its burden of proving by clear and convincing evidence that the parties entered into an antecedent agreement that they would maintain the substance of Section 1(g) unchanged Similarly, UP cannot demonstrate that any alleged mistake was mutual, rather, the facts show that UP alone caused any error and alone was mistaken Finally, even if UP were correct that a mutual mistake exists (and UP is not correct), UP cannot demonstrate that the mistake is material – BNSF is actually running *fewer* trains per day than the parties originally anticipated

²⁰ A party might also merit relief in a mistake case where one party in fact did not make a mistake, but that party knew that the other party was making a mistake See, e.g., Cal Civ Code § 3399 Here, however, UP cannot assert that BNSF knew UP was making a mistake, because UP has already conceded that "UP does not believe that the elimination of the Central Corridor and/or I-5 Restrictions from the Restated and Amended Settlement Agreement resulted from any deliberate effort by BNSF to gain an advantage " UP Petition at 20

1 BNSF And UP Never Reached An Antecedent Agreement Involving
Section 1(g)'s Substance

UP's case essentially hinges on its claim that BNSF and UP entered into an antecedent agreement to maintain the substance of Section 1(g) unchanged. Without this, UP's case fails. For three reasons. UP cannot prove that the parties reached the antecedent agreement UP claims they did. First, the weak factual foundation that UP offers to support the existence of an antecedent agreement does not qualify as clear and convincing evidence that the parties entered into an antecedent agreement. Second, the language of the contract that the parties agreed to also refutes UP's claim that the parties agreed to any such prior agreement. And third, UP's actions in the years since the parties entered into the Restated and Amended BNSF Settlement Agreement demonstrate that, at the time of the Agreement, UP held an intent identical to the language of the revised provision. In short, the entire time line – evidence from before the Agreement was reached, evidence of the Agreement itself, and evidence from after the Agreement showing how the parties performed it – rebuts UP's claim that the parties reached an antecedent agreement to maintain Section 1(g) unchanged.

a UP Assumes Without Support That The Parties Agreed To Keep Section
1(g) Unchanged

An antecedent agreement must be an *actual* agreement. According to the California Supreme Court, this means “a *definite* intention or agreement on which the minds of the parties had met” that preexisted the written contract. *Bailard v. Marden*, 227 P.2d 10, 13 (Cal. 1951) (emphasis added). An “unwarranted assumption” will not suffice. *Sardo v. Fid. & Deposit Co. of Md.*, 134 A. 774, 775 (N.J. 1926).

For instance, in *Sardo*, the court denied reformation where one party assumed that his insurance policy for cash and securities also covered jewelry, though he never raised the question with the insurance company. Similarly, in *Atlas Corp. v. United States*, 895 F.2d 745, 752 (Fed.

Cir 1990), the Federal Circuit denied reformation where companies that produced nuclear fuel never discussed with the government who would pay to clean up certain radioactive by-products. And in *Aero Sales, Inc v City of Salem*, 114 P 3d 510 (Or Ct App 2005), a company leasing land from a city to build an airplane hanger “assumed” that the city would give the company access to an airstrip. In denying the plaintiff’s claim, the court emphasized that “there is absolutely no evidence that the parties ever *discussed*” the term in question, “[m]uch less is there any evidence that the parties reached an *agreement*” on it. *Id* at 514 (emphases in original).

Similarly, here, UP’s discovery answers show that it assumed without good cause that BNSF wanted to keep the substance of Section 1(g) unchanged. [REDACTED]

[REDACTED] UP’s subjective claim of the parties’ mutual intention is not enough. The plaintiffs in *Sardo*, *Atlas*, and *Aero* also guessed wrong about the intentions of their contracting partners, and the courts held that the parties in those cases had never reached antecedent agreements.

In addition to its admission that it merely assumed that the parties had entered into a mutual antecedent agreement, UP also has effectively admitted that BNSF never discussed with UP whether or not to change the substantive provisions of Section 1(g). Reply of UP to the Initial Response of BNSF, at 2, Verified Statement of John H. Rehensdorf and Lawrence E. Wzorek at 7. [REDACTED]

[REDACTED] Despite these concessions, UP has pointed to three documents as purported evidence of

a mutual antecedent agreement. But the documents, taken either individually or together, do not support UP's case.

The first two documents relate to BNSF's initial draft of the Restated and Amended BNSF Settlement Agreement sent to UP in December 2000. The first is the draft itself (which contained a minor revision to Section 1(g)), and the second is a chart of the principal changes incorporated into the draft. Neither of these documents mentions a substantive change in Section 1(g). The third document is a chart summarizing the principal changes in the Settlement Agreement submitted to the STB on July 25, 2001. This chart indicates that the Restated and Amended BNSF Settlement Agreement restated the traffic restrictions. These three documents do not show, however, that the parties had any sort of an agreement with regard to maintaining or altering the substance of Section 1(g).

The first two documents were prepared by BNSF before discussions had been held with UP concerning the revision of the 1995 BNSF Settlement Agreement in general (and Section 1(g) in particular). Thus, they cannot be reflective of a mutual agreement between the parties that the traffic restrictions in Section 1(g) would not be revised. As described above, BNSF believed Section 1(g) was ambiguous with respect to the traffic restrictions and was uncertain as to UP's intent in that regard. BNSF intended to, and did, seek UP's clarification of those restrictions. Thus, the absence of a proposed substantive change to the section in BNSF's December 2000 draft is not remarkable and provides no brief to UP. In fact, the parties had no meeting of the minds with regard to Section 1(g) until UP and BNSF agreed that Section 1(g) needed to be clarified, UP proposed the language options for BNSF's consideration, and BNSF accepted the language that UP wrote - the language that became part of the Settlement

Agreement *Sec 7 Corbin on Contracts*, at 302 (“[E]ssential parts of the contract may have been assented to for the first time when the written document was itself executed”)

With respect to the chart submitted to the STB in July 2001, UP’s citation of the language noting that Section 1(g) “restates” the restrictions in Original Section 1(g) is a thin reed for UP to lean on. It is a single word in multiple pages of charts describing dozens of contractual changes. In any case, the chart does not serve as a substitute for the clear and unambiguous language submitted to the STB, and it was UP’s obligation to read and understand the contractual language that it wrote and proposed to BNSF.²¹

As is mentioned above, evidence supporting reformation must be of the “*clearest and most satisfactory character*” *Philippine Sugar Estates*, 247 U.S. at 391 (emphasis added). The three documents UP relies on here fall short of that mark.

b. The Language Of Revised Section 1(g) Itself Refutes UP’s Claim That The Parties Reached An Antecedent Agreement

The text of Revised Section 1(g) that UP wrote in its entirety and that is now part of the Settlement Agreement further erodes UP’s claim that the parties made a mutual mistake. Even when contractual text is the basis for a dispute, that text still maintains evidentiary value in mutual mistake cases. “The document itself, duly executed and introduced in court, has weight as evidence of mutual agreement.” *7 Corbin on Contracts*, at 329. Along the same lines, the

²¹ To the extent UP is asserting that it had no responsibility to read and understand the final Restated and Amended BNSF Settlement Agreement, and that it could instead rely on the summary, such a position effectively would convert the summary into the governing contract. As the Supreme Court has held, “[i]t will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained.” *Upton v. Iribalcock*, 91 U.S. 45, 50 (1875). See also *Nicholson v. United States*, 29 Fed. Cl. 180, 189 (1993) (“a party becomes bound by the obligations contained within a legally executed document, regardless of whether the party reads the document before execution”) (quote taken from passage citing authority from multiple federal and state appellate courts). Here, UP had an even *higher* responsibility to understand Revised Section 1(g) because UP itself wrote the provision.

Restatement (Second) of Contracts states that, “[w]here the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement.” and that “[a]n integrated agreement is a writing or writings constituting a *final* expression of one or more terms of an agreement ”

Restatement (Second) of Contracts, §§ 209(3), 209(1) (emphasis added) In other words, the final, complete written contract governs And, as is discussed above, courts assume that each party has read and understood the words of a contract before agreeing to them *See, e g , Upton*, 91 U S at 50

Here, there is no dispute that UP’s revised version of Section 1(g) both clarified and altered the parties’ obligations as compared to the language of Original Section 1(g) As UP states in its Petition, the revised version “removed restrictions on BNSF’s use of those intermodal trackage rights ” UP Petition at 3 The fact that the words are clear, and that UP itself wrote those words removing the restrictions, itself counters UP’s claim that the parties entered into a conflicting antecedent agreement to maintain the substance of Section 1(g) and precludes UP’s ability to prove its case by clear and convincing evidence

c UP’s Course Of Performance Under The Restated And Amended Settlement Agreement Confirms That The Parties Never Agreed To Retain The Substance Of Section 1(g) Unchanged

After the parties revised the Settlement Agreement in 2002, UP knew that BNSF was running trains in accordance with Revised Section 1(g) On four occasions, UP even conceded that BNSF had the right to run trains pursuant to the terms Revised Section 1(g) lays out It should not be surprising, then, that until immediately before this proceeding began, UP over a period of several years never claimed that BNSF violated the Restated and Amended BNSF Settlement Agreement Under traditional principles of contract law, a party’s conduct under a contract is often the best evidence of the meaning of the contract and of the parties’ intent at the

time they contracted. Given that UP's course of performance therefore shows UP intended the Settlement Agreement to mean what it says, UP cannot have also believed that the parties had entered into a conflicting antecedent agreement based on intent contrary to the written contract. It surely cannot make out such a case by clear and convincing evidence.

(1) Legal Standard

Courts treat parties' performance under a contract as especially important when determining what the parties intended. According to the Restatement (Second) of Contracts, "any course of performance accepted or acquiesced in is given great weight in the interpretation of the agreement." Restatement (Second) of Contracts § 202(4). *See also* Cal. Civ. Proc. Code § 1856(c) ("The terms set forth in a writing may be explained or supplemented by course of performance"). Indeed, parties' actions under a contract are "often the strongest evidence of [the parties'] meaning." Restatement (Second) of Contracts § 202, cmt. g. *See also Sterling v. Taylor*, 152 P.3d 420, 429 (Cal. 2007) (stating "the practical construction placed upon [a contract] by the parties before any controversy arises as to its meaning affords one of the most reliable means of determining the intent of the parties"), *Am. Mfg. Co. of Tex. v. Witter*, 343 S.W.2d 943, 948 (Tex. Civ. App. 1961) (stating that course of performance "constitutes the highest evidence of the intention of the parties").

Course of performance is so valuable that courts refer to it even when there is no ambiguity in a contract's language, such as in this case, where even UP concedes the meaning of the text as written. That is, course of performance "should always be given weight." 5 *Corbin on Contracts*, at 152. *See also* Restatement (Second) of Contracts, § 202 (1) cmt. b (the meaning of words "commonly depends on their context"). Finally, course of performance under a contract sheds light on the parties' intention *when they entered into the contract*. As *Corbin on Contracts* states, "course of performance when employed to interpret a contract is an indicator of

what the parties intended at the time they formed their agreement ” 5 *Corbin on Contracts*, at 136 Here, UP’s course of performance definitively shows that it understood the Settlement Agreement to mean what it says

(2) Application Of Legal Standard

(a) UP Explicitly Acknowledged The Validity Of Revised Section 1(g)

Perhaps most important, UP *admitted* that it accepted the terms of Revised Section 1(g) as written UP explicitly conceded this point on at least four separate occasions [REDACTED]

[REDACTED] This description of BNSF’s rights, of course, jibes with the text of Revised Section 1(g), because intermodal trains running between Oakland and Stockton are by definition non-Central Corridor/non-I-5 trains In other words, this communication specifically acknowledges BNSF’s right to run the type of train that UP is protesting in this proceeding [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] These four concessions by multiple UP representatives, [REDACTED]
[REDACTED], negate UP's claim that the governing contract contained a mistake. Rather, during the pre-litigation period that showcases UP's unbiased understanding of its obligations, UP repeatedly conceded that it read the Settlement Agreement the same way that BNSF did

(b) UP Implicitly Acknowledged The Validity Of Revised Section 1(g)

UP also took three sorts of actions that amounted to implicit concessions: it programmed its systems to accept BNSF's non-Central Corridor/non-I-5 intermodal traffic, it actually accepted that traffic, and it billed BNSF for the traffic.

First, at least since 2004, UP Trackage Rights Manager Linda Gardner has had the responsibility for programming the "Master DB5" (essentially a template or "dummy") for each approved route into UP's computer system that tracks BNSF trains on UP's lines. *V.S. Roberts/Barrett* at 5-6. She programmed these templates into UP's computer system only after holding discussions with Mr. Barrett. *Id.* at 5. Without these templates, UP's system would have automatically rejected BNSF's electronic requests for access for a train to run (also called a "161-SDD"). UP created a separate template for each type of train and for each routing. *Id.* By actively priming its system to accept BNSF's requests for access of trains that were clearly non-Central Corridor/non-I-5 intermodal traffic, UP effectively conceded that BNSF has the right to run such trains on UP's lines. Further, in the process of programming its computers to accept

BNSF's trains, UP never protested on the basis of Revised Section 1(g) until October 2006 *Id* at 7 ²²

Second, UP then accepted these trains. And the volume of traffic is noteworthy – UP accepted *over one thousand* BNSF trains that it now claims the Settlement Agreement does not permit. UP cannot reasonably deny that Revised Section 1(g) should be read to mean anything other than it plainly states when it accepted so many BNSF trains without objection ²³

Significantly, UP never objected to accepting any of those trains on the basis of Revised Section 1(g) until October 2006. *V S Roberts/Barrett* at 7, 8-9

Third, UP then went ahead and billed BNSF for each of the trains. As the April 2006 bill attached as Exhibit 1 to *V S Roberts/Barrett* shows, UP knew it was billing BNSF for non-Central Corridor/non-I-5 intermodal traffic. It knew because the codes on the bills correspond to the codes in UP's own computer system, which identify the origin, destination, and type of trains, and also because the bills themselves further identify the specific segments of UP line that the BNSF trains traveled over.

For instance, the attached bill that UP sent to BNSF for trackage rights includes multiple trains that traveled from "El Pinal-Stege" or from "Stege-El Pinal" ²⁴ BNSF trains running from El Pinal to Stege (or vice versa) over UP lines must first travel north to Elvas-Stockton, and then head south to Stege. A look at a map confirms that a train with such routing could not have prior or subsequent movements on either the Central Corridor or the I-5 lines. Further, for 48 of the El

²² For a more detailed explanation of how BNSF communicated with UP's computer system, see Footnote 25, *infra*

²³ Notably, UP never objected to these trains in the Joint Service Committee meetings that it held with BNSF in 2004 and 2005 during which high-level operating officials discussed operational and service issues between the carriers. *V S Roberts/Barrett* at 9

²⁴ El Pinal is located at Stockton, and Stege sits just north of Oakland and OIG

Pinal-Stege/Stege-El Pinal BNSF trains, the UP bill also lists an intermodal code from UP's computer system (in which the first letter is J or I). Thus, the bill confirms that each of these 48 trains was a non-Central Corridor/non-I-5 intermodal train. UP billed BNSF thousands of dollars per segment, thereby acknowledging the legitimacy of the movements.

(c) BNSF Gave UP Notice Of BNSF's Traffic

In addition to these concessions (explicit and implicit) by UP of BNSF's *right* to run the traffic that UP now disputes, BNSF gave UP full prior notice that BNSF was *actually* running these trains. The notice contains all of the information that UP would have needed to protest if it had the grounds to do so, namely the type, the origin, and the destination of each train that UP accepted.

The Roberts/Barrett Verified Statement attaches as exhibits charts illustrating the number of non-Central Corridor/non-I-5 intermodal trains that BNSF ran on the Cal-P and on the Elvas-Stockton lines. As previously described, BNSF first used the Cal-P line for such traffic in June 2004, when it began generating heavier and more consistent volumes of traffic moving to and from OIG. In March 2005, BNSF began using the Cal-P and Elvas-Stockton lines for non-Central Corridor/non-I-5 intermodal trains on a regular basis.

For all of this traffic, BNSF gave notice to UP through at least three methods. First, it was BNSF's usual practice to inform UP of any service plan that would lead to more than a minimal bump in traffic. Therefore, Bruce Barrett, who worked in BNSF's trackage rights office in Omaha, sent a notice to UP's corridor managers, directors, and dispatchers, advising them of BNSF's intent to operate its trains over the two lines. V.S. Roberts/Barrett at 4. Second, Mr. Barrett and other BNSF representatives in UP's Omaha dispatching center routinely held conversations with their UP counterpart, in which the two officials discussed what trains BNSF planned to run. *Id.* at 5. Finally, BNSF entered information on every train it planned to run on

UP's lines into the Electronic Data Interchange ("EDI") communication-protocol that the two railroads share, usually 48 hours before BNSF ran the train *Id* at 6. The data that BNSF entered for each train included a code explaining the route of the train and the type of train, entered in a manner that UP's system recognized ²⁵ *Id* at 5-6. Therefore, BNSF gave UP all of the information that it needed in order for UP to know that BNSF was running non-Corridor and non-I-5 intermodal trains on both the Cal-P and Elvas-Stockton lines.

(d) UP Acknowledged BNSF's Trains

Further, on numerous occasions, UP *acknowledged* that BNSF was operating non-Corridor/non-I-5 intermodal trains on UP's lines. See pages 11-13, *supra*. Therefore, even if BNSF had not given UP multiple forms of notice of BNSF trains, UP independently had knowledge of BNSF's actions. Indeed, the chart that UP created for the purposes of this litigation [see Exhibit E to the Petition] shows that UP was fully capable of independently charting each BNSF train that ran on its lines, manifest or intermodal, with or without

25

Despite UP's claims, there can be no dispute that BNSF entered into UP's system, *in the format that UP's system understood*, information for each train. As described by Mr. Barrett (V.S. Roberts/Barrett at 5-6), this information identified the origin, destination, and type of each BNSF train. UP's computer system accepts codes that are six characters long for each train.

It is true that BNSF has its own code, and that BNSF included both BNSF's own format and also the same information into UP's format, as was just described. Absent information that UP's discovery response does not adequately explain, UP's assertions that it could not understand or track BNSF's trains appear to be wrong.

subsequent or previous Central Corridor or I-5 movements. If UP could compile that list for this proceeding, it could have compiled it earlier to track BNSF's trains.

Finally, it is telling that, when UP placed limits on BNSF trains, UP never referred to the traffic restrictions. For instance, in August 2006, UP restricted all freight trains (including BNSF's) to night operations on the basis that it did not have the capacity to meet all of UP's obligations, especially passenger trains operations, during daylight hours. But UP never mentioned Section 1(g) until October 2006.

[REDACTED]

In short, by routinely accepting BNSF intermodal trains, with full knowledge of those trains' character and routes, UP signaled that it understood what Revised Section 1(g) called for. UP understood that it had agreed to accept BNSF's trains, and that it had not entered into a conflicting antecedent agreement. Significantly, in spite of all of the forms of notice that BNSF gave to UP that BNSF would be running non-Central Corridor/non-I-5 intermodal trains on UP's lines, UP never raised an objection on the basis of Revised Section 1(g) until October 2006. Therefore, UP cannot meet its burden by clear and convincing evidence.

2 UP Cannot Demonstrate Any Mutuality In The Alleged Mistake

Another element of a mutual mistake claim – that the mistake be mutual – is closely related to the antecedent agreement prong, and therefore also poses an extremely difficult obstacle for UP to overcome in this proceeding. If one party's interpretation of the contract is consistent with the writing, then any alleged mistake lacks mutuality. Here, it is indisputable that BNSF interpreted the Settlement Agreement to mean what it says, and therefore it is not possible for UP to establish mutuality.

In order to satisfy the mutuality requirement, a party must prove that it was not alone in intending the final contract to contain a given provision. So, "[w]hen courts speak of mutuality of the mistake, they usually mean that a mistaken belief by one party alone that the writing will contain a given provision is not a ground for reformation." 7 *Corbin on Contracts*, at 283-84. As the Supreme Court of California has held, "[w]here the failure of the written contract to express the intention of the parties is due to the inadvertence of *both of them*, the mistake is mutual and the contract may be revised on the application of the party aggrieved." *Lemonge Elec. v. County of San Mateo*, 297 P.2d 638, 640-41 (Cal. 1956) (emphasis added). Where only one party holds an understanding that the other party does not share, then the mistake cannot be mutual. See *Amex Assurance Co. v. Caripides*, 316 F.3d 154 (2d Cir. 2003).

In the context of this case, any alleged mistake was solely in the mind of UP – BNSF never shared the intention that UP claims it held regarding the substance of Section 1(g). For all of the reasons discussed above, demonstrating that the parties never entered into an antecedent agreement, the mistake is not mutual. In this regard, one document that predates the pending adjudication is especially important. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Mr

Bredenberg's recognition of BNSF's trackage rights over the Cal-P line confirms BNSF's unbiased and contemporary understanding that Revised Section 1(g) was intended by the parties to mean what it plainly says. That is, the e-mail demonstrates that the parties cannot have had a mutual intent that the contract failed to memorialize.

Of course, there is a good reason that BNSF and UP never mutually shared the intent to keep Section 1(g) unchanged in substance – as is described in the factual section above, BNSF thought that Original Section 1(g) was unclear. That version established conflicting restrictions on BNSF's manifest trains. Further, BNSF expressed its thoughts about the lack of clarity in Section 1(g) to UP, and that lack of clarity contributed to the parties' negotiations that culminated, in 2002, in Revised Section 1(g). Therefore, BNSF could not have mutually intended with UP to keep the substance of the original version intact.

Finally, the facts here are similar to those in *Amex Assurance Co.* 316 F.3d at 154. That case concerned whether a life insurance policy that did not include adult children as automatic beneficiaries resulted from a mutual mistake. The Second Circuit held that there could be no

mutual mistake where one of the parties wrote the policy and knew what it said. According to the court, while the policy holder may have “mistakenly believed” that the policy covered adult children, in fact, the insurance company “knew what it provided”, therefore, the “mistake was not mutual.” *Id.* at 161-62. In the case at hand, even if UP did not understand its own provision (and, as is discussed above, the evidence demonstrates that UP did in fact understand the provision to mean what it says), BNSF had read and understood the provision. The misunderstanding here was not mutual.

3 The Alleged Mistake Was Not Material And So Does Not Entitle UP To Relief

California and other jurisdictions require a party seeking reformation of a contract to establish that the alleged mutual mistake was material. At the time that the parties agreed to the 1995 Original Section 1(g), they anticipated that BNSF would run *four* trains per day. And, according to UP, BNSF is on average running *fewer* than three trains per day. Therefore, the alleged mistake cannot be material.

In California, “[a] mistake of fact may be the basis for reformation of a written agreement only if the mistake is material to the agreement.” *Cottle*, 200 Cal App 2d at 8. See also *Dairvland Power Coop v United States*, 16 F 3d 1197, 1202 (Fed Cir 1994). The crux of whether a mistake is material is whether the complaining party would have “acted differently” if it had known about the mistake when it entered into the contract. *Royal Indem Co v Kaiser Aluminum & Chem Corp.*, 516 F 2d 1067, 1071 (9th Cir 1975).

Here, UP cannot show by clear and convincing evidence that it would have acted differently, because in fact BNSF is still not running as many trains as UP and BNSF jointly anticipated before agreeing to Original Section 1(g). Simply put, UP and BNSF expected at least *four* BNSF trains per day over the Cal-P line, see *V S Owen* at 7-12, and BNSF is running fewer

than three [REDACTED]

[REDACTED]²⁶ Given that the overall volume of trains that BNSF is operating is less than the volume that UP expected to receive, UP has no basis to claim that it would not have agreed to Original Section 1(g) if it knew then what it knows now. And that is precisely what UP would need to argue in order to demonstrate that the alleged mistake is material.

There is also no basis for UP to argue that BNSF's traffic is causing any material congestion on the two lines, as is discussed above. UP would still not have the capacity it needed to accommodate all of the passenger trains even if no BNSF trains ran each day.²⁷ UP's reliance on the Verified Statement of Eugene K. Skoropowski, Managing Director of Capitol Corridor, does not help its case.²⁸ In his statement, Mr. Skoropowski asserts that, "in routing unauthorized intermodal/automotive trains over the Cal-P Line, BNSF is creating additional congestion that directly and adversely affects the reliability of the Capitol Corridor trains that also operate on

²⁶ [REDACTED]

²⁷ In other words, there is no basis for UP's claim that "BNSF's operation of Intermodal Trains on the Cal-P Line that are neither Central Corridor Intermodal Trains nor I-5 Intermodal Trains has congested that line, with resulting adverse effects for the traveling public as well as for UP and its customers." UP Petition at 9. As is discussed in the Factual Background section above, the Cal-P line would still be congested even if *none* of the BNSF trains that UP contests ran on the Cal-P.

²⁸ It should be noted that, as Mr. Skoropowski himself has indicated at page 3 of his Verified Statement, he has assumed, but has not independently verified, that the revision of the traffic restrictions was a mistake, and thus his Verified Statement is of no probative value on that issue. Further, Mr. Skoropowski's assertions concerning BNSF's conduct similarly rest on his assumption in that regard. Finally, if, as Mr. Skoropowski indicates at page 4 of his Verified Statement, the capacity model studies funded by Capitol Corridor did not include the BNSF trains on the Cal-P line, then that is because UP apparently failed to advise Capitol Corridor that that it was anticipated that four BNSF trains daily would operate on the line.

that line ” *Id* at 39 He further states that, for the period of five months between August 2006 and December 2006, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In other words, the passenger trains fared the worst when BNSF ran the fewest trains. Clearly, UP’s problems run deeper than BNSF’s few trains per day. Of crucial importance, UP has effectively *conceded* that it has not viewed the extra volume as material to its operations, because it did not raise Section 1(g)’s alleged limits to BNSF for almost two years while BNSF ran its trains on UP’s lines (as is described above in the discussion on course of performance)

Therefore, UP cannot prove by clear and convincing evidence that the alleged mistake was material – BNSF is on average running one train day per day fewer than the parties anticipated. UP therefore would not have refused to enter into the bargain with BNSF in 1995, and also therefore BNSF’s trains are not causing UP’s congestion problems²⁹

C. UP’s Own Gross Negligence Caused The Alleged Mistake And Bars Relief

Even if a mutual mistake technically existed (and for the reasons discussed above, no such mutual mistake occurred here), UP’s own gross negligence bars it from seeking reformation. According to the California Supreme Court, “we long have adhered to the common law rule that a contract may be reformed due to mutual mistake based upon ‘ordinary

²⁹ Accordingly, UP’s assertions that BNSF’s OIG trains are inhibiting its ability to compete ring hollow. UP was fully aware in 1995 that BNSF would run four trains a day on the Cal-P line and cannot now be heard to complain that those trains (and, in fact, one less train per day) are causing it undue competitive harm.

negligence,' but not when the mistake is based upon 'gross negligence.'" *City of Santa Barbara v Superior Court of Santa Barbara County*, No. S141643, 2007 WL 2027806 at *16 (Cal. July 16, 2007) (citation omitted)

UP's actions with regard to Section 1(g) consist of a litany of missed opportunities to avoid or correct the mistake, or at least to mention it. During a period of five years, UP *itself* drafted what it now claims is incorrect language, failed to catch the supposed error even though no fewer than *six* UP supervisors and attorneys approved of it, did not say anything to BNSF during the negotiations about the alleged error even when it reviewed at least *six* drafts of the Restated and Amended Settlement Agreement containing Revised Section 1(g), did not say anything about the alleged error to the STB when UP and BNSF submitted the Settlement Agreement to the Board, conceded to BNSF that UP was obliged to accept BNSF's non-Central Corridor/non-I-5 intermodal trains, programmed its own computers to accept BNSF's trains, actually accepted over 1,000 such trains, billed BNSF for those trains, and [REDACTED]

[REDACTED] If UP is correct that a mutual mistake otherwise existed (and UP is not correct), UP itself engaged in a long list of negligent actions. It is fundamentally unfair for UP to now ask this Board to reform the contract, given that UP had one chance after another to correct its alleged error, but did not.

It is also significant that UP is an extremely sophisticated multinational corporation with decades of experience negotiating trackage rights agreements. Courts do not favor granting reformation relief for mistakes to savvy legal players who should have known better. *See Aero Sales, Inc.*, 114 P.3d at 514 ("experienced and knowledgeable businessmen" should have known to protect their rights), *Royal Indemnity Co.*, 516 F.2d at 1070 (the plaintiff, an indemnity

company, has “experience in the insurance industry” that should have caused it to avoid the alleged mistake), *Short Bros . PLC v United States*, 65 Fed Cl 695, 797 (2005) (stating that an experienced government contractor “was in a position to appreciate the scope of the undertaking” in the contract it petitioned to reform) In this regard, it is especially significant that UP itself wrote the provision in question

As a related point, speaking to the sophistication of the parties, the fact is that, in renegotiating the Restated and Amended Settlement Agreement in 2002, BNSF and UP over a period of months engaged in extensive discussions and trades involving the language and substance of literally dozens of separate provisions The overall choreography of the renegotiations is extremely difficult to reconstruct step by step But the fact remains that the parties made and agreed to the revisions to Section 1(g) in the context of the much broader and more involved renegotiation UP now claims that it can pluck a single provision from its context An experienced business such as UP knows that such an action would be both unfaithful to the negotiations and profoundly unfair to BNSF

And perhaps most damaging to UP’s Petition, the Restatement (Second) of Contracts speaks *directly* to the sort of negligence that UP committed here, where first it drafted a provision and then later claimed that the provision is flawed and subject to reformation The Restatement flatly prohibits such behavior A comment to Section 155, which discusses mutual mistakes, explains “If one party sends to the other an offer which, because of a mistake, does not reflect the offeror’s intention, *the rule stated in this Section does not apply* both because only one party is mistaken and because there was no prior agreement ” Restatement (Second) of

Contracts, § 155, cmt b Given that UP caused the error here, it cannot now seek relief at BNSF's expense ³⁰

D. The Relief UP Seeks Will Adversely Affect Third Parties Who Rely On BNSF To Transport Goods To And From Oakland International Gateway

According to Section 155 of the Restatement (Second) of Contracts, courts do not reform contracts on the basis of mutual mistake "to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected " Here, BNSF's shippers rely on BNSF's ability to operate intermodal trains to transport goods to and from OIG Without the trackage rights that UP granted to BNSF, BNSF never would have integrated both OIG and the shippers who rely on it into BNSF's business That is, BNSF relied on its trackage rights agreement with UP when it negotiated for the rights to operate OIG, without the UP rights, BNSF clearly would not have the capacity to serve OIG over BNSF's own inefficient and slow line connecting Stockton and Oakland As a result, all of the shippers who have since contracted with BNSF to use OIG have themselves, through BNSF, relied on UP's trackage rights commitment to BNSF BNSF's OIG operation serves 45-50 shippers each year, for a volume amounting to over 180,000 intermodal units UP, if it prevails, would thereby harm each of these shippers who in good faith purchased transportation services from BNSF ³¹

³⁰

See UPR-07-0008276 If UP did not keep track of BNSF trains, this lack of oversight by UP is simply further evidence of UP's own gross negligence with regard to Section 1(g) If UP failed to detect the increase of BNSF trains after so much time, then it is not reasonable for UP to object for the first time now Moreover, as Mr Barrett discusses in his Verified Statement, senior UP employees keep close track of the traffic levels on UP's lines, and they also challenge BNSF when they believe that BNSF has exceeded its allocation for a given line V S Roberts/Barrett at 6-7

³¹ In addition, the competitive elements of the BNSF Settlement Agreement aim to place BNSF in the shoes of the former SP so that all competition – both existing and future – is preserved Had the UP/SP merger not occurred, SP could have used its Cal-P and Elvas-Stockton lines to

Additionally, as discussed above, in 2004 BNSF and UP entered into a Memorandum of Understanding (and related trackage rights agreement) to allow BNSF to operate its trains on UP's line between Bakersfield and Stockton. This agreement rested on BNSF's understanding that it could use the Cal-P line to operate non-Central Corridor/non-I-5 intermodal trains, and thereby serve its shippers using OIG. If UP were to prevail in this proceeding, then these third-party shippers would be harmed, due to BNSF's inability to serve them as planned.

E. UP's Actions Have Created A Reliance Interest In BNSF In Using the Cal-P And Elvas-Stockton Lines, And Therefore UP Is Estopped From Reforming Revised Section 1(g)

In addition to the injury to third parties, UP's requested reformation remedy will also harm BNSF itself. Through its actions, described above, UP has created in BNSF a reliance interest in using the Cal-P and Elvas-Stockton lines, and it would unjustifiably harm BNSF if UP takes that right away, even if this Board were to find the existence of a mutual mistake (which it should not).

According to the Restatement (Second) of Contracts § 90, "[a] promise which the promisor should reasonably expect to induce action on the part of the promisee and which does induce such action is binding if injustice can be avoided only by enforcement of the promise." Here, UP's actions legally constitute an implicit promise to allow BNSF to rely on continuing access to UP's lines. That is, after drafting the provision it now challenges, for four and a half years UP never objected to Revised Section 1(g), and for approximately two years UP then accepted over 1,000 of the BNSF trains that it now protests. (As BNSF argues above, these actions by UP also constitute confirmation through course of performance of the text of Revised

serve OIG customers once the facility opened. To deny BNSF its contractual right to similarly make use of those lines would risk imposing significant competitive harm on those customers resulting from the loss of BNSF as an effective competitor to UP for OIG traffic.

Section 1(g)) BNSF reasonably relied on this implicit promise stemming from UP's repeated actions over a period of years. BNSF structured its business on the assumption that it would continue to have the same access to UP's two lines that UP's actions since 2002 had indicated it would provide to BNSF. As a result, BNSF entered into the MOU with UP in 2004, and also entered into obligations with shippers to move freight to and from OIG based on its use of UP's two lines.

If BNSF cannot continue to access the OIG over UP's lines, BNSF will suffer significant business losses, in lost sunk costs, in lost good-will of shippers, and in potential legal exposure. Given these circumstances, the elements of Section 90 reliance are present. UP's actions confirmed to BNSF that it had access to UP's lines. BNSF reasonably acted on that confirmation, and "injustice" would result if UP took away that access. Accordingly, this Board should estop UP from pursuing its reformation claim.

F. The Reformation Relief That UP Requests Is Not Available

For two reasons, the Board should not grant UP the reformation remedy that it requests. First, UP's own actions caused the alleged problem, and so it should not now have the ability to seek relief from the Board and from BNSF. Second, even if UP were entitled to some sort of reformation (and it is not), the specific changes it requests go too far.

UP does not deserve reformation, which is an equitable remedy that courts have discretion to grant – or not. See Restatement (Second) of Contracts, § 155, cmt. d (stating "[s]ince the remedy of reformation is equitable in nature, a court has the discretion to withhold it, even if it would otherwise be appropriate"). BNSF has already discussed how UP itself and alone caused any alleged problem. UP drafted the language in dispute, and failed to fix it or to speak up about it on numerous occasions.

According to UP's Petition, two California cases nonetheless leave the remedy of reformation available to it. The first, *Martinelli*, 230 P 2d at 448, states "[t]he fact that the party seeking relief has read the instrument and knows its contents does not prevent a court from finding that it was executed under a mistake." But there, an appeals court simply accepted the trial court's determination that parties to a deed had made an antecedent agreement that the contract did not reflect. By contrast, in this proceeding, one of the crucial questions is *whether* an antecedent agreement exists in the first place (and, as established, it does not). The second case, *I. A. Redondo R R Co v New Liverpool Salt Co*, 87 P 1029 (Cal 1906), states that "the forgetfulness of the attorneys" will not bar reformation. However, that case involved a party's failure to notice that its agent failed to include a limitation in a deed. Here, by contrast, UP wrote the entire provision from top to bottom. UP's error (if one existed, which BNSF denies) was much more gross than simply copying an erroneous deed, as the attorney did in *Los Angeles Redondo R R Co*.

Further, these cases do not settle the matter of when the equitable relief of reform should be made available. As the Restatement (Second) of Contracts states, a party "is expected to use his senses and not rely blindly on the maker's assertion." *Id.*, § 172, cmt b. Further, "[i]n determining whether the recipient of a misrepresentation has conformed to the standard of good faith and fair dealing, account is taken of his peculiar qualities and characteristics, including his credulity and gullibility, and the circumstances of the particular case." *Id.* Here, UP's long list of errors should preclude it from receiving reformation, especially because UP is such a sophisticated actor in trackage rights negotiations.

Even if UP were correct about everything else in this Petition (and for the reasons discussed above, it is not), the relief that it asks this Board to grant would not restore the

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August 2007, a true and correct copy of the foregoing Opening Brief of BNSF Railway Company Opposing Petition of Union Pacific Railroad Company for Reformation of Agreement is being served as follows

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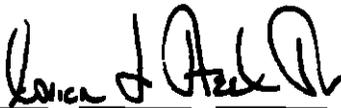
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substance of Original Section 1(g) As is described above, the first sentence of Original Section 1(g) imposed no routing restrictions on BNSF's manifest trains on the Cal-P line However, the reformation that UP seeks would permit it to accept only those manifest trains that had prior or subsequent movements on the Central Corridor or the I-5 UP's suggested reformation, therefore, would establish terms that the parties never agreed to According to traditional common law principles, this Board has no authority to do that See 7 Corbin on Contracts, at 302 (stating "[r]eformation is not a proper remedy for the enforcement of terms to which the defendant never assented ")

CONCLUSION

For the reasons stated above, BNSF respectfully requests that the Board deny UP's Petition to reform Revised Section 1(g) in the Restated and Amended BNSF Settlement Agreement

Respectfully submitted,



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August 20, 2007

VERIFIED STATEMENT
OF
PETER J RICKERSHAUSER

My name is Peter J Rickershauser. I am Vice President, Network Development of BNSF Railway Company ("BNSF"). My business address is 2500 Lou Menk Drive, Fort Worth, Texas 76131. In this position, I share responsibility within BNSF for strategic issues impacting BNSF's rail network, including strategic connecting carrier relationships with Class I carriers as well as regional and shortline railroads, line review and rationalization processes, and infrastructure projects involved in "Public Private Partnerships." Among these responsibilities are oversight for BNSF's usage and compliance with agreements and conditions involving customer facilities and lines to which BNSF gained access as a result of the UP/SP merger.

I joined BNSF in October 1996 as Vice President, Marketing, UP/SP Lines. In this capacity, I was responsible for coordinating the marketing and implementing of the new service opportunities that BNSF offered to shippers as a result of the UP/SP merger. BNSF gained access to more than 4,200 miles of UP and SP track through a combination of trackage rights and line purchases as a condition of the September 1996 UP/SP merger.

Prior to joining BNSF, I was Vice President, Sales, with Southern Pacific Rail Corporation in Denver, Colorado, where I directed SP's field carload sales force in the United States and Canada. From 1991 to 1995, I was Managing Director, Regional Sales-Midwest, in Lisle, Illinois, for SP. My responsibilities in that position included planning and directing sales activities for SP's largest domestic carload sales region.

From 1982 to 1991, I held a number of sales and marketing management positions with Norfolk Southern Railroad, including Vice President, Sales and Marketing, for Triple Crown Services, Inc., a Norfolk Southern subsidiary, Director, Intermodal Marketing, and district sales

manager positions. Previous to that, I held a series of positions in railroad operations and maintenance-of-way departments with Conrail predecessors Central Railroad Company of New Jersey and the New York & Long Branch Railroad Co. in the Northeast, followed by sales representative and district sales manager positions in Iowa with the Norfolk & Western Railway Co.

I earned a Bachelor of Arts degree from Franklin & Marshall College in 1971, and a Master of Arts degree in 1974 from Syracuse University.

I am submitting this Verified Statement in support of the Opening Brief Of BNSF Railway Company Opposing Petition Of Union Pacific Railroad Company For Reformation Of Agreement. I participated in and was BNSF's principal business negotiator in the negotiation of the Restated and Amended BNSF Settlement Agreement, and I have personal knowledge of that negotiating process relating to both BNSF and UP.

It is my understanding that in this proceeding UP is claiming that UP and BNSF jointly committed a "mutual mistake" when they entered into Section 1(g) of the Restated and Amended BNSF Settlement Agreement in 2002. That is, UP apparently is claiming that UP and BNSF, before agreeing to Revised Section 1(g), entered into an agreement to maintain unchanged the substance of Original Section 1(g), but that the final Revised Section 1(g) does not reflect this agreement. UP's contention is not correct. For the reasons I discuss below, I disagree with UP's claim that the parties entered into an agreement to maintain the substance of Original Section 1(g) unchanged. In fact, BNSF intended that Section 1(g) be changed to specifically clarify the applicable traffic restrictions.

A. Original Section 1(g)

BNSF and UP agreed to Original Section 1(g) as part of the 1995 BNSF Settlement Agreement imposed by the STB on UP's merger with Southern Pacific. At the time Original

Section 1(g) was drafted and agreed to. I was not involved in the negotiation of the merger settlement agreement between BNSF and UP/SP, as I was employed by Southern Pacific in the Vice President, Sales position referred to above. However, the settlement agreement reached included Section 1(g), which clearly provided BNSF with certain trackage rights over the “Cal-P” line in California.

As is clear from reading the text of the section, it is extremely technical, even compared to other trackage rights provisions of the Settlement Agreement. More important than that, however, the section contains inherent ambiguity relating to the substance of the rights and obligations it lays out. With regard to manifest trains, Original Section 1(g) in the first sentence does not limit how BNSF may route its manifest trains that use the Cal-P line – it states that “On SP’s line between Weso and Oakland via the ‘Cal-P,’ BNSF shall be entitled to move only (1) one manifest train/day in each direction.” But later, in the fifth sentence, it says that BNSF “may also utilize the ‘Cal-P’ for one manifest train per day moving to or from Oakland via Keddie and Bieber, provided, however, that BNSF may only operate one manifest train/day in each direction via the ‘Cal-P’ regardless of where the train originates or terminates.” This “may” clause seems to indicate, at least implicitly, that BNSF is restricted in its ability to run I-5 manifest trains on the Cal-P line. For example, did it mean that BNSF could only run one I-5 manifest train per day regardless of direction on the Cal-P line? In that case, BNSF could appear to be in violation of the Settlement Agreement any time it ran more than one I-5 manifest train per day on the line notwithstanding the lack of routing restrictions on manifest trains in the first sentence. Thus, the lack of restrictions in the first sentence conflicts with the possible restrictions in the fifth sentence, rendering the provision as a whole ambiguous. BNSF was long aware of Section 1(g)’s flaws, and BNSF desired to renegotiate Section 1(g) to ensure that its

meaning was clear to all readers, and BNSF could fulfill its obligation to serve customers using the Cal-P line as necessary within commonly understood and agreed to limits, and without interpretation outside the Settlement Agreement being required

B. Revised Section 1(g)

BNSF began the negotiations which led to the Restated and Amended Settlement Agreement in December 2000, when it sent a draft of the agreement to UP. The purpose of revising the Settlement Agreement was to incorporate the various conditions that the Board had imposed on the UP/SP merger and to reflect subsequent Board decisions interpreting and clarifying those conditions. The revision was also intended to clarify a number of issues that had arisen in the course of implementing the Settlement Agreement. As indicated, one of the provisions that BNSF intended to renegotiate was Section 1(g) to eliminate the ambiguities and provide clarity such that any reader – BNSF, UP, the STB, or a rail customer – would all know uniformly what it meant and that, once agreed to, there would be no differing interpretations leading to potential future disagreements or misunderstandings between the parties.

Before describing the negotiations with regard to Section 1(g) in particular, it is important for me to note that the renegotiation of the Settlement Agreement was quite intricate. The parties ultimately agreed to revise some three dozen provisions. In the context of these complex talks, the parties often traded rights and bargained one term for another in the process of incorporating the intent of STB decisions in the UP/SP merger proceeding as well as ensuring that the language adopted was equally clear to all readers. In that regard, the final Restated and Amended BNSF Settlement Agreement that the STB ultimately accepted reflected a delicate balance of rights and obligations of each party. During this intense period of negotiations, the parties frequently communicated with each other, both directly and through their representatives. These frequent

communications continued between April and July of 2001, when the parties submitted the agreement to the STB

In an initial attempt to address the problems in Original Section 1(g) as part of the overall Settlement Agreement renegotiation effort, BNSF edited the Original Section 1(g) in the draft of the revised Settlement Agreement, which it sent to UP on December 22, 2000. After BNSF sent the draft restated and amended Settlement Agreement to UP in December 2000 and UP responded in March 2001, the parties negotiated over a period of several months through a series of meetings, conference calls, e-mails, and other communications, trying to reach consensus on a revised Agreement

BNSF explicitly raised the issue of ambiguity in Section 1(g) at a May 1 meeting with UP in Washington, D C. In response, UP communicated to BNSF that it would prepare a revised section that would more clearly identify the applicable restrictions [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This is correct as far as it goes

However, as is mentioned above, the problems with Section 1(g) involved substance as well as language

A few days after the Washington, D C meeting, Larry Wzorek of UP on May 5, 2001, e-mailed to BNSF two alternate proposals for revising Section 1(g). It was clear from various e-mails exchanged between BNSF and UP that the two proposed revisions to Section 1(g) were receiving high-level extensive review from UP officials, and thus BNSF had the understanding that the proposals accurately reflected UP's considered intent to offer two separate and distinct options for BNSF review. BNSF also interpreted the two alternative proposals for revising

Section 1(g) offered as being mutually acceptable to UP, being offered in good faith, and that BNSF's choice of either option and response of our choice to UP was both what was expected and satisfactory to the UP negotiating team and their executive management. There was no mention by UP throughout these negotiations during this time of any supposed preexisting agreement concerning any of the terms of Section 1(g). Even if there had been such an agreement, I would have expected UP's submission of alternatives for rewording all of Section 1(g) submitted to BNSF to have reflected that alleged agreement's terms in what was forwarded to BNSF.

The first proposed insert did not clarify the inherent ambiguities in the Original Section 1(g) regarding BNSF manifest trains. Although it contained different language than the Original Section 1(g), the first proposed revision kept the same restrictions on UP's line from Weso to Oakland.

The second insert that UP proposed, however, clearly revised the substantive traffic restrictions, and so eliminated the ambiguity. That is, UP's second proposal revised the traffic restrictions in the first sentence to apply them only to UP's line between Sacramento and Oakland (and not all the way to Weso). It placed the restrictions themselves in a separate sentence that read "BNSF manifest trains may be either I-5 corridor or central corridor trains." UP's second proposal thus removed the I-5 Corridor and Central Corridor restrictions from intermodal trains and applied them instead to manifest trains.

After considering each of the two separate options that UP had drafted, BNSF decided that the second one eliminated ambiguity and more clearly stated the parties' intent with respect to the traffic restrictions. Therefore, BNSF accepted UP's second option. Subsequently, on May

18. UP and BNSF agreed during a conference call to include UP's second proposed insert in the Restated and Amended BNSF Settlement Agreement

UP and BNSF again turned to Section 1(g) during their negotiations to address the issues of whether BNSF could set out and pick up traffic on the two UP lines and whether to count local service against the traffic restrictions. During this set of subsequent negotiations, the parties exchanged numerous drafts of Section 1(g). The parties exchanged at least six drafts during this set of negotiations, and all of these drafts incorporated UP's second proposed insert substantively revising the traffic restrictions. During this set of negotiations, I again emphasize that UP never asserted that either it or the parties mutually had made a mistake or that the revised language failed to reflect UP's specific intent and desire with respect to the traffic restrictions. Along the same lines, I also emphasize that UP never claimed that the parties had entered into an agreement that conflicted with the terms of the revised language that the parties agreed to accept on May 18.

The parties submitted the final Restated and Amended BNSF Settlement Agreement to the Board on March 1, 2002. At no time in any of its pleadings to the Board before this proceeding was instituted did UP ever claim that the parties had made a mistake, UP also never claimed that the version of Section 1(g) that the parties agreed to on May 18 conflicted with its own understanding of its obligations.

C. Lack Of Support For Alleged Antecedent Agreement

I understand that in this proceeding UP is relying on three documents to buttress its claim that the parties allegedly entered into an "antecedent" agreement that conflicts with the language of the Revised Version of Section 1(g). Those documents are (1) BNSF's initial revision of Section 1(g) that it sent to UP on December 22, 2000, (2) the chart of changes in BNSF's December 22, 2000 letter to UP, and (3) the chart that BNSF and UP drafted and submitted to

the STB on July 25, 2001. From my participation in the negotiations with UP, I disagree with UP that any or all of these documents evidence an antecedent agreement with UP regarding the substance of Section 1(g). Rather, none of these documents was written with the intent of evidencing any such agreement, because the parties never entered into such an agreement. Moreover, the December 2000 documents were meant to be, and were used as, tools for identifying issues and posing possible solutions in a fluid, negotiating working environment. And until this proceeding, UP never communicated to me (or, to my knowledge, anyone else at BNSF) that these documents constituted an alleged antecedent agreement regarding the substance of Section 1(g).

D. The 2004 Memorandum Of Understanding

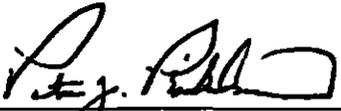
BNSF negotiated a Memorandum of Understanding with UP (and a subsequent trackage rights agreement) which provided, among other things, for overhead BNSF trackage rights over UP between Bakersfield and Stockton, CA for up to six trains per day, which was executed on March 3, 2004. The MOU resulted from a decision by UP and BNSF management to explore opportunities to share lines and other facilities as a way to reduce investment and costs to both carriers while improving service to shippers. (The impetus for this shared initiative was based on the Canadian-originated term "Co-Production," under which CN and Canadian Pacific worked out directional running using lines of both carriers in the Fraser River Canyon of British Columbia as a way of boosting capacity for both carriers without the significant capital outlays any alternative, individual plans carried out by the carriers independently would have required.) BNSF would not have entered into the 2004 MOU but for our understanding of the meaning and application of the governing text of the Revised Version of Section 1(g). This is because BNSF granted UP significant rights in the MOU, and the trackage rights between Bakersfield and Stockton were a principal part of the consideration BNSF received in return. But those rights

were only of value to BNSF if trains moving over the UP line could use the Cal-P to and from the Oakland International Gateway. In other words, BNSF relied on the Revised Version of Section 1(g) in negotiating and executing the 2004 MOU.

VERIFICATION

I, Peter J Rickershauser, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on August 17, 2007



Peter J Rickershauser

**VERIFIED STATEMENT
OF
CHRIS A ROBERTS
AND
BRUCE D BARRETT**

Chris A. Roberts:

My name is Chris A Roberts I am currently Region Vice President – South Operations for BNSF Railway Company, 2600 Lou Menk Drive, Fort Worth, Texas 76131 As Region Vice President, I am responsible for all BNSF operations in the South Region, which encompasses portions of California as well as BNSF’s transcontinental main line from Chicago to California The Cal-P and former SP Elvas-Stockton lines at issue in this proceeding are within the South Region

I joined BNSF’s predecessor in 1975 as a switchman/brakeman and progressed through a series of increasingly responsible operations positions, including engine foreman, yardmaster, power distributor, assistant trainmaster, trainmaster, General Director Locomotive Utilization, and Terminal Superintendent Los Angeles I became Assistant Vice President, Transportation, in 1994, and was named to lead Operations South in 1997 I completed the Program for Management Development at Harvard University’s Graduate School of Business in 1995

I am submitting this Verified Statement in support of the Opening Brief of BNSF Railway Company Opposing Petition of Union Pacific Railroad Company for Reformation of Agreement

Because I am directly involved in day-to-day operations in BNSF’s South Region, I directly oversee the implementation and execution of the trackage rights BNSF received on UP’s Cal-P and Elvas-Stockton lines pursuant to the UP/SP merger Therefore, my statement here is

based on my personal knowledge of these operations in general, and is also based on the specific interactions between the two railroad companies as I discuss below

Bruce D. Barrett:

My name is Bruce D Barrett I am currently Manager, Contracts and Joint Facilities for BNSF Railway Company, 2600 Lou Menk Drive, Fort Worth, Texas 76131 Previously, I worked from 1998 to 2005 as Manager, Trackage Rights Operations, at BNSF's trackage rights office located in the UP Harriman Dispatching Center in Omaha, Nebraska

I joined BNSF in 1974, as a brakeman I then progressed through a series of positions, including locomotive engineer, and Assistant Director Crew Management I became Manager, Trackage Rights Operations in 1998, and began my current position, Manager, Contracts and Joint Facilities, in 2005 I have a bachelor's degree in management and master of business administration

I am submitting this Verified Statement in support of the Opening Brief of BNSF Railway Company Opposing Petition of Union Pacific Railroad Company for Reformation of Agreement

As BNSF's Manager, Trackage Rights Operations, I was directly involved in the day-to-day implementation of trackage rights operations by BNSF on the Cal-P and former SP Elvas-Stockton lines during time periods that are relevant to the proceeding now pending in the STB Also, in my current position, I routinely review the bills that UP sends to BNSF relating to BNSF trains running on these specific UP lines Therefore, my statement here is based on my personal knowledge of both trackage rights implementation and billing operations involving both BNSF and UP, as I discuss below

A. Initial Intermodal Traffic

Mr Roberts states that the intermodal service that BNSF offered to and from the Port of Oakland before the Oakland International Gateway (“OIG”) commenced operations in 2002 was limited Mr Roberts states that, even after OIG opened, BNSF did not need to operate full trains in and out of OIG, because there was not sufficient demand or density, so BNSF continued to use its own routing for traffic to and from the facility BNSF also operated limited manifest service on its Richmond-Stockton line (BNSF has not regularly run manifest trains on the Cal-P line, but it has run manifest trains between Elvas and Stockton)

Mr Roberts states that BNSF’s use of the Richmond-Stockton line for intermodal traffic raised complaints from the City of Richmond, which alleged that BNSF trains blocked streets, delayed traffic, and created horn noise Also, the trains moved slowly through Richmond. because the line accommodated traffic only at 10 miles per hour and contained multiple grade crossings, which hindered intermodal traffic As a result, BNSF explored options to reduce traffic on the Richmond-Stockton line

B. BNSF’s Decision To Increase Intermodal Traffic On The Cal-P And Elvas-Stockton Lines

Mr Roberts states that on June 13, 2003, in order to bypass Richmond, BNSF requested that UP grant it trackage rights between Port Chicago and Martinez, California UP refused on July 24, 2003, and stated that its reason for turning down BNSF’s request was its need to meet existing passenger and freight traffic loads (as well as a commitment to allow an additional 16 commuter trains to operate over the line) As a result, BNSF then considered the Cal-P line as an alternative, given the 2002 revision of Section 1(g) Accordingly, BNSF’s Service Design department created a service plan

Mr Roberts states that BNSF first used the Cal-P line for non-Central Corridor/non-I-5 intermodal traffic in June 2004. In March 2005, BNSF began using the lines on a regular basis for non-Central Corridor/non-I-5 intermodal traffic. This usage has continued to the present (While BNSF also at that time ran "bare tables" (i.e., empty intermodal trains) on the UP lines, BNSF has since ceased such operations.) I have been advised by Peter J. Rickershauser that, before deciding to run these trains, BNSF checked and confirmed that the Restated and Amended BNSF Settlement Agreement authorized BNSF to do so.

Mr Roberts states that, also contributing to BNSF's usage of the two UP lines was, at least for some time periods, BNSF's maintenance project between Bakersfield and Stockton. This maintenance project, however, did not prompt BNSF to use the two UP lines for increased intermodal traffic.

C. Forms Of Notice That BNSF Gave To UP Regarding Intermodal Traffic On The Cal-P And Elvas-Stockton Lines

Mr Barrett states that, before BNSF began use of its trackage rights on the Cal-P and Elvas-Stockton lines for non-Central Corridor/non-I-5 intermodal trains, BNSF provided UP with an operating plan stating that BNSF would start running such trains on the lines. From UP's Omaha office, Mr Barrett gave a notice to UP's corridor managers, directors and dispatchers advising them of BNSF's intent to operate the OIG trains to and from Stockton over the two UP lines. This notice complied with the parties' agreed protocol for BNSF's use of lines over which it had trackage rights. To the best of his memory, the notice stated that BNSF would commence operations between Stockton and Oakland via Elvas and the Martinez Sub, including operations and contact information for BNSF and UP dispatchers and dispatching managers.

Mr Barrett states that, in addition to this general notice of BNSF's intentions, BNSF also gave UP much more specific notice of the trains BNSF planned to run BNSF gave UP this sort of more specific notice by two methods First, at UP's Harriman Dispatching Center in Omaha, Mr Barrett regularly spoke with his counterparts at UP, and routinely gave UP's general superintendent, directors, corridor managers and trackage rights supervisors verbal notice of any anticipated volume increase that was more than minimal He also participated in weekly calls with UP officials every Friday to discuss operating issues

Mr Barrett states that, beyond this verbal and informal notice, he and his colleagues at BNSF also gave electronic notice to UP of the trains BNSF planned to run This electronic notice comprised two stages

[REDACTED]

On occasions where Ms Gardner questioned BNSF's right to operate on a track segment or combination of segments, she would challenge BNSF's request and check with UP resources prior to creating the dummy

[REDACTED]

[REDACTED]

Significantly, Mr Barrett states, UP officials closely monitor the BNSF trains that UP accepted into its EDI system UP general superintendents, senior directors, directors, and corridor managers monitor the traffic levels on their territory UP managers would routinely ask

questions about BNSF expected train volumes, or trains not meeting the expected arrival time onto UP, as well as challenge Mr Barrett when they believed BNSF exceeded a number which the manager believed was BNSF's authorized train volume Corridor managers would also refuse trains which were built and authorized in the UP system which they believed did not have contractual rights to run a particular segment or combination of segments on UP lines

Mr Barrett also states that until October 2006, based on his knowledge, UP never objected on the basis of Revised Section 1(g) to BNSF's use of the Cal-P or Elvas-Stockton lines for non-Central Corridor/non-I-5 intermodal traffic

D. The Bills UP Sent To BNSF Reveal That UP Knew About And Accepted Each Non-Central Corridor/Non-I-5 Intermodal Trains That BNSF Ran

Mr Barrett states that, for each segment of UP line that BNSF trains ran on, UP billed BNSF The bills that UP sent to BNSF show that UP knew it was billing BNSF for non-Central Corridor/non-I-5 intermodal traffic It knew because the codes on the bills correspond to the codes in UP's computer system, which identify the origin, destination, and type of trains, and also because the bills themselves further identify the specific segments of UP line that the BNSF trains traveled over

Mr Barrett states that the UP bill covering the Cal-P and Elvas-Stockton lines (as well as other lines) for April 2006 is attached as Exhibit 1 to this Verified Statement

Mr Roberts states that, in late August 2006, UP advised BNSF that, due to the increase in passenger trains, UP would limit freight traffic on the Cal-P line to night operations with a maximum of 6 freight trains per direction (3 UP trains and 3 BNSF trains) UP never mentioned any restrictions in any version of Section 1(g) and never pointed to those restrictions as a basis for limiting traffic

E. BNSF Use Of The Lines For Non-Central Corridor/Non-I-5 Intermodal Traffic

Mr Roberts states that BNSF began using the Cal-P and former SP Elvas-Stockton lines for non-Central Corridor/non-I-5 intermodal traffic on a regular basis in early 2005. Before doing so, as Mr Barrett discusses above, Mr Barrett provided UP with an operating plan

Mr Roberts notes that BNSF's shippers that make use of OIG obviously rely on BNSF's ability to serve them. If UP were to prevail in this proceeding, those shippers would be harmed as a result. The amount of business that BNSF does with shippers using OIG is significant. Each year, BNSF serves 45-50 such shippers, for a volume of over 180,000 intermodal units.

Mr Roberts has attached as Exhibit 2 to this Verified Statement a chart and table that reflect the number of BNSF non-Central Corridor/non-I-5 intermodal trains that have used the two UP lines from January 2004 through July 2007 on a monthly basis. As reflected in that exhibit, the average number of such trains using the lines has generally been below three trains per day. Mr Roberts has also attached as Exhibit 3 a chart that reflects on a daily basis BNSF non-Central Corridor/non-I-5 intermodal trains that have used the two UP lines from January 2004 through July 2007 on a monthly basis. During that entire period, there were only 11 days when BNSF ran four trains over the two lines and no days on which more than four trains were run.

Mr Roberts further notes that until October 2006, he never heard that UP objected on the basis of Revised Section 1(g) to BNSF's use of the Cal-P or Elvas-Stockton lines for non-Central Corridor/non-I-5 intermodal traffic. Such notice was never directly given to Mr Roberts by UP, and those BNSF employees who Mr Roberts supervised never mentioned to him that they had received any such objections from UP.

Finally, Mr Roberts states that he attended multiple Joint Service Committee meetings that BNSF and UP held in 2004 and 2005 to discuss operating and service issues between the two carriers. These meetings were attended by high-level operating officials for both UP and BNSF. Mr Roberts states that he has reviewed available notes and agendas from those meetings and that there is no indication that UP raised the issue of BNSF's OIG trains or objected on the basis of Revised Section 1(g) to BNSF's use of the Cal-P or Elvas-Stockton lines for non-Central Corridor/non-I-5 intermodal traffic.

VERIFICATION

I, Chris A Roberts, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct Further, I certify that I am qualified and authorized to file this Verified Statement

Executed on August 17, 2007



Chris A Roberts

VERIFICATION

I, Bruce D Barrett, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on August 17, 2007



Bruce D Barrett

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**HIGHLY CONFIDENTIAL
MATERIAL**

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HIGHLY CONFIDENTIAL
MATERIAL

A

AGREEMENT

This Agreement ("Agreement") is entered into this 25 day of September, 1995, between Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company (collectively referred to as "UP"), and Southern Pacific Rail Corporation, Southern Pacific Transportation Company, The Denver & Rio Grande Western Railroad Company, St. Louis Southwestern Railway Company and SPCSL Corp. (collectively referred to as "SP", with both UP and SP also hereinafter referred to collectively as "UP/SP"), on the one hand, and Burlington Northern Railroad Company ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), hereinafter collectively referred to as "BNSF", on the other hand, concerning the proposed acquisition of Southern Pacific Rail Corporation by UP Acquisition Corporation, and the resulting common control of UP and SP pursuant to the application pending before the Interstate Commerce Commission ("ICC") in 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.

NOW, THEREFORE, in consideration of their mutual promises, UP/SP and BNSF agree as follows:

1. Western Trackage Rights

- a) UP/SP shall grant to BNSF trackage rights on the following lines:
- SP's line between Denver, Colorado and Salt Lake City, Utah;
 - UP's line between Salt Lake City, Utah and Ogden, Utah;
 - SP's line between Ogden, Utah and Little Mountain Utah;
 - UP's line between Salt Lake City, Utah and Alazon, Nevada,
 - UP's and SP's lines between Alazon and Weso, Nevada;

- **SP's line between Weso, Nevada and Oakland, California via SP's line between Sacramento and Oakland referred to as the "Cal-P" (subject to traffic restrictions as set forth in Section 1g);**
- **UP's line between Weso, Nevada and Stockton, California; and**
- **SP's line between Oakland and San Jose, California.**

b) The trackage rights granted under this section herein shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to industries which are presently served (either directly or by reciprocal switch) only by both UP and SP and by no other railroad at points listed on Exhibit A to this Agreement. BNSF shall also receive the right to interchange with the Nevada Northern at Shafter, Nevada; with the Utah Railway Company at the Utah Railway Junction and Provo; and with the Salt Lake, Garfield and Western at Salt Lake City.

c) Access to industries at points open to BNSF shall be direct or through reciprocal switch. New customers locating at points open to BNSF under this Agreement shall be open to both UP/SP and BNSF. The geographic limits within which new industries shall be open to BNSF service shall generally correspond to the territory within which, prior to the merger of UP and SP, a new customer could have constructed a facility that would have been open to service by both UP and SP, either directly or through reciprocal switch. In negotiating the trackage rights agreements pursuant to Section 9f of this Agreement, the parties shall agree on the mileposts defining these geographic limitations. Where switching districts have been established they shall be presumed to establish these geographic limitations.

d) Forty-five (45) days before initiating service to a customer, BNSF must elect whether its service shall be (i) direct, (ii) through reciprocal switch, or (iii) with UP/SP's prior agreement, using a third party contractor to perform switching for itself or both railroads.

e) For Reno area intermodal traffic, BNSF may use SP's intermodal ramp at Sparks with UP/SP providing intermodal terminal services to BNSF for normal and customary charges. If expansion of this facility is required to accommodate the combined needs of UP/SP and BNSF, then the parties shall share in the cost of such expansion on a pro rata basis allocated on the basis of the relative number of lifts for each party in the 12-month period preceding the date construction begins.

f) Except as hereinafter provided, the trackage rights and access rights granted pursuant to this section shall be for rail traffic of all kinds, carload and intermodal, for all commodities.

g) On SP's line between Weso and Oakland via the "Cal-P," BNSF shall be entitled to move only (i) intermodal trains moving between (x) Weso and points east or Keddie and points north and (y) Oakland and (ii) one manifest train/day in each direction. Intermodal trains are comprised of over ninety percent (90%) multi-level automobile equipment and/or flat cars carrying trailers and containers in single or double stack configuration. Manifest trains shall be carload business and shall be (a) operated without the use of helpers and (b) equipped with adequate motive power to achieve the same horsepower per trailing ton as comparable UP/SP trains. If UP/SP operates manifest trains requiring the use of helpers then BNSF's manifest trains may be operated in the same fashion provided that BNSF furnishes the necessary helper service. BNSF may also utilize the "Cal-P" for one manifest train per day moving to or from Oakland via Keddie and Bieber; provided, however, that BNSF may only operate one manifest train/day in each direction via the "Cal-P" regardless of where the train originates or terminates. The requirement to use helpers, does not apply to movement over the "Cal-P."

h) At BNSF's request, UP/SP shall provide train and engine crews and required support personnel and services in accordance with UP/SP's operating practices necessary to handle BNSF trains moving between Salt Lake City and Oakland. UP/SP shall be reimbursed for providing such employees on a cost plus reasonable additives basis and for any incremental cost associated with providing employees such as lodging or crew transportation expense. BNSF must also give UP/SP

SUPPLEMENTAL AGREEMENT

This Supplemental Agreement ("Supplemental Agreement") is entered into this 18 day of November, 1995, between Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company (collectively referred to as "UP"), and Southern Pacific Rail Corporation, Southern Pacific Transportation Company, The Denver & Rio Grande Western Railroad Company, St. Louis Southwestern Railway Company and SPCSL Corp. (collectively referred to as "SP", with both UP and SP also hereinafter referred to collectively as "UP/SP"), on the one hand, and Burlington Northern Railroad Company ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), hereinafter collectively referred to as "BNSF", on the other hand, concerning the proposed acquisition of Southern Pacific Rail Corporation by UP Acquisition Corporation, and the resulting common control of UP and SP pursuant to the application pending before the Interstate Commerce Commission ("ICC") in 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.

Pursuant to an Agreement between UP/SP and BNSF dated September 25, 1995 (the "Agreement"), UP/SP and BNSF agreed to various trackage rights, line sales, and other related transactions.

In order to (a) realize the intent of the parties that the Agreement result in the preservation of service by two competing railroad companies for all 2-to-1 customers as described in Section 81 of the Agreement and (b) correct various errata to the Agreement that have been identified since it was signed, the parties agree to amend the Agreement as follows:

1. Amendment to Section 1.

a) Section 1b is amended by (i) inserting the phrase "with the Utah Central Railway Company at Ogden" between the phrases "Provo." and "and with the Salt" in the second to last line, and (ii) adding at its conclusion the following language:

"BNSF shall also receive the right to utilize in common with UP/SP, for normal and customary charges, SP's soda ash transload facilities in Ogden and Salt Lake City. BNSF shall also have the right to access any shipper-owned soda ash transload facilities in Ogden and Salt Lake City and to establish its own soda ash transload facilities along the trackage rights granted under this section."

b) Section 1d is amended by adding at its conclusion the following language:

"BNSF shall have the right, upon 180 days prior written notice to UP/SP, to change its election; provided, however, that BNSF shall (x) not change its election more often than once every five years and (y) shall reimburse UP/SP for any costs incurred by UP/SP in connection with such changed election."

c) Section 1g is amended by (i) revising the third and fourth sentences to read as follows:

"Manifest trains shall be carload business and shall be equipped with adequate motive power to achieve the same horsepower per trailing ton as comparable UP/SP trains. Helpers shall not be used unless comparable UP/SP manifest trains use helpers in which case BNSF trains may be operated in the same fashion provided that BNSF furnishes the necessary helper service."

and (ii) by deleting the comma in the last sentence after the word "helpers."

d) Section 1i is amended by inserting the term "BNSF" between the words "provide" and "non-discriminatory" in the second line.

SECOND SUPPLEMENTAL AGREEMENT

This Second Supplemental Agreement is entered into this 27 day of June, 1996, between Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company (collectively referred to as "UP"), and Southern Pacific Rail Corporation, Southern Pacific Transportation Company, The Denver & Rio Grande Western Railroad Company, St. Louis Southwestern Railway Company and SPCSL Corp. (collectively referred to as "SP," with both UP and SP also hereinafter referred to collectively as "UP/SP"), on the one hand, and Burlington Northern Railroad Company ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), hereinafter collectively referred to as "BNSF," on the other hand, concerning the proposed acquisition of Southern Pacific Rail Corporation by UP Acquisition Corporation, and the resulting common control of UP and SP pursuant to the application pending before the Surface Transportation Board (the "Board") in 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.

Pursuant to an Agreement between UP/SP and BNSF dated September 25, 1995 (the "Agreement"), and a Supplemental Agreement dated November 18, 1995 (the "Supplemental Agreement"), UP/SP and BNSF agreed to various trackage rights, line sales, and other related transactions.

Since execution of the Agreement and the Supplemental Agreement the parties have made a variety of commitments which will further realize their intent that competition be enhanced by the common control of UP and SP subject to the terms of the Agreement and the Supplemental Agreement.

In order to reflect these additional commitments in one agreement, the parties agree to the following further amendments to the Agreement as previously amended by the Supplemental Agreement:

1. Amendment to Section 1.

a) Section 1a is amended by inserting after the sixth subparagraph the following additional subparagraph:

"• SP's line between Elvas (Elvas Interlocking) and Stockton (subject to traffic restrictions as set forth in Section 1g and also excluding any trains moving over the line between Bieber and Keddie, CA to be purchased by BNSF pursuant to Section 2a of this Agreement);"

b) Section 1b is amended in its entirety to read as follows:

"b) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (i) "2-to-1" shipper facilities at points listed on Exhibit A to this Agreement, (ii) any existing or future transloading facility at points listed on Exhibit A to this Agreement, (iii) any new shipper facility located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement (including but not limited to situations where, when the Agreement was signed, a shipper facility was being developed or land had been acquired for that purpose, with the contemplation of receiving rail service by both UP and SP), and (iv) any new shipper facility located subsequent to UP's acquisition of control of SP at points other than those listed on Exhibit A to this Agreement on the SP-owned lines listed in Section 1a (except the line between Elvas (Elvas Interlocking) and Stockton). BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement. BNSF shall also receive

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

Finance 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 - OVERSIGHT

JOINT SUBMISSION OF RESTATED AND AMENDED
BNSF SETTLEMENT AGREEMENT

in Finance Docket No. 32760. An "Existing Transload Facility" is a Transload Facility which was in existence on September 25, 1995.

1 Western Trackage Rights

(a) UP/SP shall grant to BNSF trackage rights on the following lines:

- SP's line between Denver, CO and Salt Lake City, UT,
- UP's line between Salt Lake City and Ogden, UT,
- SP's line between Ogden and Little Mountain, UT;
- UP's line between Salt Lake City and Alazon, NV,
- UP's and SP's lines between Alazon and Weso, NV;
- SP's line between Weso, and Oakland, CA via SP's line between Sacramento, CA and Oakland referred to as the "Cal-P" (subject to traffic restrictions as set forth in Section 1(g));
- Overhead Trackage Rights on SP's line between Binney Junction, CA and Roseville, CA in the vicinity of SP MP 106.6;
- SP's line between Elvas (Elvas Interlocking) and Stockton, CA (subject to traffic restrictions as set forth in Section 1(g) and also excluding any trains moving over the line between Bieber and Keddie, CA purchased by BNSF pursuant to Section 2(a) of this Agreement),
- UP's line between Weso and Stockton, CA, and
- SP's line between Oakland and San Jose, CA.

(b) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (1) "2-to-1" Shipper Facilities and Existing Transload

UP will offer to sell the property to BNSF on the same terms and conditions as are applicable to the third party. BNSF shall have thirty (30) days in which to advise UP whether or not it will buy the property on those terms. In the event BNSF declines to buy the property on those terms or fails to advise UP of its intentions within thirty (30) days, BNSF's right of first refusal will be extinguished, and UP may sell the property to the third party. BNSF will then be required to vacate the property within six (6) months, and UP's obligation to furnish BNSF with intermodal terminal services and access to a UP intermodal facility in the Sparks/Reno area will be extinguished.

(f) Except as otherwise herein provided, the trackage rights and access rights granted pursuant to this section shall be for rail traffic of all kinds, carload and intermodal, for all commodities.

(g) BNSF may operate only the following trains on SP's "Cal-P" line between Sacramento and Oakland: (i) intermodal and automotive trains composed of over ninety percent (90%) multi-level automobile equipment and/or flat cars carrying trailers and containers in single or double stack configuration and (ii) one overhead through manifest train of carload business per day in each direction. These BNSF manifest trains may be either I-5 Corridor or Central Corridor trains. On the Donner Pass line between Sacramento and Weso, BNSF may operate only intermodal and automotive trains as described in clause (i) and one overhead through manifest train of carload business per day in each direction. The manifest trains must be equipped with adequate motive power to achieve the same horsepower per trailing ton as comparable UP/SP manifest trains. BNSF may use helpers on these trains only if comparable UP/SP manifest trains use helpers, BNSF must provide the helper service. The restrictions set forth in this section do not apply to local trains serving Shipper Facilities to which BNSF has

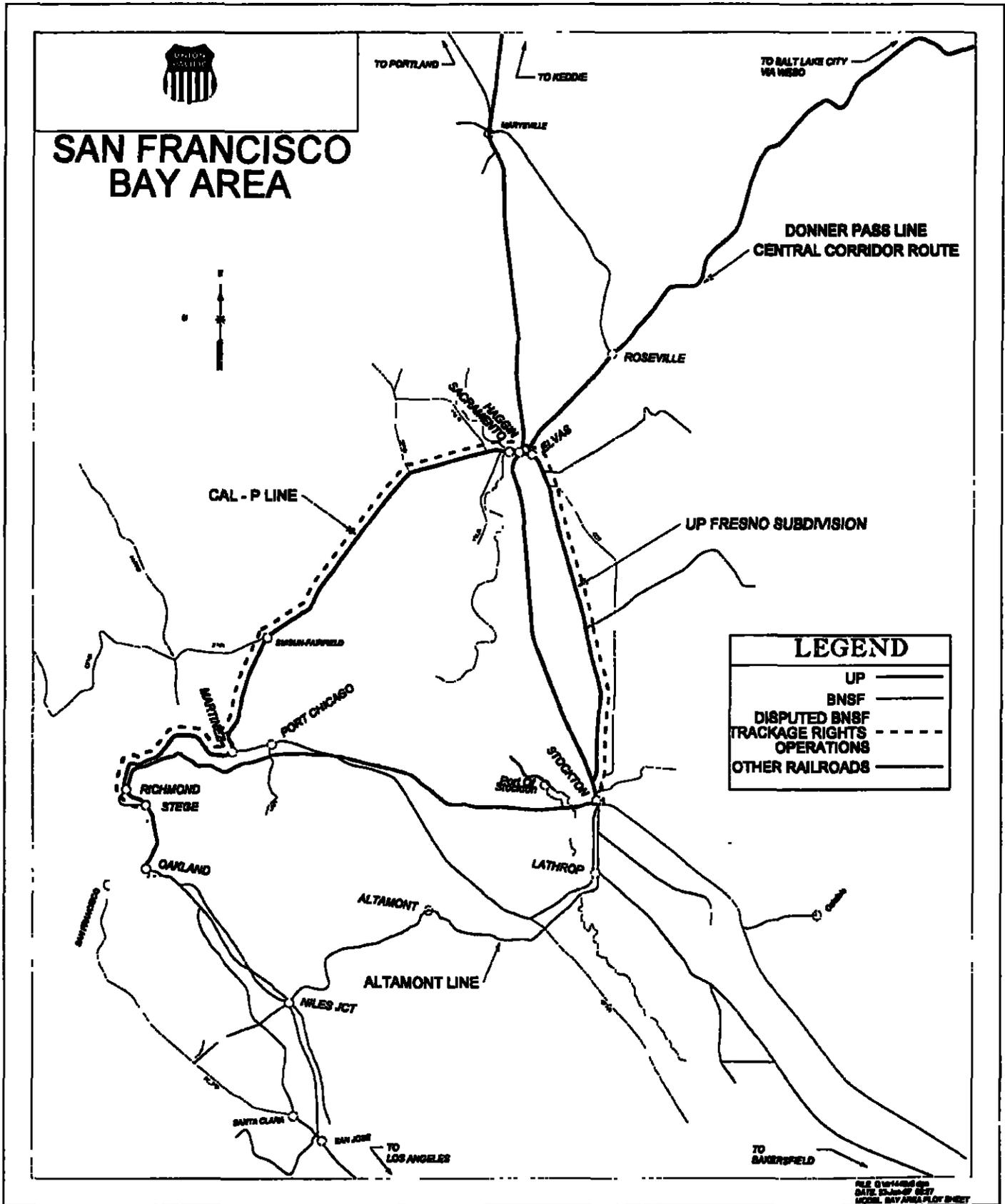
access on the identified lines, and such trains shall not be considered in determining whether BNSF is in compliance with such restrictions. If UP grants its prior concurrence, BNSF's overhead through manifest trains shall be allowed to set out and pick up traffic to or from intermediate points on the identified lines.

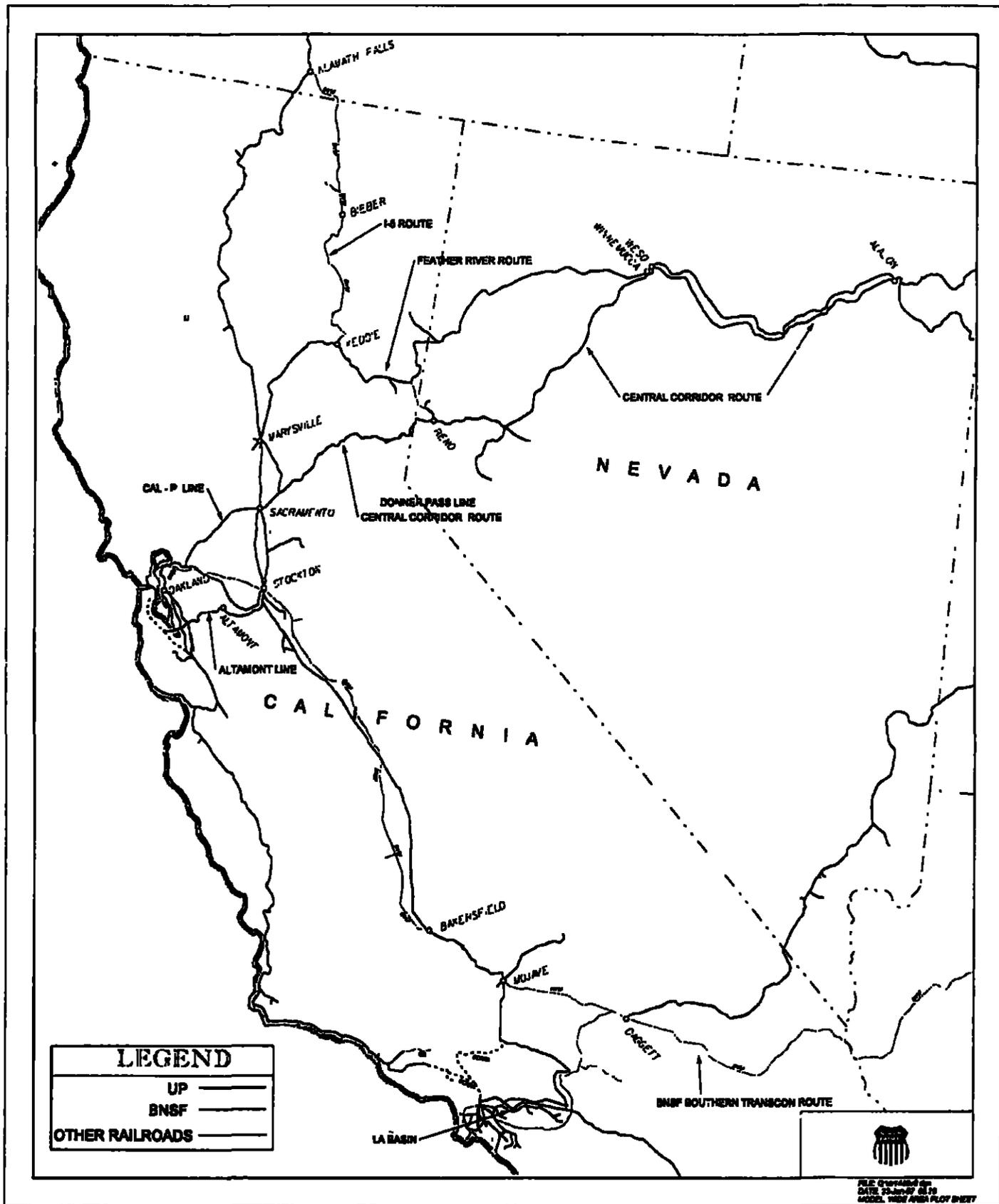
(h) At BNSF's request, UP/SP shall provide train and engine crews and required support personnel and services in accordance with UP/SP's operating practices necessary to handle BNSF trains moving between Salt Lake City and Oakland. UP/SP shall be reimbursed for providing such employees on a cost plus reasonable additives basis and for any incremental cost associated with providing employees such as lodging or crew transportation expense. BNSF must also give UP/SP reasonable advance notice of its need for employees in order to allow UP/SP time to have adequate trained crews available. All UP/SP employees engaged in or connected with the operation of BNSF's trains shall, solely for purposes of standard joint facility liability, be deemed to be "sole employees" of BNSF. If UP/SP adds to its labor force to comply with a request or requests from BNSF to provide employees, then BNSF shall be responsible for any labor protection, guarantees or reserve board payments for such incremental employees resulting from any change in BNSF operations or traffic levels.

(i) UP/SP agree that their affiliate Central California Traction Company shall be managed and operated so as to provide BNSF non-discriminatory access to industries on its line on the same and no less favorable basis as provided UP and SP.

(j) If BNSF desires to operate domestic high cube double stacks over Donner Pass, then BNSF shall be responsible to pay for the cost of achieving required clearances. UP/SP shall pay BNSF one-half of the original cost of any such work funded by BNSF (including per annum interest thereon calculated in accordance with section 9(c)(v) of this Agreement) if UP/SP

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BEFORE THE
INTERSTATE COMMERCE COMMISSION

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 CORPORATION AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY CORP.

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December 29, 1995

**VERIFIED STATEMENT
OF
NEAL D. OWEN**

My name is Neal D. Owen. I am a transportation consultant with offices at 35 Las Lomas Place, Walnut Creek, California 94598. I have over 40 years railroad transportation experience both as a railroad officer and as a consultant. This experience includes 25 years of railroad employment with The Milwaukee Road, the United States Railway Association, and Amtrak. I started as a telegraph operator and train dispatcher for The Milwaukee Road in Wisconsin and Illinois. Thereafter, I advanced progressively through management positions from Assistant Trainmaster to Regional Vice President. I joined Booz, Allen & Hamilton as a senior transportation consultant in 1978 and entered my own consulting practice in 1985. I hold a Bachelor of Business Administration degree from the University of Wisconsin-Madison.

During my career I have appeared as an expert witness in numerous proceedings before this Commission. Most recently, I developed, sponsored and testified in support of the Operating Plan submitted by the Burlington Northern Railroad Company ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") (collectively referred to as "BN/Santa Fe") in their recent control and merger application (F.D. 32549). Previous proceedings include testimony on behalf of the Denver & Rio Grande Western Railroad in Rio Grande's acquisition of the Southern Pacific Railroad (F.D. 32000); Operating Plan preparation and sponsorship in the Santa Fe/Southern Pacific merger case (F.D. 30400); and Operating Plans and testimony on behalf of Southern Pacific in the Union Pacific/Missouri Pacific/Western Pacific Railroad merger case (F.D. 30000). As a result of these tasks and

II. DESCRIPTION OF PLANNED BN/SANTA FE OPERATION

A. THE CENTRAL CORRIDOR

1. **Operation.** BN/Santa Fe trackage rights between Denver and the Valley and Bay areas would preserve service by two major carriers in the Central Corridor between the Midwestern United States and California. In addition, competitive rail options would be maintained for stations and shippers in Utah, Nevada and northern California that have existing service by only UP and SP (or shortlines that connect only to UP and SP). This includes important metropolitan areas such as Provo and Salt Lake City, UT, Reno, NV, and Sacramento and San Jose, CA. The Agreement also addresses the Ports of Oakland and Sacramento, CA. Exhibit A depicts the Central Corridor route.

BN/Santa Fe plans a complete Central Corridor operation to provide service competition at least comparable to existing levels provided by UP and SP. BN/Santa Fe would provide service across the corridor for expedited freight, manifest freight and unit train customers alike. Through-trains would operate with BN/Santa Fe locomotives and crews^{2/}, as would much of BN/Santa Fe's local and support service as described below.

2. Train Service.

a. **Through Trains.** BN/Santa Fe plans to schedule and operate six regular^{3/} trains (three train-pairs) between Denver and Richmond/Oakland/Stockton, CA.

^{2/} BN/Santa Fe trains may use UP/SP crews, as provided by the Agreement.

^{3/} For this statement, "regular" is defined as departures on each primary loading day for intermodal and automotive service (usually five to seven days a week) and daily departures for manifest service.

In addition, dedicated automotive trains in each direction would also be scheduled as sufficient traffic is developed to support such service.

One intermodal train-pair would be scheduled between Chicago, IL and Richmond/Oakland. A second intermodal train-pair is planned between Chicago and Stockton. Both of these expedited train-pairs would handle automotive traffic until the need for dedicated automotive-train service is established. These trains would also carry expedited traffic to and from Denver, Salt Lake City and Reno. Thus, important midwestern terminals and gateways such as Chicago, St. Louis, and Kansas City would maintain competitive service to the Intermountain region and also gain an important alternate route to northern California. Similarly, competitive Central Corridor service options would be maintained for eastward traffic between the Pacific Coast, the intermountain region and the midwest.

BN/Santa Fe also plans one daily manifest train-pair between Denver and Richmond/Stockton. This service, which would be augmented by extra trains as volumes warrant, would provide reliable service for customers receiving service from BN/Santa Fe in Utah, Nevada and northern California.

In addition, BN/Santa Fe would operate unit trains as needed to carry bulk traffic such as grain and coal. Unit train operation would encompass both overhead traffic that may benefit from shorter Central Corridor routings (for example, grain from upper midwest loading points to Valley destinations which would now move via Barstow, CA) and local traffic such as coal from mines that BN/Santa Fe would serve. Both manifest and

expedited trains would also carry existing BN/Santa Fe overhead traffic that can benefit from shorter routings.

b. **Local Trains.** In the Provo-Salt Lake City-Ogden-Little Mountain, UT area, yard to yard hauling and some local service would be provided by one or more daily BN/Santa Fe road switchers, based from Provo and/or SP's Salt Lake City Roper Yard. Through trains would set out and pick up at only one or two locations in this area such as Provo and Salt Lake City. These local trains would haul inbound traffic from manifest trains to satellite yards which serve individual customers. Conversely, outbound traffic would be gathered from satellite points, such as Ogden, Clearfield and Geneva, UT, blocked for through-train pick up and hauled to a single pick up location. To the extent shippers require direct BN/Santa Fe service and where it is operationally feasible, these locals may also perform some direct shipper switching. BN/Santa Fe would organize its outlying local service to keep as much traffic as is possible out of the Roper classification yard.

Between Weso and Alazon, NV, local customers would be directly served by BN/Santa Fe manifest trains operating between Salt Lake City and northern California.

Between Richmond/Oakland and San Jose, BN/Santa Fe would operate at least one daily road switcher, based from BN/Santa Fe's Richmond Yard. This service would carry traffic between BN/Santa Fe connections at Richmond Yard and satellite locations such as Warm Springs and San Jose, CA which are distribution and collection yards for individual customers. To the extent shippers require direct BN/Santa Fe service and where it is operationally feasible, these locals would also perform direct shipper switching.

BN/Santa Fe would plan to actively participate in direct service to the Port of Oakland. Intermodal and any bulk unit trains would operate directly to or from Port facilities. Initially such service would use the Oakland Terminal Railway. BN/Santa Fe would also intend to be an active participant in the ultimate service package developed to serve the Port and its proposed Joint Intermodal Terminal ("JIT"). BN/Santa Fe would have direct access to that facility under the Agreement.

Local unit train customers over the length of the route would be directly served by extra BN/Santa Fe trains to meet their service requirements.

c. **Terminal Support.** Denver: BN/Santa Fe would use its existing intermodal and switching terminals. BN/Santa Fe's yard would block through trains to eliminate the need for any extensive switching between Denver and California.

Salt Lake City: BN/Santa Fe would initially use UP/SP's Roper Yard. This includes intermodal service at the Roper ramp, industry switching in Salt Lake City and any through-train receiving or dispatching work not handled by BN/Santa Fe road switchers.

Reno: BN/Santa Fe would set out and pick up intermodal and auto traffic with selected through-trains at UP/SP's Sparks Yard.

Sacramento: BN/Santa Fe would set out and pick up with through manifest trains at UP/SP's South Sacramento Yard or in UP/SP yards at Haggin.^{4/} BN/Santa Fe plans to operate unit blocks of traffic directly to or from the Port of Sacramento. Blocks of traffic

^{4/} Haggin is located at the intersection of the I-5 and Central Corridor routes. UP/SP's Operating Plan projects capital improvements at Haggin to handle increased UP/SP activity. BN/Santa Fe would cooperate with UP/SP to ensure adequate capacity in the Haggin area.

destined beyond Sacramento may also be passed between I-5 and Central Corridor trains in the terminal.

Richmond/Oakland: BN/Santa Fe plans to use its existing intermodal and switching terminal at Richmond for traffic that cannot use the Port's proposed JIT in Oakland. BN/Santa Fe plans to use the JIT for all traffic that can be efficiently and contractually handled at that facility when it becomes operative. Those non-port shippers in the Oakland area now open to reciprocal switching, and any new customers in that same "core" Oakland Terminal area would continue to be switched by UP/SP for BN/Santa Fe through reciprocal switch arrangements.

3. Implementation. BN/Santa Fe through-train operation would use BN/Santa Fe crew districts between Denver and Glenwood, CO; Glenwood and Helper, UT; Helper and Salt Lake City; Salt Lake City and Elko, NV, Elko and Reno (Sparks), NV; and Reno (Sparks) and Richmond/Stockton. Through trains west of Elko using UP's existing line would change crews at Reno Jct. and also Oroville, CA.

Scheduled and extra intermodal trains are planned to operate normally via SP's Donner Pass (Weso-Reno-Sacramento) route. Trains to and from the Bay Area would use SP's Cal-P route^{5/} west of Sacramento. Trains to and from the Valley are now planned to use UP's route between Sacramento and Stockton.^{6/}

^{5/} The Cal-P route is SP's direct line from Sacramento to Oakland running via Davis and Benicia, CA.

^{6/} Intermodal trains to and from Stockton may also have to use UP's Feather River route between Weso and Sacramento if operating difficulties in Sacramento cannot be resolved.

The scheduled manifest train-pair may use the Donner Pass route or UP's Feather River route between Weso and Sacramento (depending on daily operating variables and possible I-5 Corridor traffic connections). West of Sacramento, the train would provide service for both the Bay and Valley areas via direct connecting trains.

Extra manifest trains and unit trains are planned to use UP's route between Weso and Sacramento. For such trains carrying Bay Area traffic, planned operation would be via UP's route between Sacramento and Stockton and BN/Santa Fe's own line between Stockton and Richmond. BN/Santa Fe would also rejoin its own line at Stockton for any trains continuing south to Valley destinations or to southern California.

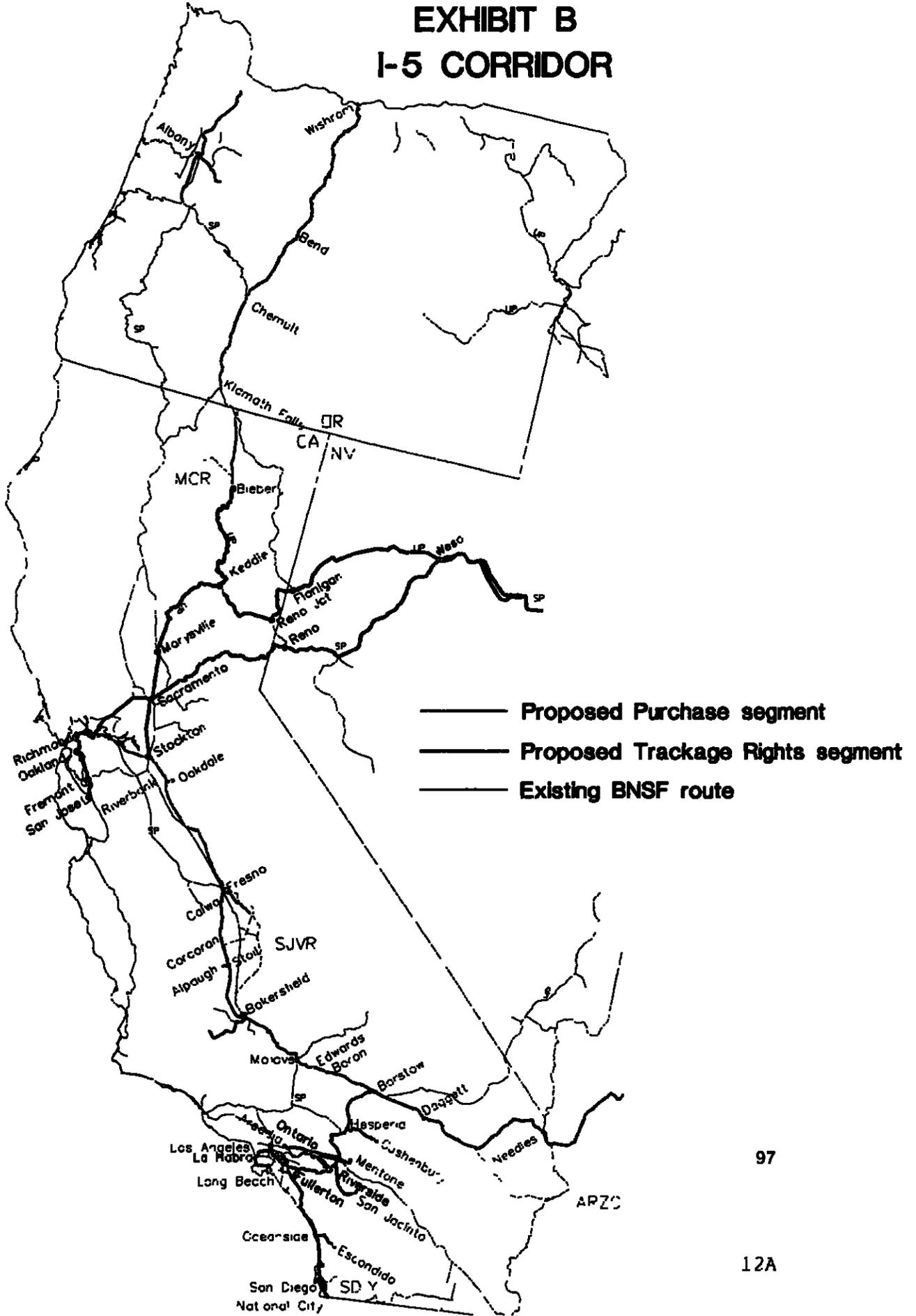
Blocks of traffic may pass between Central Corridor and I-5 Corridor trains at Sacramento, or Keddie, CA, or at intermediate points dependent upon operating conditions. This is true for all types of traffic in both directions.

A connection would be re-established just east of Richmond to permit head-on movement between SP's main tracks and BN/Santa Fe's main track. This trackage would restore a connection that was removed several years ago.

B. THE I-5 CORRIDOR

1. **Operation.** The I-5 Corridor is displayed by Exhibit B. BN/Santa Fe would use its acquired trackage between Bieber and Keddie and trackage rights between Keddie and Stockton to operate a competitive I-5 Corridor service. A large share of existing rail traffic in this corridor is now interchanged at several gateways including Portland and Klamath Falls, OR and Bieber and Stockton, CA. Most existing traffic between California and the State of Washington, and some other parts of the Pacific Northwest, moves via one

EXHIBIT B I-5 CORRIDOR



of several route combinations involving two or three railroads. The routing combinations thus form a prime element of existing service competition. If the UP/SP merger is approved in conjunction with the BN/Santa Fe Agreement, many I-5 shippers would therefore retain options. These options for two-line hauls would be replaced with two alternatives for single-line service.

Through-train service would constitute the majority of new BN/Santa Fe operation in this corridor. BN/Santa Fe would use its own locomotives and crews over the entire route.

In addition, BN/Santa Fe would use the through north-south capability to gain efficiency in its overall West Coast intermodal service. Empty equipment can be repositioned to meet weekly and seasonal demands. BN/Santa Fe's ability to work effectively with steamship lines within the West Coast port network would also be enhanced.

2. Train Service.

a. Through Trains. BN/Santa Fe plans to schedule and operate four daily manifest trains (two train-pairs) on its acquired trackage and trackage rights between Bieber and Stockton. One train-pair would be scheduled between Seattle, WA and Barstow/Los Angeles, CA. A second train-pair is planned between Pasco, WA and Barstow. All schedules would use BN/Santa Fe's existing routes north of Bieber and south of Stockton. Blocks of traffic would move to and from the Bay Area, passing to/from other BN/Santa Fe trains at or between Keddie and Sacramento or at Stockton. Salt Lake City area traffic would pass at or between Keddie and Sacramento. Extra intermodal trains would also be operated as service demands or equipment repositioning requires.

b. **Local Trains.** Local work on these segments is limited, but stations such as Clear Creek, CA would be directly served by through-train service in each direction.

c. **Terminal Support.** Bieber: Bieber is not a terminal in the conventional sense. Bieber has no switch engines or maintenance of equipment functions, but rather is simply the crew change point where BN/Santa Fe ends and UP begins - or vice versa. BN/Santa Fe's existing terminals at Seattle, Vancouver, and Pasco, WA and at Klamath Falls, OR would perform switching and terminal support to the north of the new route segments.

Sacramento: BN/Santa Fe would set out and pick up with through manifest trains at UP/SP's South Sacramento Yard or in the yards at Haggin. BN/Santa Fe would plan to operate unit blocks of traffic directly to or from the Port of Sacramento. Blocks of traffic destined beyond Sacramento may also be passed between I-5 and Central Corridor trains in the terminal.

Stockton: BN/Santa Fe's existing terminal at Stockton would support operation for the I-5 route to the south of the new segments. Through blocking is planned to and from Los Angeles, Barstow and Valley points to expedite traffic through Stockton.

3. **Implementation.** BN/Santa Fe through-train operation is planned to use crew districts between Klamath Falls and Oroville and between Oroville and Fresno, CA (through Stockton) or Richmond (through either Sacramento or Stockton).

Most BN/Santa Fe trains on the I-5 corridor would normally operate to and from points beyond Stockton and Bieber, using the new route as a bridge between the Pacific

Northwest and Pacific Southwest. Central Corridor traffic blocks would pass to and from Central Corridor trains at Keddie or Sacramento (some Bay Area traffic may move through Stockton, as stated earlier, due to the Agreement's limitation of one manifest train per day on SP's Cal-P route). Any scheduled and extra intermodal trains to or from Richmond/Oakland would be planned to operate via SP's Cal-P route west of Sacramento.

A new connection is planned from the UP/SP route to the BN/Santa Fe route at Stockton Tower to permit head-on movement between UP's line to Keddie and BN/Santa Fe's line to Barstow (and its Stockton Yard). UP/SP's Operating Plan indicates realignment and consolidation of their parallel routes within the Stockton Terminal. BN/Santa Fe trains would use the consolidated route between El Pinal, 1.9 miles north of Stockton Tower and the new connection.

C. SOUTHERN CORRIDOR

1. **Operation.** BN/Santa Fe would use its acquired trackage between Avondale and Iowa Jct, LA and trackage rights in the New Orleans terminal and between Iowa Jct. and Houston (including SP's Baytown branch) to maintain competitive railroad service options for stations and shippers now served only by SP and UP. This includes Amelia and Orange, TX as well as stations and shippers on SP's Baytown branch, such as Mont Belvieu, TX. Exhibit C shows the Southern Corridor.

As in the Central Corridor, BN/Santa Fe plans to provide a complete Southern Corridor operation to replace service competition that would otherwise be lost as a result of a UP/SP consolidation. This includes new service for overhead expedited and manifest traffic as well as for traffic originating and terminating on the acquired segments. This